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.¹ 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 – i.e. 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’.² 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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adoption of Draft Article 54 [2000]. 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’. What is more, this ‘sparse’ practice involved only ‘a limited number of [Western] States’. 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. In short, the legal position was considered ‘uncertain’.

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2. 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.
3. ibid para 6, 139.
4. ibid.
5. ibid.
Third-party countermeasures: A progressive development of international law?

ranted. 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. It suffices here to consider in turn the three most recent examples involving the adoption of third-party countermeasures against Libya, Syria and Russia.

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 Gadaffi (Libya’s Head of State) and the Libyan Central Bank. The United States took the same action. 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

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

10 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).


welcomed’ by the UN Security Council. 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’. 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.

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. 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. Ten countries have aligned themselves with the EU sanctions regime and pledged to ensure its implementation.


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


Japan, Switzerland and the United States have also taken similar action against Syria.\(^{19}\)

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.\(^{20}\) 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.\(^{21}\) The flight ban does not appear to have been implemented.\(^{22}\) However, the Arab League sanctions regime (including the *prima facie* unlawful asset freezes) otherwise came into effect almost immediately.\(^{23}\) 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.


\(^{22}\) Ibid.

\(^{23}\) 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>. 
without a clear basis for doing so.\footnote{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>.

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.’\footnote{See ‘Clinton calls for ‘friends of democratic Syria’ to unite against Bashar Al-Assad’, \textit{The Guardian} (5 February 2012) <www.theguardian.com/world/2012/feb/05/hillary-clinton-syria-assad-un>.}

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.\footnote{See ‘Sarkozy: France, partners plan Syria crisis group’, \textit{The Jerusalem Post} (4 February 2012) <www.jpost.com/Middle-East/Sarkozy-France-partners-plan-Syria-crisis-group>.} 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-
Third-party countermeasures: A progressive development of international law?

9. The regime’, including by way of freezing the assets of President Al-Assad and the Central Bank of Syria. 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. 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. 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...

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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.  

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. 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. All States concerned are members of the

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).


Third-party countermeasures: A progressive development of international law? 11

WTO. 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.36

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.37 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’.38 Practice was ‘too close to politics than [sic] it was to law to demonstrate that any such right existed’.39 The ILC commentary to Article 54 ARSIWA explains that there was ‘no clearly recognised entitlement’ to take third-party countermeasures under international law.40 In the words of the ICJ in the Asylum case,

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35 For its part, Russia has been a WTO member since 22 August 2012.
37 ILC Report 2000 (n 3) 58, para 356. See also YB ILC (2000) vol I, 303, para 7 (Mr Crawford).
38 YB ILC (2000) vol I, 282, para 46 (Mr Sreenivasa Rao); ibid 296, para 46 (Mr Opertti Badan).
40 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’\(^{41}\) 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.’\(^{42}\)

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.’\(^{43}\)

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’\(^{44}\).

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

\(^{41}\) *Asylum case (Colombia v Peru) (Merits)* [1950] ICJ Rep 266, 277.


\(^{44}\) *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.
Third-party countermeasures: A progressive development of international law?

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.

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’, 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. 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. 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*). There has long been support for such a presumption of *opinio juris*.

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46 See Operti Badan (n 38).

47 See Wood (n 36) 46-47, 56.


ris in the literature. 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.’

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’. 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. 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.’

50 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.
52 Lowe (n 43) 51.
53 Wood (n 36) 58, 70 (his Draft Conclusion 11).
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’.⁵⁵ In the opinion of EU Member States, third-party countermeasures (e.g. 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’.⁵⁶ There is increasingly strong support for this conclusion in international practice.