Since the first Gulf War the world has seen a marked increase in the deployment of unilateral restrictive measures - sanctions imposed by individual states or groups of states against other states or private entities. The deployment of these measures is usually justified as a countermeasure against alleged human rights violations.

While the international framework for the use of sanctions through the United Nations Security Council is clearly provided for in customary international law, the subsequent trend in the application of unilateral restrictive measures outside of the forum of the UNSC is less clear in terms of its legality. Although a number of EU Member States at first questioned the legality of these unilateral sanctions, the EU has increasingly emulated the US example of using sanctions as a tool of power assertion on the global stage.

This legal review sheds some light on the legal basis surrounding these often punitive measures, examining the historical record and surveying the treaties and international agreements which have a bearing on the legality of restrictive measures under international law.

UNILATERAL COERCIVE MEASURES AND INTERNATIONAL LAW

Alina Miron & Antonios Tzanakopoulos



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I. INTRODUCTION

A. Structural Conditions for the Enforcement of International Law

The international legal order is a decentralised legal order. Unlike domestic legal orders, which tend to be highly centralised, the international legal order does not have the benefit of central organs or institutions to create law (legislature), to resolve legal disputes with compulsory jurisdiction (judiciary), or to enforce the law (executive). Rather, these functions are retained by the states, which exercise them in a decentralised manner.

This means that international law is created by the states through consent (which may be more or less explicit depending on the circumstances, eg if one contrasts treaties and customary rules produced through general practice that is accepted—sometimes implicitly—as law). It means, further, that legal disputes are resolved again through agreement between the parties to the dispute, which may be achieved through negotiation, mediation, or other means, or which may delegate the resolution of the dispute to some adjudicatory organ, such as a permanent court or arbitral tribunal. It means, finally, that states are left to determine the legal position in any given situation, and to seek to enforce the law, themselves and at their own risk.

In case of violations of its rules, the international legal system is indeed notoriously 'primitive' (or, just different), in the sense that the victims of violations are also the main vindicators of their infringed rights. Professor Vera Gowland-Debbas wrote that 'reactions to violations (…) have traditionally been unilateral, ie, have taken the form of private justice. States enforced their own rights and, in invoking responsibility, freely determined the legal consequences they ascribed to other states' infringement of their rights, having recourse to coercive measures if necessary. In short, unpredictable decentralized reactions to violations of international law were and still are, to a large extent, the rule in international society'.[1]

The Charter of the United Nations deprived States of the possibility to resort unilaterally to armed force, but not of the faculty to adopt peaceful measures of self-help. The Security Council, despite its very broad competence in the field of the use of force, and of maintenance and restoration of peace more generally, was not conceived as an executive power. It is not a guardian of international legal order in general, but a guardian of international peace and security (which can be seen, to some extent, as only a subset of the international legal order). This remains largely true nowadays.

Decentralization in the implementation of international responsibility and the correlative absence of judicial and enforcement bodies endowed with competence to impose sanctions on a violator, are among the most common complaints about international law.[2] But they are also quintessential characteristics of the present-day structure of the international legal order, which has outlived the establishment of a system of collective security. This classical structure can be described as horizontal (all states enjoy sovereign equality), decentralized (states have no superior authority above them), and mainly self-appreciatory (states are those to determine

1 Vera Gowland-Debbas, 'Security Council Change: The pressure of emerging international public policy' (2009-10) 65 International Journal 119.

2 Thomas M Franck, Countermeasures and Self-Help (CUP 2009) 111.

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in the first place their legal position and their respective relations and it is only incidentally that an international judicial organ would assess the legality of their unilateral positions).

The principal method of enforcement in a decentralised legal order is thus through self-enforcement or 'self-help'. In international law, this is achieved through resort to countermeasures, which are defined as measures of 'non-compliance by one state with an international obligation owed towards another state, adopted in response to a prior breach of international law by that other state and aimed at inducing it to comply with its obligations of cessation and reparation.'[3] From a political relations perspective, unilateral restrictive measures (URM) consist in the 'the use of economic, trade or other measures taken by a state, group of states or international organizations acting autonomously to compel a change of policy of another state or to pressure individuals, groups or entities in targeted states to influence a course of action without the authorization of the Security Council'.[4] The difference between the definition of countermeasures and URM consists mainly in the fact that the latter is indifferent to the existing of a prior violation of international law which would justify the adoption of self-help, while this prior condition is consubstantial to the definition of countermeasures. From the point of view of international law, the existence of a prior wrongful act is however essential.

Countermeasures are, in the final analysis, lawful measures. Or, to be more precise, they are measures that are originally unlawful (they constitute breaches of international obligations), but that are rendered lawful (their wrongfulness being precluded) because they are adopted in reaction to a previous internationally wrongful act (a previous breach) by the targeted state (or entity), as long as they comply with the relevant rules of international law for resorting to countermeasures, which are reflected in Articles 49 to 54 ARSIWA.[5] Therefore, the qualification of unilateral restrictive measures as countermeasures is an essential element for determining their international lawfulness. For these reasons, the use of the generic phrase 'unilateral restrictive/coercive measures' is legally neutral, meaning it is without prejudice to their qualification as countermeasures within the meaning given to the term in international law.

The basic scheme of countermeasures is as follows: a state that considers itself to have suffered legal injury from the breach of an international obligation owed to it by another state, calls upon that other state to cease the breach, repair the injury, and resume compliance with the law. If that other state does not comply, then the first state may itself breach obligations it owes to that other state with the aim of inducing it to cease the breach, repair the injury, and resume compliance with the law. It is essentially a tit-for-tat, if we allowed to simplify significantly. Some (if not most) 'unilateral restrictive measures', often also called '(unilateral) sanctions' or even 'unilateral coercive measures', may in fact amount to countermeasures.

However, this is a text-book scheme. In practice, states (or international organizations) adopting unilateral restrictive measures do not always identify the international law rules that have been violated by the targeted State, but simply justify their action in light of their political objectives. And they are rarely mindful to comply with the other conditions set out in

3 James Crawford, State Responsibility: The General Part (CUP 2013) 685.

4 Human Rights Council, Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability, UN doc. A/HRC/28/74 (2015) § 9.

5 See Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), GA Res 56/83, Annex, UN Doc A/RES/56/83/Annex (12 December 2001).

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international law for resort to countermeasures (with which we deal below).

While it is accepted that injured states that are victims of a violation of international law may resort to restrictive measures in order to obtain reparation for the injury suffered and to compel the recalcitrant state to comply with its obligations, it is not permissible for states, individually or collectively, to 'punish' states which they deem in breach of international law, or, more cynically, are acting contrary to their interests. Unilateral restrictive measures, especially when they resort to coercion, raise questions that are all the more daunting as they have gradually become a major foreign policy tool of the most powerful states. Their widespread use must be assessed in light of the principles of collective security and sovereign equality. Both can be undermined as states acting unilaterally tend, on the one hand, to substitute the unilateral use of coercion for the powers of the Security Council under Article 41 of the Charter and, on the other, to set themselves up as universal police 'sanctioning' wrongdoers. Two remarkable (and interdependent) trends can be noted in current state practice: the globalisation of unilateral restrictive measures and their use as a substitute for sanctions under the UN Charter.

In this report, we first set out certain terminological clarifications in the following paragraphs. We then discuss the practice of 'unilateral restrictive measures' ('URMs') in section II. Section III is devoted to the assessment of the lawfulness of resort to URMs. In section IV we discuss potential judicial control of the lawfulness of URMs, including before the Courts of the European Union. Section V concludes.

B. Institutional Sanctions vs Unilateral (Counter -) Measures: Terminological Clarifictions

The term 'sanctions' is not, strictly speaking, a term of art in international law. It appears nowhere in the United Nations Charter ('UN Charter'; 'UNC'), and it is not the term used in customary international law to denote decentralised reactions to illegal acts, the preferred term being 'countermeasures' (and previously 'reprisals').[6] However, 'sanctions' does generally refer, in legal theory, to a reaction to illegality:[7] according to Kelsen, a sanction is the consequence that attaches by law to wrongful conduct—and conversely, wrongful conduct is the legal condition for the imposition of a sanction.[8]

However, this is a broad meaning, which does not take into account the authority of the actor to adopt restrictive measures, whereas the narrow meaning considers sanctions to be socially organized acts of constraint. Thus Abi-Saab defines 'sanctions' as '[c]oercive measures taken in execution of a decision of a competent social organ, ie an organ legally empowered

6 See ARSIWA; see also Report of the International Law Commission on the Work of its Fiftythird Session (2001), Yearbook of the UN International Law Commission, vol 2, 128, UN Doc. A/CN.4/SER.A/2001/Add.1 (part 2) ('Commentary to the Articles on State Responsibility'); see finally Peter Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 705. Cf Elizabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures (Transnational Publishers 1984) xv-xvii.

7 Hans Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems (Praeger 1950) 706; Hans Kelsen, Allgemeine Theorie der Normen (Manz 1979) 115.

8 Hans Kelsen, Pure Theory of Law (trans from the 2nd edn Max Knight, University of California Press 1967) 111 ('…the action or refrainment constituting the condition of the coercive act ordered by the legal order represents the delict (usually called 'the wrong'), and the coercive act represents the sanction. An action or refrainment assumes the character of a delict only if the legal order makes it the condition of a coercive act as a sanction.').

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to act in the name of the society or community that is governed by the legal system'.[9] In such a conception, 'sanctions' involve three cumulative characteristics: they are coercive (constraint) measures; they bear an afflictive dimension; and they are based upon a collective decision.

In international law, reactions to illegality may be unilateral ('decentralised'[10]) or, in much more limited circumstances, collective ('centralised'). The distinction between the two categories is nonetheless fundamental: whereas the unilateral measures taken by the injured entity disclose a form of private justice, the latter reveal a form of recognition of the existence of an international community and of centralization or institutionalization of the international society, with the international organization playing the role of guardian of the global legality.[11] Therefore restrictive measures are unilateral if they do not represent measures of implementation of sanctions adopted by the Security Council.[12]

The International Law Commission ('ILC'), a subsidiary organ of the United Nations General Assembly mandated to 'codify and progressively develop international law',[13] has also reserved the term 'sanctions' to characterize collective measures taken by international organisations ('IOs'),[14] covering in particular the measures taken by the United Nations Security Council ('UNSC') under Article 41 of the UN Charter in response to a threat to the peace, breach of the peace, or act of aggression.[15] The same can be said of the terminology used by other UN organs, who tend to reserve the phrase 'multilateral economic sanctions' specifically for measures mandated by the Security Council.[16] By contrast, for unilateral measures taken by states against other states in response to internationally wrongful acts by the latter that injure the former, the term 'countermeasures' is used, as already stated in the first part of this report.

