Collective Countermeasures Upon Request: Renewing the debate in view of the rise of cyberthreats

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INTRODUCTION

The emergence of new technologies can make us look at old problems in a new light. This at least seems true as it applies to the rise of cyberspace as a major battleground for States and the question of the legality of "collective countermeasures."[1] In recent years, both States and legal scholars have shown more interest in this concept than ever before—and with good reason. The logic of collective countermeasures fits exceptionally well with the challenges posed by the cyber domain. This is particularly true for States that fear becoming the target of serious cyberattacks that they alone cannot effectively counter. Many cyberattacks fall below the threshold that allows States to ask allies for assistance through the doctrine of collective self-defense. In such cases, an attractive option could be to instead ask allies for assistance in countering such attacks through the employment of collective countermeasures.

Indeed, it is likely concerns about these types of scenarios have pushed the question of the legality of collective countermeasures to the forefront of the cyber-specific debate, and several States have engaged proactively and publicly with this problem in recent years. Namely, in May 2019, Estonian President Kersti Kaljulaid, started the conversation by expressing support for the notion that States that "are not directly injured may apply countermeasures to support [a] state directly affected by [a] malicious cyber operation."[2] Only a few months later, in September 2019, the French Ministère Des Armées entered the debate with the opposite claim, noting that "[c]ollective counter-measures are not authorised,

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1. This concept is borrowed from James Crawford, the fifth and final special rapporteur on State Responsibility. It should be noted, however, that alternative terms are often used. For more on terminology, *see* MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 33–34 (2017).

2. NATO CCDCOE, *Keynote address by H.E. Kersti Kaljulaid, President of the Republic of Estonia - CyCon 2019*, YOUTUBE (May 29, 2019), https://www.youtube.com/watch?v=tdWPjEKARVA.

which rules out the possibility of France taking such measures in response to an infringement of another State's rights."[3] In December 2020, New Zealand's Ministry of Foreign Affairs and Trade issued a statement in which it seemingly supported the Estonian view, noting that it was "open to the proposition that victim states, in limited circumstances, may request assistance from other states in applying proportionate countermeasures to induce compliance by the state acting in breach of international law."[4] Conversely, in April 2022, the Government of Canada issued a statement arguing that it "does not, to date, see sufficient State practice or *opinio juris* to conclude that [collective cyber countermeasures] are permitted under international law."[5] In a May 2022-speech, while discussing options for responses to hostile cyber activity, the UK Attorney General noted that, since some States do not have the capacity to respond effectively to infringements, "[i]t is open to States to consider how the international law framework accommodates, or could accommodate, calls by an injured State for assistance in responding collectively."[6] Finally, in their respective 2023-position papers on the application of international law in cyberspace, Denmark, Ireland, and Costa Rica all expressed support for the view that at least some collective countermeasures are legal. Though it noted that "[t]he question of collective countermeasures does not seem to have been fully settled." Denmark found that "there may be instances where one State suffers a violation of an obligation owed to the international community as a whole, and where the victim State may request the assistance of other States in applying proportionate and necessary countermeasures in collective response hereto."[7] Ireland, similarly, noted that State practice since 2001 "indicates" that collective countermeasures "are permissible in limited circumstances, in particular in the context of violations of peremptory norms."[8] Costa Rica argued that not only specifically injured States but also third States may employ countermeasures "in response to violations of obligations of an *erga omnes* nature or upon request by the injured State."[9] As

3. Ministère Des Armées [Ministry of Armed Forces], *International Law Applied to Operations in Cyberspace, 7* (2019) (Fr.).

4. Ministry of Foreign Aff. & Trade, *The Application of International Law to State Activity in Cyberspace* ¶ 22 (2020) (N.Z.).

5. GOVERNMENT OF CANADA, *International Law Applicable in Cyberspace* ¶ *37* (2022), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng#a9.

6. Suella Braverman, Attorney General of the United Kingdom, *International Law in Future Frontiers* (May 19, 2022), https://www.gov.uk/government/speeches/international-law-in-future-frontiers.

7. Denmark's Position Paper on the Application of International Law in Cyberspace, NORDIC J. INT'L L. 9 (2023).

8. IRELAND DEPARTMENT OF FOREIGN AFFAIRS, Position Paper on the Application of International Law in Cyberspace ¶ 6 (2023), https://dfa.ie/media/dfa/ourrolepolicies/internationallaw/Ireland—-National-Position-Paper.pdf.

9. Costa Rica's Position on the Application of International Law in Cyberspace ¶ 5 (2023), https://docs-library.unoda.org/Open-

such, State opinion on the matter varies wildly, although the most recent statements tilt clearly in favor of the legality of at least some collective countermeasures.

Along with the increase in State-attention, we see a similar re-emergence of scholarly attention on the topic of collective countermeasures in the context of the cyber-domain.[10] Indeed, over a relatively short time period, opinions have changed quite dramatically on this matter among key participants of the debate – from a standpoint of denying the right to take collective countermeasures *per se* to a standpoint of not only supporting but endorsing the idea.[11] It is too early to say whether this is a reflection of a general trajectory, but the winds certainly seems to be blowing in that direction.

If we look at this specific legal conundrum, the problem can broadly be understood in the following way: A State that is injured by another State's unlawful conduct is allowed to employ countermeasures. Countermeasures are defined as acts (or omissions) that would normally be considered internationally wrongful but are justified because they are undertaken in response to unlawful conduct with the aim of inducing the infringing State to cease such unlawful conduct and/or pay reparations. There can be little doubt that these measures are legal. *Collective* countermeasures involve variations to this scenario, where non-injured States take part in the defensive effort. The legality of such measures has been a fraught question for decades. The legal debate on the issue peaked during the later stages of the work of the International Law Commission (ILC) and the United Nations General Assembly's Sixth Committee on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA). However, while agreements on the legality of collective countermeasures remained difficult to obtain, ARSIWA was finalized and adopted in late 2001 without a solution to the problem. Since then, only a few scholars have examined the question in depth, and the issue was only seriously re-invigorated recently, as the perils of cyber-conflict became apparent.

The recent resurgence of focus on this issue, therefore, essentially adds to a discourse that has been ongoing for some time—although at relatively low intensities since 2001. However, contrary to most of the earlier contributions, the statements referred to above focus solely on those collective countermeasures that can be characterized as "collective countermeasures upon request." These are

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Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Costa_Rica_-_Position_Paper_-_International_Law_in_Cyberspace.pdf.

10. *See* Samuli Haataja, *Cyber Operations and Collective Countermeasures under International Law*, 25 JC&SL 33 (2020); Przemyslaw Roguski, *Collective Countermeasures in Cyberspace* – LEX LATA*, Progressive Development or a Bad Idea?, in* 12TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT - 20/20 VISION: THE NEXT DECADE, 25 (Tatiana Jančárková et al. eds., 2020); Jeff Kosseff, *Collective Countermeasures in Cyberspace*, 10 NOTRE DAME J. INT'L & COMP. LAW 18, 25 (2020); Michael N. Schmitt & Sean Watts, *Collective Cyber Countermeasures?*, 12 HARV. NAT'L. SEC. J. 373 (2021). *See also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 131–32 (Michael N. Schmitt, gen. ed., 2017).

11. *See* the author's note for Michael N. Schmitt in *Schmitt & Watts*, *supra* note 10, at 373.

countermeasures undertaken by non-injured States at the request of an injured State in contexts where there is no right of collective self-defense, because the requisite threshold has not been met, or in situations where a potential right of self-defense has simply not been asserted.

This focus is narrower than the traditional "collective countermeasures" debate. In this broader debate, these kinds of countermeasures—which are based on requests from injured States—are usually conflated with another type of collective countermeasure—one in which States react to another State infringing upon the fundamental rights of its own citizens in efforts that can resemble "humanitarian interventions."[12] In these situations, a State has not been the victim of an infringement of its rights at the hands of another State, and thus there is no request.

While both kinds of intervention merit serious consideration, the former is more limited in scope and has, I believe, a stronger foundation than the latter. Therefore, it is beneficial to separate these two issues analytically and decide on the strength of arguments for and against each one individually. In this Article, I shall focus my attention on the question of a potential right to take "collective countermeasures upon request."

Because the idea of collective countermeasures is considered controversial, this Article will examine the arguments that are commonly made against the legality of collective countermeasures and assess their validity in the context of collective countermeasures upon request. These arguments are: 1) that the International Court of Justice (ICJ) held collective countermeasures to be unlawful in the *Nicaragua*-case;[13] 2) that State practice is too limited to support the development of a customary norm; and 3) that available expressions of *opinio juris* on the matter are mainly negative. I shall go through each of these arguments below in Parts III-V. Before I do so, however, it is necessary in Part I to detail the core of the legal debate, and in Part II to establish some key assumptions. Finally, I conclude in Part VI by summarizing the findings of Parts III-V and assessing the collective weight of the arguments in regards to collective countermeasures upon request.

I. STATUS QUO IN THE DEBATE ON COLLECTIVE COUNTERMEASURES

When the UN General Assembly adopted its resolution by a vote of 56/83 on December 12, 2001, it marked the end of one of the longest and most complex legal processes in UN history: the creation of ARSIWA. This process, which formally began in 1956, would require the work of no less than five special

12. On the separation of these questions, *see* Ashley Deeks, *Defend Forward and Cyber Countermeasures*, Aegis Series Paper No. 2004, 3 (2020).

13. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 211, 249 (Jun. 27) [hereinafter Nicaragua judgment].

rapporteurs, who produced 33 reports between them.[14] Although the finish line was initially the adoption of a treaty, that could not be accomplished, and, instead, 59 Draft Articles and commentary on the responsibility of States were adopted. Irrespective of the non-binding nature of this document, it is hard to overstate the importance of ARSIWA. Lawyers, judges, diplomats, and academics all over the world rely on it for insights into a range of issues, including questions concerning countermeasures. Indeed, ARSIWA contains a full chapter on countermeasures that remains the starting point for most analyses of the concept today. However, one question that the chapter does not answer is whether *collective* countermeasures are legal. As such, the chapter ends with a statement in Article 54, which essentially says that nothing was decided on the matter. This article constitutes the center of the current debate on collective countermeasures. It reads as follows:

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

The article is hardly a model in clarity,[15] and it does not help that it discusses "lawful measures" rather than "countermeasures" *ad verbatim*, which causes confusion because countermeasures are, per definition, *prima facie* unlawful.[16] Nevertheless, there can be little doubt that the focus of the article is countermeasures, and that it aims to make clear that while ARSIWA does not contain rules on collective countermeasures, it should not be read as prejudicing the potential right of States to enact such measures.

We can be certain that Article 54 deals (implicitly) with collective countermeasures because of its backstory. A previous version of the article would have allowed for collective countermeasures but was amended to the above form because of skepticism among States. This was done in an effort to table the discussion and move the ARSIWA-process forward.[17] This backstory, as explored further below, is key to understanding the current situation.

One of the consequences of the situation reflected in Article 54 is that most international lawyers seem highly skeptical of collective countermeasures, or

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14. In chronological order: Francisco V. García-Amador (six reports); Roberto Ago (eight reports); Willem Riphagen (seven reports); Gaetano Arangio-Ruiz (eight reports); James Crawford (four reports); *see* James Crawford, Articles on Responsibility of States for Internationally Wrongful Acts, 1 (2001).

