

## **Third-party countermeasures: A progressive development of international law?**

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### 1. *Introduction*

This short contribution will examine one of the great unresolved questions of contemporary international law: the position of third-party countermeasures.<sup>1</sup> The use of otherwise unlawful unilateral sanctions of a peaceful character taken by States referred to in Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) in order to induce compliance with communitarian norms – ie third-party countermeasures – is an increasingly common phenomenon in international relations. Third-party countermeasures are often resorted to by a large (and increasingly diverse) number of States acting in concert as part of a broader strategy to deal with major assaults on multilateral public order. And yet their legal position ‘has been and remains uncertain’.<sup>2</sup> There was in 2000 a ‘significant level of approval’ for third-party countermeasures in the ILC – as reflected in the provisional

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<sup>1</sup> Compare C Tams, ‘Individual States as Guardians of Community Interests’, in U Fastenrath et al (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (OUP 2011) 379, 390 (‘one of contemporary international law’s great debates’). Also: D Alland, ‘Countermeasures of General Interest’ (2002) 13 *Eur J Intl L* 1221, 1223 (‘one of the more crucial questions in the development of public international law’).

<sup>2</sup> J Crawford, *State Responsibility: The General Part* (CUP 2013) 703.



adoption of Draft Article 54 [2000].<sup>3</sup> The extreme controversy of the topic nonetheless ultimately prompted the ILC, in adopting ARSIWA in 2001, to reserve its position on third-party countermeasures. It did so in the following terms:

*Article 54. Measures taken by States other than an injured State*

This chapter [on countermeasures] 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.

There are several reasons for the position ultimately taken by the ILC. Most importantly, the legal position on third-party countermeasures was said to be uncertain. The question is whether this conclusion can really be sustained, especially in light of recent State practice on the matter.

## 2. *Three recent examples of practice*

The ILC commentary to Article 54 ARSIWA explains that State practice on third-party countermeasures was ‘limited and rather embryonic’.<sup>4</sup> What is more, this ‘sparse’ practice involved only ‘a limited number of [Western] States’.<sup>5</sup> It was apparently ‘not appropriate’ to use affirmative language in Article 54 ARSIWA as there appeared to be ‘no clearly recognised entitlement’ to take third-party countermeasures under international law.<sup>6</sup> In short, the legal position was considered ‘uncertain’.<sup>7</sup> It is doubtful whether the ILC’s conclusion was truly war-

<sup>3</sup> ILC, ‘Report of the International Law Commission on the Work of its 52nd Session’ (1 May-9 June and 10 July-18 August 2000) UN Doc A/55/10, 62, para 385 (and also *ibid* 70).

<sup>4</sup> See para 3 of the commentary to art 54 ARSIWA, ILC, Report of the International Law Commission on the Work of its 53rd Session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 137.

<sup>5</sup> *ibid* para 6, 139.

<sup>6</sup> *ibid*.

<sup>7</sup> *ibid*.



ranted.<sup>8</sup> Already in 2001, at the time of the adoption of the saving clause in Article 54 ARSIWA, relevant instances of practice on third-party countermeasures greatly exceeded the rather limited examples identified by the ILC. And this practice has since only continued to grow.<sup>9</sup> It suffices here to consider in turn the three most recent examples involving the adoption of third-party countermeasures against Libya, Syria and Russia.<sup>10</sup>

*i)* In February 2011, in response to the violent repression of the civilian population in Libya, Switzerland decided, *inter alia*, to freeze the assets of Colonel Gaddafi (Libya's Head of State) and the Libyan Central Bank.<sup>11</sup> The United States took the same action.<sup>12</sup> In addition, the Council of the League of Arab States decided by unanimous vote to suspend Libya from its membership in the Arab League – a decision

<sup>8</sup> For some ILC members, the answer to the question of the permissibility of third-party countermeasures was even 'emphatically in the affirmative': YB ILC (2000) vol I, 336, para 41 (Mr Pellet). See also Alland (n 1), 1239; Institut de droit international, 2005 Krakow Resolution 'Obligations *Erga Omnes* in International Law' (art 5), <[www.justitiaetpace.org/idiE/resolutionsE/2005\\_kra\\_01\\_en.pdf](http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_01_en.pdf)>; C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 231; M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council', (2006) 77 British YB Intl L 333, 408-409; E Katselli-Proukaki, *The Problem of Enforcement in International Law. Countermeasures, the Non-injured State and the Idea of International Community* (Routledge 2010) 201-202; A Pellet, A Miron, 'Sanctions' (2011) Encyclopedia of Public International Law, para 58, available at <<http://opil.ouplaw.com/home/EPIL>>; others have been left 'puzzled': L-A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1145-1146.

