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Master's Thesis

COUNTERMEASURES IN INTERNATIONAL LAW

ATSAKOMOSIOS PRIEMONĖS TARPTAUTINĖJE TEISĖJE

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ABSTRACT AND KEY WORDS

This work examines the concept of countermeasures in international law, exploring their basic principles and application in legal cases. A particular emphasis is placed on the investigation of the emerging forms of countermeasures, i.e. cyber and collective countermeasures, and their controversial perception in modern society. The countermeasures are studied on the example of Russia's war in Ukraine, proving that challenges arising from this case give a bigger space for further discussions and developments on the matter. The nature of countermeasures is studied through a more practical approach and the paper investigate how such measures compy with legal limitations.

Keywords: countermeasures, proportionality, Russia-Ukraine conflict, legal remedies, arbitral and judiciary decisions.

Šiame darbe nagrinėjama atsakomųjų priemonių samprata tarptautinėje teisėje, nagrinėjami pagrindiniai jų principai ir taikymas teisinėse bylose. Ypatingas dėmesys skiriamas besiformuojančių atsakomųjų priemonių formų, ty kibernetinių ir kolektyvinių atsakomųjų priemonių, ir jų kontroversiško suvokimo šiuolaikinėje visuomenėje tyrimui. Atsakomosios priemonės nagrinėjamos Rusijos karo Ukrainoje pavyzdžiu, įrodant, kad dėl šios bylos kylantys iššūkiai suteikia daugiau erdvės tolimesnėms diskusijoms ir plėtrai šiuo klausimu. Atsakomųjų priemonių pobūdis tiriamas taikant praktiškesnį požiūrį, o darbe tiriama, kaip tokios priemonės atitinka teisinius apribojimus.

Pagrindiniai žodžiai: atsakomosios priemonės, proporcingumas, Rusijos ir Ukrainos konfliktas, teisinės gynybos priemonės, arbitražo ir teismų sprendimai.

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LIST OF ABBREVIATIONS

ARSIWA – Articles on Responsibility of States for Internationally Wrongful Acts

BC – Before Christ

CCDCOE – NATO Cooperative Cyber Defence Centre of Excellence

CFSP – Common Foreign and Security Policy

DSB – Dispute Settlement Body

DSU – Dispute Settlement Understanding

EU – European Union

G7 – Group of Seven

G8 – Group of Eight

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

HRC – Human Rights Council

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross

ICT – Information and Communication Technology

ILC – International Law Commission

IP – Internet Protocol

ISP – Internet Service Provider

NAFTA – North American Free Trade Agreement

NATO – North Atlantic Trety Organization

NFK – National Fund of Kazakhstan

PCIJ – Permanent Court of International Justice

RCB – Russian Central Bank

RNWF – Russian National Wealth Fund

SCM (Agreement) – Agreement on Subsidies and Countervailing Measures

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights

UN – United Nations

UNSCI – United Nations Security Council Instrument

USD – United States Dollar

WTO – World Trade Organization

INTRODUCTION

Relevance of the topic. Countermeasures are inevitably relevant as the nature of international disputes is evolving with time, which leads to a pressing need for legal response, which will address these cases without resorting to force. Countermeasures are one of the few tools that states may apply to respond to the other state's breach without violating the international law themselves. It is especially important, since breaches of international law become more frequent and complex, involving disputes between states with asymmetric powers and compelex political situations. In current geopolitics, Russia's war in Ukraine is an example of a situation where countermeasures are not just legally justified but necessary as well. Countermeasures provide Ukraine and its allies with lawful pathways to respond to violations of sovereignty, human rights and territorial integrity. They operate within a framework that requires adherence to limitations, which is essential in preventing abuse and ensuring lawfulness in their use at the same time. Further investigation of the topic provides insights into adapting international law to emerging tendencies. Therefore, they illustrate potential ways to develop and strengthen international law, equipping it to be more profound in responding to the challenges of the 21st century and to do so peacefully.

Aims. The primary aim of the paper is to explore legal framework of countermeasures, their definition and limitations such as proportionality, necessity and due process. To elaborate on these, the paper analyses the practical application of countermeasures in various legal contexts. In support of the primary aim, the Master's Thesis investigates emerging measures within the modern context, especially in cyber realm and regarding the pressing need for collective actions. Building on this foundation, the paper explores possible alternative countermeasures that could be adopted by Ukraine in response to Russia's aggression. To further investigate the legal limitations, the thesis also addresses legal challenges within countermeasures, in particular adherence to state immunity and human rights.

Tasks. The tasks of the thesis are the following:

1. To define and identify the legal constraints that limit the use of countermeasures and compose their lawfulness through a historical lense and doctrine analysis.

2. To perform a comparative analysis to differentiate countermeasures from other legal mechanisms for responding to breaches of international law, to further study the legal nature of countermeasures.
3. To study specific cases involving countermeasures under the WTO, before international courts and arbitral tribunals to draw insights on the practical application of countermeasures.
4. To investigate the current approach to innovative countermeasures in cyber realm and within the debate on collective countermeasures to asses their feasibility and legal implications.
5. To define how doctrines on state immunity and human rights defence affect the use of countermeasures.
6. To lay out recommendations for Ukraine and other states on implementing countermeasures against Russia within the limits of international law.
7. To determine the practical application of the conditions of necessity, proportionality and due process to study the adherence to these criteria in particular cases, especially in the case of Russia's aggression against Ukraine.

Object. The object of this research is countermeasures within international law as a remedy for states that have suffered violations of their rights, exemplified by Russia's aggression against Ukraine.

Research methods. The first research method applied in the paper is the doctrinal legal research method. This paper uses this method to analyze the present doctrine on countermeasures and their aspects. Using this method, the thesis analyzes different opinions and makes up a synthesis out of them, to come to conclusions on the nature of countermeasures.

The next method applied is the method of case study. The paper uses this method to analyze cases presented before different courts, tribunals and other bodies, to compare them and to define specifics of practical use of countermeasures.

Another method used in the thesis is the method of comparative legal research. It was employed to define similarities and differences between legal concepts and practices regarding countermeasures. This method provided a deeper understanding of the application, constraints and current status of countermeasures in different contexts by comparing legal sources of international law, doctrine and cases.

The analytical legal research method was applied to thoroughly analyze and interpret doctrine, legal principles and case law to assess their logic and make up conclusions on separate issues. The method of synthesis was used to combine findings from the analysis of different legal sources to create a comprehensive understanding of countermeasures in international law by integrating diverse perspectives.

Originality. The Master thesis is original work, since it has a dual focus both on the theoretical meaning and practical application of countermeasures, especially in the ongoing case of Russia's aggression against Ukraine. There has been plenty of studies on countermeasures, but they are focused on a theoretical concept, address the concept in a broader context and do not address state-to-state relations, focusing on the contemporary complex agenda of hybrid warfare, geopolitics and state responsibility. This paper situates countermeasures within the context of an active and highly discussed international dispute. It explores what legal challenges Ukraine may face, including the limitations inherent to countermeasures, when confronting an adversary and the role of the international community in this situation. Beyond evaluating the existing framework, this Master Thesis also proposes potential options for Ukraine to use when implementing countermeasures and how to address modern geopolitical conflicts.

Sources. This paper utilizes a variety of sources to provide a comprehensive and profound analysis of countermeasures in international law. First and foremost, the Articles on Responsibility of States for Internationally Wrongful Acts have been studied to determine the foundational principles governing countermeasures. Other sources analyzed in the paper included specific cases with their decisions and advisory opinions from the International Court of Justice, arbitral tribunals and other bodies. For instance, the fundamental cases of *Gabčikovo-Nagymaros Project* between Hungary and Slovakia or case of *Air Service Agreement* between the USA and France were studied to define fundamental implications of countermeasures. Doctrinal works and articles of researchers from all over the world have been applied to the paper as well. They provided an academic perspective on the use of countermeasures, especially in addressing cases of aggression, such as Russia's war in Ukraine, and evolving modern concepts in the international community, such as collective and cyber countermeasures. For example, the work of Dr. T. Dias was studied to provide modern approach to these matters. The studies of D. Alland and J. Crawford were analyzed to understand the fundamental framework of countermeasures established throughout the years. The works of other research help aid in establishing an approach to countermeasures in the modern context too. The use of these

sources was guided by their relevance to the research objectives and their contribution to understanding the theoretical and practical dimensions of countermeasures. Together, they provide a foundation for a profound analysis and research on the topic, for a better understanding of the challenges when applying countermeasures against Russia.

1. LEGAL NATURE OF COUNTERMEASURES IN INTERNATIONAL LAW

1.1. Historical Background of Countermeasures

Under customary international law, in particular the principle of state responsibility, the state committing an internationally wrongful act and causing damage to another state through this action may be subject to countermeasures adopted by the damaged state. As O. Y. Elagab states, these tendencies can be dated back to the 1800s (Elagab, 1988, p. 18–32), predating the word "countermeasures" itself, which did not become common until the 1970s or 1980s, according to Dr. T. Dias (Dr. Dias, 2024).

In fact, history reveals that states have been employing non-military coercive tools to alter another State's behavior for centuries. Y. O. Sedliar exemplifies this statement, demonstrating that one of the earliest instances could be observed in 432 BC, when the Athenian commander Pericles instituted an economic blockade of Megara that, in turn, helped usher the Peloponnesian War. Such measures have built upon themselves since then, with countries using the measures to achieve precise foreign policy objectives (Sedliar, 2010, p. 152).

The establishment of the United Nations Charter in 1945, which formed a new international legal order, profoundly altered perspectives on countermeasures as an instrument of international public law. It has subsequently become accepted that all types of international coercion, including countermeasures, must adhere to the principles and norms established by international law (Cherniavskyi, 2008, p. 87–88).

The UN International Law Commission (ILC) has made a valuable contribution to the development and sophistication of precise and defined standards governing the peaceful settlement of disputes and the application of countermeasures. Made up of 34 legal experts, entrusted with furthering the development and codification of international law, the Commission has been looking at countermeasures since 1953, according to Dr. T. Dias (Dr. Dias, 2024). The creation of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter also – "ARSIWA") was the result of these efforts. At its fifty-sixth session in 2001, the General Assembly released a resolution, which included the draft articles on state responsibility for internationally wrongful acts (Report of the Commissions to the General Assembly…, 2001). A. L. Cherniavskyi emphasizes, that the Commission identified two main goals when drafting these Articles: establishing processes for the amicable settlement of conflicts resulting from international wrongdoing and controlling the application of countermeasures in reaction to these acts (Cherniavskyi, 2008, p. 89).

A number of developing nations expressed that they do not agree with the ARSIWA's inclusion of countermeasures during the middle of 1990s and the beginning of 2000s. The majority of objections were perceived through the lens of political concerns and not just legal justifications, with a few exceptions, including Uruguay and Brazil (Dr. Dias, 2024). Countermeasures, according to those present at the discussion of the Sixth Committee of the General Assembly, are archaic and could benefit stronger states, frequently at the expense of weaker or less significant ones (Report of the International Law Commission… 2001, para. 149).

It was rather difficult for states to agree on a single approach to countermeasures due to their inability to determine several substantive concepts. As Bahrain noted in 1992, there was a lack of agreement among International Law Commission members on a number of specified parameters (Summary Record of the 26th Meeting, 1992, para. 20). Dr. T. Dias underlines that in a comparable manner, the Czech Republic and Ireland offered commentary on the ILC's countermeasures disputes in 1997, suggesting that at least certain procedural requirements represent a progressive development rather than a long-standing norm. Singapore agreed, speculating that some restrictions might not have been required. In addition, the United States contended that the grounds for countermeasures were "far from clear" and not solidly grounded in customary international law, except from the principles of necessity and proportionality (Dr. Dias, 2024).

However, after lengthy deliberations, the nations finally achieved a consensus and on December 12, 2001 the UN General Assembly adopted the Resolution A/RES/56/589, which included The Articles on the Responsibility of States for Internationally Wrongful Acts in its annex. The issues of countermeasures are addressed in Part Three, Section II of the ARSIWA, titled "The Implementation of the International Responsibility of a State" (Responsibility of States for Internationally Wrongful Acts, 2001). The power of an injured State to take countermeasures is formally recognized in Article 49(1) of the ARSIWA, which is generally considered to be representative of international customary law (Dr. Dias, 2024).

Numerous significant international and arbitral opinions have upheld the aggrieved states' right to seek countermeasures. The disagreement between France and the United States over the Air Service Agreement (*Air Service Agreement case*) is one prominent example, with the United States applying countermeasures against France to force compliance and obtain concessions. This case demonstrated the nuances of international accords and the calculated application of countermeasures to resolve alleged treaty infractions. The arbitral tribunal in the *Air Service Agreement* dispute determined that: "If

a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'counter-measures'" (Air Service Agreement of 27 March 1946…, 2006, p. 443).

In the 1997 *Gabčíkovo-Nagymaros Projec*t case, the International Court of Justice (ICJ) also discussed countermeasures. The Court considered whether Czechoslovakia's (now Slovakia's) diversion of the Danube River may be permissible as a countermeasure to Hungary's alleged violation of international law. Even if the Court eventually determined that the countermeasures were not legal due to the lack of proportionality, it still did not question and deny such ability of states to implement them. This case demonstrates that the ICJ recognizes countermeasures as a valid response to wrongdoing, provided they satisfy the requirements of necessity and proportionality (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, para. 83, 87).

The ICJ also recognized that the United States had the right to take countermeasures against Iran for its wrongdoings in the *Case concerning United States diplomate and consular staff in Tehran*. The United States applied countermeasures against Iran because it aided militants who took over the American embassy in Tehran and held hostages from November 1979 until January 1981. As the ICJ has stated, "They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself" (*Case concerning United States diplomate and consular staff in Tehran*, (1980), I.C.J. 3, paras. 1, 30-31, 53).

In recent decades, several nations, such as North Korea, Syria, Iran, China, Russia, Belarus etc. have faced countermeasures. Only the EU and the UN have requested measures on over 30 nations worldwide (Biletskyi, 2024, p. 149).

The UN General Assembly resolution 56/83 of December 12, 2001, with annexes on the ARSIWA and the *Gabčíkovo-Nagymaros* case of 1997 are the two recent and reliable sources upon which the current countermeasures legislation is based. When taken as a whole, they offer a current and consistent representation of the concept's components (Biletskyi, 2024, p. 150).

Therefore, it is possible to say, that constituting a part of the doctrine on state responsibility, countermeasures stand out as a tool for injured states to restore their rights and respond to the wrongdoings. Analyzing their historical development helps to understand their evolving nature as mechanisms for achieving political objectives regarding foreign matters and for ensuring compliance with international law. Despite objections and challenges posed over the years, countermeasures have become an established notion in

international law, especially after their codification in the ARSIWA. It is also evident from the analysis, that despite their emergence over centuries ago, the development of countermeasures is consistent, taking into account the context at a particular moment. The inclusion of provisions on countermeasures proves the international community's desire to establish a balance between states' rights and international responsibility and justice.