Countermeasures must be distinguished from measures which may seem to be coercive to a lay person, but which are actually perfectly lawful to begin with, even if they are unfriendly towards their target. These are called measures of 'retorsion' or 'retorsions', and they do not per se amount to a violation of international law.

9 Georges Abi-Saab, 'The Concept of Sanction in International Law' in Vera Gowland-Debbas (ed), United Nations Sanctions and International Law (Kluwer 2001) 35; Alain Pellet and Alina Miron, 'Sanctions' in Rüdiger Wolfrum et al (eds), The Max Planck Encyclopedia of Public International Law (vol IX, OUP 2012) 1-15.

10 See generally Linos-Alexandre Sicilianos, Les réactions décentralisées à l'illicite : des contremesures à la légitime défense (LGDJ 1990). Cf ARSIWA Commentary (n 6) 128, para 1.

11 Pellet and Miron (n 9).

12 See Devika Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) 113 American Journal of International Law Unbound 140, 141. Daniel H Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Ali Z Marossi and Marissa R Bassett (eds), Economic Sanctions under International Law (TMC Asser Press 2015) 84. See also Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 Chinese Journal of International Law 177.

13 See Article 1(1) of the Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

14 See ARSIWA Commentary (n 6) 75, para 3); see also Report of the International Law Commission on the Work of its Thirty-first Session (1979), Yearbook of the International Law Commission, vol 2, 121, UN Doc A/CN.4/SER.A/1979Add.1 (part 2).

15 See Article 39 of the United Nations Charter.

16 UNGA, 'Economic Measures as a Means of Political and Economic Coercion: Report of the Secretary General' (1997) UN Doc A/52/459 21–2; UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Idriss Jazairy' (10 August 2015) UN Doc A/HRC/30/45, 5. The International Court of Justice seems to have some care for terminological precision. At least, in its Order for the indication of provisional measures in the case of Alleged Violations of the Treaty of Amity, Commerce and Consular Rights concluded in 1955, it uses the term "sanctions", with quotation marks when it refers to national unilateral measures and without such quotation marks when it refers to UNSC restrictive measures (ICJ, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018, paras 21-22, 55, 61). However, neither ICJ practice nor UN practice is homogenous, therefore, even at the UN, there is no terminological consensus.

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Simple examples of such retorsions include the cessation of voluntary aid (there being no general international obligation to provide aid), or the cessation of diplomatic relations (there being no general international obligation to maintain diplomatic relations with any state), as well as the restriction of trade that is not in breach of obligations to maintain trade under relevant international treaties. Though measures of retorsion may seem 'coercive' in a non-technical sense, as mentioned, if they reach the level of coercion as a technical legal term, they are no longer lawful in that they constitute prohibited intervention under international law (and thus they no longer qualify as retorsions).[17]

This neatly highlights the requirement that countermeasures must be in violation of some obligation of the state resorting to them (but that violation is justified in the instance because it is a response to a previous violation—a tit for tat).

Before we survey the historical evolution of 'sanctions' and countermeasures, as well as some of the practice regarding countermeasures in modern international law, along with so-called 'counter-sanctions' or 'secondary boycotts' (ie, countermeasures in response to counter measures). we must discuss the requirements of lawfulness of countermeasures or 'unilateral restrictive measures' under international law in some detail. It is to these matters that section II of this report now turns.

17 See below, Section II.A.

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II. LAWFULNESS OF UNILATERAL RESTRICTIVE MEASURES

If unilateral restrictive measures adopted by a state or an international organisation do not actually violate any international obligations incumbent upon that state or international organisation, then they are legally characterised merely as measuresof retorsion. Retorsions are unfriendly acts, to be sure. They will constitute, further, means of pressure, means of interference in the affairs of the targeted state. Being perfectly lawful, however, they require no justification, and nothing can be done about them other than taking equivalent action, such as having recourse to counter-retorsion. An example should suffice to demonstrate this: there is no obligation in international law for any state to maintain diplomatic relations with any other state. If state A adopts a policy, or takes a domestic measure, or even breaches a rule of law (though this is not required), and that displeases state B, state B is absolutely free to, for example, expel diplomats of state A from its territory, or otherwise impose restrictions (eg, as to size) on state A's diplomatic and consular missions in state B, or even completely break off diplomatic relations. State A has no legal recourse against this measure and cannot claim that the measure violates international law. It can only respond by similar means, most usually by expelling diplomats or state B, or downsizing state B's diplomatic mission, or recalling its ambassador from state B. It could even respond by taking further, or other, measures of retorsion, such as ceasing the provision of aid it voluntarily had been providing to state B. All of this is perfectly lawful, requires no legal justification, but it undoubtedly puts some pressure on both states with respect to \their policy and conduct.

However, unilateral restrictive measures may be in breach of rules of international law. If that were to be the case, then they constitute internationally wrongful acts that will engage the responsibility of the state resorting to them, unless they can be somehow justified under international law (eg, as countermeasures). It is to this matter that we now turn. Sub-section A reviews the rules of international law that URMs may potentially violate. Sub-section B reviews their potential legal justification—in particular whether there are circumstances that preclude the wrongfulness of the breaches of international legal rules identified in sub-section.

A. International Rules Possibly Violated

1. Breach of the principle of non-intervention

a. Interference with the political integrity of the state

Unilateral restrictive measures targeting a state have raised concerns in terms of respect for sovereign equality. The principle of non-intervention remains of paramount importance in international relations, despite the numerous instances in which it has been violated. It is a corollary of the principle of sovereign equality, which protects the less powerful States in particular. In the Corfu Channel case, when the UK claimed a right of intervention in order to secure evidence in the territory of Albania for submission to an international tribunal, the International Court of Justice observed that:

> the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily

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> lead to perverting the administration of international justice itself.[18]

In its judgment of 1986 on Military and Paramilitary Activities in and against Nicaragua, by which it declared US responsible for having violated several cardinal principles of international law, the International Court of Justice dealt at length with this principle and recalled that:

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. (…) 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (…), and international law requires political integrity also to be respected.[19]

The political integrity referred to in the quote above is endangered when 'a prohibited intervention [is] bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy'.[20]

In particular, the Court recalled that the principle of non-intervention prevents a State from intervening in support of the internal opposition in another State, for reasons of ideological or moral affinities:

> [The Court] has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention. (…). The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law.[21]

Therefore, when URMs are used with the intent to induce a change of government, it falls within the scope of the prohibition. However, the evidence of such a subjective intent is not easy to bring and rests, most of the time, on the public statements of the highest officials. But it's hard to find express statements, and the evidence of an intent to change a regime as an objective of URMs is at best circumstantial, if not impossible to come by.

In the European Union, the basic principles for establishing URMs were adopted by the Council on 14 July 2004.[22] According to those:

> If necessary, the Council will impose autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. We will do this in

18 Corfu Channel, I.C.J. Reports 1949, p. 35, also quoted in Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 ('Nicaragua'), para 202.
19 Ibid.
20 Ibid.
21 Ibid, paras 206 and 209.
22 Basic principles on the use of restrictive measures (sanctions) (doc 10198/1/04).

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accordance with our common foreign and security policy.

The objectives of the European Union's policy of restrictive measures, adopted with a view to promoting democratic elections and the rule of law, are not justified in terms of change of regime, but rather of change of policy: 'In general terms, restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decision'.

One of the grey zones of intervention in favour of the opposition concerns the practice of recognition of governments in case of rival claims of legitimacy or in case of coup d'état. Recognition of a government does not lend any particular legitimacy to that government. However, it has practical and legal consequences. Depending on the specific circumstances of a particular case, a declaration of recognition of a governmental authority might constitute an admissible or inadmissible interference in the internal affairs of the state in question.[23] EU practice of URMs in relation to Belarus, Myanmar or Venezuela refer generally to human rights violations, fraudulent elections and referenda, activities undermining democracy and the rule of law. No doubt that these are values of the European Union, enshrined in the Treaty on European Union, which constitute guiding principles of the Union's external action. However, from the point of view of international law, 'a sharp distinction must be made here between, on the one hand, the internal situation in terms of human rights and international law and the question of the election or appointment of the head of state'.[24] The latter is part of the sphere of domestic autonomy. Furthermore, if core human rights are recognized as peremptory norms of international law (jus cogens),[25] such is not the case of free, democratic elections or, for that matter, all human rights protected in the European system. If it is admitted that states other than injured states may resort to countermeasures in the general interest in case of grave violations of jus cogens,[26] such is not the case for all violations of international law.

The purpose of unilateral restrictive measures thus plays a clear role in the assessment of their international lawfulness. Difficult as it may be to establish, this investigation cannot be dispensed with, all the more so since sometimes (so many times?) the aim of protecting national security or common values may conceal an unlawful aim (change of regime) or at least an illegitimate one (eviction or weakening of foreign corporations competing with national corporations, which is also questionable under the rules of the WTO, certain bilateral investment or friendship and trade treaties, etc).

But again, all URMs which attempt to induce a state to change its policy do not necessarily amount to intervention. Indeed, states also have a sovereign right to pursue their own goals of domestic or international policy and to decide with whom they wish to entertain economic, cultural, political relations. They may therefore lawfully resort to measures of retorsion in this respect. What they cannot do is to use coercion to pursue their policy. For unilateral restrictive measures to amount to a violation of the principle of non-intervention, they must use

23 Matthias Forteau, Alina Miron, and Alain Pellet, Droit international public (LGDJ 2021) paras 383-385; Philip Kunig, 'Prohibition of Intervention' in Wolfrum (ed), MPEPIL (n 9) at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434#law-9780199231690-e1434-div2-4 (last updated April 2008). See also Deutscher Bundestag, Legal questions concerning recognition of the interim president in Venezuela, 15 Feb. 2019, WD 2 - 3000 - 017/19, available at: https://www.bundestag.de/resource/blob/827466/f4de0cf7eb1e74f552fb711f7d07fb76/WD-2-017-19_EN-pdf-data.pdf.