15. *See also* Linos-Alexandre Sicilianos, *Chapter 80: Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1137, 1144 (JAMES CRAWFORD, ALAIN PELLET & SIMON OLLESON eds., 2010).

16. *See also* Christian J. Tams, *All's Well that Ends Well? Comments on the ILC's Articles on State Responsibility*, 62 ZAÖRV 759, 789 (2002).

17. James Crawford (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, para. 74, U.N. Doc A/CN.4/517 and Add. 1–4 (Apr. 2, 2001) [hereinafter Crawford's Fourth Report].

simply disregard the issue when discussing countermeasures in general. This is what Jeff Kosseff frames as a "general sentiment against collective countermeasures."[18] While this sentiment may be slowly changing, the skeptical stance was prominently expressed within the cyber-specific debate by the "majority of the Experts" involved in the Tallinn Manual 2.0.[19] These experts concluded that "purported countermeasures taken on behalf of another State are unlawful."[20] In support of this claim, the majority pointed to the *Nicaragua* judgment and the work of the ILC in connection with ARSIWA. Other scholars simply refer to the majority in *Tallinn* when discussing collective countermeasures in the cyber-domain.[21] Similarly, in works that predate the Tallinn Manual 2.0, scholars often simply note that countermeasures are tools available to injured States.[22]

However, a growing set of studies, which mostly predate the Tallinn Manual 2.0, challenge the main arguments put forward by those skeptical of the legality of collective countermeasures. They do this largely by presenting detailed analyses of State practice and *opinio juris*.[23] The existence of these studies is also beginning to affect cyber-specific scholarship,[24] although this is hardly a universal development.[25] Indeed, if we look closer at cyber-specific scholarships, it becomes clear that participants in this debate remain hesitant on the matter, irrespective of a common sentiment that collective countermeasures endow many benefits in the sphere of cyberconflict. Jeff Kosseff, for example, argues that the Estonian call for allowing collective countermeasures within the cyber domain "is the correct normative approach" and that the traditional skeptical stance against collective countermeasures should be reconsidered.[26] He does not base his views on the mentioned studies, but rather on normative considerations, such as the idea that the global interconnectedness of cyberspace makes taking a reluctant stance towards collective countermeasures more tenuous, and that the persistent nature of the cyber threat makes it desirable to allow States to collaborate and pool resources.[27]

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18. Kosseff, *supra* note 10, at 19.

19. TALLINN MANUAL 2.0, *supra* note 10, at 132.

20. *Id*.

21. *See, e.g.*, Erik Talbot Jensen & Sean Watts, *A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?* 95 TEX L. REV. 1555, 1564 (2017).

22. *See, e.g.*, Anders Henriksen, *Lawful State Responses to Low-Level Cyber-Attacks*, 84 NORDIC J. INT'L L. 323 (2015); Katharine Hinkle, *Countermeasures in the Cyber Context: One More Thing to Worry About* 37 YALE J. INT'L L. ONLINE 11 (2011).

23. *See* CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW, 309–11 (2005); ELENA KATSELLI PROUKAKI, THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY, 113 (2010); DAWIDOWICZ, *supra* note 1.

24. *See* Haataja, *supra* note 10; Roguski, *supra* note 10.

25. *But see generally* Kosseff, *supra* note 10.

26. *Id*. at 19.

27. Kosseff, *supra* note 10, at 29–31.

Similarly, Samuli Haataja argues that "a limited right of collective countermeasures should be recognized in the cyber context."[28] While he stops short of claiming that such a legal right exists under current international law, he does argue the point as "essentially an extension of the idea of collective self-defense"[29] and refers in passing to the studies mentioned. He nevertheless focuses on the "strong policy reasons" for allowing collective countermeasures in response to cyber operations.[30] One of the limits he imposes in this respect is that collective countermeasures should only be employed if the injured State "specifically requests assistance."[31]

Going further still is Przemyslaw Roguski, who argues that international law has evolved since 2001 to allow collective countermeasures in cases involving violations of collective obligations.[32] He argues this point, for example, through references to some of the studies mentioned, though he does not deal with some of the most prominent arguments usually presented against legality, such as concerns based on the *Nicaragua*-case. Roguski also does not consider questions concerning requests for assistance.

In general, the cyber-specific studies do not go into much detail in their discussions of the status quo of State practice, *opinio juris,* or case law relating to collective countermeasures upon request—although they do add valuable considerations aimed specifically at the cyber domain. Notably, it seems that two key problems permeate the cyber-specific literature on collective countermeasures, including the Tallinn Manual 2.0. The first problem is that the available, detailed studies on State practice and *opinio juris* have not been sufficiently incorporated into the debate. This absence leaves us with an outdated and under-argued *status quo*. The second problem is that we often fail to appreciate that the focus of the cyber-specific debate is narrower than the general debate about collective countermeasures. As such, what we almost exclusively discuss is the legality of collective countermeasures *upon request*, but this narrowed focus has not significantly influenced assessments of the available case law or evidence of practice and *opinio juris*. I believe that this narrowed focus is key to understanding the problem, and this will be the guiding insight of this Article. Indeed, if we look more closely at the most commonly presented arguments against the legality of collective countermeasures, they are often less problematic when we focus on collective countermeasures upon request.

28. Haataja, *supra* note 10, at 1.

29. *Id*.

30. Haataja, *supra* note 10, at 17–18.

31. *Id*. at 19.

32. Roguski, *supra* note 10, at 25.

II. KEY LEGAL ASSUMPTIONS

To conduct a broad review of the legal status of collective countermeasures upon request, it is necessary to clarify some key legal assumptions that underpin my analysis, as doing so will reduce the necessary detail needed in the case analysis below. I shall define the concept of "countermeasure" and explain when countermeasures are considered "collective." The first element involves determining when certain acts (or omissions) are *prima facie* unlawful, while the second element involves defining the concept of an "injured State." After providing these definitions, I shall briefly touch upon the requirements for identifying customary norms in international law.

A. When does an act (or omission) qualify as a "countermeasure"?

While no authoritative definition of a "countermeasure" exists in international law, the concept includes non-forcible acts of self-help by States that are 1) "not in conformity with an international obligation towards another State"[33] and 2) taken in response to another State's initial, unlawful act. Under Article 22 of ARSIWA, the wrongfulness of such a response is precluded if and to the extent it is taken in accordance with the rules laid down in ARSIWA. A key question, therefore, becomes whether the relevant reaction was *prima facie* unlawful. If this is not the case, the reaction would generally be considered a lawful act of retortion, which does not need legal justification. For the purposes of this Article, it is worth focusing on the most common reactions discussed under the auspices of countermeasures: the freezing of State assets and the breach of international agreements, including trade agreements.

1. Freezing State assets

As the fifth and final Special Rapporteur on State responsibility, James Crawford conducted one of the key studies on State practice on collective countermeasures.[34] This study was included in the ILC-comments to Article 54 of ARSIWA. Accordingly, his choice of cases is illustrative of what key experts and States consider to be *prima facie* breaches of international law. It should be noted that Crawford included cases in which third States introduced asset freezes

33. Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, Art. 22, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ARSIWA].

34. James Crawford (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, at paras. 391–93, U.N. Doc A/CN.4/507 and Add. 1–4 (Mar. 15, 2000) [hereinafter Crawford's Third Report].

against the infringing State.[35] Similarly, the ILC commentary on Article 52(2) made clear that such freezes are *prima facie* unlawful.[36]

While there can be little doubt that the ILC presumed that State asset freezes were *prima facie* unlawful, neither Crawford nor the ILC explained exactly why. This presumptive approach has largely been adopted in later scholarship as well.[37] For example, Christian Tams' 2005-study simply noted that "the freezing of foreign assets […] constitutes a coercive interference with another State's property, and requires justification."[38] Similarly, in his 2017-study, Martin Dawidowicz notes that "[t]he assets of the responsible State, including those belonging to high-ranking officials such as Heads of State and Prime Ministers, as well as central banks, have also regularly been frozen in prima facie violation of general international law."[39] Dawidowicz does not explain this analysis in detail, but he does refer to the ICJ's *Arrest Warrant* case,[40] which found that high-ranking officials enjoy jurisdictional immunity. Dawidowicz also refers to the yet to be activated *UN Convention on Jurisdictional Immunities of States and Their Property*, which prohibits the freezing of assets belonging to central banks. Dawidowicz refers specifically to Article 21(1)(c) of this convention, which lists the property of central banks and other monetary authorities belonging to the categories protected in relation to post-judgment measures of constraint. Whether these rules reflect a broader principle is not considered explicitly by Dawidowicz, but one must assume that this is essentially the argument. However, key elements of his brief argument remain implicit. Accordingly, broad agreement exists on this matter, though specifics about the assumption and the underlying logic would benefit from further bolstering.

2. Breaking (trade) agreements

States violating their international agreements generally involve a *prima facie* breach of international law. But given that countermeasures often involve questions of trade, we need to look specifically at the rules under the WTO-regime, and the 'national security exceptions' to the underlying agreements in particular, to determine questions about *prima facie* legality.[41]

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35. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Commentary to ARSIWA], commentary to art. 54, para. 3.

36. *Id.*, at para. 6 in commentary to art. 52.

37. *See* Jarna Petman, *Resort to Economic Sanctions by Not Directly Affected States*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW, 309, 361, 365, 375 (LAURA POCCHIO FORLATI & LINOS-ALEXANDER SICILIANOS eds., 2004); TAMS, *supra* note 23; PROUKAKI, *supra* note 23; DAWIDOWICZ, *supra* note 1, at 113.

38. TAMS, *supra* note 23.

39. DAWIDOWICZ, *supra* note 1, at 113.

40. Arrest Warrant of 11 April 2000 (D.R.C. v. Belgium), 2002 I.C.J. Rep. 3.

41. Under the WTO-system, the three major agreements on trade in goods, services, and trade-related aspects of intellectual property rights (GATT, GATS, and TRIPS) all contain very similar

What is important to understand about these agreements is that they allow States a broad margin of appreciation where their essential national security interests collide with issues of trade. This includes, most prominently, the General Agreement on Tariffs and Trade (GATT),[42] which obliges members not to introduce general restrictions or quotas against other members without a basis for doing so in the agreement. However, Article XXI of GATT contains a broad national security exception, which creates legal space to lawfully employ measures in response to a national security crisis. Thus, in cases where Article XXI justifies measures, these actions cannot be considered countermeasures because they would not be *prima facie* unlawful. Rather, they would be considered retortions. The same is true for the General Agreement on Trade in Services (GATS)[43] and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[44] As discussed below, case law suggests that we should treat these national security exceptions similarly. Accordingly, the points made here about GATT are also apply to the other agreements.

The national security exception in GATT holds that nothing in the agreement "shall be construed" to "prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests," including actions that are "taken in time of war or other emergency in international relations."[45] This language leaves the Members ample room for interpretation. Seemingly, the Members get to decide if their essential security interests are threatened—and if they need to employ measures. On that basis, academics have often debated 1). whether States are essentially "self-judging," in the sense that, once the exception is evoked, no external entity can adjudicate the matter; and 2). whether the provision is essentially "non-justiciable," implying that the article contains no legal criteria upon which a Member can be challenged. In other words, it has been suggested that States can simply claim "national security" considerations and automatically be in conformity with GATT. Yet several recent decisions from WTO dispute settlement panels have made clear that this is not the case.