1.2. Definition and Scope of Countermeasures in International Law

The Articles on State Responsibility for Internationally Wrongful Acts, developed by the UN International Law Commissions, define five scenarios in which an act that would normally be considered a breach of international law is legally permitted: (1) consent of the damage state, (2) self-defense, (3) countermeasures, (4) force majeure, (5) a condition of crisis, (6) necessity. These exceptions are in general addressed in Articles 21-25 and constitute an important part of the legal framework for state liability in international law (Responsibility of States for Internationally Wrongful Acts, 2001, Arts. 21-25).

Commentaries on the ARSIWA state that countermeasures are actions done in violation of an existing treaty commitment but rationalized as a necessary and proportionate remedy for another State's internationally wrongful act. Countermeasures are temporary in nature, meaning they are applied only to achieve a certain justified goal and their validity ends when such aim is achieved. Since they help wounded states to respond to violations when other ways of dispute settlement are absent, it is possible to say that countermeasures are a tool of self-help in international law (Draft articles on Responsibility of States…, 2001, p. 128-129). They are required to remedy the infraction, if third-party mechanisms, such as international courts or tribunals, may serve as a substitute for countermeasures, but are not effective because the responsible state fails to cooperate (Draft articles on Responsibility of States…, 2001, p. 128-129).

The Arbitral Tribunal in the *Air Service Agreement* case noted: "Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute" (Air Service Agreement of 27 March 1946…, 2006, p. 445). States choose countermeasures on their own, therefore they will be held liable for unlawful measures if they are applied in breach of international law. Furthermore, the principle of peaceful dispute resolution compels the wounded state to exhaust all peaceful settlement possibilities before pursuing countermeasures (Bihnyak, 2020, p. 191).

To be justifiable, a countermeasure must meet specific criteria. Articles 49 to 53 of the ARSIWA's substantive and procedural requirements for taking countermeasures strike a careful balance between protecting the "wounded" state's right to stop global wrongdoing and creating a strong enough framework to prevent possible abuse and conflict escalation (Dr. Dias, 2024).

Article 49 of the Articles on the Responsibility of States for Internationally Wrongful Acts established the purpose and scope of countermeasures. As a result, an injured State is allowed to take countermeasures only against a State guilty of committing an internationally wrongful act with the aim to compel the State to comply with its duties. Countermeasures are confined to temporarily suspending the State's international commitments to the responsible State. They should also, to the greatest degree possible, be implemented in such a way that the execution of the relevant obligations can be resumed in the future (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 49).

Article 51 of the ARSIWA states that: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question" (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 51). They involve acts that violate existing duties but are deemed essential and proportional in reaction to the other state's illegal act (Draft articles on Responsibility of States…, 2001, p. 134). According to Article 53, they "shall be terminated as soon as the responsible State has complied with its obligations". Therefore, they are, by definition, temporary measures designed to achieve a certain purpose, and their rationale must stop once that aim is met (Draft articles on Responsibility of States…, 2001, p. 137)

It has been widely acknowledged that determining the "proportionality" of countermeasures is a complicated issue that can only be approached roughly. When resolving disputes, it is important to take into consideration both gravity of issue addressed by the breach and the harm suffered. The International Law Commission has exmphasized that it is necessary to take into account both the "quantitative" and "qualitative" aspects of the injury received (Draft articles on Responsibility of States…, 2001, p. 135).

The reversibility criteria is not always strict as in some circumstances it may be impossible to reverse all the impacts of countermeasures. The main point is that countermeasures should strive to enable the resumption of postponed commitments wherever possible. If there are numerous viable responses available, the wounded State should choose the one that allows for the most complete restoration of responsibilities (Draft articles on Responsibility of States…, 2001, p. 135).

Article 50 of the Articles on State Responsibility sets crucial limitations on the scope and use of countermeasures. “A State undertaking countermeasures must continue to comply with applicable dispute resolution requirements with the responsible State; and respect the inviolability of diplomatic and consular agents, buildings, archives, and documents” (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 50). It means that Article 50, paragraph 1(a) therefore supports and reflects the norm established in the Charter of the United Nations (Charter of the United Nations, 1945, Art. 2). Article 50, paragraph 1(b) underscores that countermeasures must not conflict with the need to defend fundamental human rights. This concept has been studied since 1945 and is supported in human rights treaties that forbid violations of fundamental rights even in emergency conditions. International Law Commission provides an example, that in its General Comment No. 8 (1997), the Committee on Economic, Social and Cultural Rights emphasized the negative impact of restrictions on vulnerable populations, emphasizing that responses should not cause disproportionate harm to people, especially children (Draft articles on Responsibility of States…, 2001, p. 132).

Article 50, paragraph 1(c) forbids reprisals under international humanitarian law, which is consistent with Article 60, paragraph 5 of the Vienna Convention. This is applied to groups protected by the Geneva Conventions (1949) and Additional Protocol (1977), such as prisoners of war or civilians. Paragraph 1 (d) of Article 50 states that countermeasures cannot modify duties under peremptory rules. These norms, which cannot be amended by any treaty or unilateral act, are non-derogable even in the face of countermeasures. This clause supports the regulations laid out in Article 26, stating that circumstances of lawfulness cannot justify and excuse violation of peremptory norms. It is noteworthy, that states may agree that they will not apply countermeasures to some matters of internationa law, even if they are not peremptory norms. This can be accomplished by agreements such as bilateral or multilateral treaties, which may expressly forbid countermeasures concerning their subject matter or in circumstances of breach (Draft articles on Responsibility of States…, 2001, p. 132-133).

The International Law Commission further gave comments on Article 52 of the ARSIWA. In the context of countermeasures, Article 52 paragraph 1(a) requires the damaged State to first demand cease and recompense from the responsible State before taking action. This condition ensures that any unusual countermeasures are preceded by notification and a chance for the responsible State to respond. Paragrap 1(b) also lays out that the damaged State is obliged to notify the responsible State of its intention to take countermeasures and offer negotiations first. These procedures are meant to provide the

responsible State an opportunity to rethink, with notifications frequently occurring close together or concurrently (Draft articles on Responsibility of States…, 2001, p. 136).

The Commission expresses its understanding of the Article by detailing that the wounded State may omit the notification requirement if it needs to take immediate steps to protect itself, according to parahraph 2. It is done to prevent additional harm and loss, for instance, by freezing assets. It gives States the right to take actions when they would be useless if delayed. As a result, urgent steps can be implemented immediately without waiting for previous notification (Draft articles on Responsibility of States…, 2001, p. 136).

In Paragraph 3 the Commission addresses the situation in which the improper act has halted and the dispute has been referred to a court or panel for settlement. In such instances, unilateral countermeasures are not justified and if they have already been implemented they must be discontinued immediately (Draft articles on Responsibility of States…, 2001, p. 136).

Therefore, it is possible to say that countermeasures are both an essential and strictly regulated mechanism for ensuring state responsibility. The ARSIWA provides a comprehensive legal foundation for the lawfulness of countermeasures, ensuring that the States do not have any space to abuse this concept in their own interests. This demonstrates a correlation between the States' need for the defense of rights and restoration of legal order and the need to prevent the escalation of conflicts and complications of the political agenda. Therefore, states must adhere to a set of limitations, inscribed in international law and legal practice, and must not step aside from them. Otherwise, the State applying countermeasures will bear responsibility itself.

1.3. The Distinction Between Countermeasures and Other Remedies

O. V. Bihnyak was right to point out that in international law doctrine, there is no uniform perspective to what coercive methods entail, nor is there a final agreement on their terminology. These acts are described using terms such as "reprisals", "retorsions", "sanctions", and "countermeasures" (Bihnyak, 2020, p. 170). Therefore, it is crucial to understand the difference between these concepts to be in the right when applying any of them.

In describing countermeasures in international law, D. Alland observes that, by definition, they are fundamentally illegal but are justified by the objective and grounds for their deployment (Alland, 2002, p. 1221). This distinguishing trait differentiates

countermeasures from retorsions, which are “unfriendly” actions that do not violate the state’s international duties, even if they are in response to an internationally unlawful conduct, the definition of which was given by the International Law Commission (Draft articles on Responsibility of States…, 2001, p. 128).

J. Spáčil gives the definition of retorsions, describing them as not a legal idea but rather a descriptive category or technical word with no direct legal implications. He also stresses that that this lack of constraint applies only when the conduct in question really fits the defining requirements of retorsion, i.e. it must be unfriendly while remaining legal. If the behavior does not fit these characteristics, it is not considered retorsion and hence constitutes an internationally wrongful act, unless there is another ground under international law (such as countermeasures) that precludes its unlawfulness (Spáčil, 2024, p. 48)

J. Spáčil investigates the concept even further, implicating that because retorsion is not governed by international law, it does not face the same constraints as other unilateral remedies. As a result, retorsions are not subject to the criteria of temporarity, reversibility etc. Furthermore, a state is not constrained by the motive, goal, duration or specific type of the selected measures. Despite the lack of such legislative limits, the state frequently chooses proportionate measures to ensure “just and sound politics” (Spáčil, 2024, p. 48-49).

Still, there is one primary legal constraint for retorsion. Since retorsions are not illegal in nature, they must not interfere with state’s responsibilities to the international community, which means that more violent measures must be avoided. For example, in J. Spáčil’s opinion, principles such as sovereignty and non-intervention in domestic affairs may exclude certain actions from being called retorsion (Spáčil, 2024, p. 48-49). Jeff Kosseff previously voiced an opinion like J. Spáčil’s, affirming that retorsions are not subject to legal limitations that apply to countermeasures. He also emphasizes that even though retorsions are legal, they may cause political friction between states. Practical constraints on retorsion stem from political considerations rather than legal ones. Unlike countermeasures, retorsion does not require a prior finding that the other state’s act was legally incorrect, nor does it necessitate proportionality (Kosseff, 2020, p. 16).

Another measure that could be taken by a State is reprisal. According to the ICRC online casebook, a “reprisal” is an act that violates international humanitarian law but, in rare situations, is considered lawful as an enforcement tool in retaliation to a past violation by an enemy. However, reprisals may be used only when following limited conditions. Certain targets are always off-limits for reprisals, such as the wounded; medical and

religious personnel; sick or shipwrecked; prisoners of war; medical units and equipment; civilian object; civilians and civilian populations; resources critical to civilian survival; cultural property; the natural environment; facilities containing dangerous forces; and structures or materials designated for civilian protections (Sassòli *et al.,* 2014). The ILC has also given its comment on the term, stating that from the historical point of view the term "reprisals" has been used to such illegal activities as the use of force as a consequence of self-defense against a breach. However, more recently, the term "reprisals" has been restricted to actions committed during international military conflicts (Draft articles on Responsibility of States…, 2001, p. 128).

M. N. Schmitt adds to the discussion, emphasizing criteria that limit reprisals. Most importantly, the permissible purpose of a reprisal is to force the enemy to comply with international humanitarian law. They could be applied by Ukraine against Russia, following its recent attacks, for example. Once the enemy complies with international humanitarian law, the right to engage in reprisals ceases (Schmitt, 2024).

Article 51 of the UN Charter clearly specifies another possible measure for States to react to another State's breach of international law. It defines that a state's right to self-defense arises when there is an "armed attack" (Charter of the United Nations, 1945, Art. 51). M. N. Schmitt underlines that such attacks are always illegal use of force that violate Article 2(4) of the Charter. Nevertheless, only force sufficient to constitute an armed attack allows for a forcible reaction. Importantly, the author establishes that self-defense activities must adhere to the widely accepted standards of necessity and proportionality. Necessity implies that the damaged State must employ force to oppose the attack when non-violent alternatives fail (Schmitt, 2024).

Another important measure is sanctions. The official website of the EU, EUR-lex, contains a definition of sanctions and other related and relevant provisions. According to the EU's common foreign and security policy (CFSP), Articles 29 of the treaty on European Union (TEU) empowers the Council of the European Union to impose sanctions. These sanctions do not bear a punitive character. They rather have the aim to urge the targeted state to modify problematic policies or activities, for example if these states violate human rights. The measures must be aligned with the EU's external action objective, as stated under Articles 21 TEU (Sanctions (restrictive measures), 2021). According to the principles outlined in the Guidelines for the Implementation and Evaluation of Restrictive Measures (Sanctions) within the Common Foreign and Security Policy, sanctions target specific states, regions, government, organizations, or persons with the goal of influencing their

policies or activities to coincide with the goals outlines in the Treaty on the Functioning of the EU (TFEU) (Homlia, Mykytenko, 2019, p. 141).

The International Law Commission emphasized the importance of reserving the term "sacntions" for coercive measures imposed by international organizations in response to breaches of international obligations with serious consequences for the international community. Such actions, particularly those implemented by the UN, are applied with the aim to ensure international peace and security, as it is established in the Charter (Nurrulaev, 2023, p. 510).

O. V. Bihnyak also investigates the concept of sanctions and comes to several conclusions. The application of sanctions is a unilateral process and the state applying sanctions may not be the offending state. It means, that these measures are used only in response to the prior international wrongdoing, separating them from precautionary coercive measures or illegal use of force. Sanctions are imposed not merely based on the commission of an international offense, but also on the guilty party's reluctance to fulfill its international obligations to repair the effects of such an offense. According to current international law principles, states may use sanctions only after exhausting all the possible peaceful methods of dispute settlement. However, this rule may not apply in cases of grave violations of international law, for example breaches of peace, acts of aggression etc. In such cases sanctions can be applied immediately. A formal warning about the probable deployment of international legal sanctions is a necessary requirement for their application. Such warning must adhere to customary diplomatic standards and may take the form of notes, official statements, or public speeches delivered by state representatives (Bihnyak, 2020, p. 170-178).

In conclusion, the concept of state responsibility is evidently complex since the variety of available tools requires clear distinction between their legal bases. They all could be applied under different circumstances, depending on what the particular case requires. The major difference between all of these tools is that not all of them constitute unlawful actions in nature. For example, retorsions are legal actions that do not adhere to any limits, even though they are undriendly. What differentiates reprisals from others is that they are used in international humanitarian law, urging state to comply with such norms. Self-defence concept is applied in cases of an armed-attack and potentially may involve the use of force by the damaged State. From the analysis of sanctions it is possible to conclude, that sanctions and countermeasures share significant similarities as both of these concepts adhere to similar limitations and bear the legal nature alike. Therefore, the issue of their

distinction arises. The prevailing opinion among scholars and practitioners is that sanctions are a type countermeasures, based on their common purpose and legal framework.