24 German Bundestag Study (2019), p. 6.

25 On this concept, see below, para. 68.

26 This is dealt with in part III of this Report.

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means of coercion. Put it differently, a coercive intent may be admitted, but not the coercive means. Which leads to the question of what represents 'coercion' in international law.

b. The Coercive Means

As the ICJ put it in Nicaragua v United States, '[i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State'.[27]

There are competing views on the meaning of the concept of 'coercion' in international law. Those who subscribe to a narrow meaning of the concept consider that coercion does not extend much beyond the threat or use of armed force against a state or the employment of such coercive means that approximate such threat or use of armed force (including extraterritorial enforcement).[28]

Others consider this approach to be too restrictive: military coercion, be it direct or indirect, is not the only form of coercion. According to this vision, other forms of pressure, especially those accompanied by drastic measures of enforcement, depriving the targeted entities of their patrimonial rights or of their physical liberty, could amount to coercion if they reduce in an essential manner the scope of the liberty of choice of the state. Article 18 of the ARSIWA also incorporates the broader concept of constraint. Paragraph 3 of the commentary states that '[t]hough coercion for the purpose of Article 18 is narrowly defined, it is not limited to unlawful coercion [...] because [relevant measures] involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, ie coercive interference, in the affairs of another state. Such is also the case with countermeasures. […] However, coercion could possibly take other forms, eg serious economic pressure, provided that it is such as to deprive the coerced state of any possibility of conforming with the obligation breached'.[29] In 1927 already, in the Lotus judgment, the Permanent Court of International Justice held that: 'the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state'.[30] The question is what 'exercise of power' may mean in this context. It is certainly forbidden to States to take enforcement measures in foreign territory. Some acts however are indeed indirectly coercive, in that they are accompanied by a threat of physical coercion. The effectiveness of indirect coercion is generally based on a deterrent sanction, which is enforced in the territory of the state which has taken the extraterritorial measure. Thus, even if the location of the physical coercion is ultimately within the territory of the reacting state, the object of the threat is indeed abroad.

27 Nicaragua, para 205.

28 See generally Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4 Cambridge Journal of International Law 616.

29 Article 18 of the ARSIWA also incorporates the broader concept of constraint. Paragraph 3 of the commentary states that '[t]hough coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion [...] because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, ie coercive interference, in the affairs of another State. Such is also the case with counter-measures.[…] However, coercion could possibly take other forms, eg serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached'.

30 PCIJ, Judgment of 7 September 1927, "Lotus" Case (France v Turkey), Series A, No 10, 18-19.

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2. Respect for human rights in the targeted state

The International Law Commission's Articles on State Responsibility indicate that countermeasures may not breach human rights obligations (as well as other specific obligations referring to humanitarian law, the prohibition of the use of force, diplomatic law, and other *jus cogens* obligations). However, this refers to the human rights obligations of the state resorting to the countermeasures (or, by extension, any unilateral restrictive measures), which are generally applicable only in situations where that State exercises jurisdiction. This is not necessarily limited to the reacting state's territory. Human rights obligations may also apply extraterritorially, to the extent that the reacting state exercises jurisdiction, whether under the spatial or under the personal model.

However, unlike situations of occupation or extraterritorial presence of state organs, the state resorting to unilateral restrictive measures will not normally be exercising any jurisdiction factually in the territory of the target state. While then the reacting state will not be allowed to breach human rights obligations—say against nationals of the target state present in its territory or otherwise within its jurisdiction—by way of countermeasures or in any other way, it is under no obligation to enable human rights protection within the jurisdiction of the target state, though it may be under an obligation not to render compliance with human rights completely impossible, as we explain below. As such, the prohibition of countermeasures affecting human rights obligations does not, in and of itself, prohibit unilateral restrictive measures that have an adverse impact on the enjoyment of human rights in the target state. However, if the URMs affect directly the human rights of private entities targeted by the measures, and these entities can be considered as being 'within the jurisdiction' of the state resorting to URMs, then there can be claims regarding the violation of human rights.

Any URM taken by the reacting state are likely to affect the target state's ability to comply with its own human rights obligations. This is particularly so when the URM taken is a measure restricting trade or economic or financial relations between the two states; when URMs are taken by a plurality of states, which may have a compounding effect on the target state; and, finally, when regional international organisations (the EU, eg) react through the adoption of unilateral restrictive measures, again due to the compounding effect of such measures taken by a significant number of regional powers.

The capacity of such measures to adversely impact the enjoyment of human rights in the target state is particularly pronounced when a powerful state (or a group of states) reacts through asset freezing or suspending trade with a weaker state. Being targeted by economic and financial URMs will evidently put significant strain on the target state's resources and may affect its ability to respect and protect human rights, especially those requiring positive action on the part of the state. This is not only limited to economic, social and cultural rights, but also to most civil and political rights—most of them include recognised positive obligations, which require resources.

To take a recent example, in its provisional measures order in the Treaty of Amity case between Iran and the United States, the ICJ considered that US URMs posed a risk a irreparable harm to Iran's rights on the basis of humanitarian considerations:

> The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent

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> Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment may have a serious detrimental impact on the health and lives of individuals on the territory of Iran.[31]

The legal mechanism for assessing the impact of these URMs under international law is the principle of proportionality (and limited exclusions of countermeasures as per Article 50 ARSIWA). According to ARSIWA, if the URM is otherwise in breach of international law (ie, otherwise than by violating human rights obligations), it can only be justified as a countermeasure if it is commensurate with the injury suffered by the injured, and now reacting, state.[32] Any countermeasure that would clearly causally and directly affect the target state's ability to comply with its human rights obligations could then be disproportionate and as such unlawful. This is because a countermeasure resulting in (further) human rights violations could not be commensurate to whatever injury the reacting state may have suffered.

However, it will not be easy to establish that the target state's inability to comply with human rights obligations is a (direct and causal) result of the countermeasure. The assessment can only be made ad hoc and on the basis of the facts of the relevant case, but the obvious problem/defence would be that the target state may well divert funds designated for other purposes to the protection of human rights. It simply elects not to do so, but rather opts to channel the consequences of the countermeasure directly against those within its jurisdiction (and indeed the target state may do so for a variety of reasons and with various purposes, including stirring popular sentiment, or deflecting the hit against the state elite, etc). There is conflicting evidence demonstrating both that inability to comply with human rights obligations is a direct effect of countermeasures, but also that target states divert resources to protect the elite rather than devote them to human rights protection. This results in a number of counter-productive effects of countermeasures, which hit the civilian population while leaving the target state's leadership largely unaffected. Such effects may well be orchestrated by the target state's leadership in order to deflect the hit and mobilise an increasingly impoverished local population.

That being said, far-reaching countermeasures which starve the target state of resources (such as UCMs taken by a plurality of states and/or international organisations imposing blanket embargoes, or freezing all available assets of the state, and the like) will be disproportionate on their face, and in the extreme will also violate the prohibition of intervention (on which see the previous sub-section). It is to be remembered that countermeasures aim at inducing compliance of the target State with a breached international obligation, but may not cross the line into coercion, which results in prohibited intervention in the domestic affairs of the target state. Such extreme URMs will be unlawful and will engage the responsibility of the state(s) taking them.

In the absolute extreme, URMs may reach the level of economic warfare. Economic warfare

31 ICJ, Order 3 Oct 2018, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), § 91.

32 See further section III.B below.

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is not a term of art in international law, but the point here is to highlight that extreme URMs may lead to the starvation of the population of the target state, or that lead to other grave violations of fundamental rights of the population, such as access to medical resources. Such measures will by definition be unlawful as disproportionate (as long of course as the causal link can be shown), and if military means are employed to enforce them (eg, blockade) they will constitute a violation of the prohibition of the use of force and will result in an armed conflict which will call international humanitarian law (and its specific protections over the civilian population) into application. But these are extreme circumstances that have not really been witnessed in the modern practice of states resorting to URMs.

3. Breaches of Particular Treaty Obligations and the Role of the Security Exception

Many multilateral and bilateral trade agreements protect the freedom of trade between states: examples include the General Agreement on Tariffs and Trade; regional free trade agreements; treaties of friendship, commerce and navigation; and bilateral and multilateral investment agreements. Restrictive economic measures such as embargoes and boycotts imposed by one state party against another are typically inconsistent with such treaties.

However, in some instances, the qualification of a URM as an unlawful act may be challenging, in particular when a legal rule is accompanied by exceptions. An act may appear at first sight as unlawful because it is contrary to one state's treaty obligations for instance, but ultimately reveal itself as lawful because it is actually permitted by a particular clause of that treaty. In the case of treaties with an economic scope, such a clause is provided by the 'security exception' inserted in most of them. The objective assessment of these clauses is all the more difficult since states enjoy discretion in appreciating their security needs. The security exception could thus be invoked almost as a blank cheque for the use of unilateral restrictive measures, which would otherwise violate those treaties.

Article XXI of the GATT is among the best-known examples:

> Nothing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or the materials from which they are derived;
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The clause finally came to scrutiny before a WTO Panel in 2019, in the case Russia—Measures Concerning Traffic in Transit.[33] The

33 WTO Panel Report, 5 April 2019, Russia – Measures Concerning Traffic in Transit, WT/DS512; see also WTO Panel Report, 28 July 2020, United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526).

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Panel rejected Russia's claim according to which the clause was 'self-judging' and the measures adopted in pursuance of security interests were immune from judicial control.[34] For the first time, a panel gave objective definitions of the concept of 'essential security interests' and 'emergency in international situations', providing thus parameters to appreciate whether there is a threat and whether the measures adopted are necessary to meet it. According to the Panel:

> 'Essential security interests', which is evidently a narrower concept than 'security interests', may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.[35]

However, the Panel also insisted upon the large margin of appreciation (or at least subjectivity) left to the state, which is essentially qualified only by the obligation of good faith:

> The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests. However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.[36]

The Panel held the security threat and the emergency in international relations to be cognate yet distinct from a situation of war, which is an extreme sub-category of the former:

> [T]he less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise.[37]

Not only did the Panel objectively define concepts which were usually left to the appreciation of states, but it also looked into the necessity of the measures adopted and their connection with the threat to security or the emergency invoked:

> Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.[38]

34 Ibid., § 7.129.
35 Ibid., at § 7.130.
36 Ibid., §§ 7.131-7.132 (emphasis added).
37 Ibid, § 7.135.
38 Ibid, § 7.138.

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The security exception came also before the European Court of Justice, in the context of the challenge by targeted entities of the EU restrictive measures, adopted against Russia following the takeover of Crimea and the events in Donbass. These entities contested the compatibility of these measures with the 1994 EU-Russia Partnership Agreement. However, the Partnership Agreement provides in its Article 99 that:

> Nothing in this Agreement shall prevent a Party from taking any measures:
> (1) which it considers necessary for the protection of its essential security interests:
> (d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

In the Rosneft case, the Grand Chamber of the ECJ conflated security interests and international peace and security, considering that the latter deserved protection through the activation of the security clause, even in circumstances where the European Union or its member States were not directly affected:

> [T]he wording of that provision does not require that the 'war' or 'serious international tension constituting a threat of war' refer to a war directly affecting the territory of the European Union. Accordingly, events which take place in a country bordering the European Union, such as those which have occurred in Ukraine and which have given rise to the restrictive measures at issue in the main proceedings, are capable of justifying measures designed to protect essential European Union security interests and to maintain peace and international security, in accordance with the specified objective, under the first subparagraph of Article 21(1) and Article 21(2)(c) TEU, of the Union's external action, with due regard to the principles and purposes of the Charter of the United Nations.[39]

B. Countermeasures as circumstances precluding wrongfulness

As the last sub-section has demonstrated, unilateral restrictive measures may be in breach of international obligations incumbent upon the state or international organisation resorting to them. If so, they will, in the first instance, constitute an internationally wrongful act, which would engage the international responsibility of the relevant actor, unless they can somehow be justified. Breach of particular treaty obligations may be justifiable under the terms of the treaty (eg, if the treaty permits derogations, or includes potential exceptions/exemptions, and so on, as discussed immediately above) or under general treaty law (eg, under Article 60 of the Vienna Convention on the Law of Treaties which permits suspension or termination of a treaty for 'material' breach). However, such treaty-law justifications will in any event not be available for breaches of obligations under customary international, which will include jurisdictional rules, human rights obligations, the prohibition of intervention, and so forth.