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national security exceptions. Case law suggests that these rules should be interpreted similarly. *See* Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 7.241–42, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020) [hereinafter Qatar v. Saudi Arabia-report].

42. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153, 1867 U.N.T.S. 187 (1994) [hereinafter GATT].

43. *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

44. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS].

45. *See* GATT, *supra* note 42, at arts. XXI(b) and XXI(b)(iii).

In an April 2019 decision in the case of *Russia – Measures Concerning Traffic in Transit*,[46] a WTO dispute settlement panel made clear that States are not self-judging,[47] and that while the national security exception does create a wide margin of appreciation, it also includes objective elements that set firm legal limits to its use. Importantly, the analytical framework developed in this decision, and its transferability to other parts of the WTO-regime, was confirmed in a June 2020 Panel report in the case of *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*.[48] The core conclusions of both cases emphasized that the national security exception does not provide members with full and unbridled autonomy to decide when and where to enact trade measures based on claims of national security considerations. Such conclusions were confirmed in a group of recent decisions ruling that the United States was not justified in relying on the national security exception to introduce certain steel and aluminum tariffs.[49]

In *Russia – Measures Concerning Traffic in Transit*, the Panel concluded that it is for the member itself to determine what it considers "necessary" under the rule,[50] and that it is "in general" left up to each member to define "what it considers to be its essential security interests."[51] However, the Panel also noted that this latter concept, "which is evidently a narrower concept than 'security interests,' may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[52] As such, even though it is generally up to the States to define such interests, they cannot go beyond what constitutes a good faith-interpretation of the concept, which has to fit plausibly within the definition put forward by the Panel.[53]

The Panel's finding that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity"[54] is of particular importance. In other words, the measures taken must meet "a minimum

46. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO. Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter Ukraine v. Russia-report].

47. *Id.* at para. 7.56.

48. Qatar v. Saudi Arabia-report, *supra* note 41.

49. *See* Panel Reports, United States – Certain Measures on Steel and Aluminium Products, WTO. Docs. WT/DS544/R, WT/DS552/R, WT/DS556, WT/DS564 (adopted Dec. 9, 2022). The United States has appealed the panel reports, but given ongoing lack of agreement among WTO members regarding the filling of Appellate Body vacancies, there is no Appellate Body Division available to handle the case.

50. Ukraine v. Russia-report, *supra* note 46, at para. 7.146.

51. *Id.* at para. 7.131.

52. *Id.* at para. 7.130.

53. *Id.* at para. 7.132.

54. *Id.* at para. 7.134.

requirement of plausibility."[55] Contrary to what some scholars have previously suggested, this seems to only require that a national security consideration is articulated. It is thus not a requirement that the invoking State explicitly rely upon the national security exception.[56] Nevertheless, a lack of notification would seem to weaken a State's case for lawfulness, especially given that the GATT Council of representatives decided in 1982 that "contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI."[57] Therefore, while a lack of notification is not considered sufficient in itself to find a *prima facie* breach of the WTO-regime in this article, it is an important element. What *is* considered detrimental, however, is if *prima facie* unlawful measures are not accompanied by prominent justification put in terms of the intervening States' essential security interests.

In addition to this question of interests, the Panel also determined that the concept of "time of war or other emergency in international relations" constitutes an objective standard not left to the Members themselves to decide.[58] Rather, this concept "qualif[ies] and limit[s] the exercise of the discretion accorded to Members."[59] In defining the concept of an "emergency in international relations" the Panel noted that "political or economic differences between Members are not sufficient,"[60] and that such conflicts will not rise to the relevant level "unless they give rise to defence and military interests, or maintenance of law and public order interests."[61] For an emergency in international relations, the Panel presented the following definition:

> [A] situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability *engulfing or surrounding a state*. Such situations give rise to particular types of interests *for the Member in question*, *i.e.*, defence or military interests, or maintenance of law and public order interests.[62]

As the italicized phrases above imply, the definition assumes the presence of a certain kind and level of tension that involves a member State, and it is assumed that this tension gives rise to certain interests for that State. Conversely, it does not imply that other members' interests are necessarily affected under such circumstances. Therefore, it remains unclear if the presence of an emergency for one member can be used by others to employ the national security exception. If that is not the case, action taken under such circumstances could be considered

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55. *Id.* at para. 7.138.

56. DAWIDOWICZ, *supra* note 1, at 116.

57. GATT Council of Representatives, *Decision Concerning Article XXI of the General Agreement*, WTO Doc. L/5426 (Dec. 2, 1982).

58. Ukraine v. Russia-report, *supra* note 46, at paras. 7.82. and 7.101; *See also* Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WTO. Doc. WT/DS544/R (adopted Dec. 9, 2022), at para. 7.122 [hereinafter China v. USA-report].

59. Ukraine v. Russia-report, *supra* note 46, at para. 7.65.

60. *Id.* at para. 7.75.

61. *Id.*

62. *Id.* at para. 7.76 (emphasis added).

countermeasures rather than retortions. In this context, the newer decisions on the United States' steel and aluminum tariffs are of interest, because they emphasize that the national security exception is articulated in relation to the essential security interests of the invoking State. As stated by the Panel, "the relevant 'security interests' are those of the Member taking action under Article XXI(b)."[63] Immediately above this statement, the Panel defined the concepts of "interest" and "security" as "the relation of being involved or concerned as regards potential detriment or (esp.) advantage" and "the condition of being protected from or not exposed to danger," respectively.[64] Plainly put, the member State that invokes the national security exception must do so in relation to its own essential security interests, defined as its own concerns about or involvement in a situation that includes a relevant kind of danger.

The issue of direct versus indirect involvement in a national security situation can be illustrated through the 1979 Iranian Hostage Crisis. It is reasonable to conclude that an emergency in international relations existed between the United States and Iran during this crisis. Conversely, it is not reasonable to conclude that the emergency encompassed the many US-allies that got involved in the conflict—especially given that so many of them hesitated to get involved in the first place, despite strong American appeals to do so.[65] Similarly, during a debate in the GATT Council of Representatives in relation to the Falklands War of 1982—in which the European Community (EC), Canada, and Australia had taken measures against Argentina on the basis of a request from the United Kingdom—several representatives seemingly acknowledged the right of the United Kingdom to invoke the national security exception under the circumstances but rejected the right of others to do the same.[66] Therefore, the national security exception cannot generally be invoked by non-injured States in situations that do not directly threaten their essential security interests.

B. When is a countermeasure "collective"?

Once a countermeasure has been employed, it is necessary to determine if its author was an injured State or a third State in relation to the original, unlawful act. Only in the latter case can the countermeasure qualify as "collective." Under ARSIWA the definition of "injured States" is used to delimit which States are covered by the rules found in ARSIWA's chapter on countermeasures. Article 42 of ARSIWA notes that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

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63. *See* China v. USA-report, *supra* note 58, at para. 7.110.

64. *Id.*

65. See infra IV.b.44. Western States' measures against Iran (1980)

66. GATT Council of Representatives, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, WTO Doc. C/M/157 (Jun. 22, 1982), at 5–6 (esp. statements from Brazil and Spain) [hereinafter GATT meeting C/M/157].

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

i. Specifically affects that State; or

ii. Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Detailed interpretations of this rule will not be hereby discussed, but simply note that this definition must be considered when deciding if a State should be treated as an injured State or a third State—and, thus, if a countermeasure can be considered "collective." ARSIWA also specifically highlights the rights of States "other than an injured State" to invoke the responsibility of the infringing State more broadly—essentially delineating situations in which such States are not considered "injured" *per se*. This is the case where the obligations breached are "owed to a group of States" and when the relevant obligation "is established for the protection of a collective interest of the group," or in cases where the obligation is "owed to the international community as a whole."[67] As such, these situations involve obligations *erga omnes (partes)*.

C. Identifying customary international law

The essential goal of this Article is to (re)consider key arguments often made against the legality of collective countermeasures upon request. In the process, I shall also argue that we are at a stage where a preliminary assessment can be made about the presence of a customary norm. To do that, we need to consider the available State practice and expressions of *opinio juris*, and we need to determine if sufficient support can be found in these materials for the plausible identification of a customary norm. The question of exactly how much State practice and *opinio juris* is needed for this purpose remains unclear, although the ILC's 2018 Draft Conclusions on Identification of Customary International Law provides a useful starting point.[68] What we seek to identify is the elusive presence of a "general practice accepted as law."[69] "General" in this regard means practice that is "sufficiently widespread and representative, as well as consistent."[70] In regard to the evidence of practice accepted as law, the ILC argues that *opinio juris* can be reflected in "a wide variety of forms."[71] In general, the ILC simply explains that

67. ARSIWA, art. 48(1)(1)(a) and (b).

68. Int'l Law Comm'n, Draft conclusions on identification of customary international law, with commentaries, U.N. Doc. A/73/10 (2018) [hereinafter ILC-customary international law].

69. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

70. ILC-customary international law, *supra* note 68, at 135.

71. *Id.* at 140.

"one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way."[72]

Having introduced the relevant background, I shall analyze the arguments commonly made against the legality of collective countermeasures. The first of these is the argument that the *Nicaragua*-judgment rejected such legality.

III. "COLLECTIVE COUNTERMEASURES" IN THE *NICARAGUA*-JUDGEMENT

A widely asserted argument against the legality of collective countermeasures is the claim that the ICJ rejected such legality in its 1986 *Nicaragua*-judgment. Within the cyber-specific debate this argument was most prominently put forward by the "majority of the Experts" in the Tallinn Manual 2.0.[73] These Experts referred specifically to paragraph 249 of this judgment, which includes the following statement:

> The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[74]

This statement is often read as an outright prohibition against collective countermeasures. While citing this paragraph, the majority of Experts simply "took the position that, as set forth in the Nicaragua judgment, purported countermeasures taken on behalf of another State are unlawful."[75] This approach is too simplistic. Although the statement does, on its face, imply that non-injured States cannot take countermeasures in response to unlawful acts by another State, there are several reasons to be hesitant about reading too much into the paragraph.

It should be taken into consideration that the *Nicaragua*-case involved a range of interferences by the United States into the affairs of Nicaragua; the most serious of which was the use of force. The use of force played an outsized role in the deliberations and focus of the Court, specifically as it related to assistance provided to the Contra forces by the United States.[76] Significantly, the Court preceded the excerpted paragraph above with an analysis of the most important facts relating to the principle of non-use of force. In so doing, the Court found *prima facie* evidence of violations at the hands of the United States and discussed whether such violations could be justified (as the United States claimed) as an exercise of collective self-defense. Accordingly, the Court went through a range of factors to determine if, firstly, an armed attack had occurred, and secondly, if

72. *Id.* at 125.

73. TALLINN MANUAL 2.0, *supra* note 10, at 132.

74. Nicaragua judgment, *supra* note 13, at para. 249.

75. TALLINN MANUAL 2.0, *supra* note 10, at 132.

76. Nicaragua judgment, *supra* note 13, at para. 292(3).

the justification could plausibly be maintained. The Court answered both questions in the negative. It did so while identifying several detrimental factors, including the fact that none of the victim-States asked the United States for help at the relevant times. This was a major legal stumbling block for the United States, as the Court made clear that "there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which regards itself as the victim of an armed attack."[77] Given the inability of the collective self-defense justification to withstand scrutiny, the Court began to look for reasons not put forward by the United States that could explain why these actions "may nevertheless be justified on some legal ground."[78] In so doing, the Court noted that initial uses of force that do not rise to the level of an armed attack "cannot . . . produce any entitlement to take collective counter-measures involving the use of force."[79] It was only upon making this statement that the Court eventually produced the text quoted above. In other words, the focus of the Court was clearly on the use of force and the specific context of the actions of the United States. The logic applied was therefore hard to divorce from the circumstances of the case—which is also reflected in an oft-missed statement in the judgment on this subject.