CHAPTER 2: COUNTERMEASURES IN INTERNATIONAL LAW PRACTICE

2.1. Approach to Countermeasures in Disputes Within the Competence of WTO

A bilateral or multilateral treaty may expressly prohibit the use of countermeasures for its violation or in connection with its subject matter. The EU treaties are an example of this, as they have their own enforcement procedures in place. The World Trade Organization has a similar dispute settlement framework, under which before suspending concessions or other obligations prescribed in WTO agreements a member must request a prior authorization from the Dispute Settlement Body. This is done in response to the other state's violations of its obligations, recommendations of WTO panel or the Appellate Body (Understanding on Rules and Procedures…, 1994, Art. 3, para. 7 and 22).

Article 23 of the WTO Dispute Settlement Understanding requires members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under WTO agreements to use and follow the DSU's rules and processes (Understanding on Rules and Procedures…, 1994, Art. 23). In *ADM v. Mexico* the tribunal relied heavily on the International Law Commission (ILC) Articles and existing case law to determine the validity of the countermeasure (*ADM v. Mexico*, 2004, ARB(AF)/04/5, paras. 121-125). This leads to the idea that disputes on countermeasures under WTO may rely on ILC Articles and case law as well and are subject to the same limitations. As M. Paparinskis points out, the WTO Dispute Settlement Understanding (DSU) includes the use of countermeasures within an impartial institutional framework governed by the Dispute Settlement Body (DSB). It offers precise guidelines for establishing the incompatibility of measures taken to comply with WTO rulings, describes the type and scope of acceptable countermeasures, and outlines procedures for determining the suspension of concession, which frequently involve and arbitrator (Paparinskis, 2010, p. 12).

J. J. Losari and M. Ewing-Chow emphasize on the fact that private people's interests, especially foreign investors, may be influenced by countermeasures, even if they are legitimate under WTO legal framework. In such instances, if the two disputing WTO Members have an investment agreement, an investor from one Member who is affected by a DSB-approved countermeasure may sue the other Member for a violation of the agreement. The researchers state that this scenario is feasible given the interconnectivity of commerce and investment in today's globalized economy. They exemplify this dynamic with the Sugar War between Mexico and the United States. Mexico claimed that its restrictions impacting American investors were appropriate countermeasures in response

to the United States' alleged violation of its trade duties under the NAFTA. While this issue centered on NAFTA, problems concerning the propriety of countermeasures under the larger WTO framework could arise (Losari, Ewing-Chow, 2014, p. 2-3).

DSU governs conflicts involving the agreements included in Annex 1A of the WTO Agreement in its entirety, as well as the Plurilateral Trade Agreements, provided the disputing parties are also parties to these agreements, The General Agreement on Trade in Services (with respect to services) and The Agreement on Trade-Related Aspects of Intellectual Property Rights (with respect to intellectual property); and plurilateral trade agreements (Understanding on Rules and Procedures…, 1994, Art. 22 para. 3).

Under the DSU, the WTO members are allowed to apply countermeasures if they meet certain standards and follow particular processes. Articles 22.3(a) of the DSU requires the complaining Member to first seek the suspension of concessions of obligations within the same sector where the panel of Appellate Body has detected a breach or nullification of advantages. According to the Article 22.3(f), "sector" refers to all goods in the context of goods; a principal sector as outlined in the "Services Sectoral Classification List" in the context of services; and, in the context of trade-related intellectual property rights, any of the categories covered in Sections 1 through 7 of Part II, or the obligations under Parts III or IV of the TRIPS Agreement (Understanding on Rules and Procedures…, 1994, Art. 22 para. 3(a) and (f)).

If this strategy is deemed impractical or unsuccessful, Articles 22.3(b) authorizes cross-sector retribution within the same agreement, whereas Article 22.3(c) allows cross-agreement retaliation. It is necessary to pay attention to some factors when applying the aforementioned rules. First of all, the party must consider within what sector and what trade or agreement a nullification or violation occurred and was identified by the Appellate Body or a panel. The trade's significance to the party is a major matter as well. The Party must also consider what wider economic complications such nullification will have, especially whether suspending concessions or rejecting obligations will have any effects. Justification of the request is also a requirement when the party decides to request authorization to suspend concessions or obligations under subparagraphs (b) or (c), submitting it to the DSB and sharing with the relevant Councils and, in separate cases with the appropriate sectoral bodies. If any covered agreement prohibits a suspension of concessions, it cannot by authorized by the DSB. Article 22.4 of the DSU is related to the notion of proportionality under customary international law and requires the level of such suspension to be commensurate with the level of the nullification or impairment (Understanding on Rules and Procedures…, 1994, Art. 22 paras. 3(b-e), 4 and 5). J. J. Losari and M. E. Chow point

out that the condition for "equivalence" is met when the level of countermeasures is equal to or less than the estimated harm (Losari, Ewing-Chow, 2014, p. 10).

The DSU established that first, the parties must regulate their dispute by means of negotiations and agree on compensation. However, the party initiating the dispute settlement process may request the DSB to authorize it to suspend concessions before the breaching state under covered agreements if the parties cannot agree on a satisfactory compensation within 20 days after the reasonable period expires (Understanding on Rules and Procedures…, 1994, Art. 22 para. 2). According to Article 22.6 of the DSU, the DSB, which comprises of all WTO Members, grants authorizations for countermeasures within 30 days following the expiration of the reasonable length of time, unless all Members agree by consensus to reject the proposal. It is worth noting that the dispute may be transferred to arbitration under the DSU. If a Member challenges the proposed suspension level or claims that the procedures in para. 3 of Article 22 were not properly followed regarding a request under para. 3(b) or (c) of Article 22, the issue will be referred to arbitration. Therefore, the arbitrator will confirm whether the suspension matches the level of nullification or impairment and whether it complies with the relevant agreement (Understanding on Rules and Procedures…, 1994, Art. 22 para. 6 and 7).

When looking at cases on disputes arising under WTO, it is possible to trace a few common scenarios. Usually, countermeasures withing the WTO framework involve imposition of additional tariffs on imports, exceeding the retaliating state's existing tariff schedule. Other examples include suspending responsibilities under the TRIPS Agreement, especially suspending protection of intellectual property rights of nationals of the breaching state. For example, in *EC-Bananas III* case, Ecuador offered actions that included suspending duties under TRIPS Article 14. This suspension permitted the reproduction of phonograms in Ecuador without the approval of the rights holders in the country of origin, which impacted performers, phonogram producers and broadcasting companies (Losari, Ewing-Chow, 2014, p. 10).

It is noteworthy that since 2017, the use of security exceptions in trade disputes has increased dramatically, including cases presented by WTO Members as security-related conflicts. Many recent challenges entail steps to address breaches of non-WTO obligations, which are frequently linked to security or human rights concerns. D. Azaria gives an example of *Russia-Traffic in Transit* (2019) where addressed Russian measures relating to the armed war with Ukraine in Crimea, which Russia wrongfully annexed. Similarly, Qatar filed multiple disputes against Saudi Arabia, including *Saudi-Arabia – IP Rights* (2020), and Venezuela began discussion with the United States in 2019 over actions it said were

WTO-inconsistent and linked to alleged human rights breaches. This rising reliance on security exclusions has led some commentators to propose that WTO adjudication should avoid diggind into such “sensitive matter”, suggesting not to address unilateral restrictions implemented in response to violations outside the WTO framework (Azaria, 2022, p. 389-391).

It is of particular significance to observe the procedural and substantive aspects of countermeasures under WTO in practice. Therefore, it may be worthy to take into consideration the *U.S.-Upland Cotton* lawsuit launched by Brazil. On 4 July 2005, before compliance proceedings began, Brazil requested DSB authorization under Article 4.10 of the SCM Agreement and Article 22.2 of the DSU to impose countermeasures against the U.S. for "prohibited subsidies". Brazil proposed suspending tariff concessions under GATT 1994 by applying additional customs duties on U.S. imports. Due to the severity of the issue, Brazil also signaled it might suspend obligations under the TRIPS Agreement and GATS, deeming import duties alone insufficient. On 5 July 2005, the parties informed the DSB of agreed procedures regarding the subsidies. On 14 July, the U.S. objected to Brazil's request, challenging the countermeasures and arguing procedural non-compliance. The DSB referred the matter to arbitration on 15 July 2005. Later, both parties jointly requested a suspension of the arbitration proceedings, which the Arbitrator approved on 17 August 2005 (United States — Subsidies on Upland Cotton, 2014).

On 25 August 2008, following the completion of the compliance proceedings, Brazil requested the resumption of the two arbitration proceedings. Regarding the "prohibited subsidies," the arbitrator determined that Brazil could request authorization from the DSB to suspend concessions or other obligations under the Agreements on trade in goods in Annex 1A, at a level not exceeding USD 147.4 million for FY 2006, with subsequent annual amounts determined by a methodology outlined in the arbitrator's decision. The arbitrator determined that regarding the "actionable subsidies" Brazil could seek authorization to suspend concessions or other obligations under the Agreements on trade in goods in Annex 1A. However, such suspension could not exceed the level of USD 147.3 million annually. Brazil then requested the DSB's authorization to suspend the application of concessions or other obligations to the United States, in accordance with the arbitrator’s decision, under Article 22.7 of the DSU and Article 4.10 of the SCM Agreement for the "prohibited subsidies". The DSB granted this request. Similarly, for the "actionable subsidies", Brazil requested authorization under Article 22.7 of the DSU and Article 7.9 of the SCM Agreement, which the DSB also approved (United States — Subsidies on Upland Cotton, 2014).

Therefore, it is important how the arbitrator viewed the case and made a few peculiar judgements. The arbitrator came to conclusion that based on the periodic payments from the United States, the scope and degree of countermeasures varied annually. Furthermore, Brazil was allowed to take countermeasures outside of the domain of commerce, such as suspending intellectual property rights owing to the United States if annual payments surpassed specific criteria. Eventually, Brazil and the United States came to an understanding and negotiated an agreement. It allowed the United States to omit countermeasures in exchange for monetary compensation and commitments to future cotton program improvements. Furthermore, the United States agreed to alter its export credit guarantees, examine greater market access for Brazilian beef formerly prohibited on sanitary grounds, and financially compensate Brazil (United States — Subsidies on Upland Cotton, 2014).

Another challenge for WTO is the tendency that within the WTO framework, the possible conflict between DSB-authorized countermeasures and private investor rights may occur. This has been acknowledged, particularly during the *EC-Banana III* (Ecuador) arbitration under Article 22.6 of the DCU. The discussion acknowledged that countermeasures under the GATS may affect service suppliers who are commercially present in the Member implementing the countermeasures, potentially infringing on rights to equal treatment under national laws or international treaties, Similarly, countermeasures under the TRIPS Agreement may infringe on the private rights of people or legal persons, including intellectual property rights. While the arbitrator acknowledged the problem, they left the resolution of possible disagreement fully up to the Member implementing the countermeasures. However, there may be more issues arising from application of legitimate trade countermeasures, not addressed by this method (Losari, Ewing-Chow, 2014, p. 11).

In conclusion, by analyzing the practice established in international law, it is evident that countermeasures are actually bound by strict procedural and substantial limitations. In the context of the WTO, these are the principle of proportionality, the authorization from the DSB, consideration of economic consequences and cross-sector impacts. Of course, as in disputes before international courts and arbitral tribunals, countermeasures must adhere to general criteria. However, disputes under WTO have their unique traits as well. The *U.S.-Upland Cotton* is a great example of the complexity of countermeasures application in a different context. For example, it reflects the idea laid out in the DSU on possible countermeasures in a “sector” different from the one, where the violation took place. It is of particular interest that such measures may concern even intellectual property and the provision of services. It is also of particular interest, that the disputes involving

countermeasures usually refer to financial compensation, as we observed in the *U.S.-Upland Cotton* case. The disputes under the WTO are not limited to the DSB observance as they may be referred to the arbitration as well, which is another distinguishing trait. In general, disputes under WTO involving countermeasures must protect economic interests in the first place and maintain the level of cooperation in trade system.

2.2. Approach to Countermeasures Within the Practice of International Courts

Examining cases involving countermeasures in international courts is essential for understanding how theoretical principles, such as those outlined in the ILC Articles on State Responsibility and in the chapter 1 of the thesis, are applied in practice. Some of these cases provide valuable insights into how international tribunals developed significant concepts governing countermeasures, including their legality and procedural requirements, further influencing the formation and codification of specific norms in international law.

In the 1997 *Gabčíkovo-Nagymaros Project* case, the International Court of Justice (ICJ) discussed countermeasures. The problems arose from long-standing disagreements between Hungary and the former Czech and Slovak Federal Republic over the terms of the Budapest Treaty's on construction of the Gabčíkovo-Nagymaros system of locks (1977) implementation and termination. Plans for building and running the Gabčíkovo-Nagymaros Barrage System along the Danube River were laid forth in the Treaty, along with a "provisional solution" for managing water and navigation (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, para. 15-25).

The ICJ held in the 1997 ruling on the *Gabčíkovo-Nagymaros* dispute that Czechoslovakia was right in seeking a temporary solution, but Hungary was not justified in renouncing its treaty responsibilities. However, the Court established that Czechoslovakia exceeded its legal rights when it unilaterally used the barrage system. Therefore, ICJ ordered Hungary and Slovakia to engage in negotiations to achieve the targets of the treaty. Furthermore, Hungary owed Slovakia payment of damages due to abandonment, while Slovakia had to compensate damages, caused by operation of the dam (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, para. 15-25).

Slovakia claimed that, in accordance with the Budapest Treaty (1977), Hungary had made a decision to abandon the Dunkiliti activities. This led to Czechoslovakia's inability to go on further with the original project. Invoking the "principles of approximate application", Slovakia argued that it was justified in seeking a solution that was as close to the original idea as practicable. It also further contended that the Czechoslovakia had to

take measures to lessen the harm cause by Hungary's illegal actions. It further underlined that part of upholding international commitments in good faith was limiting damage (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, para. 67-68). Therefore, Slovakia has invoked the principle of proportionality and necessity, justifying them with reference to the minimization of harm. It is also important to note that Slovakia has raised a notion of good faith.

Dr. T. Dias points out that the Court did not deny the injured state's ability to use countermeasures even if the diversion was unlawful due to the lack of proportionality in the end. This case demonstrates that the ICJ recognizes countermeasures as a valid response to wrongdoings, provided they satisfy the requirements of necessity and proportionality (Dr. Dias, 2024). This case was one of the cornerstones of ICJ's views on countermeasures, which is still cited in other decisions of the ICJ as it detailed fundamental interpretations of countermeasures.

First and foremost, the Court examined the test of proportionality. The Court concluded that Czechoslovakia committed an internationally wrongful act by implementing "Variant C," a unilateral diversion of the Danube approximately 10 kilometers upstream of Dunakiliti. The Court then examined whether this action could be justified as a countermeasure in response to Hungary's alleged noncompliance with its international obligations (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, paras. 81-82).