As such, this sub-section deals with defences for URMs that are in breach of international obligations under general international law, and in particular with circumstances precluding

39 ECJ (Grand Chamber), PJSC Rosneft Oil Company v Her Majesty's Treasury and Others [2017] C-72/15, § 112.

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wrongfulness. Such circumstances precluding wrongfulness may be invoked by a state or international organisation breaching an international obligation in order to excuse the breach (the non-performance) of the obligation 'while the circumstance in question subsists'.[40] Once the circumstance precluding wrongfulness stops applying, conduct in compliance with the international obligation must resume.

The ARSIWA provide for a number of circumstances precluding wrongfulness; these are: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), force majeure (Article 23), distress (Article 24), and necessity (Article 25). While we do not exclude the possibility that a state or international organisation resorting to URMs in breach of its international obligations could seek to rely on any of these justifications for its conduct, most of them are unlikely to be applicable to URMs. Consent, for example, will most likely not be present for the taking of a unilateral coercive measure against another state, nor will the reacting state be able to successfully plead force majeure or distress except in the most peculiar circumstances. Self-defence would also be unavailable unless the reacting state is also taking action in response to an armed attack in accordance with Article 51 of the UN Charter, and necessity has such strict conditions that its successful pleading would be next to impossible.

The only meaningful excuse for URMs, as already alluded to in the rest of this report, would thus be countermeasures, including countermeasures in the general interest. However, for countermeasures to be successfully pleaded in excusing the conduct in breach of international obligations, there is a number of substantive and procedural conditions that need to be fulfilled. The relevant conduct is excused (its wrongfulness is precluded) only for as long as the relevant conditions continue to be satisfied.[41] It is thus to these conditions that we now turn.

1. Conditions and limitations for resort to countermeasures

The 2001 Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') of the ILC constitute the most authoritative instrument which codifies the conditions and limitations which determine the lawfulness of countermeasures. These conditions are therefore the main tools to reduce arbitrary or abusive recourse to countermeasures. Short of substituting this form of private justice by a centralized mechanism of control and enforcement, the ILC provided for substantive and procedural rules which allow to assess the lawfulness of countermeasures. They put on the state resorting to countermeasures the burden of justifying their adoption and proportionality. In the absence of a judicial mechanism to make such determination, these conditions may at least serve the purpose of civilizing the dialogue between the responsible and the injured State, by providing a common set of rules of reference. Although used extensively by international and domestic courts, the ARSIWA are rarely referred to by States in relation to their practice of unilateral restrictive measures. Yet, this is the ultimate test for appreciating the lawfulness of any such measures.

What are the conditions for lawful resort to countermeasures? First of all, we need to refer again to the definition of countermeasures. Countermeasures are measures that are in breach of an obligation of the reacting (injured) state taken against a target (responsible) state, in response to a previous breach of an obligation of the target state that is owed to the

40 ARSIWA Commentary 71, para 2.
41 ARSIWA Commentary 75, para 4.

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reacting state, or to a group of states including that state, and aiming to induce the compliance of the target state with its obligations under the law of state responsibility to cease the wrongful act if it is continuing, to offer assurances and guarantees of non-repetition, and to offer reparation.

Articles 49 to 53 ARSIWA establish conditions regulating the lawfulness of countermeasures. Their lawfulness is extrinsically determined by the prior wrongful act of a state (conditions 1 and 2 below) and intrinsically by a series of substantive and procedural conditions aiming at circumscribing their potentially noxious effects (conditions 3 to 6 below):

1. the identification and establishment of a prior unlawful act;
2. the target of the countermeasures (the responsible State);
3. some countermeasures are excluded since they would offend against fundamental norms;
4. the effect ratione temporis of countermeasures (temporary and reversible);
5. proportionality;
6. procedural conditions (notification/ sommation).

Some of these conditions are further analysed below. From the elements of the definition given above, and the list just referred to emerge the main substantive conditions for lawful resort to countermeasures. Only the most relevant for the discussion on URMs are referred to below. Since the function of countermeasures is to induce compliance,[42] these cannot be punitive in character. As such, they must be (i) limited to the non-performance of obligations 'for the time being', ie, until compliance is achieved.[43] This means that a URM is only justifiable as a countermeasure only for as long as the target refuses to acknowledge its breach of obligations and/or does not comply with its secondary obligations of cessation, assurances and guarantees of non-repetition, and reparation.

Countermeasures must also be (ii) reversible 'as far as possible',[44] so as to allow the reacting state to resume compliance with its own obligations.[45] This means simply that a UCM should not produce irreversible effects, in effect cancelling out the reacting state's obligation. For example, an asset freeze is by definition a reversible measure, as assets frozen can be unfrozen at any given point in time and thus permit resumption of compliance with relevant obligations. Whatever effects the freeze has occasioned are not to be considered irreversible in the instance.

Since countermeasures must be targeted on the responsible state, the target must be a state that is internationally responsible for the breach of an obligation (iii).[46] As such, unilateral restrictive measures that are sought to be justified as countermeasures cannot directly target third states. This is particularly important with respect to URMs that purport to have extraterritorial effects on third states, discussed in sub-section III.C below. These effects can be seen as targeting third states, and their lawfulness is particularly problematic. As such, and in order to remain lawful with respect to the third states affected by an exorbitant assertion of extraterritorial jurisdiction, any such URMs will require some independent basis of legal justification. They cannot remain lawful simply because they can be qualified as

42 Article 49(1) ARSIWA & ARSIWA Commentary at 130.
43 Article 49(2) ARSIWA.
44 ARSIWA Commentary 129, para 6 and Article 49(3) ARSIWA.
45 Article 49(3) ARSIWA.
46 ARSIWA Commentary 130.

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countermeasures against the responsible state. The measures must be proportionate to the injury suffered by the reacting state (iv).[47] Assessing the proportionality of a particular URM that is sought to be justified as a countermeasure can only be undertaken against a specific factual constellation, and not in the abstract.

The measures cannot be in breach of certain obligations, such as the obligation not to use force, obligations of a humanitarian character and obligations to respect human rights, other obligations under peremptory norms of international law, or certain obligations under diplomatic law (v).[48]

Finally, the measures must be taken by the state that is injured by the internationally wrongful act (vi), though this is discussed in further detail in the sub-section immediately following this discussion.

Further to these substantive conditions, there are also certain procedural requirements for resort to countermeasures. Countermeasures must be preceded by a (i) demand by the reacting (injured) state that the target (responsible) state comply with its secondary obligations of cessation, assurances and guarantees of non-repetition, and reparation, and (ii) a notification of the intention to resort to countermeasures.[49] They must also be accompanied by (iii) an offer to negotiate with the target (responsible) state.[50] They must finally be (iii) suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3). However, some of the procedural requirements for resort to countermeasures, such as notification, can on occasion be circumvented by recourse to 'urgent' countermeasures.[51]

These requirements are less mundane than one might think. Indeed, they impose on states a duty to justify their unilateral actions, to motivate their unilateral decisions, even summarily by reference to international law. In principle, such requirements are particularly effective for counter-balancing the power of self-appreciation of States and for preventing abuse of countermeasures. They are also a powerful tool for pushing States to dialogue.

2. Countermeasures by the injured state and countermeasures by other states

In principle, countermeasures can only be taken by an injured state; therefore, the obligation that the target state breached must be owed to the reacting state and this state is specially affected by the breach.[52] However, it should be mentioned here that the ARSIWA do not take a position on the availability of 'countermeasures in the general interest', ie counter-measures taken by a state or international organisation that has not been specially affected by the breach of an international obligation, but is still among those to whom the breached obligation is owed.[53] However, it is accepted that certain international obligations (such as, for example, the prohibition of the use of force, or the protection of human rights) are owed not (just) to individual states, but rather to 'the international community as a whole', so that all states have a legal interest in their observation.[54] These are, among others, obligations arising from per-emptory norms of international law (*jus cogens*).

47 Article 51 ARSIWA.
48 Article 50 ARSIWA.
49 Article 52(1) ARSIWA.
50 Ibid.
51 Article 52(2) ARSIWA.
52 Articles 42 & 48 ARSIWA (providing definitions of injured states).
53 See Article 54 ARSIWA.
54 Cf Barcelona Traction (Second Phase) (Belgium v Spain) ICJ Reports 1969, paras 33-34.

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Parenthetically, peremptory norms of international law are norms which are, in the words of Article 53 of the Vienna Convention on the Law of Treaties, accepted by the internationally community of states as a whole as norms from which no derogation is permitted. There are few norms that have achieved the status of *jus cogens*, though it is now largely acepted that these include the prohibition of the use of armed force/prohibition of aggression, the prohibition of apartheid, piracy, genocide, slavery, crimes against humanity, war crimes, torture, and the principle of self-determination (with all the definitional difficulties that this entails).

Article 54 of ARSIWA leaves open the possibility for 'indirectly' injured States to adopt measures in case of violations of *jus cogens* or of other obligations owed *erga omnes* or *erga omnes partes*:

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

This safeguard clause mentions indeed the possibility for third States to 'take lawful measures' in reaction to violations obligations owed erga omnes (partes), but, precisely because of the use of the term 'lawful measures', it is impossible to interpret the provision as either allowing or prohibiting countermeasures 'in the general interest'. This is because countermeasures are, in the final analysis, 'lawful measures'. On the other hand, if the intention of the provision was to refer to measures that are already in the first instance 'lawful', then the provision is redundant: there is no permission required by the law for an entity to adopt measures that are anyway lawful. As such, the provision of Article 54 itself does not resolve the issue whether 'indirectly' injured states can resort to countermeasures 'in the general interest', a matter that the ILC is explicit about in its commentary to Article 54.

Be that as it may, it is probably now established in the practice of states that resort to countermeasures 'in the general interest' is available under international law.[55] ARSIWA's silence on this point seems to be compensated by considerable practice, which as such met with little opposition. The EU has resorted to such countermeasures in the general interest on a number of occasions, mainly in response to serious human rights violations occurring in third states. In fact, it has provided a significant amount of international practice in this most problematic area of countermeasures.[56] A brief overview of the relevant EU practice is provided in the following paragraphs.