In paragraph 210 of the judgment, the Court notes the following question: "if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs?"[80] This would, according to the Court, potentially be a right "analogous to the right of collective self-defence."[81] The Court explicitly chose not to deal with this question in the abstract and instead limited itself to the problem at hand. It noted the following:

> [S]ince the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. *It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.*[82]

Given this context, I find it hard to agree with the majority of the Experts in Tallinn Manual 2.0 that the *Nicaragua*-judgment can be read as an abstract rejection of collective countermeasures *per se*. In particular, it remains unclear whether the statement found in paragraph 249 presupposes the factual situation in

77. *Id*. at para. 199.
78. *Id*. at para. 246.
79. *Id*. at para. 249.
80. *Id.* at para. 210.
81. *Id.*
82. *Id.* (emphasis added).

the case, where namely no requests for assistance had been made, and where use of force had been applied.

Upon reviewing the Court's decision in 1989, Jonathan Charney also found that the Court's discussion of collective countermeasures resulted essentially in a "dicta that . . . forbid third state counter-measures in the absence of a request from the victim state when another state provides support short of armed force for revolutionary groups operating in the victim state."[83] Charney went on to say that he believed that the Court "did not foreclose third state counter-measures in other situations not involving the use of force."[84] Similarly, James Crawford, in his 2013 book on State responsibility, explained that "[t]he Court did not address what the position would be if the victim had requested that other states assist it in taking collective (non-forcible) countermeasures against Nicaragua."[85] Crawford continued by saying that it "seems reasonable to conclude, by analogy with collective self-defense, that the position would be different."[86] Suggesting that the *Nicaragua*-judgment does not clearly outlaw collective countermeasures is therefore not a novel idea, especially in regards to measures taken on the basis of a request from the victim-State. Indeed, most scholars that have subsequently analyzed the legality of collective countermeasures have not found the *Nicaragua*-judgment detrimental.[87] Especially pertinent is perhaps that two key contributors to the debate on international law in cyberspace, Michael N. Schmitt and Sean Watts,[88] expressed essentially the same view in 2021. They argued that "[t]he best reading of the judgment restricts the court's observations on collective countermeasures to instances involving the use of force and lacking a request from [sic] victim states."[89] On that basis, Schmitt and Watts concluded that the judgment cannot be read as an unequivocal rejection of collective countermeasures upon request,[90] and indeed, that "collective cyber countermeasures on behalf of injured states, and by extension support to countermeasures of the injured state, are lawful."[91] This view represents a change

83. Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 74 75 (1989).

84. *Id.* at 75.

85. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 704 (2013).

86. *Id.*

87. *See, e.g.*, TAMS, *supra* note 23, at 205–07; DAWIDOWICZ, *supra* note 1, at 6470; PROUKAKI, *supra* note 23, at 48, 15256.

88. Michael N. Schmitt is the general editor of the *Tallinn Manual,* and Sean Watts is one of the legal experts in the *Group of Experts* whose views are reproduced in the manual.

89. Schmitt & Watts, *supra* note 10, at 194.

90. *Id*.

91. *Id*. at 213.

in opinion for both authors, who had both previously made the case for the opposite conclusion.[92]

IV. STATE PRACTICE ON COLLECTIVE COUNTERMEASURES UPON REQUEST

Another key issue in the debate about the legality of collective countermeasures—with or without requests—is whether sufficient State practice exists to support the construction of a legal right. Usually, this debate takes place against the backdrop of the review of practice included in the ILC-commentary to ARSIWA. I believe, however, that this review suffers from challenges that undermine its significance. These challenges include the difficulty of discerning the logic applied and the fact that newer studies have superseded the review by finding much more State practice than is identified by the ILC.

A. The problematic ILC-review

In the commentary to Article 54 of ARSIWA, the ILC included a brief study of State practice on collective countermeasures. The study concluded that practice was "limited and rather embryonic"[93] and that it had therefore demonstrated uncertainty about the law on collective countermeasures. On that basis, the ILC expressed the view that "no clearly recognized entitlement" exists to employ collective countermeasures.[94] Without delving into this specific conclusion, however, I contend—as have others before me—that the logic employed to reach this conclusion is flawed.[95] To explain this conclusion, it is easiest to go through the ILC's reasoning.

In the commentary, the ILC opens its analysis with the conclusion that State practice is too limited to create a right to take collective countermeasures. From here, the ILC sets out to prove this claim. First, it notes that in "a number of instances, States have reacted against what were alleged to be breaches of obligations referred to in article 48 without claiming to be individually injured."[96] The obligations referred to here are essentially obligations *erga omnes (partes)*. Specifically, the ILC mentions six such cases, to which it refers simply as "examples"[97]:

1. The United States' prohibition in 1978 of certain imports from and exports to Uganda because of its purported genocidal policies.

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92. *See* Michael N. Schmitt, *"Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT'L L. 697, 731 (2014); Jensen & Watts, *supra* note 21, at 1564.

93. Commentary to ARSIWA, *supra* note 35, at para. 3 in commentary to art. 54.

94. *Id.* at para. 6 in commentary to art. 54.

95. *See, e.g.*, Sicilianos, *supra* note 15, at 1145–46.

96. Commentary to ARSIWA, *supra* note 35, at para. 3 in commentary to art. 54.

97. *Id.*

2. The measures taken by the United States and other Western States in 1981 against Poland and the Soviet Union because of these countries' suppression of demonstrations and detainment of dissidents in Poland.
3. The measures taken by the European Community, Australia, Canada, and New Zealand in 1982 against Argentina because of its attack on the Falkland Islands.
4. The United States' adoption of the Comprehensive Anti-Apartheid Act in 1986 in an effort to end Apartheid in South Africa.
5. The measures taken by the European Community and the United States in 1990 on the basis of Iraq's invasion of Kuwait.
6. The measures taken by the European Community in 1998 in response to the humanitarian crisis in Kosovo.

In addition to these examples, the ILC also identifies cases where "certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations." The ILC explained, while providing two examples, that these States did not rely on a right to take countermeasures.[98]

Finally, the ILC notes that in "some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered 'injured States' in the sense of article 42."[99] On that basis, the ILC explains that, "[a]s this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of cases."[100]

This is, essentially, the case put forth by the ILC. As far as I can tell, the ILC does not actually argue its position. Indeed, it simply mentions a range of cases that seem to support the notion that a right to collective countermeasures exists, while making clear that these cases are merely "examples" and not the result of an exhaustive search. It does not include any explicit evidence of, say, widespread contemporaneous criticism or rejections of such a right, or other elements that could serve as a linchpin for a negative conclusion. As such, it is difficult to understand how the review is able to sustain a negative conclusion unless we assume that the ILC believed that there was virtually no more practice available and thus that the study was actually comprehensive. While this situation can seem puzzling, there is a good reason the analysis seems at odds with its conclusion: The study is essentially a reworked version of the original analysis developed by Special Rapporteur, James Crawford, in his *Third Report on State Responsibility*, which drew a very different conclusion.[101]

98. *Id.* at para. 4 in commentary to art. 54.
99. *Id.* at para. 5 in commentary to art. 54.
100. *Id.* at para. 6 in commentary to art. 54.
101. Crawford's Third Report, *supra* note 34, at paras. 39192.

Crawford's original study reviews "some examples of recent experience concerned with collective countermeasures" and "attempt[s] an assessment of that practice."[102] His material review is essentially the same as the one described above. However, Crawford concludes that "a considerable number of instances" can be identified in which non-injured States took measures in response to unlawful acts, and that "in some cases at least" the measures taken would be deemed illegal if they could not be conceived as collective countermeasures.[103] According to Crawford, this "seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation."[104] Crawford's conclusion is very different from the one discussed in the commentary to ARSIWA, though the two were reached on the basis of a nearly identical analysis. This dimension seems to go a long way in explaining the weaknesses of the ILC-analysis.

If we look closer at the specifics of how the argument shifted, it seems obvious that the ILC essentially chose to focus on the caveats included in Crawford's analysis, rather than the conclusion—such as the admission that practice was "dominated by a particular group of States (*i.e.*, Western States)."[105] On that basis, Crawford admitted that the practice was, indeed, "rather sparse and involves a limited number of States." But he continued by saying that "[n]onetheless there is support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. If other States are entitled to invoke responsibility on account of such breaches . . . it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that State."[106] Indeed, it was on that basis that Crawford proposed that ARSIWA include the right to take collective countermeasures.

In light of the above, I believe it is prudent to treat the ILC-review as an important but limited first step in the quest to understand State practice on this issue. Since the work was put forward in 20002001, several newer studies have shown that the ILC's approach was too limited. Of the handful of key studies discussed in this Article, only one comes down on the side of the ILC, while the rest reject the ILC's approach and conclusions.

From here, I shall look closely at these later studies with a critical eye on State practice specifically supporting (or rejecting) the legality of collective countermeasures upon request. It is important to note that while these later studies are thorough, they tend to ignore or underplay the issue of requests. That is the lacuna I shall try to fill in this Article. For now, I shall present these key studies

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102. *Id*. at para. 390.
103. *Id.* at para. 395.
104. *Id.*
105. *Id.* at para. 396.
106. *Id.* at para. 401.

and use them as a point of departure for my review of State practice specifically related to collective countermeasures upon request.

B. State practice on collective countermeasures upon request

My analysis of State practice takes its point of departure in the work of a handful of legal scholars, who have, admittedly, done most of the hard work of identifying and analyzing cases involving collective countermeasures. My contribution will be to look collectively at their efforts and focus on the issue of requests for assistance.

Looking at the landscape of scholarship that has added significantly to the debate on State practice over the last few decades, key insights can be drawn particularly from the work of James Crawford (2000),[107] Jarna Petman (2004),[108] Christian J. Tams (2005),[109] Elena Katselli Proukaki (2010),[110] and Martin Dawidowicz (2017).[111] These scholars have very different approaches, however, which I will briefly highlight.

Crawford qualified his study by explaining that he only "briefly" reviewed "examples" of "recent experience" with collective countermeasures, with an eye on considering "what provisions ought to be made in the draft articles" that he was responsible for at that moment.[112] Accordingly, we need to take into account this limited and specific purpose of the study, which is conducted over the span of only about four pages, and which makes reference to ten cases in total, some only in passing.

Petman's review identifies "example[s] of cases"[113] in which some kind of community was taken seemingly on the basis of breaches of community norms. These cases are grouped into different types of situations. After reviewing such cases, Petman notes that they are "clearly not exhaustive."[114] As such, while her review is systematized in genre, there is no real attempt to delimit the study in time or scope. In total, Petman's study includes fourteen cases that are analyzed over the span of about seventeen pages.