The Court calls attention to the fact that for a countermeasure to be lawful, it must meet specific conditions. First, it must respond to a prior internationally wrongful act by another State and be directed against the offending State exactly. While Variant C was not initially framed as a countermeasure, it was evidently a reaction to Hungary's suspension and abandonment of treaty works, which the Court deemed internationally wrongful. Additionally, the injured State must request the offending State to cease its wrongful conduct or provide reparation. In this case, Czechoslovakia repeatedly called on Hungary to fulfil its treaty obligations (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, paras. 83-84).

However, the proportionality of the countermeasure is a critical condition. The Court found that Czechoslovakia's actions made it impossible for Hungary to use its equitable share of the Danube's resources by unilaterally controlling such a shared resource, wich also caused ecological harm to the Szigetkoz region. This action exceeded what was proportionate under international law. Moreover, Hungary's earlier consent to certain diversions under the original project could not justify such a significant unilateral measure without Hungary's agreement (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, paras.

85-86). As the diversion was disproportionate, it did not qualify as a lawful countermeasure. Consequently, the Court did not assess whether the measure was reversible or intended to induce compliance, both of which are further conditions for countermeasures (*Gabčikovo-Nagymaros Project*, (1997), 1997 I.C.J. 7, para. 87).

In the *Case Concerning Military And Paramilitary Activities In And Against Nicaragua* the Court had to consider whether the activities in question could be justified, not on the grounds of collective self-defence against an armed attack, but as countermeasures in response to Nicaragua's actions, which are not claimed to amount to an armed attack. This issue was examined within the framework of the principle of non-intervention under customary international law. Eventually, the Court also rejected the notion of a right to undertake collective countermeasures in response to an armed intervention (*Case concerning military and paramilitary activities in and against Nicaragua*, (1986), 1986 I.C.J. 14, paras. 55, 257).

One of the recent cases upholds the ICJ's position regarding countermeasures. On 14 June 2016, the Islamic Republic of Iran submitted an application to initiate proceedings against the United States of America, citing a dispute over measures allegedly adopted by the U.S. in violation of the Treaty of Amity, Economic Relations, and Consular Rights, signed in Tehran on 15 August 1955. According to Iran, such measures had a significant impact on the ability of Iranian entities, including state-owned companies, to control and enjoy their property, both within the U.S. and abroad (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, (2016), paras. 1 and 150).

It is the Court's role to determine whether the "essential interests" cited when referring to countermeasures are genuine and to assess the necessity of the measures. The Applicant argued that the necessity criterion requires an evaluation of proportionality, considering the harm caused by the measures. In support of this argument, Iran referenced the Court's precedent, particularly the judgments in the *Military and Paramilitary Activities in and against Nicaragua* case. The Court emphasized that measures must not only aim to safeguard the essential security interests of the party implementing them but must also be deemed "necessary" for achieving that purpose, reaffirming its findings in previous cases. Furthermore, the determination of necessity is not solely a matter of the implementing party's subjective judgment and is subject to the Court's assessment (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, paras. 105-106).

Iran contended that by applying such measures, the United States violated the principle of separation of legal personalities. This was done by illegitimate block and

seizure of property belonging to Iran and some Iranian companies. While the United States claimed these actions were part of its "efforts to provide redress for victims of terrorism," Iran argued that it had not adequately explained how such efforts justified its actions against Iranian enterprises involved in commercial activities (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, para. 117).

Therefore, the Court began by rendering whether the measures challenged by Iran and taken by the United States were "unreasonable." This way the Court details this definition and states that in its usual sense, "unreasonable" refers to a lack of rational justification. The Court further explained that, when assessing the "reasonableness" of a regulation, a court "must recognize that the regulator . . . has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion" (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, para. 146).

The Court confirms that such "reasonableness" in a given case depends on particular circumstances. According to the Court, under the Treaty of Amity a measure is considered unreasonable if it fails to meet certain criteria. First, a measure is unreasonable if it does not serve a legitimate public purpose. In this case, the United States argues that it adopted legislative provisions and judiciary bodies made decisions, based on those provisions, all contested by Iran, with the aim to compensate the victims of "terrorist acts" for which Iran was held liable by U.S. courts. In general, providing effective remedies to plaintiffs awarded damages can be regarded as a legitimate public purpose (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, para. 147).

Furthermore, the Court states that the absence of an adequate connection between the action taken and the aim presented leads to "unreasonableness". A measure is deemed unreasonable if there is no adequate connection between the objective sought and the action taken. In general, the attachment and execution of assets from a defendant found liable by domestic courts can be regarded as having a reasonable relationship to the goal of compensating plaintiffs (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, para. 148).

Additionally, a measure is deemed unreasonable if its negative effects are grossly disproportionate to the intended purpose. In the case of *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court defined "unreasonable" in the following way: “A regulation . . . must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked” (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, para. 149).

In light of the above, the Court concluded that, even assuming the legislative provisions adopted by the United States and their application by U.S. courts pursued a legitimate public purpose, they resulted in an impairment of Iranian companies' rights that was manifestly excessive when compared to the protection afforded to the stated purpose. The Court therefore determined that the legislative and judicial measures were unreasonable. The United States argued that Executive Order 13599, prohibiting the Nicaraguan ships from entering into the U.S. ports, was issued in response to Iran's "sustained support of terrorist acts". However, since Executive Order 13599 applied to “[a]ll property and interests in property of any Iranian financial institution”, it was found to be manifestly excessive in relation to the intended purpose. As a result, the Court concluded that Executive Order 13599 was also an unreasonable measure (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, paras. 156-157).

Therefore, the analysis of the cases above grants an opportunity to observe how the Court’s perception of countermeasures established over time. It is of great importance as the ICJ’s fundamental decisions built a foundation for the creation of the ARSIWA, contemplating on the basic conditions that would later be portrayed in the Articles. It is possible to say that the Court showed a consistent approach to countermeasures in these cases, providing a comprehensive interpretation of legal concepts within the countermeasures framework. It is also evident that the interpretation and application of countermeasures are very context-dependent and subjective, depending on the details of each case.

2.3. Approach to Countermeasures in Arbitral Tribunals

As it has been previously discussed, in the *Gabčikovo-Nagymaros Project* case, the ICJ accepted that countermeasures could justify actions that would otherwise be considered illegal, if taken in response to a previous international wrongful act by another state and

directed against that state. Under some conditions, this principle has been acknowledged in arbitral decisions, most notably the *Naulilaa*, *Cysne*, and *Air Service Agreement* awards, which are the fundamental arbitral decisions concerning countermeasures. These cases show a constant recognition of the propriety of countermeasures in specific situations where they fit the required criteria (Draft articles on Responsibility of States…, 2001, p. 75).

In the *Cysne* case, for instance, Germany responded to Britain's unlawful actions, which included violations of its treaty obligations by transporting specific products as contraband. However, Germany exceeded its jurisdiction as it sank a Portuguese ship, transporting new goods added to the German contraband list. In this case the panel ruled that even when reprisals are justified they still may have an impact on the nationals of innocent states. Therefore the victim state should make every effort to avoid or mitigate any of such unintended effects. J. J. Losari and M. Ewing-Chow come to the conclusion that, unfortunately, no tribunal has explicitly come to a unanimous agreement on the amount to which the victim state must undertake such efforts (Losari, Ewing-Chow, 2014, p. 5).

As confirmed in the commentaries to the ILC Articles, countermeasures can only prevent wrongdoing in the relationship between the wounded State and State that committed the globally unlawful act. This principle had been also well established in the *Cysne* case before, where the tribunal highlighted that reprisals, which are typically illegal under international law, are justified only if prompted by an act of the same sort and reparations can only be sought against the offending State. Although the *Cysne* case involved the use of military force and so constituted reprisals, which was a more used term regarding such type of measures, the same concept applies to countermeasures (Draft articles on Responsibility of States…, 2001, p. 128-129).

As it has been discussed in previous chapters, the state implementing countermeasures shall send a notice or warning to the targeted state giving it the opportunity to respond or change its position. In the *Naulilaa* case, the arbitral panel provided a ruling that this criterion would only be reached if the warning was provided repeatedly without eliciting a productive response. The International Law Commission Articles supplement this concept and go on to explain that the existence of negotiations can meet the criterion of warning. However, this requirement is not absolute, particularly in circumstances where immediate countermeasures are required to defend the interests of the state implementing them (Losari, Ewing-Chow, 2014, p. 5). In the *Naulilaa* arbitration, the tribunal also asserted that countermeasures will not be lawful if they do not adhere to the demands of

humanity and the principles of good faith governing relations between States. This was later established as a rule in the ILC Articles (Draft articles on Responsibility of States…, 2001, p. 132).

Analyzing more recent arbitral cases, it is possible to see the criteria the tribunals use to assess countermeasures. In *ADM v. Mexico*, for examples, the tribunal stated four cumulative prerequisites for Mexico to successfully defend against countermeasures, citing *Gabčíkovo-Nagymaros* and the ILC Articles. First, prerequisite would be that the United States had violated NAFTA Chapters 3 and/or 7, as well as Chapter 20, therefore it upheld the principle of response to the internationally wrongful act. Second, Mexico's measure was enacted in response to these prior alleged breaches and was intended to encourage the U.S. to comply with NAFTA. Mexico's measure had to be proportionate and did not violate the claimant's individual substantive rights (*ADM v. Mexico*, 2004, ARB(AF)/04/5, paras. 125-127). In *Corn Products v. Mexico*, the tribunal has also set out criteria for legal countermeasures, drawing from the *Air Service Arbitration* and *Gabčíkovo-Nagymaros* cases. These six criteria included: the countermeasures must be taken in response to a prior breach of international law, directed at the offending state, and intended to induce that state to comply with its obligations. Additionally, the measures should be temporary, which will enable the resumption of the performance of obligations, and they must be proportional to the harm caused by the wrongful act. Lastly, the countermeasures must be accompanied by an attempt to settle the dipute by other means and a call for the responsible state to fulfil its obligations (*Corn Products International, Inc. v. United Mexican States*, (2008), ARB (AF)/04/1, paras. 145-146). This set of criteria is more consistent with the ILC Article's rules for lawful countermeasures. In contrast, in *Cargill v. Mexico*, the tribunal referred to the ILC Articles as an "important point of departure" but did not establish the requirement for appropriate remedies. Instead, it emphasized how countermeasures could not exonerate illegal behavior under NAFTA Chapter 11 (*Cargill v. Mexico*, 2009, ARB(AF)/05/Z, para. 420).

Article 51 of the ILC Articles states that countermeasures must be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in questions". Additionally to relying on this provision for a qualitative comparison of related international obligations, the tribunal used the "aims and effects" approach to assess proportionality by determining whether the countermeasure's goal was appropriate in relation to the structure and content of the violated rule. It cited the *Case Concerning the United State Diplomatic and Consular Staff in Tehran* to underline that the

countermeasure must be closely related to the alleged infringement. (*ADM v. Mexico*, 2004, ARB(AF)/04/5, paras. 154-156).

To determine the proportionality of countermeasures the ICSID in *ADM v. Mexico* used a qualitative comparative approach. Therefore, it looked into suspected violations of trade-related requirements for agricultural goods and sanitary measures, as well as state-to-state dispute settlement obligations. These were compared to NAFTA Chapter 11, which clearly targets private individuals (investors) as direct objects and beneficiaries, despite the fact that they do not have individual substantive rights. The tribunal concluded that, because the obligations allegedly violated by the U.S. were interstate in nature, and the countermeasures had an impact on private individuals' rights, they were neither proportionate, necessary, or reasonable connected to Mexico's goals of ensuring U.S. compliance. The tribunal stated that Mexico's purpose of obtaining US Compliance under Chapters 7 and 20 could have been achieved through other means that did not violate investment protection rules in Chapter 11. It did not propose alternative measures, but concluded that Mexico's actions were disproportionate (*ADM v. Mexico*, 2004, ARB(AF)/04/5, paras. 157-158).

The examination of the arbitral tribunal's decisions gives a deeper understanding of how countermeasures are perceived in arbitration. In general, arbitral tribunals use the corresponding approach to countermeasures, which is similar to decisions of ICJ. However, they give their own interpretations, depending on each case. It is noteworthy, that arbitral tribunals pay special attention to the negotiations as a peaceful method of dispute settlement that should be executed before countermeasures application. Arbitral tribunals also emphasize the importance of complying with fundamental rules of international law. The principle of proportionality remains central and the most challenging concept when resolving disputes before arbitral tribunals.

CHAPTER 3: COUNTERMEASURES AVAILABLE IN RESPONSE TO RUSSIAN AGGRESSION

3.1. Cyber Countermeasures Within the Framework of International Law

Given the increasing frequency and complexity of cyberattacks, the rising role of countermeasures in cyberspace poses legal and practical concerns. This problem is becoming more pressing since cyberattacks, particularly those targeting Ukraine, have become a key feature of current geopolitical confrontations. For example, Ukraine has been vulnerable to a large number of cyberattacks since 2022. Thousands of such instances were observed in numerous areas such as government, defense, banking and infrastructure (Biletskyi, 2024, p. 150).

Experts such as Dr. T. Dias suggest that cyberspace necessitates a more flexible interpretation of international law, notably in terms of countermeasure application. The pace, magnitude and covert nature of cyberattacks create particular obstacles in selecting suitable responses. This has urged a sophisticated examination of the circumstances in which states may lack the capability to successfully deploy countermeasures. Another major concern is the potential use of "collective countermeasures" or "third-party countermeasures" in which one state attempts to intervene on behalf of another affected by a cyberattack. These principles pose problems concerning the scope of collective responsibility in the cyber sphere, as well as how international law may effectively address such challenges (Biletskyi, 2024, p. 150).

The rules defining countermeasures in the cyber realm required at least some kind of codification to ensure clarity and consistency in their application. Therefore, the CCDCOE produced the Tallinn Manual 2.0. Published in 2017, the Tallinn Manual 2.0 examined the international legal framework applicable to cyber incidents that states face regularly, yet do not rise to the level of armed conflict or the use of force (The Tallinn Manual, 2024). It underlines that governments are liable for cyberattacks against other states launched from their territory. It also outlaws the use of force in cyberspace, as it gives potential for hackers to harm infrastructure, digital data, and life support systems, frighten civilians, and constitute war crimes. As a result, cyberwars are classified as "armed conflicts" and the employment of countermeasures in reaction to cyberattack is considered legal (The Tallinn Manual, 2024).

Among the nations, acknowledging the use of countermeasures legislation to cyber activites, there are Australia, Austria, Canada, Estonia, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Singapore, Sweden, the United Kingdom and the

United States. However, other countries, notably Brazil, China and Cuba have expressed concern over its application.

According to the general principle of international law, an injured State may only pursue countermeasures against the responsible State provided the conditions discussed in the previous chapters are met. Some countries, including Canada, Israel, Norway the UK and the US have advocated for a specific approach to the notification requirement in cyber operations, primarily to maintain the effectiveness of the measures and to avoid disclosing sensitive capabilities of the responding State. Many countries, including Canada, Germany, Italy, Japan, Norway, Sweden, Switzerland, the UK and the US have also explicitly supported the idea of use of non-cyber countermeasures in response to cyber operations. Similarly, cyber countermeasures might be implemented in response to non-cyber unjust behavior (International Cyber Law in Practice: Interactive Toolkit, 2024).