<sup>9</sup> See Tams (n 8) 198-251; Dawidowicz (n 8) 333-418; Katselli Proukaki (n 8) 90-209.

<sup>10</sup> Other examples of third-party countermeasures since 2000 include those taken against Burma (2000-present), Zimbabwe (2002-present) and Belarus (2004-present) (see further n 9).

<sup>11</sup> See Swiss Federal Council, 'Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Libye' (21 February 2011) <[www.admin.ch/opc/fr/classified-compilation/20110418/201103110000/946.231.149.82.pdf](http://www.admin.ch/opc/fr/classified-compilation/20110418/201103110000/946.231.149.82.pdf)>.

<sup>12</sup> See President Obama's Executive Order 13566 of 25 February 2011, <[www.treasury.gov/resource-center/sanctions/Programs/Documents/2011\\_libya\\_eo.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/2011_libya_eo.pdf)>. Further: 'U.S. Imposes Sanctions on Libya in Wake of Crackdown', *The New York Times* (25 February 2011) <[www.nytimes.com/2011/02/26/world/middleeast/26diplomacy.html](http://www.nytimes.com/2011/02/26/world/middleeast/26diplomacy.html)>.



‘welcomed’ by the UN Security Council.<sup>13</sup> Article 18 of the Pact of the League of Arab States allows for membership suspension for ‘any State that is not fulfilling the obligations resulting from this Pact’.<sup>14</sup> However, the Pact does not refer to any obligation incumbent upon Arab League Member States to comply with international human rights and humanitarian law. It thus appears that the suspension of Libya was *prima facie* wrongful as it could not be justified under the Pact. Libya’s wrongful suspension is probably best viewed as only attributable to the organization. Still, as a minimum, Arab League Member States expressed support for this action and so it may reasonably be assumed that they accept the use of third-party countermeasures in such circumstances. All these actions were taken prior to the enforcement measures adopted by the Security Council against Libya under Chapter VII UN Charter and therefore required independent justification.<sup>15</sup>

*ii)* In May 2011, EU Member States imposed various unilateral sanctions against Syria in response to the massive violations of international human rights and humanitarian law committed by the Syrian regime.<sup>16</sup> The EU sanctions regime against Syria has since been renewed and broadened on numerous occasions. It includes, *inter alia*, the freezing of assets belonging to President Al-Assad and the Central Bank of Syria.<sup>17</sup> Ten countries have aligned themselves with the EU sanctions regime and pledged to ensure its implementation.<sup>18</sup> Australia, Canada,

<sup>13</sup> ‘Arab League Bars Libya From Meetings, Citing Forces’ Crimes’, *Bloomberg News* (22 February 2011) <[www.bloomberg.com/news/articles/2011-02-22/arab-league-bars-libya-from-meetings-citing-forces-crimes](http://www.bloomberg.com/news/articles/2011-02-22/arab-league-bars-libya-from-meetings-citing-forces-crimes)>; Security Council Press Statement on Libya (22 February 2011) <[www.un.org/News/Press/docs/2011/sc10180.doc.htm](http://www.un.org/News/Press/docs/2011/sc10180.doc.htm)>.

<sup>14</sup> Pact of the League of Arab States (adopted 23 March 1945, entered into force 10 May 1945) 70 UNTS 237.

<sup>15</sup> UNSC Res 1970 (26 February 2011); UNSC Res 1973 (17 March 2011).

<sup>16</sup> Council Decision 2011/273/CFSP of 9 May 2011 [2011] OJ L 121/11; Council Decision 2011/782/CFSP of 1 December 2011 [2011] OJ L 319/56.

<sup>17</sup> Council Implementing Decision 2011/302/CFSP of 23 May 2011 [2011] OJ L 136/91; Council Decision 2012/122/CFSP of 27 February 2012 [2012] OJ L 54/14. For the most recent renewal of the sanctions regime, see Council Decision 2015/837/CFSP of 28 May 2015 [2015] OJ L 132/82.