Since 1970, the EU has imposed unilateral sanctions against a number of third states. In 1977-1979 it suspended development assistance owed to Uganda under the first Lomé Convention (Lomé I) due to the serious human rights violations of the Idi Amin regime. This was a breach of the Lomé I, as the suspension could not be justified under the agreement's own provisions—which notably did not make

55 See generally Linos-Alexandre Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 European Journal of International Law 1127; Christian Tams, Enforcing Obligations Erga Omnes in International Law (CUP 2005); Martin Dawidowicz, 'Public Law Enforcement Without Public Law Standards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council' (2006) 77 British Year Book of International Law 333.

56 See Christian Tams and Alessandra Asteriti, 'Erga Omnes, Jus Cogens and Their Impact on the Law of Responsibility' in Malcolm Evans and Panos Koutrakos (eds), The International Responsibility of the European Union (Hart 2013) 163, 172 ff. See generally Paolo Palchetti, 'Reactions by the European Union to Breaches of Erga Omnes Obligations' in Enzo Cannizzaro (ed), The European Union as an Actor in International Relations (Kluwer 2002) 219.

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development assistance conditional upon the protection of basic human rights.[57] In 1980 the EU took similar measures against Liberia, again suspending development assistance in breach of Lomé I.[58] These violations required justification under general international law. The justification was none other than the widespread and systematic human rights violations that were taking place in Uganda and Liberia at the time.

Later, the EU started building 'human rights conditionality clauses' into relevant agreements.[59] This was done so as to allow suspension of aid under the terms of the agreement itself, without having to resort to some justification under general international law.[60] In such cases there is in principle no internationally wrongful act that needs to be justified through resort to a circumstance precluding wrongfulness.

In 1998, the EU enacted sanctions against the Federal Republic of Yugoslavia (Serbia-Montenegro) (FRY) that went clearly beyond the measures prescribed by the UNSC under Chapter VII of the UN Charter. Such sanctions could not be justified by virtue of UN Charter Articles 25 and 103 and thus had to be considered 'autonomous' or unilateral sanctions, which required independent justification. In particular, the EU imposed on its Member States the freezing of assets of the FRY[61] and the suspension of air links with the FRY,[62] forcing them in the latter case to breach bilateral air service agreements. The purported justification for these measures going beyond the UNSC-imposed measures was that they were in response to the 'unacceptable violation of human rights' by the FRY against the Kosovar Albanian community and the intransigence of the FRY government in this respect.[63] Earlier, in 1992, the EU had taken measures potentially in breach of the GATT 1947 against the Socialist Federal Republic of Yugoslavia (SFRY), before the UNSC had imposed any Chapter VII measures; these were indeed challenged by the SFRY but the relevant claim was dismissed on the technical point that the FRY did not automatically continue the party status of the SFRY.[64] Such measures, if not justifiable under the GATT exceptions, would need independent justification under general international law.

Several of the EU measures taken in 2002-2003 against Zimbabwe were justifiable under conditionality clauses in the Cotonou

57 The EU sought to argue that whatever action it took was without prejudice to its obligations under Lomé I. See response of the Council of the European Communities to the question of a member of the Parliament, deploring the 'consistent denial of basic human rights to the people of Uganda', in accordance with the decision at its meeting on 21 June 1977: OJ C 214/1 (7 September 1977). This decision, which became known as the 'Uganda Guidelines,' stated that the EEC would act within the framework of Lomé I but seek to ensure that assistance given to Uganda would not be used to prolong or reinforce the human rights violations. However, assistance was indeed suspended and, this being a violation of the agreement, it had to be justified as a countermeasure. See Tams (n 55) 210–211; Tams and Asteriti (n 56) 173-174.

58 See Tams (n 55) 211.

59 For the discussion on the inclusion of such conditionality clauses in Lomé II–IV and the ultimate failure of the attempts see e.g., A Young-Anawaty, 'Human Rights and the ACP-EEC Lomé II Convention: Business as Usual at the EEC' (1980) 13 New York University Journal of International Law and Politics 63; DJ Marantis, 'Human Rights, Democracy, and Development: The European Community Model' (1994) 7 Harvard Human Rights Journal 1.

60 See generally Lorand Bartels, Human Rights Conditionality in the EU's International Agreements (OUP 2005).

61 See EU Council Common Position 98/326/CFSP of 7 May 1998 Concerning the Freezing of Funds Held Abroad by the Federal Republic of Yugoslavia and the Serbian Government.

62 See EU Council Common Position 98/426/CFSP of 29 June 1998 Concerning a Ban on Flights by Yugoslav Carriers between the Federal Republic of Yugoslavia and the European Community.

63 See EU Common Position 98/240/CFSP of 19 March 1998 on Restrictive Measures against Yugoslavia. See also EU Council Regulation (EC) 1901/98 of 7 September 1998 Concerning a Ban on Flights by Yugoslav Carriers between the Federal Republic of Yugoslavia and the European Community.

64 See Esa Paasivirta and Alan Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks' in Cannizzaro (n 56) 212.

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Agreement,[65] which had by then succeeded the various iterations of the Lomé Agreement discussed above. Other measures, however, such as asset freezes, were not, and thus required justification under international law.[66] The same applies to asset freezes imposed on Belarus in 2004. All these measures were taken in response to widespread and systematic human rights abuses in the relevant States.

The EU has also taken measures against Russia with respect to the situation in Crimea, again clearly relying on the violation of obligations *erga omnes* (unlawful use of force and prohibition of annexation of territory through the use of force), as well as against Belarus most recently in response to the latter's diversion and forced landing of a civilian aircraft overflying Belarusian territory.[67]

Finally, the EU has considered the adoption of measures in violation of the international obligations either incumbent upon itself or upon its Member States on a number of other occasions, but it may have decided not to adopt these based on practical—rather than legal—considerations.[68] This would suggest that the EU would have considered these measures justifiable under general international law, had they been adopted.[69] Based on the practice in the preceding paragraphs, it emerges clearly not only that the EU considers countermeasures in the general interest as allowed under international law, but also that it has significantly contributed to the practice establishing them as such.

What emerges is that we can only assess the legality of unilateral restrictive measures on a case-by-case basis. Every measure must be reviewed to determine whether it falls foul of any obligations of the state or international organisation taking it owed to the target state. If not, the measure is an act of retorsion, and the legal assessment stops there. If the measure appears to breach some obligation owed to the target state, then it must be assessed against the conditions for lawful resort to countermeasures. If it complies with those conditions, the wrongfulness of the measure is precluded, and the reacting state bears no international responsibility for it. If, however, the measure falls foul of any of those conditions, it constitutes an internationally wrongful act, which engages the responsibility of the reacting state or international organisation.

65 See Partnership agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, Art 96, June 23, 2000, 2000 OJ (L 317) 3 (Cotonou Agreement).

66 See Tams (n 55) 224–225.

67 For an analysis why the relevant obligations violated by Belarus in the instance may be owed at least erga omnes partes see Miles Jackson and Antonios Tzanakopoulos, 'Aerial Incident of 23 May 2021: Belarus and the Ryanair Flight 4978' [2021] EJIL:Talk! (24 May), available at: https://www.ejiltalk.org/aerial-incident-of-23-may-2021-belarus-and-the-ryanair-flight-4978/.

68 See eg, Tams (n 55) 220.

69 See ibid 220.

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III. PRACTICE OF SANCTIONS AND UNILATERAL RESTRICTIVE MEASURES

In this section, we review the historical development and current practice with respect to sanctions (defined as above as measures imposed by the Security Council under Article 41 of the UN Charter) and unilateral restrictive measures (defined as above as measures taken by one or more states, or even international organisations such as the EU, without any Security Council mandate). This review is necessarily limited. Subsection A reviews the historical development of Security Council sanctions from comprehensive, global sanctions to more targeted, less 'blunt' instruments for responding to a threat to the peace. This is because Security Council practice in this respect in not just crucial in and of itself, but also because it has influenced the practice of states and the EU in their adoption of unilateral restrictive measures. Sub-section B reviews US and EU practice in the adoption and implementation of [sanctions and] unilateral restrictive measures, while subsection C deals briefly with 'sanctions against sanctions', that is to say with the practice of responding to unilateral restrictive measures that are perceived as unlawful through countervailing measures, including blocking statutes.

A. From global to targeted sanctions

The United Nations Charter entrusts the Security Council with the 'primary' responsibility for the maintenance of international peace and security.[70] In exercising that primary responsibility, the Security Council has been given considerable powers under Chapter VII of the Chapter. After it determines the existence of a threat to the peace, breach of the peace, or act of aggression under Article 39, the Council has the power to impose 'measures not involving the use of armed force' (colloquially referred to as 'sanctions') in accordance with Article 41.[71] These measures are binding on all member states of the United Nations, which must implement them in accordance with Article 25 of the Charter. In so doing, member states may violate obligations under treaties: the UN Charter provides for that by means of Article 103, according to which '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. Obligations under Security Council decisions are obligations 'under the Charter', given the language of Article 25.

Article 41 UNC provides an indicative, non-exhaustive list of the measures 'not involving the use of armed force' that the Security Council may decide 'are to be employed to give effect to its decisions', which it then can 'call upon the Members of the United Nations to apply'. 'These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[72] The types of measures envisioned by Article 41 are rather traditional, as may be expected for a provision drafted in the mid 1940s. The practice of the Security Council over the last 30 years, however, has gone quite a bit beyond those traditional measures, and has even been quite inventive in coming up with 'measures not involving the use of armed force' to respond to threats to the peace. This 'inventiveness' is, in general terms, allowed by the language of Article 41, though it

70 Article 24(1) UNC.

71 The Security Council can also authorise states to use force to implement its decisions in accordance with the prevailing interpretation of Article 42, though this is a matter with which the present report does not concern itself.

72 Article 41 UNC [emphasis added].

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is subject to other legal restrictions depending on the circumstances.[73]

We must distinguish between two periods in Security Council practice relating to Article 41 measures:[74] the first is a period of non-practice, in reality, and spans the length from the creation of the United Nations to the end of the Cold War. The second is a period of burgeoning practice starting with the Iraqi invasion of Kuwait and continuing to present day, though it has been tapering off in the last few years. We can be quite brief in discussing the first period of (non-) practice. In the first 45 years of its existence the Security Council found itself almost permanently deadlocked due to the super-power rivalry and the Cold War. It was able to adopt Article 41 measures only twice, against Southern Rhodesia and in response to Apartheid in South Africa.[75] These were the first and only instances of sanctions until the Iraqi invasion of Kuwait in 1990, and the sanctions were largely limited to arms and oil embargoes.