Dr. T. Dias emphasizes that a major topic of disagreement, both in general and in the context of cyberspace, is whether governments other than the wounded state may use countermeasures under customary international law. These countermeasures often known as “collective” or “third-party” countermeasures, call into question the extent to which a state that has not been directly damaged by the wrongful act can respond to violations of international law perpetrated by another state. Dr. T. Dias points out that this issue especially evolves in cases of cyberattacks originating from another state on state’s elections or critical infrastructure, as well as invasions, such as in the case of Ukraine. This assistance could involve cyber or non-cyber actions that might otherwise be considered unlawful but are intended to compel the responsible state to cease its actions or provide reparations for the harm caused (Dr. Dias, 2024).

For example, according to Ireland’s national perspective on international law in cyberspace: “The possibility of imposing third party or collective countermeasures in the cyber context is particularly relevant for states that may consider it necessary to respond to a malicious cyber-operation with a counter-operation, but lack the technological capacity to do so on their own” (International Law and Cyberspace, 2023, para 26).

This concept also garners support from Estonia, which has stated that non-injured states “may apply countermeasures to support the state directly affected by the malicious cyber operation” (International Cyber Law in Practice: Interactive Toolkit, 2024).

This position has gained some backing from New Zealand (The Application of International Law to State Activity in Cyberspace, 2020, paras. 3-4). As M. Schmitt points out, this could apply where there is no legal alternative to the use of force and diplomatic activity is insufficient. Such an interpretation would empower states to actively aid other

states, particularly if they lack the cyber capacity to oppose an ongoing illegal cyber operation or discourage the responsible state with non-cyber countermeasures (Schmitt, 2021).

Actors on the international arena have voiced their opinions regarding countermeasures in cyber realm. The EU has voiced its position regarding the application of countermeasures in cyberspace, stating that: "The injured State may resort to countermeasures in order to induce the former State to comply with its obligations under international law. Such countermeasures, be it in the cyber domain or not, are measures that would normally constitute a violation of an obligation under international law but whose wrongfulness is precluded because they constitute a response to a previous violation by another State. Countermeasures must be consistent with the relevant rules of customary international law" (Declaration by the European Union and its Member States… 2024, p. 11)

Australia has also outlined its stance on the legality of countermeasures in cyberspace. It has stated that: "If a State is a victim of malicious cyber activity, which is attributable to a perpetrator State, the victim-State may be able to take countermeasures under certain circumstances… Countermeasures may be cyber in nature or taken through alternative means, such as temporarily not performing certain bilateral treaty obligations owed to a State. Countermeasures in cyberspace cannot amount to a use of force and must be proportionate" (Australia's submission on international law… 2021, p. 5). Therefore, Australia also agrees with the notion that injured states may apply both cyber and non-cyber countermeasures in response to cyber attack or other similar wrongdoings.

Austria has detailed its approach to countermeasures in response to cyberattacks, declaring that in cases involving urgent countermeasures, particularly relevant in the context of cyber actions, the obligation to provide prior notification may not apply, as stipulated in Article 52 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Moreover, Austria asserts that states may adopt collective countermeasures against another state that violates obligations *erga omnes*—duties owed to the international community as a whole (referencing Article 48(1)(a) and Article 54 of ARSIWA), e.g. acts of aggression or genocide, especially when the directly injured state is soliciting support from others. While cyber operations rarely constitute such breaches, exceptions might exist. For instance, a state-sponsored public cyber campaign inciting violence against a national, ethnic, racial, or religious group with the intent to destroy that group could amount to public incitement to commit genocide, contravening Article III(c) of the Genocide Convention. However, even in such scenarios, the principle of

proportionality imposes strict limitations on collective countermeasures, which must always be observed. Additionally, preventive cyber actions — such as exploiting vulnerabilities or embedding "logic bombs" in other states' ICT networks before any internationally wrongful act occurs — cannot be justified under the framework of state responsibility (International Cyber Law in Practice: Interactive Toolkit, 2024).

Brazil is rather critical of countermeasures in cyber realm. In Brazil's opinion, attributing cyber activities to a specific state presents significant challenges, compounded by varying levels of technical resources and expertise among states to trace the origins of such activities or verify claims of breaches of international obligations through cyber means. Furthermore, cyber operations can be intentionally designed to obscure or spoof their origin, increasing the likelihood of erroneous responses against innocent parties. Additionally, the rapid progression of wrongful cyber operations heightens the risk of escalation, potentially spilling over into the kinetic domain. Considering these complexities, Brazil emphasizes the need for continued discussions on the legality of countermeasures in response to internationally wrongful acts, particularly in the cyber realm (Official compendium of voluntary national contributions…, 2021, pp. 21-23).

Germany showed some support to Brazil's concerns. Given the intricate and interconnected nature of cyber infrastructures — spanning not only multiple states but also various institutions and societal sectors within individual states – cyber countermeasures carry a heightened risk of producing unintended or even unlawful consequences. In light of this, in Germany's opinion, states must exercise exceptional care and diligence in assessing whether the established limitations governing cyber countermeasures are fully satisfied. Moreover, states may undertake cyber reconnaissance measures to evaluate potential countermeasure options and assess the risks of unintended side effects, provided these measures comply with the requirements for countermeasures (On the Application of International Law in Cyberspace, 2021, p. 13-14).

J. Spáčil emphasizes that while technical attribution focuses on accessible data (e.g., IP addressed, locations), legal attribution is concerned with identifying legal liability under Articles 4-8 of ARSIWA, which provide the standards for holding nations accountable for globally illegal acts. States are generally responsible for the activities of their own authorities and military forces. However, they can also be held liable for the actions of non-state actors, for example private entities authorized by the state, if certain requirements are met. Because cybercriminals frequently take to considerable measures to conceal their identity (for example, by spoofing or utilizing third-party territory), wounded states are at risk of misattribution. J. Spáčil provides an example of North Korea's cyber operations

against South Korean servers in 2013. North Korea used computers from 40 nations, the majority of which even had no role in the attack. If an aggrieved state misidentifies the culpable state and then takes countermeasures against an innocent third state as a result of this misattribution, it may be performing an internationally wrongful act (Spáčil, 2023, p. 90). This is a major reason why countermeasures should be addressed with caution, as highlighted by countries such as Brazil and others.

The growing importance of cyberspace in the international community underscores both the potential utility of countermeasures in this field and challenges they pose. Their use is burdened by the questions of attribution, risks of escalation and proportionality. While many states, including the U.S., Canada, and EU members, have supported the application of countermeasures in the cyber domain, others, such as Brazil and Germany, express caution due to the potential for misattribution and unintended consequences.

It is greatly relevant in modern society to consider countermeasures in the cyber realm. One of the most accurate examples why it should be done is Ukraine, which is experiencing challenges posed by cyber operation in particular cyber attacks. Based on the analysis of states' positions, it is possible to advise Ukraine to implement cyber countermeasures to respond to wrongful acts, taking into consideration all the risks present. A specific way Ukraine could do that will be discussed in subchapter 3.3.

3.2. Collective Countermeasures and International Cooperation

Traditionally, scholars have approached countermeasures as unilateral actions undertaken by an injured state against a state in breach of its obligations. At the same time, they dismissed the possibility of countermeasures application by a state other than the injured one due to conflicting views and a lack of consistent state practice in this area. However, in contemporary settings, researchers argue that the use of collective countermeasures allows less powerful and less developed states to collaborate in countering the advantages that stronger states hold in traditional bilateral relations. D. Crawford, for instance, acknowledged the necessity of permitting collective countermeasures but only in limited circumstances, such as when requested by the injured state or in response to "serious breaches of obligations owed to the international community as a whole" (Biletskyi, 2024, p. 150-151).

Dr. T. Dias describes that several states have expressed support for such measures, both within the cyber domain, as previously discussed, and in broader contexts. However, others have raised concerns about the risks posed by actions taken by states other than the

directly injured party. Among the risks, the states name potential conflict escalation and the undermining of the UN collective security framework, particularly the Security Council's mandate to maintain or restore international peace and security (Dr. Dias, 2024). For example, Israel has argued that countermeasures by "interested" states, as opposed to injured states, could have a destabilizing effect, creating parallel mechanisms to address serious breaches without the coordinated, balanced, and collective attributes of existing systems (Summary record of the 15th meeting, 2000, para. 25). Similarly, the UK has cautioned that such measures could "potentially be highly destabilizing" to treaty relations (Dr. Dias, 2024).

From a legal perspective, the ICJ has addressed the issue of countermeasures taken by states other than the injured state in the *Nicaragua* case. The Court determined that it could not justify the countermeasures undertaken by a third state, which was the United States in that case, especially measures involving the use of force. While the use of force is unequivocally prohibited as a countermeasure, the ICJ's stance on the United States' non-forcible measures remains less definitive (*Case concerning military and paramilitary activities in and against Nicaragua*. Nicaragua v. United States of America, (1986), 1986 I.C.J. 14, paras. 242-249). Dr. T. Dias suggests that it is possible that the Court was not outright rejecting the legality of countermeasures by non-injured states in general but rather ruling specifically on the U.S. actions due to its failure to meet the necessary preconditions. Some commentators have argued that state practice and *opinio juris* have since evolved, providing sufficient evidence for the development of customary international law permitting such countermeasures in appropriate circumstances (Summary record of the 15th meeting, 2000, para. 25).

It has been proposed that states other than the injured state, including those not bound by the breached obligation and therefore not indirectly injured ("third states"), might take countermeasures in support of the injured state, regardless of whether the breached obligation is of an *erga omnes* nature, as highlighted by Dr. T. Dias. One potential scheme presents a third state acting as a proxy for the injured state, implementing countermeasures on the latter's behalf, in line with what the injured state would be entitled to under international law. Another suggestion is that third states could collaborate with the injured state in taking joint countermeasures. A distinct consideration is whether third states may assist the injured state in its countermeasures. In this scenario, the third state does not undertake countermeasures itself but provides support to the injured state's actions. This assistance could take various forms, such as financial aid, defensive software or hardware, cybersecurity training, intelligence-sharing, or secondary involvement in cyber operations

executed by the injured state. Such support could be organized on an ad hoc basis or through established cyber defense alliances (Dr. Dias, 2024).

As O. A. Hathaway, M. M. Mills and T. M. Poston generalize, the ILC's Draft Articles avoid attempting "to regulate the taking of countermeasures by States other than the injured State". However, they suggest that non-injured states may invoke state responsibility — a necessary prerequisite for countermeasures — when obligations *erga omnes* are involved (Hathaway *et al.*, 2024, p. 1024). Article 48(1), influenced by the ICJ's *Barcelona Traction* decision, establishes that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State" if the breached obligation is owed to the international community as a whole. In addition to demanding "cessation of the internationally wrongful act, and assurances and guarantees of non-repetition", a state other than the injured state "may claim from the responsible State...performance of the obligation of reparation...in the interest of the injured State" (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 48).

O. A. Hathaway, M. M. Mills and T. M. Poston emphasize that a 2022 ICJ decision concerning alleged breaches of obligations *erga omnes* partes (obligations owed to all parties to a treaty) supports the limited use of collective countermeasures for such violations. In its judgment in *The Gambia v. Myanmar*, the ICJ concluded that The Gambia had "standing to invoke the responsibility of Myanmar for the alleged breaches of its obligations". The Court rejected Myanmar's argument that allowing non-injured states to claim reparation would result in an overflow of disputes and raise questions about the entitlement of "non-injured" states to seek reparation on behalf of victims who are not their nationals. They additionally provide an example that even in its earlier *South West Africa* judgment the ICJ acknowledged that "states may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice", provided that "such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law" (Hathaway *et al.*, 2024, p. 1025).

Dr. T. Dias provides a few instances, that have been referenced as potential evidence of state practice supporting collective countermeasures, also referred to as countermeasures in the general interest. For example, since the early 2000s, the EU, the US, Switzerland, and other states have imposed asset freezes as well as trade and investment restrictions on Myanmar in response to human rights violations committed by Myanmar officials. Similarly, in 2011, the US and Switzerland enacted asset freezes and trade restrictions against Libya, which was also suspended from the Arab League due to human rights and

humanitarian law violations during the country's repression of pro-democracy movements. Comparable measures were taken against Syria, with asset freezes, trade restrictions, and civil aviation bans implemented by the EU, the US, Australia, Switzerland, Canada, Turkey, and Japan, alongside Syria's suspension from the Arab League and the Organization of Islamic Cooperation, in response to human rights and humanitarian law violations by the Assad regime beginning in 2011 (Dr. Dias, 2024).

Another relevant example that Dr. T. Dias provides is the case of Russia, when numerous states, including EU and G7 member states, Australia, Canada, New Zealand, Norway, the Republic of Korea, Singapore, and several Eastern European nations (such as Serbia, Georgia, Moldova, and Albania), have adopted asset freezes, trade and investment restrictions, civil aviation bans, and in Canada's case, asset seizures. These actions were adopted in response to Russia's annexation of Crimea in 2014 and its subsequent full-scale invasion of Ukraine in 2022. Other examples include the Saudi Arabia's and The United Aram Emirates' land, air, and sea blockade against Qatar in 2017, citing Qatar's alleged support for international terrorism in violation of the Riyadh Agreements, and the EU's ban on Belarusian airlines in 2021 following Belarus' breach of the Chicago Convention by unlawful diversion of a commercial aircraft between Greece and Lithuania. Furthermore, Belarus has faced asset freezes, investment restrictions, suspension of bilateral road transport agreements by Norway, and the suspension of the Treaty on Conventional Armed Forces in Europe by Poland, all in response to its support for Russia's invasion of Ukraine (Dr. Dias, 2024). These instances collectively illustrate the application of countermeasures in various contexts to address breaches of international obligations and uphold compliance with international law. They showcase that the practice of applying collective countermeasures is quite vast and common in the modern society. It is also worthy to note that in most cases, provided above, such collective countermeasures were applied in cases of breaches by the offending state of the *erga omnes* obligations.

The Council of the EU, in support of the concept of collective countermeasures, decided to include a recital in its Council Decision, which states: "As long as the illegal actions by the Russian Federation continue to violate the prohibition on the use of force, which is a peremptory rule of international law, it is appropriate to maintain in force all the measures imposed by the Union and to take additional measures, if necessary" (Council Decision (CFSP) 2023/191, 2023, para. 3). It is important to note that several states, including Russia, China, Iran, and Brazil, have consistently opposed countermeasures taken by indirectly injured states, even in cases involving serious breaches of *erga omnes* obligations. However, some states have shown support for general interest countermeasures

by publishing their national positions or statements on international law in cyberspace, which could be viewed as evidence of their *opinio juris* on the matter. For instance, Estonia has adopted a broad perspective, advocating that states not directly harmed may take countermeasures to assist the state directly affected by malicious cyber activities. Similarly, Ireland has acknowledged that, since the adoption of the ARSIWA in 2001, state practice demonstrates that third-party or collective countermeasures may be permissible in specific circumstances, particularly when violations involve peremptory norms (Dr. Dias, 2024). Significantly, as N. Crawford states, the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) regard collective countermeasures as a legal grey area, one that is yet to be fully defined and that requires further development through state practice (Crawford, N. 2021).