<sup>18</sup> Declaration by the High Representative on behalf of the European Union (9 June 2011) <[www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/cfsp/122483.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/122483.pdf)>; Declaration by the High Representative on behalf of the European Union (1 November 2012) <[www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/cfsp/133276.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/133276.pdf)>



Japan, Switzerland and the United States have also taken similar action against Syria.<sup>19</sup>

In November 2011, the Council of the League of Arab States suspended Syria's membership in the organization without any clear legal basis for doing so under Article 18 of the Pact of the League of Arab States.<sup>20</sup> The Arab League also decided to adopt a host of other unilateral sanctions against Syria, including the freezing of assets belonging to the Syrian government and senior regime officials as well as a ban on civil aviation.<sup>21</sup> The flight ban does not appear to have been implemented.<sup>22</sup> However, the Arab League sanctions regime (including the *prima facie* unlawful asset freezes) otherwise came into effect almost immediately.<sup>23</sup> The decision to ban flights (even if not implemented) indicates at least a willingness on the part of several Arab League Member States to suspend treaty obligations owed to Syria in the field of civil aviation

(Albania, Croatia, Georgia, Iceland, Lichtenstein, Macedonia, Moldova, Montenegro, Norway and Serbia).

<sup>19</sup> President Obama's Executive Orders 13573 (18 May 2011) and 13582 (17 August 2011) <[www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx)>; Australian Department of Foreign Affairs and Trade, 'Australia's autonomous sanctions: Syria' (13 May 2011) <[www.dfat.gov.au/un/unsc\\_sanctions/syria\\_autonomous\\_sanctions.html](http://www.dfat.gov.au/un/unsc_sanctions/syria_autonomous_sanctions.html)>; Swiss State Secretariat for Economic Affairs, 'Mesures à l'encontre de la Syrie' (18 May 2011) <[www.seco.admin.ch/themen/00513/00620/00622/04669/index.html](http://www.seco.admin.ch/themen/00513/00620/00622/04669/index.html)>; Canadian Department of Foreign Affairs, Trade and Development, 'Canadian Sanctions Related to Syria' (24 May 2011) <[www.international.gc.ca/sanctions/countries-pays/syria-syrie.aspx](http://www.international.gc.ca/sanctions/countries-pays/syria-syrie.aspx)>; Ministry of Foreign Affairs of Japan, 'Implementation of measures to freeze the assets of President Bashar Al-Assad and his related individuals and entities in Syria' (9 September 2011) <[www.mofa.go.jp/announce/announce/2011/9/0909\\_02.html](http://www.mofa.go.jp/announce/announce/2011/9/0909_02.html)>.

<sup>20</sup> See 'Syria suspended from Arab League', *The Guardian* (12 November 2011) <[www.theguardian.com/world/2011/nov/12/syria-suspended-arab-league](http://www.theguardian.com/world/2011/nov/12/syria-suspended-arab-league)>.

<sup>21</sup> See 'Syria isolated after unprecedented Arab League sanctions', *The Telegraph* (27 November 2011) <[www.telegraph.co.uk/news/worldnews/middleeast/syria/8919029/Syria-isolated-after-unprecedented-Arab-League-sanctions.html](http://www.telegraph.co.uk/news/worldnews/middleeast/syria/8919029/Syria-isolated-after-unprecedented-Arab-League-sanctions.html)>; 'Arab League places sanctions against 17 Syrian officials and includes a ban on flights', *Al-Arabiya News* (1 December 2011) <[www.alarabiya.net/articles/2011/12/01/180249.html](http://www.alarabiya.net/articles/2011/12/01/180249.html)>.

<sup>22</sup> *ibid.*

<sup>23</sup> See 'Syria given 24 hours to sign Arab League deal or face sanctions', *The Guardian* (4 December 2011) <[www.guardian.co.uk/world/2011/dec/04/syria-arab-league-sanctions](http://www.guardian.co.uk/world/2011/dec/04/syria-arab-league-sanctions)>.



without a clear basis for doing so.<sup>24</sup> In concert with the Arab League, Turkey decided, *inter alia*, to freeze assets belonging to President Al-Assad and the Syrian government.<sup>25</sup> The OIC has also suspended Syria from its membership in the organization with a doubtful legal basis for doing so in the OIC Charter.<sup>26</sup>