Tams' focus is on situations involving responses to breaches of *erga omnes* obligations,[115] and he divides such practice into 1) situations of "actual violations," 2) situations involving "statements implying a right to take countermeasures," and 3) situations of "actual non-compliance justified

107. Crawford's Third Report, *supra* note 34.
108. Petman, *supra* note 37.
109. TAMS, *supra* note 23.
110. PROUKAKI, *supra* note 23.
111. DAWIDOWICZ, *supra* note 1, at 111238.
112. Crawford's Third Report, *supra* note 34, at para. 390.
113. Petman, *supra* note 37, at 361.
114. *Id.* at. 376.
115. TAMS, *supra* note 23, at 207.

differently." Tams is not completely clear about his scope, but he does say that he identifies "a considerable number of instances since 1970" and that such instances are "cited as examples."[116] In total, Tams conducts a review of seventeen cases, which takes up about thirty-five pages.

Proukaki's review divides cases between situations in which State actions did not amount to countermeasures but were nonetheless illustrative of a determination to exert pressure on the basis of "serious violations of fundamental community and collective interests,"[117] and instances in which non-injured States actually took collective countermeasures. She notes that her study consists of "various examples" and aims to "provide evidence that countermeasures in the collective interest have frequently been used by states and that they are well established in international law."[118] Proukaki does not set a clear temporal scope and goes all the way back to 1853 to find her first case. In total, Proukaki reviews thirty-seven cases over the span of about 116 pages.

Finally, Dawidowicz presents a thorough review of State practice, which is more limited in scope than the others because he includes only "instances in which States have adopted *prima facie* unlawful unilateral coercive measures in response to breaches of obligations *erga omnes (partes)*."[119] Nevertheless, Dawidowicz manages to identify and discuss twenty-one cases in total, covering the material in about 126 pages. On the temporal scope, Dawidowicz finds that the entry into force of the UN Charter in 1945 provides a "useful starting point"[120] for his analysis. Ultimately, Dawidowicz, like the others, refers to his case selection as mere "examples" of the conduct studied.[121]

In total, these five scholars identify forty-four cases relating to State practice on collective countermeasures. Irrespective of their different approaches and focus, twenty-two of these cases are included in at least two of the studies, while seventeen cases are included in at least three. It should be noted, however, that some of the cases could arguably be split up into several different cases or combined. Therefore, the specific numbers are of limited importance. What is important is the overall picture. For our purposes, within these studies we can identify at least nine examples of situations where collective countermeasures were plausibly taken on the basis of a request from an injured State. In the following sections, I shall review these nine cases as well as the newest prominent case on the matter: Russia's invasion of Ukraine in 2022 and the international response thereto. It should be emphasized that I am discussing only a subset of practice, which should not be read as an indication that the rest of the material is not highly important.

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116. *Id*. at 209.

117. PROUKAKI, *supra* note 23, at 102.

118. PROUKAKI, *supra* note 23, at 110.

119. DAWIDOWICZ, *supra* note 1, at 111.

120. *Id*.

121. *Id*. at 113.

1. United States' measures against Japan (1940-1941)

The second Sino-Japanese war, which is often thought of as the initiation of the Second World War in the Pacific theater, started in a confused and messy manner in July of 1937. Despite initial uncertainties, there can be no doubt that the conflict escalated on the basis of Japanese aggression constituting an unlawful use of force. Indeed, as noted by Oona A. Hathaway and Scott J. Shapiro, "it was clear that Japan had engaged in gross violations of the Pact and Covenant" of the League of Nations.[122] Despite such breaches, the League and its members neglected to implement collective sanctions in response,[123] and as a consequence, China stood alone in its conflict with Japan. Caught in this situation, China initiated a policy of public diplomacy aimed especially at the United States in an effort to secure sanctions against Japan. This effort included both formal requests for sanctions and indirect propaganda aimed at molding the views of American elites.[124] The activities of the American Committee for Non-Participation in Japanese Aggression provide a key example of the unofficial effort. The group lobbied with the express goal of "helping China by pushing for a ban on the export of munitions to Japan."[125] Thus, according to Tsuchida Akio, the Committee "tried to use a US embargo against Japan to deter Japan's aggression."[126] While the Committee was officially American, it was heavily influenced by China, which had its own propaganda agents placed in the Committee and provided much of the financing.[127]

An example of the more formal approach is described in the pages of the *The New York Times*, which reported on June 30, 1940, that the governor of the Bank of China (and brother-in-law of Chiang Kai-shek, the head of the Nationalist government of China), T. V. Soong, met with American officials in an effort to "try to bring about an embargo on shipments of American raw materials to Japan."[128]

These efforts seemingly bore fruit, as the United States decided in the following months to initiate major economic sanctions against Japan—an effort that was "greeted with enthusiasm" in China.[129] These sanctions would come to include a complete embargo and the freezing of Japanese assets on June 25,

122. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 174 (2017).

123. *Id.*

124. *See* Tsuchida Akio, *China's "Public Diplomacy" Towards the United States Before Pearl Harbor*, 17 J. AM.-E. ASIAN REL. 35 (2010).

125. *Id*. at 44.

126. *Id.*

127. *Id*. at 46–47.

128. *Embargo Plea Expected*, N.Y. TIMES (Jul. 1, 1940).

129. Frank Tillman Durdin, *U.S. Export Curbs Hailed by Chinese*, N.Y. TIMES (Jul. 28, 1940).

1941,[130] which dealt a serious blow to the Japanese and led Japan and the United States on a collision course.

There can be some doubts about the legality of the various sanctions applied during this incident, but at least the freezing of Japanese State assets would *prima facie* seem to violate the rights of Japan under international law. Accordingly, the case constitutes an example of a situation where one State (Japan) violated an *erga omnes* norm affecting another State (China), which then requested assistance from an uninjured State (United States), leading to the adoption of *prima facie* unlawful sanctions.

2. Organization of American States' measures against the Dominican Republic (1960)

On August 17, 1960, *The New York Times* reported that Venezuela "formally asked" the Organization of American States (OAS) "to adopt sanctions against the Dominican Republic because of aggression."[131] Specifically, the Venezuelan foreign minister, Ignacio Luis Arcaya, charged the Trujillo-regime of the Dominican Republic with "fomenting rebellion and plotting the murder" of the Venezuelan president.[132] On that basis, he asked that OAS respond through "the adoption of all sanctions provided by the Inter-American Treaty of Mutual Assistance of 1947, except for military action."[133] The OAS heeded the call on August 20, when it unanimously voted to impose sanctions.[134]

The decision formed the culmination of a process initiated by Venezuela on June 4, 1960, when it asked the Chairman of the Council of the OAS for the immediate convening of the OAS Organ of Consultation to make the case that the Dominican Republic had infringed upon its sovereignty.[135] A series of meetings were held, during which the OAS decided to look into the matter and make an assessment. The assessment led the OAS to adopt its so-called *Resolution I*, which concluded that the actions of the Dominican Republic "constitute[d] acts of intervention and aggression"[136] and argued that "collective action [was] justified."[137]

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130. Executive Orders: Foreign Exchange Transactions, Transfers of Credit, Export of Coin and Currency (China and Japan), 6 Fed. Reg. 146, 3715 (Jul. 29, 1941).

131. Tad Szulc, *Venezuela asks O.A.S. Sanctions*, N.Y. TIMES (Aug. 18, 1960).

132. *Id.*

133. *Id.*

134. Org. of Am. States, *Sixth Meeting of Consultation of Ministers of Foreign Affairs as the Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, O.A.S.T.S. Doc. OEA/Ser.C/11.6 (Aug. 1621, 1960) [hereinafter OAS-meeting 1960].

135. Lloyd Brown-John, *Economic Sanctions: The Case of the O.A.S. and the Dominican Republic, 1960-1962*, 15 CARIBBEAN STUDIES 73, 76 (1975).

136. OAS-meeting 1960, *supra* note 134, at 45.

137. *Id*. at 5.

On that basis, the Member States decided to take action in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance.[138] Specifically, the OAS decided to impose sanctions on the Dominican Republic, including breakingdiplomatic relations, suspending trade in war-related materials, and promising to consider further sanctions.[139] Some States, including the United States, chose to impose broader sanctions, subsequently on January 4, 1961, the OAS also extended its list of sanctions.[140]

Although the sanctions were in line with treaty regimes created for the purpose, at least some of the sanctions violated the GATT-agreement, to which both the Dominican Republic and several other members of the OAS were parties.[141] These States were bound by the most-favored-nation principle, and thus, arguably, were in breach of their treaty obligations under GATT in relation to at least some of the sanctions against the Dominican Republic.[142] This case demonstrates a situation involving 1) a clear violation of an *erga omnes* norm, 2) a request by the injured State for assistance in responding to the violation, and 3) the initiation of *prima facie* illegal acts by a large number of non-injured States in response to the original violation.

3. Arab States' measures against Israeli allies (1973)

The 1973 Oil Crisis commenced when members of the Organization of Arab Petroleum Exporting Countries (OAPEC) decided to engage in a collective embargo against Israeli allies. The backdrop to this decision was the Six-Day War of June 1967 between Israel and the neighboring States of Egypt, Jordan, and Syria. During the war, Israel invaded and occupied parts of its neighboring territories, including East Jerusalem, the Sinai Peninsula, the West Bank, and the Golan Heights. The Six-Day War created an unstable situation that led to war once again in 1973 when Egypt and Syria attacked Israel in what became the Yom Kippur War. It was in this context that OAPEC launched the oil embargo, which targeted several countries seen as complicit in the Israeli occupation policy—including, namely, the United States.

This situation is relevant to the practice of collective countermeasures to the extent that one agrees with the premise that 1) at least some of the Arab States were injured by a breach of an *erga omnes* norm at the hands of at least some of the targeted States, and that 2) the chosen response—the oil embargo—constituted a *prima facie* unlawful act. In relation to the original breach, the argument goes that Israel's 1967 attack on its neighbors and occupation of their territory constituted a breach of an *erga omnes* norm. This question is obviously highly

138. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

139. OAS-meeting 1960, *supra* note 134, at 56.

140. Brown-John, *supra* note 135, at 80.

141. PROUKAKI, *supra* note 23, at 11516.

142. *See id.*

fraught and controversial. Indeed, there is hardly a subject of international law that has been more thoroughly discussed than the various actions taken by Israel and its neighboring countries during this broader conflict. Thus, in order to avoid getting bogged down, I will merely note here that, for the purposes of this Article, a reasonable case can be made that Israel breached several rules of international law of an *erga omnes* character during and following this military offensive, including the *jus cogens* prohibition on the use of force. Several States, including the United States, assisted Israel in achieving its goals—including those relating to Israel's ability to hold occupied territories.[143] This assistance can be understood as a violation of the principle articulated in Article 41(2) of ARSIWA, which, read in combination with Article 40(1), notes that no State shall "render aid or assistance in maintaining" a "situation created by" a "serious breach by a State of an obligation arising under a peremptory norm of general international law." It is plausible that Egypt and Syria had a right to employ countermeasures because the United States' actions had injured them in this way.

On the question of the illegality of the oil embargo, it seems plausible, for example, that the efforts of Kuwait and Saudi Arabia against the United States constituted a *prima facie* breach of their international obligations. Kuwait was a party to GATT at the time, and without a valid defense under Article XXI—which was never raised—Kuwait was arguably acting in violation of the most-favored-nation principle, while Saudi Arabia was arguably acting in violation of bilateral agreements with the United States.[144] If Egypt and Syria were indeed injured by a breach of an *erga omnes* norm at the hands of the United States, and non-injured States such as Kuwait and Saudi Arabia responded by taking *prima facie* unlawful actions against the United States, the situation could be seen as a case of collective countermeasures. On that basis, it is necessary to consider whether Egypt and Syria requested such assistance.