Even if the notion of collective countermeasures must be further developed, the states' practice demonstrates that they are commonly used to respond to wrongful actions of the offending states and do not constitute wrongful actions. For instance, Ukraine has already initiated a domestic effort to repurpose approximately $500 million in confiscated Russian assets for reconstruction. However, due to Ukraine's jurisdiction being limited to only a small portion of the total Russian assets frozen globally, its unilateral attempts to compel or directly obtain reparations have yielded limited results (Hathaway *et al*., 2024, p. 1023-1024).

States seeking collective action against Russia for its aggression in Ukraine must establish a legal basis for doing so. States other than Ukraine can invoke Russia's responsibility for its wrongful acts and join countermeasures based on two grounds. First, under Article 42 of ARSIWA, states may hold Russia accountable if the breached obligations were owed to the international community or if the breach specially affected those states. Article 31 of ARSIWA defines "injury" as any damage caused by a wrongful act. Russia's war has displaced millions which affected the international community and caused economic consequences. It has also disrupted trade, harming countries dependent on Ukrainian commerce. Additionally, Russia has further affected some states by unlawfully seizing assets of states involved in its asset freezes. Finally, Russia's aggression poses a grave threat to European security, prompting costly responses from NATO and EU member states to defend against the threat (Pr. Akande *et al*., 2023, paras. 43-45).

Second, the researchers emphasize, that even if not directly affected, any state can invoke Russia's responsibility because its actions have undermined the international legal system, violating peremptory norms on a large scale. They point out that Article 54 of ARSIWA allows any state, and not just an "injured" state, to take lawful measures to

address a breach of obligations owed to the international community or specific groups. The Commentary clarifies that states can invoke responsibility if the breach affects collective interests, such as *erga omnes* obligations like preventing genocide. The ICJ has recognized that breaches of these obligations violate non-derogable norms, granting standing to any state to seek reparation on behalf of both the collective community and the victims (Pr. Akande *et al*., 2023, paras. 46-48).

The obligation of non-aggression is another peremptory norm of international law, recognized as an *erga omnes* obligation, meaning it impacts all states, not just the direct victim of aggression. Therefore, similar to how states can hold a state accountable for committing genocide, any state or group of states can invoke the responsibility of the aggressor and seek redress. This principle is reflected in Article 48 of ARSIWA. Consequently, third-party states not directly affected by Russia's actions can also invoke its responsibility for violating *erga omnes* obligations and demand the cessation of its unlawful conduct and reparations for any injuries caused to directly affected states (Pr. Akande *et al*., 2023, paras. 49-51).

Consequently, in response to Russia's actions in Ukraine, various collective countermeasures have been implemented by states and international organizations to hold Russia accountable and address the breach of international law. These measures primarily aim to disrupt Russia's economic stability, diminish its ability to fund further aggression, and isolate it diplomatically. The European Union, the United States, and other Western nations have been targeting key sectors of the Russian economy, including finance, energy, and technology. These measures have included asset freezes, trade restrictions, and export bans on critical technologies, such as machinery, microelectronics etc. (Risks and Considerations for Doing Business in the Russian Federation…, 2024). Additionally, Russia's central bank has faced asset freezes, restricting its access to foreign reserves (Von Stosch, 2024).

The international community has also undertaken collective diplomatic actions, such as suspending Russia from organizations like the Council of Europe (The Russian Federation is excluded from the Council of Europe, 2022) and the G8 (Acosta, 2014), and expelling it from major international events, including the Olympic Games (Duggal, 2024). Military support has been provided to Ukraine, including weapons, training, and intelligence-sharing, from NATO members and other allies (Relations with Ukraine, 2024). Non-military support includes humanitarian aid, which has been channeled through international organizations and third-party states to assist displaced populations and the Ukrainian government (Europe Ukraine, 2024).

The European Union, the United States, and the United Kingdom have agreed to provide Ukraine with financial support from frozen Russian assets. In total, Ukraine is set to receive approximately USD 50 billion from the G7 and the EU. The Russian assets will be allocated to meet Ukraine's key needs, including defense, reconstruction, and humanitarian support to restore everything that was influenced by the Russian invasion (Statement of the Ministry of Finance of Ukraine, 2024).

Potential diplomatic measures could include further isolating Russia from international forums and organizations. This could involve efforts to suspend Russia from key international forums and organizations, including the United Nations Security Council. Although such a move would face significant procedural and political hurdles, it would signal strong international disapproval and exert symbolic pressure. Several countries have suspended cooperation under treaties with Russia (Canada-Russia relations, 2024) and there were cases of imposing travel and visas bans (Latvia ready to take in Ukrainian refugees…, 2022). Beyond political and military elites, visa bans could extend to individuals in key industries supporting Russia's strategic goals, such as technology, banking, and infrastructure. Governments could review existing bilateral agreements with Russia, especially in such fields as scientific research, energy projects, and military cooperation. Freezing or terminating such agreements would further isolate Russia from collaborative opportunities and resources. Nations could reduce the number of Russian diplomatic personnel in their countries which would be another way of encouraging Russia to complying with its obligations.

Therefore, such evolving practice reflects the commitment of the international community to uphold obligations owed to all states and to mitigate the consequences of disbalance of powers. This recognizes the role of third states in implementing countermeasures in aim to aid the injured state, even though countermeasures emerged as a unilateral action at first, inherent to the injured state only. Even though this matter is debatable and some states voice objections, the state practice in international law reflects the use of collective countermeasures against grave breaches of international law. This is particularly evident in the case of Ukraine, which encouraged the international community to step in and take countermeasures against Russia, due to its violation of *erga omnes.*

3.3. Alternative Countermeasures: Expanding Ukraine's Response Framework

States often resort to various countermeasures aimed at compelling the offending state to comply with its legal obligations, in response to violations of international law. These measures can take many forms, including travel restrictions, asset freezes, prohibitions on the export of weapons, freezes on the assets of the offending state's central bank, prohibitions on rendering services etc. Furthermore, states may restrict issuing work permits or deny other economic privileges, all in an effort to pressure the offending state to cease its wrongful actions (Biletskyi, 2024, p. 149).

For instance, in the *Tehran Hostages* case in response to actions it held Iran responsible for, the United States implemented several unilateral countermeasures. For example, the U.S. began identifying Iranian students violating their visa terms and initiated deportation proceedings. President Carter also ordered a halt to all oil purchases from Iran. Fearing that Iran might withdraw funds and repudiate obligations, the U.S. blocked Iranian assets in the country, including bank deposits. The U.S. also restricted the personnel assigned to the Iranian Embassy and consulates in the U.S and severed diplomatic relations with Iran, imposing a ban on exports to Iran, a sanction previously proposed to the UN Security Council. The U.S. also began cataloging Iranian assets frozen since November 1979 and compiling claims from American nationals against Iran. Additionally, all Iranian visas for entry into the U.S. were canceled and the U.S. prepared legislation to address claims from hostages and their families. On April 17, further economic measures were announced, including a travel ban for U.S. citizens to Iran and plans to use frozen Iranian assets for reparations to hostages and their families (*Case concerning United States diplomate and consular staff in Tehran*, United States v. Iran, (1980), I.C.J. 3, paras. 30-32). Therefore, countermeasures, aimed at making the offender comply with its obligations under international law may take different forms as long as they adhere to the conditions acknowledged by the ARSIWA, customary law and state practice.

Ukraine has already implemented a number of countermeasures. For example, it has recognized at the legislative level the right to confiscate Russian property. In Ukraine, considering the full-scale aggressive war launched and waged by the Russian Federation against Ukraine and the Ukrainian people, the forced seizure of property belonging to the Russian Federation and its residents is carried out without any compensation for its value. Any property of the Russian Federation or its residents on Ukrainian territory may be seized without exception. This includes, in particular, funds, foreign currency assets, bank deposits, movable and immovable property, property rights, corporate rights, securities, and cryptocurrencies. Property of the Russian Federation and its residents, forcibly seized in accordance with this law in the form of funds, will be transferred to the State Budget of

Ukraine and allocated to the fund for the liquidation of the consequences of armed aggression (Law of Ukraine “Pro osnovni zasady prymusovoho vyluchennia…”, 2023, Art. 2). Such countermeasures align with the conditions of application for countermeasures under international law. First, these actions directly respond to an internationally wrongful act: Russia’s full-scale aggressive war, which violates fundamental norms of international law, including the prohibition of aggression. Second, Ukraine has publicly articulated the basis for these measures and has called for Russia to stop its aggression, satisfying the requirement for notification and justification of the countermeasure. The proportionality condition is met as these actions target Russian state and resident assets within Ukraine, focusing on mitigating the consequences of aggression rather than escalating the conflict. The amount of assets confiscated and frozen would definitely be less than the amount of material damage cause to Ukraine, therefore such measures are not excessive. The measures are also reversible, as confiscation laws could be repealed or revised if Russia ceases its aggression and meets its international obligations. Finally, the necessity of these countermeasures is evident as Ukraine needs to address the massive consequences of the aggression and requires resources to fund recovery actions.

Ukraine has also severed diplomatic relations with the Russian Federation (Ukrayina rozirvala dyplomatychni vidnosyny z Rosiyeyu…, 2022). In 2022, the Cabinet of Ministers of Ukraine also adopted a resolution "On the Prohibition of Exporting Goods from Ukraine to the Customs Territory of the Russian Federation". The resolution prohibits the export of goods from Ukraine’s customs territory under foreign trade contracts, with trade or destination country being the Russian Federation. This resolution will remain in effect until the state of martial law is lifted and Russia ceases its unfriendly actions against Ukraine, which reflects the principle of the temporarity of countermeasures (Uriad povnistyu zaboronyv eksport tovariv do RF, 2022). On April 9, 2022, the Cabinet of Ministers of Ukraine adopted Resolution No. 426, which imposed a full ban (embargo) on the import of goods from the aggressor state, the Russian Federation, into Ukraine, applied specifically to goods imported under the customs regime. An analysis of the content of Resolution No. 426 suggests that the ban operates on a formal principle, meaning it applies to all goods imported from the Russian Federation into Ukraine, regardless of the country of origin of those goods (Postanova Kabinetu Ministriv Ukrayiny…, 2022).

Ukraine’s severance of diplomatic relations with the Russian Federation and the prohibition on trade with Russia align with the conditions for the application of countermeasures under international law. These measures are adherent to the criterion, requiring the state to respond to prior internationally wrongful acts, as Ukraine responds to

Russia’s violations of international law. Prior notification of Russia through legislative and official government actions satisfies the procedural requirement of informing the wrongdoing state. The measures, including trade restrictions, are in line with the proportionality requirement since they are adjusted to safeguard Ukraine’s sovereignty and security and the consequences of such restrictions are far less the same as the harm done to Ukraine. Moreover, such restrictions are recognized as acceptable in international law, proven by the state practice discussed above. The reversibility and necessity principles are upheld, as these countermeasures are temporary and will cease when martial law is lifted and Russia ends its hostile actions, demonstrating Ukraine’s commitment to proportional and reversible remedies aimed at restoring lawful relations.

“To protect national security, sovereignty, and territorial integrity, prevent collaborationism, halt the incitement of inter-religious hostility, and avoid destabilizing the religious environment in Ukraine”, the Verkhovna Rada of Ukraine passed a law banning the activities of the Moscow Patriarchate, the Russian Orthodox Church, and religious organizations that are part of the Russian Orthodox Church, including the Ukrainian Orthodox Church (Proekt Zakonu pro vnesennia zmin do deiakykh zakoniv Ukrayiny…, 2023). The ban on the activities of the Moscow Patriarchate and related religious organizations in Ukraine also aligns with the conditions for the application of countermeasures. It is a response to the internationally wrongful act of Russian aggression, especially when the misuse of religious organizations by Russia is aiding it to undermine Ukraine's sovereignty and territorial integrity. Therefore, such measures are relevant and the target is legitimate. As it has been mentioned, Ukraine has called for Russia to stop its unlawful behavior multiple times, so it fulfilled the condition of prior notification. The measure is proportional, as it targets entities directly linked to the aggressor state and its influence operations, without broadly infringing on religious freedoms unrelated to Russian affiliations. These measures are aimed at protecting Ukrainian sovereignty from propaganda and actions undermining the authority of the Ukrainian state. Additionally, the measure is reversible, as the ban could be lifted if the circumstances change, such as the cessation of hostilities and the absence of threats to Ukraine's sovereignty and security.

These are only a few examples of measures adopted by Ukraine to compel Russia to perform its duties. Further actions could concern the residence permits for Russian citizens. The Cabinet of Ministers of Ukraine has adopted a resolution that halts the processing of applications from Russian citizens for immigration permits, as well as the issuance and renewal of permanent or temporary residence permits submitted before the resolution came into effect. Additionally, new applications from Russian citizens will not be accepted.

Exceptions allowing for extended stays or the issuance of residence permits include marriage, family reunification, employment, volunteering, and education. The suspension of application processing will remain in place until martial law is lifted and for 30 calendar days thereafter (Rosiyanam v Ukraini vydavatymut posvidky na prozhyvannia…, 2024).

In our view, Ukraine could further restrict the streamlined process for issuing permits, particularly by requiring comprehensive background checks by state security services. This is crucial since Russian citizens may pose a great risk to Ukraine. For example, residence permits could provide Russian citizens with easier access to sensitive areas or information, potentially leading to intelligence gathering, espionage activities and transfering information to Russia. Or there is a risk that some individuals may sympathize with the Russian government and collaborate with it, undermining Ukraine's sovereignty, and security. Russian workers, especially those in technology, communications, or infrastructure sectors, could exploit their positions to carry out cyberattacks or sabotage. Given the potential security risks posed by Russian nationals to Ukraine's sovereignty and territorial integrity, these measures, both adopted and potential, would align with the principle of proportionality, as they do not impose excessive or discriminatory restrictions. Importantly, the measure is reversible, as it is limited by the duration of martial law and will cease 30 days after its conclusion. It ensures that such measure is temporary and necessary to address the current extraordinary circumstances.