In February 2012, US Secretary of State Clinton called for ‘friends of democratic Syria’ to unite against President Al-Assad based on the following rationale:

‘Faced with a neutered Security Council, we have to redouble our efforts outside of the United Nations with those allies and partners who support the Syrian people’s right to have a better future.’<sup>27</sup>

French President Sarkozy agreed and took a leading role in the establishment of the so-called ‘Group of Friends of the Syrian People’ – a large and diverse diplomatic coalition created as a direct response to the failure of the Security Council to take enforcement action against Syria.<sup>28</sup> The Group – with the participation of at least some sixty States – has repeatedly ‘welcomed’ the unilateral sanctions adopted by the EU, the Arab League and others and ‘call[ed] upon all States of the group of Friends of the Syrian People and all states that have not yet exerted the necessary pressure to join these efforts and further isolate the Syrian re-

<sup>24</sup> See eg Agreement For the Liberalization of Air Transport Between the Arab States (entered into force 18 Feb. 2007) available at <[www.icao.int/sustainability/Documents/RegionalAgreements.pdf](http://www.icao.int/sustainability/Documents/RegionalAgreements.pdf)>.

<sup>25</sup> See ‘Turkey imposes sanctions on Syria’, *The Guardian* (30 November 2011) <[www.guardian.co.uk/world/2011/nov/30/turkey-imposes-sanctions-on-syria](http://www.guardian.co.uk/world/2011/nov/30/turkey-imposes-sanctions-on-syria)>.

<sup>26</sup> Charter of the Organisation of the Islamic Conference (as amended) <[www.oic-oci.org/is11/english/Charter-en.pdf](http://www.oic-oci.org/is11/english/Charter-en.pdf)>. Also: Final Communiqué adopted by the Fourth Extraordinary Session of the Islamic Summit Conference (Mecca, 14-15 Aug. 2012) 7-8 <[www.oic-oci.org/english/conf/is/ex-4/is\\_ex4\\_fc\\_en\\_w\\_links.pdf](http://www.oic-oci.org/english/conf/is/ex-4/is_ex4_fc_en_w_links.pdf)>; OIC Res. 2/4-EX (IS) on the Situation in Syria (15 August 2012) <[www.oic-oci.org/english/conf/is/ex-4/is\\_ex4\\_res\\_en.pdf](http://www.oic-oci.org/english/conf/is/ex-4/is_ex4_res_en.pdf)>. Further: ‘Organization of Islamic Cooperation suspends Syria’, *CNN* (16 August 2012) <<http://edition.cnn.com/2012/08/15/world/meast/syria-unrest>>.

<sup>27</sup> See ‘Clinton calls for ‘friends of democratic Syria’ to unite against Bashar Al-Assad’, *The Guardian* (5 February 2012) <[www.theguardian.com/world/2012/feb/05/hillary-clinton-syria-assad-un](http://www.theguardian.com/world/2012/feb/05/hillary-clinton-syria-assad-un)>.

<sup>28</sup> See ‘Sarkozy: France, partners plan Syria crisis group’, *The Jerusalem Post* (4 February 2012) <[www.jpost.com/Middle-East/Sarkozy-France-partners-plan-Syria-crisis-group](http://www.jpost.com/Middle-East/Sarkozy-France-partners-plan-Syria-crisis-group)>.



gime', including by way of freezing the assets of President Al-Assad and the Central Bank of Syria.<sup>29</sup> These repeated statements, at least insofar as they relate to the aforementioned asset freezes, are indicative of a willingness of a very large (and diverse) number of States to adopt third-party countermeasures.

*iii*) In March 2014, EU Member States imposed various unilateral sanctions against Russia for its role in the destabilisation of Ukraine.<sup>30</sup> The EU sanctions regime against Russia has since been renewed and broadened on several occasions. It includes, *inter alia*, unilateral sanctions against the financial, energy and defence sectors of the Russian economy.<sup>31</sup> With respect to the defence sector, an arms embargo was introduced – an act of retorsion. As for the financial sector, the action taken consisted in denying certain Russian financial institutions access to European capital markets by banning them from selling newly issued