The Iraqi invasion of Kuwait at the end of the Cold War found the Security Council in a new era of consensus. This enabled it to act and impose for the first time comprehensive economic sanctions against Iraq,[76] even after the authorised armed intervention by states had forced Iraq to withdraw from Kuwait. At the time, the Security Council had no experience in the use of the 'blunt instrument' of sanctions,[77] but it was quickly realised that comprehensive economic sanctions had quite devastating side-effects on the civilian population, without necessarily being particularly effective on the leadership of the target state in inducing it to comply with international law and the obligations imposed by the Security Council under Chapter VII of the UN Charter.

Indeed, the Iraqi sanctions quickly caused severe shortages in food, educational materials, medicines, and even building materials in Iraq, leading to devastating difficulties for the civilian population. This was not only because of restrictions on exports to Iraq, but also because Iraq found itself unable to purchase or produce any such materials (that it theoretically could), deprived as it was of its major source of income: oil exports. The Security Council did act to alleviate those side-effects by introducing humanitarian exceptions and exemptions, and by establishing the Oil-for-food Programme which allowed some oil exports from Iraq, with the proceeds from such exports being held in an escrow account that could be used under supervision for the purchase of, quite literally, food and other necessities.

The experience of the Iraqi sanctions demonstrated both the enormous power of the Security Council, a power heretofore untapped, as well as the potentially devastating and catastrophic effects of that power. The sanctions crippled Iraq without necessarily being fully successful in inducing Iraq's compliance (though they did ensure that Iraq destroyed its stock-piles of weapons of mass destruction and remained unable to produce any more such weapons). They had to be modified in order to protect the civilian population (including through the introduction of humanitarian exceptions and exemptions), and they remained in place for a rather long time (over a decade, and until the 2003 unauthorised invasion of Iraq by the US, the UK, and other states). This was a learning

73 See Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (OUP 2011) ch 3.

74 This is a rather crude categorisation, as we could easily come up with further periods of practice depending on how much of a fine-grained approach we may wish to adopt. For an example see Antonios Tzanakopoulos, 'La Russie et le Conseil de sécurité : trois époques de la pratique' (2019) 123 Revue générale de droit international public 91.

75 SCR 232

75 SCR 232 (1966) [Southern Rhodesia]; 418 (1977) [South Africa].

76 SCR 660 (1990) et seq.

77 'An Agenda for Peace' […]

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opportunity for the Security Council. It should be stressed that the lessons learned by the Council were due in no small part to the reaction of many humanitarian, non-governmental organisations, and civil society, who brought the plight of Iraqi civilians to the fore and demanded the reaction of the international community.

Ever since the Iraqi sanctions experience, the Security Council has steered clear of adopting comprehensive economic sanctions. Rather, and over a significant period of time, which has included consultations with states and other stakeholders, including relevant humanitarian organisations, it has sought to hone its approach and to 'target' its sanctions so as to avoid any devastating or otherwise problematic effects on the general population of states subjected to such measures.

This targeting has taken two forms: the first is an attempt to target measures to goods and services that are seen to fuelling or enabling whatever on-going conflict or situation is determined by the Council to constitute a threat to the peace. Accordingly, the Security Council has imposed bans on goods that have ranged from arms and oil (the implication being rather obvious) to diamonds and even timber. The second form of targeting of sanctions has focused on individuals and entities most responsible for the situation that was determined to constitute a threat to the peace, in an effort to avoid causing harm to the general population of the state. In the first instance, the Security Council would target high-ranking state officials and government entities in the target state. However, and especially after 9/11 and the fall of the Taliban regime in Afghanistan, there have been instances where the Security Council would not determine that a particular state and its leadership constitute a threat to the peace, but rather a non-state entity, such as Al-Qaeda, or ISIL (Da'esh), or even the Taliban (no longer being the government of Afghanistan), and would then proceed to impose sanctions against individuals and entities 'associated with' those organisations. Some authors describe these 'horizontal sanctions', ie a type of targeted individual coercive measures, arranged in blacklists that are organised thematically and have a global reach.[78]

The measures usually imposed on individuals and legal entities (whether high-ranking state officials or 'associated with' targeted non-state entities) consist in asset freezes, prohibitions on making available funds or other economic resources to such individuals or entities, travel bans, and arms embargoes. As with comprehensive sanctions, the Security Council did overtime realise the almost impossible position this would put certain individuals in, and included some exceptions and exemptions in the sanctions, such as for food and other necessities, as well as for legal representation.

Judicial control of UN sanctions has been a matter of controversy ever since the Security Council started imposing severe restrictions, as described above, to individuals and entities merely 'associated with' non-state entities determined to be terrorist organisations or otherwise constituting threats to the peace. Reactions in domestic courts and the courts of the EU ultimately resulted in the Security Council introducing a Focal Point in 2006, where those targeted by the measures can apply for 'de-listing', and the Office of the Ombudsperson in 2009 (with powers extended further in 2011), which may now recommend delisting of targeted individuals and entities in a manner that is quasi-binding on the Security Council.[79]

78 C Portela, 'Horizontal Sanctions Regimes: Targeted Sanctions Reconfigured?' in Charlotte Beaucillon (ed), Research Handbook on Unilateral and Extraterritorial Sanctions (Edward Elgar 2021).

79 See further on these issues Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), Challenging Acts of International Organisations before National Courts (OUP 2010) 54; id, 'The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments' in Giuseppe Martinico et al (eds), Kadi on Trial: A Multifaceted Analysis of the Kadi Judgments (Routledge 2014) 121.

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Taking a leaf from the Security Council's book, states and the EU have also modelled their unilateral coercive measures along the lines developed in the practice of the Security Council; or, rather, the practice developed in parallel, as it is not unusual that states, especially permanent members of the Council, would suggest the adoption of measures that resembled their own unilateral coercive measures. As such, the practice of the Council in adopting 'sanctions', and that of states adopting 'unilateral coercive measures' can be seen as a feedback loop, one informing the other. This is also because states would have to implement Security Council sanctions domestically, further amassing know-how as to the modelling and operation of restrictive measures.

relations. Of course, unilateral coercion has not emerged only in recent years or even decades, but once isolated and scarce, restrictive measures have become major instruments of the foreign policy of some states – indeed, it can be said that they are the tool par excellence in case of failure of negotiations. In this respect, we have gone from a sparse practice to a systematic yet highly unregulated practice, which poses a challenge to the system of collective security.

Several dozen states and several thousand people are now subject to these types of measures.[80] The US currently maintains 35 sanctions regimes, only ten of which are described as associated with Security Council resolutions.[81] The EU currently maintains 45 sanctions regimes,

CASES	ARMS EMBARGOES	ASSETS FREEZES	TRAVEL BANS	TRADE RESTRICTIONS	FINANCIAL RESTRICTIONS	DIPLOMATIC RESTRICTIONS
85	39	64	53	15	14	9
	46%	75%	62%	18%	16%	11%

Figure 1. Types of sanctions imposed by the EU (Francesco Giumelli, Fabian Hoffmann & Anna Książczaková (2021), 'The when, what, where and why of European Union sanctions', European Security, 30:1, 1-23)

B. Development of unilateral restrictive measures: EU practice vs US practice

The growth of unilateral restrictive measures adopted with a coercive intent is a distinctive consequence of the post-9/11 era of international

of which only 19 of which are described as having a UN mandate.[82] Many other states also impose unilateral restrictive measures, among

80 See the review of practice in the blog supervised by Maya Lester QC and Michael O'Kane, https://www.euro-peansanctions.com/region/.

81 See US Department of the Treasury, 'Sanctions Programs and Country Information' (Financial Sanctions 2020) https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx .

82 European Commission, 'Restrictive Measures (Sanctions)' (2021), at: https://ec.europa.eu/info/business-econ-omy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en.

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them Australia, Canada, Russia, Japan, Norway, Switzerland and Ukraine.[83]

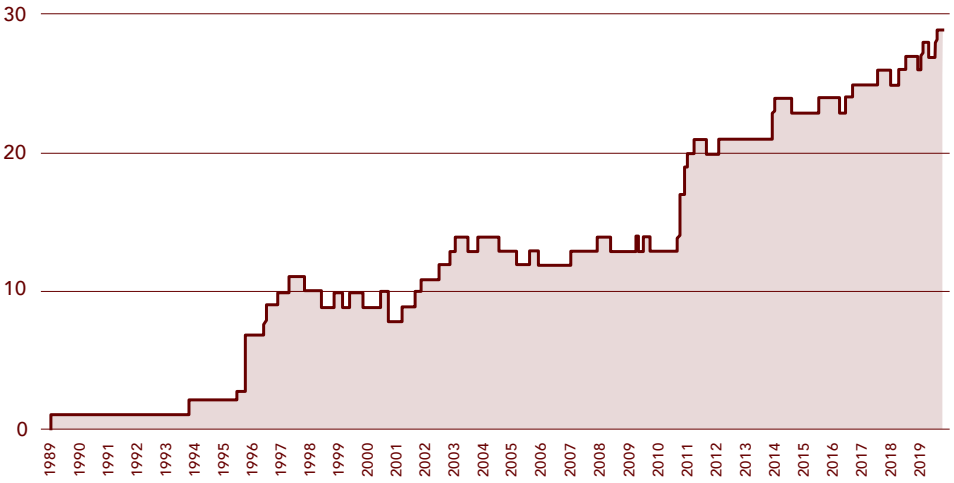

Figure 2. Growth of restrictive measures in the European Union (Francesco Giumelli, Fabian Hoffmann & Anna Książczaková (2021) 'The when, what, where and why of European Union sanctions', European Security, 30:1, 1-23).

US and EU unilateral restrictive measures differ on several accounts. First, the US does differentiate between the measures adopted to implement sanctions adopted by the Security Council and its own unilateral restrictive measures. From the point of view of international law, the two regimes are however entirely different. Second, while the EU prefers targeted restrictive measures, US restrictive measures are generally broader in scope and tend to be more comprehensive than the EU ones. Such a broad scope may be a factor in the appreciation of the proportionality of the measures adopted, if they were to qualify as countermeasures.

83 On Australia: Australian Government, 'Australia and Sanctions', at: https://www.dfat.gov.au/international-rela-tions/security/sanctions/Pages/about-sanctions#types
on Canada, see M Nesbitt, 'Canada's "Unilateral" Sanctions Regime Under Review: Extraterritoriality, Human Rights, Due Process, and Enforcement in Canada's Special Economic Measures Act' (2017) 48 Ottawa Law Review 509; on Japan see Machiko Kanetake, 'Implementation of Sanctions: Japan' in M Asada (ed), Economic Sanctions in International Law and Practice (Routledge 2019); on Norway see Global Legal Group, 'Norway: Sanctions 2021' (International and Comparative Legal Guide 5 October 2020) <https://iclg.com/practice-areas/
sanctions/norway>; on Switzerland see Swiss State Secretariat for Economic Affairs, 'Situation in Ukraine: Federal Council Decides on Further Measures to Prevent the Circumvention of International Sanctions' (Press Release, 27 August 2014) <https://www.seco.admin.ch/seco/en/home/seco/nsb-news/medienmitteilungen-2014.msg-id-54221.html>; on Ukraine see M O'Kane, 'Ukraine and Other Countries Align with EU's Extension of its Ukraine Territorial Integrity Sanctions' (EU Sanctions, Press Release, 6 November 2019) <https://www.europeansanctions.com/2019/11/ukraine-and-other-countries-align-with-eus-extension-of-its-ukraine-territorial-integritysanc-tions/>.