Another interesting instance of Ukraine applying countermeasures can be found in the cyber realm. As it was established in the previous chapter, modern state practice recognizes the use of cyber countermeasures, which must adhere to general principles, in response to internationally wrongful acts. The example of Ukraine is, that officials and military personnel are now prohibited from using the Telegram messenger app on work devices. This decision, made by the National Cybersecurity Coordination Center on September 19 and the National Security and Defense Council, also limits Telegram's use at critical infrastructure facilities due to national security risks. According to studies, in 2023, 72% of Ukrainians relied on Telegram as their primary platform for news. However, the Security Service of Ukraine and the General Staff reported that Russian operatives exploit Telegram for cyberattacks, malware distribution, geolocation tracking, and coordinating missile strikes. Kyrylo Budanov, head of Ukraine's Defense Intelligence, stated that Russian intelligence services can access user messages, even deleted ones, along with personal data. To mitigate these risks, the use of Telegram has been banned on official devices across government bodies, the military, security sectors, and critical infrastructure operators (Ukrains′kym chynovnykam zaboronyly Telegram, 2024).

Ukraine could further develop the use of countermeasures in this area. For example, it could extend the ban on Telegram beyond government and military devices to private contractors working in critical infrastructure, telecommunications, finance sectors or even completely ban the messenger. Another possible way is to make sure that internet service providers (ISPs) implement geofencing measures, meaning that they limit acces to Telegram in certain places, especially in government buildings and high-security zones and, if possible, restrict access to a number of Telegram sources linked to Russia. Current and potential countermeasures in this field would be in compliance with conditions of lawful countermeasures. The measures directly respond to Russia's wrongful acts, threatening the security of Ukraine, including committing cyberattacks, the distribution of malware, and using Telegram to track geolocations and coordinate missile strikes. Ukraine has also properly called for Russia to stop its wrongful actions. The restrictions are proportionate as the use of Telegram could significantly compromise national security and be potentially dangerous for Ukrainian citizens, due to reasons mentioned above. The measures are reversible as well, as the ban can be lifted when the security threats cease to exist, for example when the hostilities end or Telegram changes its security policies. Given the documented exploitation of Telegram by Russian intelligence, the ban is necessary to protect Ukraine's national security and territorial integrity. It addresses an immediate and tangible threat, making it a justified countermeasure. It is also worthy to note, that Ukraine would not face risk of misattribution of cyberattacks and harmful cyber actions, therefore it would not lead to unlawfulness of this ban.

In conclusion, Ukraine's application of countermeasures against Russia for violating international law can be recognized as a legally sound response. It has applied them in various fields, from economic to diplomatic, tailoring countermeasures to the current conflict and ensuring their legality. Since Russia has not ceased its wrongful actions, Ukraine may expand its framework on countermeasures, further encouraging compliance with international law. As discussed in the paragraph, Ukraine could adopt these countermeasures in cyber and non-cyber realms in an attempt to protect its rights.

CHAPTER 4: LEGAL CHALLENGES IN THE IMPLEMENTATION OF COUNTERMEASURES

4.1. State Immunity: Navigating Legal Obstacles in the Implementation of Countermeasures

According to customary international law, the idea that "every internationally wrongful act of a state entails the international responsibility of that state" is basic (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 1). As P. Webb states, this responsibility stems from the state's standing as an international legal person. The term "international responsibility" refers to the wrongdoer state's obligation to account for its violation of international law, which can be invoked by either the wounded state, a group of states, or the international community as a whole. If the breached commitment is owed to a specific state or a group of states, the injured party or parties may seek the state's compensation (Webb, 2024, p.1).

Alternatively, if the violation involves an obligation *erga omnes* (an obligation due to the international community as a whole), any state may claim culpability. P. Webb emphasizes that Russia has undertaken an act of aggression that clearly violates international law, specifically the prohibition on the use of force under Article 2(4) of the UN Charter, establishing Russia's international responsibility (Charter of the United Nations, 1945, Art. 2(4)). Article 1 of the UN Charter seeks to prevent acts of aggression and breaches of peace, whereas Article 2(4) specifically prohibits the use of force to endanger a state's territorial integrity or political independence (Charter of the United Nations, 1945, Art. 1(1)). Therefore, when actions violating these rules happen, states may invoke measures to interfere with the breach. Several legal tools have been applied in response to Russia’s wrongdoing, including expulsion from the Council of Europe and the UN Human Rights Council, as well as the freezing of Russian state assets in a number of countries. Despite these efforts, Russia has yet to comply with calls to stop its aggressive acts or offer reparations (Webb, 2024, p. 1-2).

When applying such measures, states face legal challenges. As frozen assets are one of the most important countermeasures in the Russia-Ukraine war, we will consider these challenges in regard to this example. The issue of Russia's accountability, particularly in light of its frozen foreign reserves and state-owned property, raises serious concerns regarding the implementation of immunity norms under international law. As P. Webb stresses, these immunity principles primarily address immunity from jurisdiction and immunity from enforcement, which includes immunity from execution or constraint

measures. Under international law, state-owned property located on foreign soil is often free from judicially enforced constraints. This immunity from enforcement is founded on the principle of sovereign equality, which holds that states are not subject to the jurisdiction of foreign tribunals unless they have waived their immunity or consented to such acts (Webb, 2024, p. 4-5).

P. Webb emphasizes that the principles governing immunity from enforcement are governed by the concept that interfering with a state's property on foreign soil undermines the state's sovereign authority and capability to regulate its own affairs, particularly in pursuit of public goals. This rationale is especially important because many countries, like Russia, keep a sizable percentage of their national wealth in foreign reserves. Their ability to dispose of these assets is regarded as an essential aspect of their sovereign rights. However, the International Court of Justice (ICJ) has stated that protection from enforcement goes beyond just jurisdictional immunity. The fact that a foreign state is unable to claim immunity from jurisdiction before a foreign court, does not exclude the use of constraint measures (such as asset seizure) against its property. As P. Webb indicates, this distinction is critical in understanding why, even after a judicial judgment is issued against a state, implementing that judgment by actions such as freezing or seizing state property in another country might be hampered by immunity regulations (Webb, 2024, p. 6).

P. Webb points out, that according to the ICJ, a foreign state's property cannot be subjected to restraint measures unless specified exceptions apply, even if a legitimate judgment exists against the state. State property is generally immune from enforcement if it is used for public purposes. The boundary between public and private use can be difficult to make, especially when state actions include both public and private parts. Some state-sponsored activities blur the distinction between public and private functions, making it impossible to firmly categorize some properties. Despite their complexities, central bank assets typically enjoy extensive immunity, reflecting their importance to the state's economic and sovereign functions. This increased security assures that sovereign money is not taken or restrained by foreign legal processes, unless clear exceptions, such as commercial use, are created (Webb, 2024, p. 6-7).

Russian property residing overseas is normally exempt from enforcement unless it can be demonstrated that Russia has consented to enforcement, has designated the property for claim enforcement, or is utilized or intended for commercial reasons (United Nations Convention on Jurisdictional Immunities…, 2004, Arts. 18-20). Military and cultural property are believed to be used for government non-commercial objectives and hence are

exempt from enforcement. State immunity from enforcement provides central banks with a high level of security. According to Article 21(1)(c) of the UNCSI, the property of a central bank or other monetary authority is immune from all enforcement procedures unless the state expressly consents or allocates those assets for the satisfaction of a claim (United Nations Convention on Jurisdictional Immunities…, 2004, Art. 21. para. 1(c)). According to P. Webb, assets held by central banks are generally expected to be used for non-commercial or public purposes, regardless of whether the central bank is a governmental agency or an independent business. However, the position of sovereign wealth funds under state immunity legislation is ambiguous. For example, a recent Swedish Supreme Court decision concluded that the property of Kazakhstan's National Fund, controlled by the central bank, was not immune from enforcement, as it was managed like usual long-term investments in international capital market (Webb, 2024, p. 8-9).

P. Webb provides another example, when a Belgian court similarly concluded that the National Fund of Kazakhstan's (NFK) assets were used for commercial reasons, and hence were not immune from execution. Drawing on the Swedish decision, which represents a unique instance of state practice, it may be conceivable to confiscate assets from the Russian National Wealth Fund (RNWF) that are unrelated to central banking responsibilities while being within immunity laws (Webb, 2024, p. 9). Another potential target for confiscation is Russian billionaires' assets, which are frequently linked to President Putin's abuse of state resources for personal gain. Several countries have already targeted such assets. In the United Kingdom, an agreement between the Office of Financial Sanctions Implementation and Roman Abramovich resulted in the sale of Chelsea Football Club for GBP 2.5 billion in May 2022, with the proceeds frozen and set to benefit Ukrainian war victims (Panja, Smith, 2022). The U.S. has confiscated a superyacht owned by Viktor Vekselberg and compelled another oligarch to pay US$5.4 million, with plans to transfer money to Ukraine (Chisholm, 2022). Because oligarch assets are privately owned, they are not immune to seizure, albeit any expropriation must follow the legal due process (Webb, 2024, p. 10).

I. W. Brunk states that immunity is typically limited to actions carried out by courts or bodies fulfilling judicial powers. Therefore, the confiscation process is frequently portrayed as an executive or legislative action rather than a judicial one to avoid state immunity. It might be possible to avoid foreign sovereign immunity if executive officials effectuate the confiscation with no involvement of the courts (Brunk, 2023). This is established in international practice, for example, international documents such as the UNCSI provide that immunity from enforcement applies only to actions related to judicial

proceedings. Article 2(1)(a) of the UNCSI defines a "court" as any state authority authorized to perform judicial powers, which may include both courts and administrative organs, but only in the context of judicial proceedings (United Nations Convention on Jurisdictional Immunities…, 2004, Art. 2(1)(a)). Furthermore, state immunity legislation in several countries, including Argentina, Australia, Canada, Hungary, Israel, Japan, Pakistan, Russia, Singapore, Spain, South Africa, the United Kingdom, and the United States, restricts immunity to judicial proceedings while excluding executive or administrative measures. As a result, framing confiscation as an executive or legislative action enables it to avoid the limits of state immunity (Webb, 2024, p. 12).

For a state to pursue it is to acknowledge openly that the confiscation of Russian Central Bank (RCB) assets constitutes a breach of Russia's immunity from enforcement. However, this breach could be defended on the grounds that it qualifies as a lawful countermeasure. Under international law, violations of this nature may be justified if they are taken as a direct response to an internationally wrongful act committed by another state and are specifically targeted at that state. Other conditions of lawfulness include ensuring that the primary aim of the measure is to induce the offending state to comply with its international obligations, temporary nature of the measure and reversibility (Webb, 2024, p. 14).

For Ukraine, these legal precedents offer practical significance as they allow to seek justice and reparations, since Ukraine is seeking to apply countermeasures against Russia, especially in the form of confiscating Russian state assets. The analysis of the concept of state immunity in practice poses a great significance, since it facilitates the exploration of limits of such immunity. This, in turn, gives Ukraine opportunities to expand its framework on countermeasures and hilghlights ways for Ukraine to apply certain countermeasures against Russia.

4.2. Human Rights : Legal Implications and Challenges for Countermeasures

Implementing countermeasures against states that violate international law requires a careful balance between enforcement and the protection of fundamental human rights. Actions such as asset freezes, confiscations, or trade restrictions must operate within a framework that upholds transparency, fairness, and due process. Safeguarding rights such as property ownership and access to legal remedies is essential to ensure that countermeasures remain lawful and proportionate. Countermeasures should also extend

beyond individual conflicts, establishing a consistent legal foundation to address violations of human rights and humanitarian law globally. This includes provisions for the utilization of confiscated resources to benefit victims of violations, ensuring that justice serves not only immediate needs but also broader humanitarian goals. Governments can enhance fairness and accountability by integrating administrative mechanisms for asset confiscation, judicial oversight, and effective appeal systems (Sanction. Confiscate. Compensate…, 2022, p. 3). By adhering to these principles, countermeasures can uphold international law and human rights, demonstrating that accountability can be achieved without undermining fundamental legal and procedural safeguards.

Furthermore, the International Law Commission (ILC) highlighted in its Articles on State Responsibility that countermeasures must not violate some fundamental obligations. These include obligations to refrain from threatening or using force, as specified in the UN Charter, to defend fundamental human rights, humanitarian obligations that prevent reprisals, and other duties established under peremptory standards of general international law (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 50 para. 1). Therefore, the ARSIWA indicates that countermeasures must not violate commitments to preserve fundamental human rights, as stated in Article 50(1)(b). This paragraph requires the state deploying the countermeasure to comply with its own human rights duties. In practice, authorities cannot justify suspending or violating human rights responsibilities as a countermeasure. For example, a state cannot claim that another's violation of international law allows it to torture, deny fair trials, or commit other human rights violations within its borders (Scott, 2014, p. 3.). The embodiment and confirmation of these principles can be found in practical cases. For instance, in the *Naulilaa* arbitration, the tribunal emphasized that a lawful countermeasure must adhere to the requirements of humanity and the principles of good faith governing relations between States (Draft articles on Responsibility of States…, 2001, p. 132).

Notably, none of the responses now being reviewed by the Human Rights Council (HRC) that have a major impact on human rights entail the responding state violating its own human rights commitments. Instead, these regulations have an impact on how individuals in the targeted state exercise their rights. For example, restricting aid may hinder the target state's ability to meet its human rights duties or limit the population's access to basic rights. Financial countermeasures, such as trade restrictions or embargoes, are especially indicative of this dynamic because of their far-reaching economic consequences. While these actions may have an unfavorable effect on the human rights situation in the targeted state, they may not constitute direct violations by the state enforcing

the countermeasures. The underlying issue is the lack of legal responsibility for one state to assist another in meeting its human rights responsibilities. As a result, the prohibition on breaking human rights commitments, as outlined in the ILC Articles, does not properly handle this circumstance. This highlights the complexities of examining the relationship between countermeasures and human rights implications in the context of international law (Scott, 2014, p. 3).

Countermeasures impacting the enjoyment of human rights in the target state may be deemed disproportionate under certain circumstances. As Dr. D. Azaria, Dr. K. Parlett, Prof. A. Tzanakopoulos argue, the main challenge lies in establishing a clear causal link and proving that any difficulties related to human rights in the target state resulted directly from the countermeasure imposed by the reacting state. During the UN meeting in Geneva in May 2014, states argued this point, claiming that countermeasures hindered the targeted state's ability to fulfill its human rights obligations. However, this argument is contentious, as other states countered with evidence suggesting that the "governing elite" of the targeted state could redirect resources — intended to support human rights — to serve their interests, such as self-preservation or military expenditure. This undermines the claim that countermeasures alone are responsible for the population's lack of human rights enjoyment. Instead, it could be argued that the government's misallocation of resources contributes significantly to these issues. This demonstrates the difficulty of establishing a clear connection between countermeasures and their impact on human rights, making it challenging to assess their practical effects. These considerations underline the complexity of determining responsibility and the legal framework surrounding countermeasures, particularly when human rights are at stake (Scott, 2014, p. 3).