The key meeting in Kuwait on October 17, during which a number of oil-producing States in the Arab world activated the "oil weapon," was preceded by many months of pressure on the Arab world, King Faisal of Saudi Arabia in particular, by the Egyptian President Anwar Sadat to use this weapon.[145] Sadat had called for the use of this weapon in 1972, and "[b]y the spring of 1973," according to Daniel Yergin, "Sadat was strongly pressing Faisal to consider using the oil weapon to support Egypt in a confrontation with Israel and, perhaps, the West."[146] The pressure worked, and a few months before Sadat's initiation of the Yom Kippur War, he secured a pledge from Faisal that the oil weapon would, indeed, be used during such a conflict.[147] Both Egypt and Syria took part in the

143. In particular, American delivery of critical military supplies. *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 77782 (2012).

144. *See* PROUKAKI, *supra* note 23, at 124.

145. *See* a comprehensive discussion in YERGIN, *supra* note 143, at ch. 29.

146. *Id*. at 766.

147. *Id*. at 770.

October 17 meeting, and thus took part in the decision to initiate the oil embargo. Accordingly, there can be little doubt that the embargo came at the strong urging of the injured States. Indeed, the wording of the Resolution imposing sanctions made clear that this was a direct response to the conflict between Egypt and Syria and Israel. Indeed, the sanctions targeted the United States specifically because it was "supplying Israel with all sources of strength which increase its arrogance and enable it to defy the legitimate rights and the principles of general international law."[148]

4. Western States' measures against Iran (1980)

After decades of royal rule under the Shah of Iran, Mohammed Reza Pahlavi, a revolution in 1979 upturned Iranian society and established the State we know today as the Islamic Republic of Iran. In early 1978, millions of protesters took to the streets expressing their frustration with the Shah and his regime, in many cases inspired by the messages of then exiled Ayatollah Khomeini. By 1979, these protests became a full-fledged revolution. The Shah fled Iran, Khomeini returned from exile, and Iran became an Islamic republic.

The turmoil in Iran had many violent consequences. When the ousted Shah visited the United States in late 1979 to receive medical treatment, it created a furor and popular demands in Iran for the United States to hand him over. This episode set the Iran Hostage Crisis in motion, during which a mass of young Iranians stormed the United States' embassy in Tehran, took Americans hostages, and held most of them for 444 days. In a case initiated by the United States on the matter, the ICJ concluded that the government of Iran was legally responsible for the situation because it had failed to oppose the attack on the embassy, almost immediately endorsed the attack, and maintained the situation through the use of armed militants "acting on behalf of the State."[149] Indeed, the Court did not mince words. It strongly underlined the seriousness of the situation. In particular, the Court recalled "the extreme importance" of the principles of law governing diplomatic and consular relations, which were being undercut. The Court felt that it was "its duty to draw the attention of the entire international community … to the irreparable harm that may be caused by events" of this kind.[150] Indeed, the Iranian actions were widely condemned,[151] and the UN Security Council called upon Iran "to release immediately" the embassy staff and "to allow them to leave the country."[152] It is reasonable to argue that Iran infringed upon the rights of the

148. *See* OAPEC Ministerial Council Statement on Production Cutbacks (Oct. 17, 1973).

149. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 91 (May 24) [hereinafter Hostages judgment].

150. *Id.* at para. 92.

151. *See* Keesing's Contemporary Archives, Record of National and International Current Affairs with Continually Updated Indexes (Volume XXVI 1980) at 30207–08 [hereinafter Keesing's 1980 XXVI].

152. S.C. Res. 457 (Dec. 4, 1979).

United States and that these rights could be considered of an *erga omnes* character because of their broader effects.

The United States responded quickly and issued an order on November 12, 1979, to end all oil imports from Iran, and on November 14, 1979, to order a freeze on Iranian assets.[153] More importantly, the United States campaigned to get its allies to join these sanctions. This effort began with calls for EC members to reduce their diplomatic presence in the country,[154] and later, the complete closure of embassies.[155]

These calls for action escalated in December 1979. On December 11, 1979, US Secretary of Defense Harold Brown said at a press conference in connection with a NATO meeting that it is "now appropriate for the Allies, our friends, and the world community to reflect their disapproval [of the Iranian actions] through concrete diplomatic and economic steps."[156] In a parallel effort, the US Secretary of State Cyrus Vance held talks with several Western European leaders between December 10 and 11, 1979, to secure their help.[157] During these meetings, Vance sought to persuade his European allies to impose a range of economic sanctions against Iran, including freezing Iranian assets.[158] The Europeans were reluctant initially not because of concerns about their international legal obligations, but because of a range of other considerations. For example, Secretary Vance met with the UK Prime Minister on December 10, 1979, at 10 Downing Street to secure UK cooperation on the matter. Vance made clear his wish for "collective action" to be taken by the United States and its allies, and that "it would be extremely helpful if America's allies could freeze Iranian assets in the way that the Americans had done."[159] The Prime Minister was initially worried about the consequences and the effectiveness of the measure.[160] The question was left somewhat open, and Secretary Vance made clear that he was on his way to have similar talks with other heads of governments.[161] The American pressure was felt by several other US-allies.

Over a period of some months, the United States "increased its pressure on Western allies, in particular the nine members of the European Community, to take measures against Iran in line with the draft UN Security Council resolution

153. Keesing's 1980 XXVI, *supra* note 151, at 3020607.

154. *See, e.g.*, LUMAN ALI, BRITISH DIPLOMACY AND THE IRANIAN REVOLUTION, 1978-1981 187 (2018).

155. *Id*. at 19091.

156. Keesing's 1980 XXVI, *supra* note 151, at 30208.

157. *Id*.

158. ALI, *supra* note 154, at 191.

159. Prime Minister's Office files, PREM19/76, IRAN (Internal Situation), Record of a Discussion Between the Prime Minister and the United States Secretary of State, Mr. Cyrus Vance, at 10 Downing Street, on Monday, 10 Dec., 1979, at 1030 Hours (Dec. 10, 1979), at 2.

160. *Id.* at 3.

161. *Id.* at 4.

of January 1980 which had been vetoed by the Soviet Union."[162] This included the instigation of a near total embargo of Iran. On April 8, President Carter sent messages to Canada, Japan, Australia, New Zealand, and Western European countries asking for the instigation of such measures.[163] The US went to great lengths to persuade its allies to take tough measures against Iran.

The US-allies were hesitant to get involved,[164] and in an April 13 interview with foreign correspondents, President Carter stated that the United States needed "the full and aggressive support"[165] of its allies, particularly in relation to sanctions.[166] A little more than a week later, on April 22, the EC finally relented. First, they took diplomatic and economic sanctions, including a ban on most exports to Iran and oil imports from Iran, which were "strongly welcomed" by the United States.[167] Additionally, Japan announced that it would join the EC's action. In the following days, several Western countries followed suit, including Canada, Australia, Portugal and Norway—the latter deciding on a total trade boycott.[168] On May 18, the EC decided to expand its sanctions, including by suspending all contracts between the EC and Iran signed after the hostage crisis started on November 4, 1979.

This case clearly involves unlawful Iranian actions against the United States, and persistent US requests for assistance from their allies around the world. However, the question of whether the actions eventually taken by the Europeans were in fact *prima facie* unlawful is a point of disagreement. Christian Tams found that the EC actions "remained intrinsically lawful,"[169] and James Crawford similarly found that they "arguably remained mere retorsions."[170] Both noted, however, that the Europeans made statements suggesting that they were prepared to take countermeasures.[171] Dawidowicz excluded the case from his review, likely because he did not believe that the case involved *prima facie* unlawful measures. Petman, on the other hand, suggested that the legality of the EC actions were "doubtful,"[172] while Proukaki found that at least the EC decision to suspend EC-Iranian contracts "seems to fall within the category of third-state countermeasures as implying their intention to take action that may be in violation of specific commitments under international law."[173] Additionally, Jochen

162. Keesing's 1980 XXVI, *supra* note 151, at 30530.
163. *Id.*
164. *Id.*
165. 80 DEP'T ST. BULL. [i] (1980), 12.
166. *Id*.
167. Keesing's 1980 XXVI, *supra* note 151, at 30530.
168. *Id*. at 30531.
169. TAMS, *supra* note 23, at 226.
170. Crawford's Third Report, *supra* note 34, at para. 394.
171. *Id.*; TAMS, *supra* note 23, at. 22627.
172. Petman, *supra* note 37, at 361.
173. PROUKAKI, *supra* note 23, at 144.

Frowein and Linos-Alexandre Sicilianos, who conducted a series of earlier studies, both suggested that at least the decision to suspend contracts was likely *prima facie* unlawful.[174]

On this basis, it seems reasonable to conclude that while legitimate disagreement exists about the *prima facie* legality of the EC actions, it is at least arguable that the imposition of a near total embargo on Iran would likely entail the breach of contracts like those already on the books between the EC and Iran. The case therefore plausibly involves collective countermeasures upon request. Indeed, it is also an example of how the issue of requests is usually ignored in the literature. Of the works cited, only Crawford really made the American requests a part of the narrative, while all the others either ignored or downplayed this key element of the story.

5. Western States' measures against Argentina (1982)

On April 2, 1982, Argentina invaded the Falkland Islands. This territory formed part of the United Kingdom, and the invasion was a clear breach of both sovereignty and the prohibition on the use of force: two central *erga omnes* norms. Indeed, the UN Security Council in its Resolution 502 (1982) harshly condemned Argentina the following day, calling the action a "breach of the peace" and demanding an "immediate withdrawal."[175] The United Kingdom responded by sending an armada towards the islands to fight off the Argentinians. The United Kingdom also adopted sanctions against Argentina, including the freezing of Argentine assets.[176]

In support of their British allies, EC members also adopted a range of sanctions against Argentina, including the prohibition of "all imports of Argentine origin into the Community."[177] This import embargo constituted a *prima facie* violation of the EC member's obligations under GATT and a violation of specific EC-Argentina agreements.[178] Notably, the latter agreements were not subject to the national security exception under GATT, so no obvious legal defense exists for this action.[179] However, as discussed in Part II above, there is good reason to believe that the national security exception does not cover a situation like this one, and thus that the broad import prohibition was *prima facie* unlawful in its totality.

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174. *See* Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 HAGUE ACAD. INT. L. COLLECTED COURSES 345, 41617 (1994); LINOS-ALEXANDRE SICILIANOS, LES REACTIONS DECENTRALISEES A L'ILLICITE: DES CONTRE-MESURES A LA LEGITIME DEFENSE 160 (1990).

175. S.C. Res. 502 (Apr. 3, 1982).

176. *See* Geoffrey Marston (ed.), *United Kingdom Materials on International Law 1982*, 53 BYIL 337 (1982).

177. Letter dated 13 April 1982 from the Permanent Rep. of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/14976 (Apr. 14, 1982).

178. *See* DAWIDOWICZ, *supra* note 1, at 141.

179. *Id.* at 14142.

It is noteworthy that the EC and other States did try to defend their actions with reference to the national security exception. However, in doing so, these States hinted at a legal theory that went beyond Article XXI. The official justification put forward by the EC, Australia, and Canada was that the measures were taken "on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection."[180] These "inherent rights" were mentioned several times during debates in the GATT Council,[181] but this did little to clarify what the States meant.