<sup>29</sup> See Final Statement by the Co-Chairs of the International Working Group on Sanctions (Paris, 17 April 2012) <[www.state.gov/e/eb/tfs/spi/syria/documents/211643.htm](http://www.state.gov/e/eb/tfs/spi/syria/documents/211643.htm)>. Also: Chairman's Conclusions of the International Conference of the Group of Friends of the Syrian People (Tunis, 24 February 2012) <[www.state.gov/r/pa/prs/ps/2012/02/184642.htm](http://www.state.gov/r/pa/prs/ps/2012/02/184642.htm)>; Chairman's Conclusions of the Second Conference of the Group of Friends of the Syrian People (Istanbul, 1 April 2012) <[www.mfa.gov.tr/chairman\\_s-conclusions-second-conference-of-the-group-of-friends-of-the-syrian-people\\_-1-april-2012\\_-istanbul.en.mfa](http://www.mfa.gov.tr/chairman_s-conclusions-second-conference-of-the-group-of-friends-of-the-syrian-people_-1-april-2012_-istanbul.en.mfa)>; Statement by the Friends of the Syrian People International Working Group on Sanctions (Washington, D.C., 6 June 2012) <[www.treasury.gov/press-center/press-releases/Pages/tg1606.aspx](http://www.treasury.gov/press-center/press-releases/Pages/tg1606.aspx)>; Statement by the Friends of the Syrian People International Working Group on Sanctions (Doha, 19 July 2012; The Hague, 20 September 2012) <[www.state.gov/e/eb/tfs/spi/syria/documents/211642.htm](http://www.state.gov/e/eb/tfs/spi/syria/documents/211642.htm)>; <[www.government.nl/files/documents-and-publications/reports/2012/09/20/statement-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions/statement-eng.pdf](http://www.government.nl/files/documents-and-publications/reports/2012/09/20/statement-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions/statement-eng.pdf)>; Statement by the Friends of the Syrian People International Working Group on Sanctions (Tokyo, 30 November 2012) <[www.government.nl/documents-and-publications/leaflets/2012/12/10/joint-statement-tokyo-30-nov-2012.html](http://www.government.nl/documents-and-publications/leaflets/2012/12/10/joint-statement-tokyo-30-nov-2012.html)>; Communiqués by the Friends of the Syrian People International Working Group on Sanctions (Sofia, 26 February 2013; Ottawa, 25 June 2013) <[www.government.nl/documents/publications/2013/02/27/communiqué-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions](http://www.government.nl/documents/publications/2013/02/27/communiqué-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions)>; <[www.government.nl/documents-and-publications/publications/2013/06/25/communiqué-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions.html](http://www.government.nl/documents-and-publications/publications/2013/06/25/communiqué-by-the-friends-of-the-syrian-people-international-working-group-on-sanctions.html)>.

<sup>30</sup> Council Decision 2014/145/CFSP of 17 March 2014 [2014] OJ L 78/16, Council Regulation (EU) 269/2014 of 17 March 2014 [2014] OJ L 78/6. See also Council Implementing Decision 2014/151/CFSP of 21 March 2014 [2014] OJ L 86/30.

<sup>31</sup> Council Decision 2014/512/CFSP of 31 July 2014 [2014] OJ L 229/13, Council Regulation (EU) 833/2014 of 31 July 2014 [2014] OJ L 229/1. See most recently Council Decision 2015/2431/CFSP of 21 December 2015 [2015] OJ L 334/22.



bonds, shares or similar financial instruments there. In the energy sector, an export embargo was introduced on certain sensitive goods and technologies (such as certain pipe used in the oil and gas industry) destined for deep water oil exploration and production, arctic oil exploration and production or shale oil projects.<sup>32</sup>

The financial measures taken by EU Member States against Russia are covered by Article I(2)(b) GATS and as such appear to violate the general obligation to provide MFN treatment in Article II GATS. No exemption to the application of Article II GATS seems applicable.<sup>33</sup> EU Member States also did not invoke the national security exception in Article XIV *bis* GATS. The limited export embargo applicable to energy-related goods also amounts to a quantitative trade restriction which is *prima facie* unlawful under Article XI GATT. Again, EU Member States did not invoke the national security exception in Article XXI GATT as possible justification for their otherwise unlawful conduct. Australia, Canada, Japan, Switzerland and the United States have taken similar action against Russia.<sup>34</sup> All States concerned are members of the

<sup>32</sup> *ibid.* For the list of prohibited energy-related goods and technologies, see *ibid.*, Annex II. The three biggest (State-owned) banks in Russia are among the financial institutions on the EU sanctions list (*ibid.* Annex III).