In conclusion, countermeasures face challenges regarding obligations in the human rights protection field, since they must both enforce international law and safeguard human rights. One of the ways to do so is not to apply broad countermeasures that will affect the whole population of the breaching state. It is possible to apply targeted measures affecting specific subjects, e.g. oligarchs. However, in current circumstances, countermeasures will likely affect the broader group of people in the target state. Even though sometimes it is difficult to link the use of countermeasures to violations of human rights, the injured state must make sure they are not disproportionate.

4.3. Limits of Countermeasures: Proportionality, Necessity, and Due Process

The application of countermeasures in international law requires strict adherence to conditions of lawfulness to ensure that they remain justifiable and proportionate. According to Article 49(1) of the ARSIWA, countermeasures are only authorized if they are designed to compel the responsible state to "comply with its obligations". This compliance involves putting an end to any ongoing wrongful activity and offering compensation to the affected party (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 49 para. 1). As P. Webb states, countermeasures are not intended to be used as a form of punishment for wrongdoing. Some critics say that seizing Russian Central Bank (RCB) assets and reversibility of such measures may increase Russia's motivation to comply with its responsibilities, matching the measure with its original goal of fostering compliance (Webb, 2024, p. 26).

According to Article 49(2) of the ARSIWA, authorized countermeasures are limited to the temporary non-performance of international duties by the state implementing the measures against the responsible state (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 49 para. 2). The ILC intended to create a rigorous time restriction, ensuring that responses remained coercive rather than punitive. This demand for temporality contrasts with greater flexibility in terms of reversibility. Some may argue that as a result, nations cannot use countermeasures to justify permanent confiscation of Russian Central Bank (RCB) assets. When a state uses countermeasures against foreign property, it must be able to return the property in its original form, including any accumulated interest or profits, once the countermeasures are lifted (Webb, 2024, p. 26-27). It is worthy to view this statement in the light of the concept of reversibility. To avoid countermeasures from being used as punitive acts, Article 49(3) of ARSIWA requires that countermeasures be implemented in a way that allows for the resumption of the fulfillment of the responsibilities in question. This indicates that the necessity for reversibility is not absolute. For example, given the liquidity and fungibility of RCB assets, James Crawford, the ILC Rapporteur for ARSIWA, noted that financial damage, such as loss of earnings or interest, is rarely permanent (Crawford, J. 1994, p. 68). Both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have acknowledged that financial loss is not "irreparable" and thus "reversible" while considering temporary measures. As a result, the need of reversibility does not preclude a state from deploying countermeasures to justify the confiscation of RCB assets, as long as Russia is entitled to retrieve its assets once it has met its restitution obligations (Webb, 2024, p. 26-27).

The elements of enticement, temporariness, and reversibility would all be met if Ukraine received the entire amount of RCB assets, rather than simply the interest, in the

form of a loan, subject to Russia meeting its commitment to give reparation. States could stipulate that the assets would be returned to Russia once it fulfilled the compensation commitment. Alternatively, governments might transfer the assets to a compensation mechanism, performing the function of reparations to Ukraine for breaching international law regulations. The countermeasures, which would include transferring frozen assets to Ukraine and other affected parties, would be proportionate. As indicated in Article 51, they would be compensatory rather than punitive, with the goal of assisting Ukraine in mitigating the harm and beginning the recovery process. The financial expenses of recovery significantly outweigh the value of the frozen Russian assets, thus there is little danger that the remedies will result in an excessive transfer. Furthermore, any funds transferred to Ukraine would be credited to Russia, substantially decreasing its liability rather than imposing penalties (Webb, 2024, p. 27-28).

If the value of the transferred assets exceeds the amount owed in reparations, the surplus may be returned to Russia. As P. Webb states, the suggested countermeasure, transferring frozen Russian state assets to an international compensation system that will pay compensation to Ukraine or other harmed parties on Russia's behalf, fully meets the ILC's reversibility criteria. It ensures that past legal relations are restored because the relevant assets are fungible and can be returned if the reason for the countermeasure is no longer valid. The ILC further underscores that states should refrain from implementing actions that result in "irreparable damage". If there are lawful and effective countermeasures available, nations should choose those that allow the suspension of responsibilities to be reversed. In fact, when transferring frozen assets, governments may declare that the assets will be returned if Russia complies with its responsibilities to cease and make compensation. Alternatively, the rules controlling the compensation process may state that Russia would receive credit for any reparations paid, with the remaining debt lowered correspondingly. If the value of the transferred assets exceeds the amount owed in reparations, the surplus may be returned to Russia. In either case, this method would not cause irreparable harm to Russia (Webb, 2024, p. 27-28).

States planning to take countermeasures must also "call upon" the responsible state to comply with its international commitments and notify the responsible state of any decision to take countermeasures, proposing to engage in negotiations. The international community has already met this need by giving Russia multiple opportunities to discuss. Article 52 of ARSIWA does not require a state to use all channels to notify Russia of its intention to take countermeasures (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 52). The governments have already begun consultations regarding the

conflict between Ukraine and Russia, meeting this condition. For example, on February 26, 2022, Ukraine started ICJ proceedings against Russia, questioning the legal basis for Russia's so-called "special military operation" in Ukraine. In November 2022, the UN General Assembly passed a resolution stating that "Russia must be held to account for any violations of international law in or against Ukraine" (Webb, 2024, p. 28).

Article 52(3) states that countermeasures may not be used if the globally wrongful act has ended and the dispute is before a court or body with the jurisdiction to impose binding decisions on the parties (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 52 (3))). However, P. Webb argues that this rule has no bearing on the use of countermeasures in the context of the Ukrainian conflict for two reasons. First, the criterion in Article 52(3)(b), which prohibits countermeasures whenever a dispute is pending before a competent court or tribunal, does not apply if the responsible state fails to participate in the dispute resolution process in good faith or is unwilling to cooperate. Russia has not cooperated with the ICJ's Order for Provisional Measures, which directed Moscow to "immediately suspend the military operations" in Ukraine that began on February 24, 2022. Second, and more importantly, Articles 52(3)(a) and (b) are cumulative, according to the ILC analysis. It indicates that countermeasures are not appropriate when the wrongful act has ended, and the issue is being actively resolved in good faith by a court or tribunal with binding power over the parties. Because Russia's military activities are ongoing and reparation has not yet been made, the wrongful act continues, and so the restrictions in Article 52(3)(b) cannot be imposed (Webb, 2024, p. 28-29).

Three additional concerns occur as a result of, but do not preclude, employing countermeasures to justify the confiscation of Russian Central Bank (RCB) assets. First, Article 51 of the ARSIWA requires that countermeasures be commensurate to the injury suffered, taking into account both the magnitude of the internationally unlawful act and the rights at risk (Responsibility of States for Internationally Wrongful Acts, 2001, Art. 51). Given the scope of Russia's aggression and the enormous damage incurred by Ukraine — which is likely to exceed the value of the frozen Russian state assets — the confiscation of Russian assets can be judged proportionate to the harm Ukraine has suffered. Second, identifying the exact amount Russia owes is difficult during an ongoing battle, weakening the case for collective responses against an unknown quantity. However, considering the substantial damage caused by Russia's activities, the RCB assets are unlikely to be worth more than the reparations owed. There is no need to postpone determining restitution until the disagreement is resolved. The General Assembly's condemnation of Russia's conduct underlines the gravity of the violation, emphasizing the global consensus that Russia's

aggression violates a basic premise of the rules-based international order. Furthermore, Ukraine's claims to sovereignty, territorial integrity, political independence, and compensation are obviously important. These rights are vital to Ukraine's very survival as a sovereign state, hence the recommended responses are extremely relevant and necessary (Webb, 2024, p. 29-30).

Therefore, it is critical to follow proper application of countermeasures, adhering to the rules on their legitimacy. Since states apply such measures at their own risk it is in their own interests to follow all criteria of lawfulness of countermeasures. Otherwise, the state implementing unlawful measures would breach the international law itself. As seen in the case of the possible Russian assets freeze and confiscation, states must apply measures carefully with a sound justification of such application. Ukraine has a good legal basis to justify these assets freeze under international law, analyzing all the criteria inherent to the concept. Other states condemning Russia’s actions is helpful as well as it underlines the gravity of these actions and supporting the justification of measures.

CONCLUSIONS AND PROPOSALS

1. By tracing the origins of countermeasures and their application across various time periods and in different forums, it is possible to say that countermeasures have always served as a vital mechanism for implementing state responsibility . However, their historical evolution illustrates the transformation from retaliatory practices to a more sophisticated legal framework. Despite being used over the centuries, they are consistent in following foundational criteria. Legal limitations of countermeasures, such as prior wrongful act, proportionality, due process etc., are critical to their legitimacy. These criteria ensure that countermeasures remain lawful responses within the framework of international law. By adhering to these limitations, states respond to violations and enforce states responsibility while minimizing the risks of escalating conflicts or committing wrongful acts themselves.

2. The comparative analysises shows the differences between countermeasures and other legal mechanisms for responding to violations of international law. Unlike retorsions, reprisals and self-defence, countermeasures operate within a strict framework, designed to ensure their lawfulness and prevent abuse of their implementation. Due to similarities in legal nature, sanctions are usually described by scholars to consist a part of countermeasures. Therefore, the abundance of the measures leaves space for international law to develop, clarify interpretations and to eliminate confusion in their application.

3. The analysis of specific cases under the WTO, before international courts and arbitral tirbunals highlights valuable insights into their application in practice. They show how countermeasures are applied to address violations, portraying the difficulties of such a process. Each institutional framework brings insights into how countermeasures are adapted to different political and legal contexts. While examining these cases, it is clear that despite the effectiveness of countermeasures, their use is highly context-based and subjective, influences by the facts of the case, court's interpretation of legal framework and specific circumstances.

4. The research on innovative countermeasures in cyberspace, along with collective countermeasures, shows both the evolving nature of the concept and new challenges it faces. While countermeasures in cyber realm offer potential solutions to new threats in form of hybrid warfare, cyber attack etc., their legal implications are still a topic for debates, especially regarding the issues of attribution and proportionality. The concept of collective countermeasures consists of another complication, raising questions about the legitimacy and necessity of a multilateral response. However, while there remains a need

for a more extensive legal framework and consensus to ensure their lawful application, such countermeasures are widely and effectively used by state in moder society.

5. The investigation of the state immunity and human rights concepts in relation to countermeasures shows a complex intersection and correlation between these notions. As demonstrated in several cases, involving countermeasures, the concept of state immunity is not absolute as in certain instances the application of countermeasures has been justified even when such use would violate this principle. The important thing to mention is that the countermeasures applied must be lawful. Furthermore, while countermeasures have to restrain from infringing upon human rights, it is difficult to definitively define that the human rights were breached as a consequence of implementation of countermeasures. It highlights the complexity of assessing the effects of countermeasures on human rights and state immunity and underlines the importance of clear guidelines on their use in such instances.

6. The research determines that countermeasures may serve as an effective tool for other states and Ukraine to respond to the breaches of international law by Russia, provided they are strictly adherent to the legal framework. It is important for Ukraine to explore innovative countermeasures to address the breaches of an adversary in an affective and lawful way. Despite the application of various countermeasures, Russia has not seized violating international law. By exploring and implementing innovative and collective strategies, Ukraine can strengthen its response to ongoing breaches.

7. The conditions of proportionality, due process etc. are essential for the lawful application of countermeasures. However, thei practical use is often dependent on the specifics of each case. These criteria have been essential in shaping Ukraine’s response to Russia’s aggression. Still, following them constitutes a major challenge, underlining the importance of clarity in the application to ensure legality and consistency.

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SUMMARY (IN ENGLISH)

Countermeasures in International Law

Yana Daniv

This paper provides a comprehensive analysis of the concept of countermeasures in international law, combining the findings of legal doctrine, case law and practical application. The thesis also examines the historical development of the concept, establishing almost complete consistency in its interpretation, except for matter arising from modern challenges. The legal framework is addressed in the paper as well, emphasizing on legal criteria, such as prior notification or proportionality, as ways to make countermeasures lawful and non-breaching international law.

Countermeasures are also analyzed through the study of the application of legal doctrine in international cases by the WTO, before international courts and arbitral tribunals, defining that usually the application of legal criteria is subjective and context-dependent. The paper investigates the evolving nature of countermeasures, including their application in cyber realm and collective actions, emphasizing on the controversies of these issues and current state practice. This leads to the analysis of a specific case – Russia's aggression against Ukraine – to investigate a contemporary example of injured state's navigation of countermeasures application. By examining this, the thesis provides a few possible mechanisms and recommendations for Ukraine to expand its response framework against Russia, ensuring its lawfulness and justification, especially when studying the concepts of state immunity and human rights protection. The paper concludes, that countermeasures are a vital tool for injured states to restore their rights, even if the successful application requires compliance with established legal principles and consideration of broader consequences.

SUMMARY (IN LITHUANIAN)

Atsakomosios Priemonės Tarptautinėje Teisėje

Yana Daniv

Šiame darbe pateikiama išsami tarptautinės teisės atsakomųjų priemonių sampratos analizė, derinant teisės doktrinos išvadas, teismų praktiką ir praktinį taikymą. Darbe taip pat nagrinėjama istorinė sąvokos raida, įtvirtinant beveik visišką jos interpretavimo nuoseklumą, išskyrus iš šiuolaikinių iššūkių kylančią materiją. Straipsnyje taip pat nagrinėjama teisinė bazė, pabrėžiant teisinius kriterijus, tokius kaip išankstinis pranešimas arba proporcingumas, kaip būdus, kaip padaryti atsakomąsias priemones teisėtomis ir nepažeidžiančiomis tarptautinės teisės.

Atsakomosios priemonės taip pat analizuojamos tiriant teisės doktrinos taikymą tarptautinėse bylose PPO, tarptautiniuose teismuose ir arbitražiniuose tribunoluose, apibrėžiant, kad paprastai teisinių kriterijų taikymas yra subjektyvus ir priklausomas nuo konteksto. Straipsnyje nagrinėjamas besikeičiantis atsakomųjų priemonių pobūdis, įskaitant jų taikymą kibernetinėje srityje ir kolektyvinius veiksmus, pabrėžiant šių klausimų prieštaravimus ir dabartinę valstybės praktiką. Tai veda prie konkretaus atvejo – Rusijos agresijos prieš Ukrainą – analizės, siekiant ištirti šiuolaikinį sužalotos valstybės valdymo atsakomųjų priemonių taikymo pavyzdį. Nagrinėjant tai, darbe pateikiami keli galimi mechanizmai ir rekomendacijos Ukrainai plėsti reagavimo į Rusiją sistemą, užtikrinant jos teisėtumą ir pagrįstumą, ypač nagrinėjant valstybės imuniteto ir žmogaus teisių apsaugos sampratas. Darbe daroma išvada, kad atsakomosios priemonės yra gyvybiškai svarbi priemonė nukentėjusioms valstybėms atkurti savo teises, net jei sėkmingam taikymui reikia laikytis nustatytų teisinių principų ir atsižvelgti į platesnes pasekmes.