Nevertheless, as recorded in Keesings Contemporary Archives from 1982, the actions taken by the EC members happened "[f]ollowing representations from Britain,"[182] as was the case for Commonwealth countries. For example, it is noted in *Keesings* that "New Zealand on April 5 broke off diplomatic relations with Argentina and imposed a ban on imports from and exports to Argentina on April 13 in response to a formal British request."[183] This action was arguably a *prima facie* violation of New Zealand's international legal obligations.[184]

At the time, there were major disagreements about the legality of the actions taken by the sanctioning States. As such, this is one of the relatively rare cases in which several States went on record to reject the legality of such sanctions. However, this disagreement generally followed allied "party" lines,[185] and therefore it seems reasonable to assume that at least part of the motivation is to be found in the relevant States' political views and alliances, rather than a strictly legal analysis.

6. Western States' measures against the Soviet Union (1983)

On August 31, 1983, a Korean Airlines Boeing 747 carrying 269 passengers and crew of various nationalities was shot down by the USSR, killing all on board. This downing of an unarmed, civilian aircraft animated "an explosion of condemnation," as US President Reagan put it in a televised address on September 5, 1983.[186] In response, several Western States took measures against the USSR, some of which seem to be in *prima facie* violation of international law, including breaches of aviation agreements.[187] While some of the States were responding to

180. Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons: Communication to the Members of the GATT Council, WTO Doc. L/5319, ¶ 1(b) (May 5, 1982).

181. GATT meeting C/M/157, *supra* note 66, at 7, 910 and 12.

182. Keesing's Contemporary Archives, Record of National and International Current Affairs with Continually Updated Indexes (Volume XXVIII 1982) at 31532 [hereinafter Keesing's 1982 XXVIII].

183. *Id.* at 31533.

184. *See* similarly DAWIDOWICZ, *supra* note 1, at 142.

185. *Id.* at 14348.

186. See Transcript of President Reagan's Address on Downing of Korean Airline, N.Y. TIMES, (Sep. 6, 1983). [hereinafter Reagan Transcript]; 83 DEP'T ST. BULL. [i] (Nov. 1983), at 67.

187. TAMS, *supra* note 23, at 217.

their nationals being killed under such circumstances, taking action in their capacity as States specifically affected by the breach of both specific rules on civilian aviation and communitarian norms on the use of force, others, like Switzerland, did so on the basis of something resembling collective countermeasures.[188] And when NATO foreign ministers met in Madrid on September 7, 1983, they agreed on the need for an allied response to the incident.[189]

This case contains interesting examples of encouragement of a collective response. The United States, for example, having lost nationals in the incident, made statements to that effect. In President Reagan's televised address, he noted that the United States was "cooperating with other countries to . . . join us in not accepting Aeroflot [(the State-run Soviet airline company)] as a normal member of the international civil air community unless and until the Soviets satisfy the cries of humanity for justice."[190] In a subsequent radio address on September 17, 1983, President Reagan repeated that the United States was "asking" other States to "join" the United States in its efforts.[191] Notably, President Reagan expressed his appreciation of a range of sanctions taken by US allies against Russia. These included Canadian sanctions taken against Aeroflot,[192] Scandinavian Airlines' suspension of flights within Soviet airspace, several NATO States' suspension of civilian air traffic between these States and the USSR, and Swiss, Finnish, Australian, and New Zealand boycotts.[193] The United States was, in other words, clearly asking its allies to join it in sanctioning the Soviet behavior, and several allies responded by seemingly taking collective countermeasures.

7. United States' measures against Libya (1985)

During the 1970s and 1980s, it was semi-official policy for Libya to support international terrorism.[194] One example of this policy was Libya's support of attacks on civilians at the Rome and Vienna airports on December 27, 1985.[195]

In relaying these events, *The New York Times* described how terrorists "hurled grenades and fired submachine guns at crowds of holiday travelers . . . in

188. *Id.*

189. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 67.

190. Reagan Transcript, supra note 186.

191. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 45.

192. Reagan Transcript, supra note 186.

193. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 45.

194. See Corri Zoli, Sahar Azar & Shani Ross, Patterns of Conduct: Libyan Regime Support for and Involvement in Acts of Terrorism, INSTITUTE FOR NATIONAL SECURITY AND COUNTERTERRORISM (2010); U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSLIAD-87-133FS, TERRORISM: LAWS CITED IMPOSING SANCTIONS ON NATIONS SUPPORTING TERRORISM (1987), at 7 and 10.

195. U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSLIAD-87-133FS, TERRORISM: LAWS CITED IMPOSING SANCTIONS ON NATIONS SUPPORTING TERRORISM (1987), at 7 and 10.

attacks on check-in counters of El Al Israel Airlines."[196] While these attacks were seemingly directed at Israel, they killed more Americans—five Americans were killed, while one Israeli died. In total, 20 people died in these attacks, and more than 110 people were wounded.[197] Such attacks, if attributed to a State, would certainly involve the breach of several *erga omnes* norms, including the use of force. And while the territorial States of Italy and Austria would be the directly injured parties in this regard, Israel and the United States could plausibly claim to be specifically affected by such a breach of a communitarian norm. In this particular case, the actions were quickly tied to Libya and widespread condemnation followed.

Israel took several steps in response to the attack, including making calls for "international economic and political sanctions against Libya."[198] Simultaneously, the United States employed various sanctions against Libya, such as President Reagan's order to block "all property and interests in property" of Libya in the United States or in American possession or control.[199] As these actions interfered with the property rights of Libya, they appear to be *prima facie* unlawful.

Following these efforts, American officials asked European allies to join in. President Reagan held a news conference on January 7, 1986, during which he announced US sanctions and urged allies to follow the US example. President Reagan noted that the U.S. "urged repeatedly that the world community act decisively and in concert to exact from Qadhafi a high price for his support and encouragement of terrorism."[200] He also stated that the "United States ha[d] already taken a series of steps to curtail most direct trade between our two countries, while encouraging our friends to do likewise."[201]

The American and Israeli efforts did not bring about the application of major sanctions, however, and it was widely reported that "[m]any European allies ha[d] refused to join American efforts to punish Libya."[202] Various US allies

196. John Tagliabue, Airport Terrorists Kill 13 and Wound 113 at Israeli Counters in Rome and Vienna, N.Y. TIMES, (Dec. 28, 1985).

197. *See* Leslie H. Gelb, Italy Now Linking Syrians to Attack at Rome Airport, N.Y. TIMES, (May 21, 1986).

198. Norman Kempster, Israeli Policy on Retaliation Told by Peres: Premier Bars Attack on Libya but Not on Terrorist Bases There, L.A. TIMES, (Jan. 6, 1986).

199. Exec. Order No. 12544, 51 Fed. Reg. 1235 (Jan. 8, 1986).

200. The President's News Conference (Jan. 7, 1986), https://www.reaganlibrary.gov/research/speeches/10786e.

201. *Id.*

202. Bernard Weinraub, President Breaks All Economic Ties with the Libyans, N.Y. TIMES, (Jan. 8, 1986).

"expressed doubts about the merits of economic sanctions,"[203] and expressed concerns about isolating Gaddafi.[204]

Nonetheless, the US and Israel did clearly try to ensure a collective response to this breach of an *erga omnes* norm, namely by asking their allies to join them in sanctioning Libya. While not much came of these efforts, this seems to have been the result of political calculation rather than legal deliberation.

8. Various States' measures against Iraq (1990)

The first major test of the Post-Cold War international security system occurred when the then president of Iraq, Saddam Hussein, launched a sudden invasion of Iraq's much smaller, but oil-rich, neighbor Kuwait on August 2, 1990. Sandwiched in time between the fall of the Berlin Wall and the dissolution of the Soviet Union, the unsteadiness of the times made it far from certain how the international community would respond. As it turned out, a strong response came almost immediately. On the day of the attack, the UN Security Council assembled to condemn the invasion and demanded an immediate and unconditional withdrawal.[205] On the same day and in the days following, a range of countries decided to employ unilateral economic sanctions in response. This included the decisions of the United States on August 2, 1990,[206] the EC on August 4, 1990,[207] Japan on August 5, 1990,[208] Australia on August 6, 1990,[209] and Switzerland on August 7, 1990[210] to enact a range of measures including trade embargoes and the freezing of State assets.[211] These actions were taken either previous to or outside of the legal authority provided by Resolution 661 (1990), adopted by the Security Council on August 6, 1990, which authorized various economic measures.[212] Consequently, several of the measures imposed had to be justified through other legal rationales. It is interesting to note, as Martin Dawidowicz did,

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203. Gerald Boyd, President Freezes All Libyan Assets Held in the U.S., N.Y. TIMES, (Jan. 9, 1986); Allies Are Cool to Reagan's Sanctions, N.Y. TIMES, (Jan. 9, 1986).

204. *Id.*

205. *See* S.C. Res. 660 (Aug. 2, 1990).

206. *See* Exec. Order No. 12722 – Blocking Iraqi Government Property and Prohibiting Transactions with Iraq (Aug. 2, 1990).

207. *See* Chargé d'affaires a.i. of Italy to the U.N., Letter dated 6 august 1990 from the Chargé d'affaires a.i. of the Permanent Mission of Italy to the United Nations addressed to the Secretary-General, U.N. Doc. S/21444 (Aug. 6, 1990).

208. *See* Letter dated 5 August 1990 from the Permanent Rep. of Japan to the United Nations addressed to the Secretary-General, U.N. Doc. S/21449 (Aug. 6, 1990).

209. *See* Note Verbale dated 14 August 1990 from the Permanent Rep. of Australia to the United Nations addressed to the Secretary-General, U.N. Doc. S/21520 (Aug. 14, 1990).

210. *See* Note Verbale dated 22 August 1990 from the Chargé d'affaires a.i. of the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. S/21585 (Aug. 22, 1990).

211. *See also* DAWIDOWICZ, supra note 1, at 159–60.

212. *See* S.C. Res. 661 (Aug. 6, 1990).

that the Security Council authorization was thought of at the time as additional to the actual decisions on sanctions made by many States,[213] and that these States referred neither to any right related to collective self-defense, or to rights under Article XXI of GATT to justify their actions. Since an unwarranted invasion of another country is a clear violation of the prohibition on the use of force, and since several of the sanctions put in place in response involved *prima facie* unlawful acts, the remaining plausible justification would be the right to take collective countermeasures. The question thus becomes what role the Kuwaiti government played in these decisions.

Keesing's Contemporary Archives summarizes the actions of the ousted Kuwaiti government at the time, stating that "the Amir and his ministers spent much of their time traveling the world to bolster opposition to the invasion."[214] This illustrates the intense efforts of the Kuwaitis. A report from *The New York Times* on August 5, 1990 described that the Kuwaiti Embassy in Washington D.C. was in full advocacy-mode; the Ambassador was quoted as saying that he had made appeals to President Bush and that "he was grateful for the economic sanctions that the Bush Administration imposed on Iraq."[215]

Indeed, a wide range of communications and coordination happened between the exiled government of Kuwait, including the Amir of Kuwait, and the assisting countries, especially the United States. Statements made by White House Deputy Press Secretary Roman Popadiuk made clear that during the early hours of the invasion, the Security Council was called together "[at] the urging of Kuwait and the United States,"[216] and President Bush noted in remarks to reporters on August 5, 1990 that he had talked to the Amir the day before and "gave him certain assurances."[217] Finally, in his Message to the Congress on the Declaration of a National Emergency With Respect to Iraq, President Bush stated that efforts to block Kuwaiti assets under US control were made "with the approval of the Kuwaiti government."[218] As such, there can be no doubt that States, in enacting various measures—including economic sanctions—against Iraq in response to the invasion of Kuwait, did so with the clear support and consent of the government of Kuwait.