<sup>33</sup> See GATS Annex on Article II Exemptions; GATS Annex on Financial Services <[www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf)>.

<sup>34</sup> See President Obama's Executive Orders 13660-13662 of 6, 17 and 20 March 2014 (as amended on 16 July and 12 Sept. 2014) <[www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx)>; US Department of the Treasury Press Release, 'Announcement of Additional Treasury Sanctions on Russian Financial Institutions and on a Defence Technology Entity' (29 July 2014) <[www.treasury.gov/press-center/press-releases/Pages/jl2590.aspx](http://www.treasury.gov/press-center/press-releases/Pages/jl2590.aspx)>; White House Press Release, 'Statement by the President on New Sanctions Related to Russia' (11 September 2014) <[www.whitehouse.gov/the-press-office/2014/09/11/statement-president-new-sanctions-related-russia](http://www.whitehouse.gov/the-press-office/2014/09/11/statement-president-new-sanctions-related-russia)>; US Department of the Treasury Press Release, 'Announcement of Expanded Treasury Sanctions within the Russian Financial Services, Energy and Defense or Related Materiel Sectors' (12 September 2014) <[www.treasury.gov/press-center/press-releases/Pages/jl2629.aspx](http://www.treasury.gov/press-center/press-releases/Pages/jl2629.aspx)>; White House Press Release, 'Continuation of the National Emergency with Respect to Ukraine' (2 March 2016) <[www.whitehouse.gov/the-press-office/2016/03/02/notice-continuation-national-emergency-respect-ukraine](http://www.whitehouse.gov/the-press-office/2016/03/02/notice-continuation-national-emergency-respect-ukraine)>; Government of Canada, Special Economic Measures (Russia) Regulations (SOR/2014-58) (17 March 2014) <<http://laws.justice.gc.ca/eng/regulations/SOR-2014-58/FullText.html>>; Swiss Federal Council, 'Ordonnance instituant des mesures visant à empêcher le contournement de sanctions internationales en lien avec la situation en Ukraine' (27 August 2014) <[www.admin.ch/opc/fr/classified-compilation/20142202/index.html](http://www.admin.ch/opc/fr/classified-compilation/20142202/index.html)>; Statement by



WTO.<sup>35</sup> These actions may thus be understood as third-party countermeasures.

### 3. *Evaluation*

The brief review above indicates that State practice on third-party countermeasures can today hardly be described as neither limited nor embryonic. Practice may be dominated by Western States, but it is certainly not limited to them – as most recently witnessed by the examples of Libya and Syria. In other words, practice appears to be sufficiently widespread, representative as well as consistent to form the basis of a rule of customary international law.<sup>36</sup>

This leaves the question of whether practice on third-party countermeasures is accepted as law – that is, whether any *opinio juris* is associated with it. It was observed in the ILC debate that it was ‘unclear’ whether this was so.<sup>37</sup> ILC members stated that practice on third-party countermeasures was ‘deeply enmeshed with policy’ and belonged to ‘an area in which the borderline between international law per se and foreign relations was fairly indistinct’.<sup>38</sup> Practice was ‘too close to politics than [sic] it was to law to demonstrate that any such right existed’.<sup>39</sup> The ILC commentary to Article 54 ARSIWA explains that there was ‘no clearly recognised entitlement’ to take third-party countermeasures under international law.<sup>40</sup> In the words of the ICJ in the *Asylum case*,

Australian Prime Minister Abbott, ‘Expanded Sanctions Against Russia’ (1 September 2014) <[www.pm.gov.au/media/2014-09-01/expanded-sanctions-against-russia](http://www.pm.gov.au/media/2014-09-01/expanded-sanctions-against-russia)>; ‘Statement by the Minister for Foreign Affairs of Japan on the Additional Measures Imposed on Russia in Connection with the Ukraine Situation’ (25 September 2014) <[www.mofa.go.jp/press/release/press4e\\_000445.html](http://www.mofa.go.jp/press/release/press4e_000445.html)>.

<sup>35</sup> For its part, Russia has been a WTO member since 22 August 2012.

<sup>36</sup> See M Wood, ‘Second Report on Identification of Customary International Law’ (22 May 2014) UN Doc A/CN.4/672, 36-45 (with many further references).