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Furthermore, EU legislative acts elaborate on the reasons and objectives of the restrictive measures. Their preamble often refers to the rules of international law which the EU considers to have been violated. Such elements of motivation are generally absent from US practice, which justify the measures adopted by a statement of policy. Furthermore, EU restrictive measures are or are intended to be temporary and reversible. They are adopted for a limited period of time (in general, 12 months), but they are renewable. They also state the goals of the restrictive measures and the steps that the targeted State must take for the EU restrictive measures to be lifted. Besides, the 'Basic Principles' (2004) obligate the EU institutions and Member States to regularly review the restrictive measures and lift them as soon as progress is recognisable. In contrast, the US restrictive measures are open-ended and stay in force until a decision is taken to lift them. This is relevant to the assessment of the condition of reversibility of countermeasures analysed above.

Last but not least, EU restrictive measures apply within the sphere of jurisdiction of the EU and of its member States. They 'cover the territory of the European Union, aircrafts or vessels of Member States, nationals of Member States, companies and other entities incorporated or constituted under Member States' law or any business done in whole or in part within the European Union.'[84] By contrast, US restrictive measures often have an extraterritorial effect and apply to all entities which US considers to have a link with its sphere of jurisdiction.[85] While the EU resorts to unilateral restrictive measures targeting directly a state or its affiliates, it condemns 'the extraterritorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law'.[86]

C. Extraterritorial URMs and secondary 'sanctions' (or boycotts)

This practice complained of by the European Union, which was discussed at the end of the last sub-section, is precisely what some authors call the issue of 'secondary sanctions/boycotts'. Resort to unilateral restrictive measures by state A will of course affect state B, the intended target of the measures. But these measures may also affect (and even be calculated to affect) third states who are not alleged by state A to have violated any rules of international law. This is especially the case when the state resorting to unilateral restrictive measures calibrates them so as for them to have 'extraterritorial' effects. The reason for a state attempting to give extraterritorial effects to its measures is to emulate the effects of collective sanctions taken by the UN. As discussed in sub-section III.A above, when the Security Council imposes sanctions under Chapter VII of the Charter, all member states of the UN must comply with those measures. This makes the collective sanctions of the Security Council particularly effective.

By contrast, when an individual state resorts to similar measures unilaterally, it is not incumbent on any other state or international organisation to do the same (though of course it may happen that more than one state will determine that another state has violated

84 Council of the European Union, Sanctions guidelines: update (2018), n°5664/18, para 51, available at: https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf.

85 On the arbitrary appreciation of the connecting link by US authorities, see Alina Miron and Berangere Taxil, 'Les extraterritorialités entre unilatéralisme et multilatéralisme', in Extraterritorialités et droit international – Colloque d'Angers (Pedone 2020) 28-32.

86 Council of the European Union, Sanctions guidelines: update (2018), n°5664/18, para 5.

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international law and take measures against it). In order to circumvent this problem, the state taking unilateral restrictive measures may condition access to its market on an economic operator satisfying certain demands of the state, even when that operator is acting outside that state's domestic sphere.[87] A state may thus demand that economic operators of third states comply with unilateral restrictive measures it is taking against another state and its companies and nationals, thus establishing a regime of 'secondary sanctions' or a 'secondary boycott'.[88] Essentially, by making these measures applicable to economic operators of third states in their dealings with the targeted state, the state taking the unilateral restrictive measures is universalising its 'sanctions' regime and is thereby reducing the foreign policy space of third states towards the target state.[89]

In practice, US extraterritorial measures of this kind have proven highly effective and have thus a quasi-universal reach, which only Security Council sanctions should legally have. The collective strategy of voluntary submission to US extraterritorial restrictive measures is particularly noteworthy. In the face of powerful American unilateralism, corporations submit themselves to US law and their behaviour can be summed up in three words: avoidance, cooperation, submission. By *avoiding* US restrictive measures, they abandon markets to avoid the risk of colossal financial sanctions. Thus, all the European corporations which had interests in Iran chose to withdraw from it following the 'withdrawal' of the US from the Iranian Nuclear Deal in mid-2018, because no European bank would ever accept their transactions[90]. The cooperation of European companies with the US administration was secured under duress. Corporations receive injunctions by mail and must accept visits from controllers mandated by the US authorities. They cooperate with the administrative and judicial authorities working in the field of US restrictive measures.

Caught between contradictory obligations (to suffer US sanctions if they do not comply with US restrictive measures or to suffer European sanctions if they do comply with US restrictive measures), corporations choose the law of the strongest party and set up costly legal compliance services aimed at improving their knowledge of US law in order to comply with it. Some parliamentary reports even refer to an 'over-compliance' strategy.[91] The network of restrictive measures is so complex and intricate that a new legal discipline has developed in recent years - that of compliance (which aims to assist companies in ensuring that their practices comply with the various 'sanctions regimes'):[92] there are masters' degrees (generally in private law) and dedicated departments in large law firms. Regrettably, these programmes make no distinction between sanctions of the Security Council and unilateral measures.

The legality of extraterritorial restrictive action is highly questionable with respect to the third states that have their economic operators targeted, as it were, by association, and their foreign policy space reduced.[93] China, Russia, and India have rejected the legality of such

87 Cedric Ryngaert, Jurisdiction in International Law (2d ed, OUP 2015) 94.

88 Ibid 117.

89 Ibid.

90 For further information, see Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018, ICJ Reports 2018.

91 France, National Assembly, Information Report No. 4082 issued by the Foreign Affairs and Finance Committees at the conclusion of the work of a fact-finding mission on the extraterritoriality of American legislation chaired by Pierre Lellouche, supra note 105, p. 39.

92 Marie-Anne Frison Roche, Le droit de la compliance.

93 See generally Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese Journal of International Law 625.

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unilateral restrictive measures, Iran has done the same in its recent application against the United States,[94] and the UN General Assembly,[95] the Human Rights Council,[96] and the Non-Aligned Movement[97] have also stated that they consider them impermissible under international law.

Extraterritoriality is therefore one of the most problematic aspects of unilateral restrictive measures The rules of jurisdiction are meant to curb such an excessive reach of measures adopted by means of domestic law. There is a way to achieve a global, universal reach of sanctions: through action by the Security Council. It is not up to states to try and achieve the same result by making exorbitant jurisdictional assertions.

D. 'Counter-sanctions' and 'blocking statutes'

Any resort to URMs carries with it a serious danger of escalation. This is because each state or international organisation resorting to URMs is determining for itself and at its own risk the legal position in any particular circumstance. To put it relatively simply, when state A considers that state B has violated an international obligation it owes to state A, then state A may invoke the international responsibility of state B, and call upon it to comply with its secondary obligations under the law of international responsibility: that is, to cease the wrongful act if it is continuing, to offer assurances and guarantees of non-repetition, and to offer reparation for the injury that the wrongful act inevitably causes (at least legally, if not always materially). State B, however, may take the position that it never violated its obligation towards state A, and refuse to comply with the demands of state A.

In that case, an international legal dispute is created between states A and B: they disagree on a question of 'fact or law'—the definition of an international legal dispute famously given by the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case. The states may of course agree in the instance (or they may have already agreed in the context of a particular treaty or in another way) to submit the relevant dispute to adjudication (that is, binding settlement by a permanent international court or an arbitral tribunal). When that is not the case, however—as it most usually is not—each state may determine the legal position for itself but, as stated above, 'at its own risk'. What this means is that the state is taking the risk that its legal assessment of the situation may turn out to be wrong. If so, and the dispute is settled finally by adjudication or by agreement between the parties, the state that made the wrong assessment of the situation will find itself internationally responsible.

Be that as it may, both states and the EU do take the 'risk' of legally assessing a particular situation, of invoking the responsibility of other states, and, when these do not comply with the relevant secondary obligations (of cessation and reparation, etc), of imposing unilateral coercive measures (countermeasures), with a view to inducing the recalcitrant state to comply with these obligations. In the example given above, following the refusal of state B to comply with the demands of state A, state A may proceed to impose what it considers 'countermeasures' against state B, as allowed under international law.

State B may well continue to disagree with that assessment. It will thus consider that the purported 'countermeasures' of state A are in

94 See Application Instituting Proceedings, at ¶¶ 12, 28.

95 GA Res 51/22 (Dec 6, 1996); GA Res 53/10 (Nov 3, 1998); GA Res 57/5 (Nov 1, 2002); GA Res 61/170 (Feb 7, 2007).

96 Human Rights Council Res 36/10, UN Doc A/HRC/RES/36/10 (Oct 9, 2017).

97 See, eg, Ministerial Declaration on the Occasion of the 40th Anniversary of the Group of 77 ¶ 35 (June 12, 2004); Ministerial Declaration of the Group of 77 and China, Annexed to the Letter Dated 30 September 2014 from the Permanent Representative of the Plurinational State of Bolivia to the United Nations Addressed to the Secretary-General, ¶ 47, UN Doc A/69/423 (Oct 7, 2014).

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fact the first breach, a breach of international obligations owed by state A to state B. It may then proceed to apply its own 'counter-measures' against state A, in effect resorting to 'counter-countermeasures'. State B in the instance will be arguing that the countermeasures of state A are in fact not allowed by international law, as they do not respond to a breach of the law by state B, and that its own 'counter-countermeasures' are the first true (and thus lawful) countermeasures in the series. It can go on from there, the situation escalating until the two states agree either to resolve the dispute between them (eg, through negotiations) or to submit to adjudication before an international court or tribunal.

Another form of *'counter-sanctions'* is legislation adopted in reaction to extra-territorial URMs. Many states react to them by adopting so-called 'blocking statutes' or other measures that aim to frustrate the exercise of what they deem illegal extraterritorial jurisdiction by the reacting state. As such, they react by resorting to a type of 'counter-countermeasures', though they are not the direct target of the measures. The blocking statutes are a defence against an abusive projection of power by a state beyond its sphere of jurisdiction. But private persons and entities are then found in a dilemma since they have to choose between complying either with the extraterritorial URMs or with the blocking statute. The European Union has such a blocking statute (Council Regulation 2271/96), now before the European Court of Justice.[98] The second problem of the blocking statutes is that they are multiplying: China adopted one in April 2021.[99] This means a multiplication of contradictory obligations for private entities, who are caught in the middle of states' fight for hegemony.