<sup>37</sup> ILC Report 2000 (n 3) 58, para 356. See also YB ILC (2000) vol I, 303, para 7 (Mr Crawford).

<sup>38</sup> YB ILC (2000) vol I, 282, para 46 (Mr Sreenivasa Rao); *ibid* 296, para 46 (Mr Operti Badan).

<sup>39</sup> *ibid* 333, para 20 (Mr Rodríguez Cedeño). Compare J Petman, ‘Resort to Economic Sanctions by not Directly Affected States’, in L Picchio Forlati, L-A Sicilianos (eds), *Economic Sanctions in International Law* (Martinus Nijhoff 2004) 376.

<sup>40</sup> See para 6 of the commentary to art 54 ARSIWA (n 4).



practice on third-party countermeasures was apparently ‘so much influenced by considerations of political expediency’<sup>41</sup> that it was not possible to discern any *opinio juris*.

It is certainly important to distinguish between legal and political justifications for State conduct. The distinction may not always be straightforward. But this is part of a wider problem with the assessment of State practice. As Wood has explained:

‘There is often considerable difficulty in ascertaining State practice. Governments do not indicate publicly, clearly, or at all, the legal basis for each and every thing that they do or refrain from doing.’<sup>42</sup>

Lowe has likewise observed:

‘States do not usually assert explicitly that their actions are (or are not) consistent with international law: explicit statements of *opinio juris* are rare.’<sup>43</sup>

This is also a general feature of the practice concerning third-party countermeasures. It seems that it was essentially for the aforementioned reason that Judges Tanaka and Sørensen in the *North Sea Continental Shelf* cases observed that it was often ‘extremely difficult’ – if not ‘practically impossible’ – to get concrete evidence of *opinio juris* ‘in view of the manner in which international relations are conducted’.<sup>44</sup>

The question that must be addressed squarely is whether practice concerning third-party countermeasures can really be said to have any significance in legal terms if States do not explicitly refer to the concept as a basis for their conduct. It seems that if any State practice motivated by political considerations were dismissed *a priori* there would not be

<sup>41</sup> *Asylum case (Colombia v Peru)* (Merits) [1950] ICJ Rep 266, 277.

<sup>42</sup> M Wood, ‘State Practice’ (2010) Encyclopedia of Public International Law, para 9, available at <<http://opil.ouplaw.com/home/EPIL>>.

<sup>43</sup> V Lowe, *International Law* (Clarendon Press 2007) 40.

<sup>44</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* (Merits) [1969] ICJ Rep 3, 176 (Diss Op Judge Tanaka) 246 (Judge Sørensen). The discovery of concrete evidence of *opinio juris* (if any) may require a ‘prolonged search’ and ‘a certain amount of good fortune’: H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 385.



much potential for law to make a contribution to international affairs. A politically motivated practice is still susceptible to legal analysis and evaluation, and can constitute valuable evidence of a rule of custom.<sup>45</sup>

It may well be that third-party countermeasures belong to ‘an area in which the borderline between international law per se and foreign relations [is] fairly indistinct’,<sup>46</sup> but this does not vitiate the law-making capacity of the relevant practice. The key question is whether practice is motivated solely by extra-legal considerations.<sup>47</sup> A negative answer must be provided to this question. Even if States have not explicitly invoked the concept of third-party countermeasures, State practice nevertheless demonstrates that they have relied on it in substance. In other words, States have adopted *prima facie* unlawful unilateral sanctions based on an explicit legal rationale; namely, the enforcement of the communitarian norms referred to in Article 48 ARSIWA. This rationale neatly corresponds to third-party countermeasures as a legal category.

It is true that the ICJ has looked for concrete evidence of *opinio juris* in instances where practice was deemed inconclusive and in doing so has applied an exacting standard.<sup>48</sup> However, in the absence of evidence of non-normative intent (*opinio non juris*), the ICJ has often presumed that consistent practice is accompanied by normative intent (*opinio juris*).<sup>49</sup> There has long been support for such a presumption of *opinio ju-*

<sup>45</sup> See eg Lauterpacht (n 44) 380; H Waldock, ‘General Course on Public International Law’ (1962) 106 *Recueil des Cours de l’Académie de Droit International* 1, 47; RR Baxter, ‘Treaties and Custom’ (1970) 129 *Recueil des Cours de l’Académie de Droit International* 25, 68; Tams (n 8) 239.