All of the above should have thrown the importance of the lawfulness of unilateral restrictive measures into sharp relief. Assessing the lawfulness of such measures adopted by a state or international organisation is first step towards determining what reaction to these measures may be available. Accordingly, the next section turns to the conditions for the lawful taking of unilateral coercive measures.

98 See the Opinion of General Advocate Hogan, 12 May 2021, in case Bank Melli Iran, Aktiengesellschaft nach iranischemRechtvTelekomDeutschland GmbH, C-124/20.

99 D. Mortlock, The 'blocking statute': China's new attempt to subvert US sanctions, 8 Feb. 2021, https://www.at-lanticcouncil.org/blogs/new-atlanticist/the-blocking-statute-chinas-new-attempt-to-subvert-us-sanctions/

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IV. JUDICIAL CONTROL

A. International Courts and Tribunals

Given that jurisdiction of courts and tribunals in international law is consensual (unlike in domestic legal systems where jurisdiction of domestic courts is compulsory), it stands to reason that there are not many cases where international courts and tribunals have had the opportunity to assess the legality of unilateral restrictive measures. States targeted by URMs have rarely attempted to challenge their legality before an international court. The stringent conditions for these courts to have jurisdiction explain to some extent the lack of case-law. Another reason probably relates to the fact that the targeted states may have doubts on the outcome of their case, which mirrors the uncertainty on the scope of general international law in relation to inter-state coercion through measures other than the use of force. Thus, when URMs are challenged before a court, it is rather on the basis of specific treaty provisions (either bilateral or plurilateral treaties of commerce and amity or, more recently, the WTO) rather than general principles of international law concerning protection of sovereignty. Indeed, these treaties may provide a basis for jurisdiction and the scope of the special obligations they entail is easier to determine than that of the rules of general international law protecting state sovereignty.

What follows in the next paragraphs is a short overview that focuses mainly on the International Court of Justice ('ICJ'), the principal judicial organ of the United Nations, but also refers to cases in the World Trade Organisation Dispute Settlement Body.

What follows in the next paragraphs is a short overview that focuses mainly on the International Court of Justice ('ICJ'), the principal judicial organ of the United Nations, but also refers to cases in the World Trade Organisation Dispute Settlement Body.

In the first instance, and to take a recent example, it is worth examining the 'sanctions' that the United States re-introduced against Iran after the former's 'withdrawal' from the Joint Comprehensive Plan of Action.[100] Iran brought claims in the International Court of Justice against the United States for violations of the Treaty of Amity of 1955 between them.[101]

Iran claims that the US decision to re-impose and aggravate a comprehensive set of so-called 'sanctions' and restrictive measures targeting, directly or indirectly, Iran, Iranian companies, and Iranian nationals, violates US obligations under the 1955 Treaty of Amity.[102] The unilateral restrictive measures imposed by the United States relate to the blocking of property of certain Iranian natural and legal persons, the revocation of licences to Iranian companies, and the exclusion of certain Iranian nationals from the United States.[103] There are a couple of things to note with respect to the Iranian claim.

The first is that Iran brought no claim against the United States with respect to the previous iteration of the sanctions. This may be explained by the fact that the previous regime of US sanctions was 'covered', at least to a large extent, by the parallel regime of UN Security Council sanctions against Iran. Indeed, the United States could have retorted, in such a case, that it was under an obligation to adopt these measures in accordance with Article 25 of the Charter, and that this obligation superseded its obligations to Iran under the Treaty of Amity in accordance with Article

100 See SC Res 2231 (July 20, 2015) (endorsing the JCPoA).

101 Application Instituting Proceedings, Alleged Violations of the Treaty of Amity, Economic Relations, and Con-sular Rights (Islamic Republic of Iran v. United States of America) (July 16, 2018).

102 Ibid at ¶ 1.

103 See ibid at ¶ 21.

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103.[104] To the extent that a state takes measures in compliance with a Security Council resolution, they require no independent justification under international law (though they do require such justification when they go beyond what the Security Council requires).

The second thing to note is that Iran brought no claims under customary international law. This is because of jurisdictional restrictions in the instance: since Iran is relying on the compromissory clause in the Treaty of Amity, it can only bring before the Court a dispute as to the interpretation and application of that Treaty.[105] However, the Treaty imposes a number of obligations that states do not have under customary international law, and it is these obligations that Iran argues the US measures are breaching: the obligation not to adopt discriminatory and unreasonable measures, the obligation not to restrict fund transfers, the obligation to extend to Iran most-favoured-nation status and national treatment, and the obligation to maintain freedom of commerce and navigation between the two states.[106]

Even if the measures are in breach of customary or treaty obligations of the United States, it is still possible that the United States will seek to justify them as countermeasures against Iran. If so, it will fall to be determined whether these comply with the requirements described in section II.B above. The Court has now rejected all US preliminary objections and will be moving on to consider the merits of the case brought by Iran.[107] Yet this may not be the end of the story. Even if the measures against Iran are justified as against Iran itself, it may be that they breach US obligations towards other states (see section III.C above).

In another case before the ICJ, Greece sought to justify its failure to comply with its obligations under an Interim Accord of 1995 between itself and (what is now) the Republic of North Macedonia as, among others, a countermeasure.[108] The Court did consider the defence invoked by Greece, but found that, even if Greece was responding to a wrongful act by North Macedonia, that wrongful act had ceased years before the recourse of Greece to the alleged countermeasure, and as such the wrongfulness of the relevant Greek measure could not be precluded as a countermeasure.[109] This was because it could not have pursued the cessation of an act that had already ceased.

As regards the WTO Dispute Settlement System, it is worth noting that the justification of countermeasures is not per se available in the context of the WTO. This is because the WTO system precludes recourse to countermeasures without permission by the Dispute Settlement Body, even after it has been determined by that Body that a violation of the covered agreements has taken place. As such, states who have had their unilateral coercive measures challenged in the WTO DSS, have sought to justify their actions by invoking relevant exceptions (such as the security exceptions in Article XXI of the GATT).[110] Control by international courts over the application of the security exception is however limited. They consider themselves empowered to define the concept and determine the existence of a threat

104 See the discussion in section II.A of this report.

105 Article XXI(2) of the Treaty of Amity, Economic Relations, and Consular Rights, Aug 15, 1955, 8 UST 899, 284 UNTS. 93 [hereinafter Treaty of Amity].

106 Ibid at articles IV, VII, VIII, IX & X; Application Instituting Proceedings at ¶ 41.

107 Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) (Preliminary Objections) [2021] ICJ Reports (3 Feb).

108 See Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece) [2011] ICJ Rep 644, 682 [120].

109 Ibid, 691-2 [165].

110 See above, Section II.A. § 3 Breaches of Particular Treaty Obligations and the Role of the Security Exception.

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to the security interests, the assessment of the necessity of the measures of retaliation adopted is actually an assessment of the credibility of the justifications provided by the retaliating state. The review is thus a review of the motivation provided, rather than of the measures themselves. But courts do not substitute themselves to State's authorities and made no judgment of the opportunity of the measures adopted by them.[111]

B. The European Court of Justice

Unilateral restrictive measures may be submitted to the scrutiny of the ECJ. Yet, a distinction must be drawn between the control exercises by the European judiciary over the individual measures and the control exercised over the policy decision to adopt a sanctions regime. Indeed, Article 275 of the TFEU limits the Court's jurisdiction in relation to the former:

> The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

The Court has therefore only a limited jurisdiction to review the political decision to institute a restrictive measures regime,[112] while it has full jurisdiction to examine the validity of individual measures, including their respect for fundamental human rights.

Like international courts and tribunals, the ECJ exercises a minimal judicial control over political discretion in the field of international relations. In the Rosneft case. The Court broadly verified the motivation provided by Council and the broad adequacy between the measures and the objectives to be reached. This very low threshold of control applies to the appreciation of the necessity of the regime of restrictive measures, but also to the adequacy of the individual restrictive measures adopted as 'targeted sanctions':

> It must be borne in mind that the Council has a broad discretion in areas which involve the making by that institution of political, economic and social choices, and in which it is called upon to undertake complex assessments (…).
> 115. Further, as is stated in recital (2) of Regulation No 833/2014, it is apparent from those statements that the aim of the restrictive measures prescribed by the contested acts was to promote a peaceful settlement of the crisis in Ukraine. That objective is consistent with the objective of maintaining peace and international security, in accordance with the objectives of the Union's external action set out in Article 21 TEU.[113]

111 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep [282]; Oil Platforms (Islamic Republic of Iran v. United States of America) (Merits) [2003] ICJ Rep [32]-[41] [78]. A.M. adde ref Qatar / Saudi Arabia (2020)

112 ECJ (Grand Chamber), PJSC Rosneft Oil Company v Her Majesty's Treasury and Others [2017] C-72/15, § 112.

113 Ibid, §§ 113-116.

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V. CONCLUSION

(a) We feel that URMs pose problems to sovereign equality and to the role of the UNSC, but the vague definition of cardinal principles and the circumstantial assessment of their violations makes it difficult to give a clear-cut answer to the lawfulness of URMs under general international law, except in the context of specific factual constellations.

(b) The countermeasures regime in ARSIWA is a set of tools to tame the beast. The conditions set out therein are therefore extremely useful is assessing the practice of URMs (in particular, not punitive, reversible, proportional and preserving fundamental principles like human rights). However, these tools are rarely referred to by states or EU in their legal discourse.

(c) Even ARSIWA has its grey zones, in particular as far as countermeasures in the general interest are concerned. Supposing they are now accepted, they cannot be anarchically resorted to. In particular, they may only be resorted to by entities other than the directly injured Stare only in case of violations of *jus cogens* or other rules *owed erga omnes (partes)*. In any case, countermeasures in the general interest must also comply with the general conditions of countermeasures referred to above.

(d) Finally, URMs must be analysed in the framework of the system of collective security established by the Charter of the United Nations. The proliferation of URMs can be seen as a stopgap measure that poorly masks the failure of the Security Council. States would prefer to go through the United Nations body - not only to gain legitimacy, but also to become more effective because of the universal application of its resolutions. The unilateral practise would be undertaken reluctantly when blocked by a veto. In short, this may be described as *substitute unilateralism*. But some of the unilateral "sanctions" have been adopted to thwart the UN process - those of the United States against Iran fall into such a category of *sabotage unilateralism*, an attempt to set up as a parallel system of international security, based however on unilateral interests and an unilateral assessment of the threat. We can and must question the defects, the shortcomings and the impotencies of the collective security regime, as well as those of current multilateralism more generally. But to believe that they can be replaced by unilateralism would be backtracking over more than a century. There is still, and always will be, a need for an interlude of forces that only multilateralism can achieve.

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