<sup>46</sup> See Operti Badan (n 38).

<sup>47</sup> See Wood (n 36) 46-47, 56.

<sup>48</sup> See eg *North Sea Continental Shelf* (n 44) 43-45, paras 75-81; *Abmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, 614-615, paras 88-90. Also: *S.S. “Lotus”* [1927] PCIJ Ser A, No 10, 28.

<sup>49</sup> See eg *Barcelona Traction (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, 42, para 70; *Gulf of Maine (Canada v United States)* (Merits) [1984] ICJ Rep 246, 293-294, 299, paras 91-93, 111; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, 82-83, para 204. Also: *North Sea Continental Shelf* (n 44) 176 (Diss Op Judge Tanaka) 231 (Diss Op Judge Lachs) 242 (Diss Op Judge Sørensen); *Nuclear Tests (Australia v France)* (Merits) [1974] ICJ Rep 253, 305-306 (Sep Op Judge Petrán); *Responsibilities and Obligations of States Sponsoring Persons and Activities with Respect to Activities in the Area*, ITLOS Case No 17 (Advisory Opinion, 1 February 2011) para 135.



*ris* in the literature.<sup>50</sup> It appears to apply *a fortiori* in the case of conduct based on a permissive rule. As Akehurst has explained:

‘In the case of a permissive rule, it may be possible to find express statements that States are permitted to act in a particular way. But express statements are not necessary to establish a permissive rule; a claim that States are entitled to act in a particular way can be inferred from the fact that they do act in that way.’<sup>51</sup>

Lowe has made a very similar point emphasizing that in the case of conduct based on a permissive rule ‘*opinio juris* is presumed to exist’.<sup>52</sup> ILC Special Rapporteur Wood has also made a distinction based on cases involving the assertion of a legal right and those acknowledging a legal obligation.<sup>53</sup> By parity of reasoning, it may be presumed that the sheer adoption of third-party countermeasures by a State entails recognition of the legal power to do so, whereas *opinio juris* on the obligatory safeguards governing their use might be more difficult to establish.

Although statements expressing *opinio juris* in the field of third-party countermeasures are rare, they do exist. For example, the Council of the European Union in 2004 released a policy statement on the use of sanctions (known in EU parlance as ‘restrictive measures’ or ‘autonomous sanctions’), which in relevant part provides:

‘If necessary, the Council will impose autonomous sanctions [including third-party countermeasures] in support of efforts to ... uphold human rights, democracy, the rule of law and good governance. We will do this in accordance with our common foreign and security policy, as set out in Article 11 TEU, and in full conformity with our obligations under international law.’<sup>54</sup>

<sup>50</sup> See eg Lauterpacht (n 44) 380; Waldock (n 45) 49; Baxter (n 45) 69; F Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 AJIL 146; Tams (n 8) 238; J Crawford, *Brownlie’s Principles of Public International Law* (OUP 2012) 26-27.

<sup>51</sup> M Akehurst, ‘Custom as a Source of International Law’ (1974-1975) 47 British YB Intl L 1, 38.

<sup>52</sup> Lowe (n 43) 51.

<sup>53</sup> Wood (n 36) 58, 70 (his Draft Conclusion 11).

<sup>54</sup> Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions) (2004) para 3, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010198%202004%20REV%201>>.



Indeed the European Commission in 2008 observed that autonomous sanctions ‘have been *frequently* imposed by the EU in recent years ... to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles’.<sup>55</sup> In the opinion of EU Member States, third-party countermeasures (eg in the form of otherwise unlawful asset freezes) are evidently a frequent tool of communitarian law enforcement used in full conformity with international law. To conclude, the argument that *opinio juris* is unclear is ultimately unconvincing – it is not borne out by international practice. The category of third-party countermeasures is needed to explain this practice in legal terms. During the final stages of the ILC debate, supporters argued that recognition of third-party countermeasures would have been ‘a legitimate form of progressive development of international law’.<sup>56</sup> There is increasingly strong support for this conclusion in international practice.

<sup>55</sup> European Commission, EU Guidelines on Implementation and Evaluation of Restrictive Measures (2008) 1 (emphasis added), <[http://eeas.europa.eu/cfsp/sanctions/docs/index\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf)>.

<sup>56</sup> ILC Report (2001) (n 4) 23, para 54.