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213. *See* DAWIDOWICZ, *supra* note 1, at 161–62.

214. Keesing's Records of World Events (Volume 36, no. 1, 1990) at 37633.

215. *See Kuwaiti Washington Embassy Embattled Too*, N.Y. TIMES, (Aug. 6, 1990).

216. Statement by the Deputy Press Secretary Popadiuk on the Iraqi Invasion of Kuwait (Aug. 2, 1990), https://bush41library.tamu.edu/archives/public-papers/2122; *see also* Statement by the Deputy Press Secretary Popadiuk on the Iraqi Invasion of Kuwait (Aug. 1, 1990), https://bush41library.tamu.edu/archives/public-papers/2121.

217. Remarks and an Exchange With Reporters on the Iraqi Invasion of Kuwait (Aug. 5, 1990), https://bush41library.tamu.edu/archives/public-papers/2138.

218. Message to the Congress on the Declaration of a National Emergency With Respect to Iraq (Aug. 3, 1990), https://bush41library.tamu.edu/archives/public-papers/2131.

9. Western States' measures against Russia (2014-2021)

During the winter of 2013, a conflict escalated in Ukraine when its Pro-Russian president, Viktor Yanukovych, rejected an EU association agreement. This led to widespread demonstrations in Kyiv, which morphed into a full-fledged constitutional crisis, and eventually a revolution, during which President Yanukovych was ousted and a new government formed. During this historic political shift in Ukraine, Russia became heavily involved in trying to shape the future of Ukraine through various forms of interference.

The first major instance of Russian interference came shortly after the ouster of President Yanukovych, when Russian soldiers wearing unmarked uniforms arrived at key facilities, buildings, and checkpoints on the Crimean Peninsula, in what would prove to be the beginnings of an unlawful Russian occupation and annexation. Shortly thereafter, Russian armed forces began to supply and fight alongside groups of Ukrainian separatists, who were trying to fight their way towards the establishment of an independent, pro-Russian republic in Eastern Ukraine. These policies constituted unlawful interference in the internal affairs of Ukraine, including through the use of force.

Ukraine responded with force, and was supported by the West through the delivery of both military and economic aid.[219] In addition to this assistance, Ukraine was also aided by the West through the adoption of a range of sanctions against Russia.[220] Most significant were the coordinated EU and US sanctions. For simplicity's sake, I will focus on the efforts of the EU and simply note here that similar considerations are relevant for the US-sanctions as well.[221]

The financial and trade sanctions put in place by the EU are the most relevant for this analysis because these sanctions limited Russian access to and benefits from European capital markets and placed restraints on the export of certain technologies. Such sanctions could plausibly be in *prima facie* violation of obligations under GATS and GATT because they constitute *prima facie* violations of core rules under these agreements, including the most-favored-nation principle.[222]

The main issue of relevance in assessing the *prima facie* legality of these sanctions is whether they could plausibly be justified under the national security exceptions of GATS and GATT. This question is best answered through an analysis of the situation under the framework developed by the WTO dispute

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219. *See* Iain King, *Not Contributing Enough? A Summary of European Military and Development Assistance to Ukraine Since 2014*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Sep. 26, 2019), https://www.csis.org/analysis/not-contributing-enough-summary-european-military-and-development-assistance-ukraine-2014.

220. *See EU restrictive measures in response to the crisis in Ukraine*, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (Oct. 5, 2020), https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/.

221. *See also* DAWIDOWICZ, *supra* note 1, at 236.

222. Dawidowicz finds the sanctions to be contrary to GATS and GATT. *See id* at 235.

settlement panel in *Russia – Measures Concerning Traffic in Transit*. Before going through such an analysis, it is necessary to address one major issue: In late 2020, the European Court of Justice (ECJ) concluded that the EU-sanctions could be justified by the national security exception of GATT, at least in relation to certain measures imposed on Russian oil companies.[223] However, the way the ECJ (and before it, the General Court of the European Union (EGC)) approached the problem left a lot to be desired. In its analysis, the EGC simply reproduced the text of Article XXI of GATT, and without any substantive discussion or analysis concluded that:

> "[I]n the light of the broad discretion which the Council has in this area, it must be held that the Council was entitled to consider that the actions of the Russian Federation undermining or threatening Ukraine's territorial integrity, sovereignty and independence could amount to a case of an 'other emergency in international relations' and that the restrictive measures at issue were 'necessary for the protection of [the] essential security interests [of the Member States of the European Union]', within the meaning of Article XXI of GATT."[224]

This analysis, I believe, is too restricted to be considered decisive. The EGC treated the question as one that required minimal substantive discussion although, as shown above in Part II, such an approach cannot be sustained. This insufficiency may be remedied by using the WTO dispute settlement panel framework and WTO-documents to provide a closer examination of the case.

A key consideration under this framework is the Panel's statement that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[225] In this case, however, the EU and its Members failed to clearly justify their actions in terms that reflected their own essential national security interests. Rather, they referenced mostly the interests of Ukraine and certain generic security considerations. For example, the European Union initially reacted to this crisis in early March 2014 by condemning Russian aggression, reiterating the severity of the threat to Ukraine, and threatening to impose sanctions against Russia. At no point did the EU members expressly articulate a threat to the EU or its members as a motivating factor for their actions.[226] Indeed, many of the members were hesitant to get too involved in the conflict in the first place.[227]

Such hesitancy is difficult to square with the notion that these States believed that their "essential security interests" were at stake. The only comments that

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223. Case C-732/18 P, PAO Rosneft Oil Company and Others v. Council (Sep. 17, 2020).

224. *See* Case T-715/14, Rosneft and Others v Council (Sep. 13, 2018), ¶ 182; the approach was approved in *id* at para. 132.

225. Ukraine v. Russia-report, *supra* note 46, at para. 7.134.

226. For a timeline of the events, *see Timeline – EU restrictive measures in response to the crisis in Ukraine*, European Council/Council of the European Union (Dec. 16, 2020), https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis/.

227. *Putin and the West* (BBC documentary 2023), part 1.

slightly resembled such a sentiment were generic statements about ensuring the "peace, stability and prosperity in Europe."[228] Similarly, the EU explained that it introduced measures "with a view to increasing the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis."[229] While there is no doubt that the situation did constitute an "emergency in international relations" in relation to Ukraine and Russia (indeed, the Panel in the case made that clear), [230] it cannot simply be assumed that this automatically translates into an emergency also in the wider context of the EU.[231] Accordingly, as no prominent attempt was made by the EU members to explain their particular national security concerns, it seems hard to give much credence to this idea.

An additional consideration, which can be drawn from the GATT Council of Representatives' 1982 decision, is that "contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI."[232] As explained in Part II above, neglecting to issue such a notification should be treated as a strike against *prima facie* legality, though it cannot be considered detrimental. In the case of Russia's aggression towards Ukraine, as noted by Dawidowicz, the EU members did not expressly invoke the national security exception.[233] It is because of these problems, that I believe we can consider several of the sanctions put in place by the EU members as *prima facie* unlawful.

In light of the dissatisfactory explanations offered by EU members, the question becomes whether the members implemented sanctions upon Ukraine's direct request. The answer is clearly yes because Ukraine clearly and repeatedly encouraged sanctions against their aggressor. Indeed, the first threats of sanctions made by the EU Heads of State and Government came at a meeting on March 6, 2014, with the then Ukrainian Prime Minister, Arseny Yasenyuk, in attendance.[234] While Yasenyuk said very little about the push for sanctions in public, he later expressed that he had been "very tough" on this point behind closed doors.[235] It was similarly reported in June 2014 that the then Ukrainian President Petro Poroshenko also urged the European Union to employ sanctions

228. EUROPEAN COUNCIL, *Statement of the Heads of State or Government on Ukraine* (Mar. 6, 2014) ¶ 3, https://www.consilium.europa.eu/media/29285/141372.pdf.

229. *See, e.g.*, Council Regulation 833/2014, preambular para. 2, 2014 O.J. (L 229/1); Council Regulation 269/2014, preambular para. 4, 2014 O.J. (L 78/6).

230. Ukraine v. Russia-report, *supra* note 46, at para. 7.123.

231. *See id*.

232. GATT Council of Representatives, *supra* note 57.

233. DAWIDOWICZ, *supra* note 1, at 235.

234. *See Extraordinary meeting of EU Heads of State or Government on Ukraine*, 6 March 2014, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (Apr. 1, 2019), https://www.consilium.europa.eu/en/meetings/european-council/2014/03/06/.

235. *Putin and the West*, *supra* note 227.

against Russia,[236] and further sanctions were expressly welcomed on June 30, 2014 in a statement by Deputy Head of the Presidential Administration of Ukraine, Valeriy Chaly.[237] On September 25, 2014 Prime Minister Yasenyuk, from the podium of the General Assembly of the United Nations, implored States to continue imposing sanctions "until Ukraine takes control of its entire territory."[238] As such, the case plausibly fits the mold of a situation involving collective countermeasures upon request.

10. (Mainly) Western States' measures against Russia (2022-)

The conflict in Ukraine escalated dramatically on February 24, 2022, when Russia launched a massive military offensive against Ukraine. The preceding months of threats and aggressive behavior from Russia had led the Ukrainian government to call for the imposition of further sanctions against Russia, including, for example, on February 23, 2022, when Ukrainian foreign minister, Dmytro Kuleba, addressed the UN General Assembly and "urge[d] member states to use all available means to protect Ukraine and deter Russia."[239] This included a call for "tough economic sanctions".[240] This message was repeated again and again, especially in the early days of the war, and Ukraine's calls for sanctions were heeded by many States, which quickly activated one sanctions package after another. A World Economic Forum-report noted that "[t]he Russian invasion of Ukraine has been met with unprecedented trade and other economic sanctions."[241] The report referred to "a total of 87 trade and other sanctions" imposed against Russia within six weeks of the invasion.[242] These sanctions were mainly imposed by members of the EU and/or NATO-countries, but other States, including Japan, Taiwan, South Korea, and Singapore, also imposed significant sanctions in reaction to the Russian aggression.[243]

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236. Ralph Ellis & Ray Sanchez, *Day of Mourning Declared After Ukrainian Military Plane Shot Down*, CNN (Jun. 15, 2014), https://edition.cnn.com/2014/06/15/world/europe/ukraine-crisis/index.html.

237. Andrew Roth & Neil MacFarquhar, *Russia Scorns Sanctions; Ukraine Army Forges On*, N.Y. TIMES (Jul. 30, 2014).

238. *Ukraine warns West Against Lifting Russia Sanctions*, BBC (Sep. 25, 2014), https://www.bbc.com/news/world-europe-29357105.

239. MINISTRY OF FOREIGN AFFAIRS OF UKRAINE, Statement by H.E. Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, at the UN General Assembly debate on the situation in the temporarily occupied territories of Ukraine, kmu.gov.ua (Feb. 23, 2022), https://www.kmu.gov.ua/en/news/vistup-ministra-zakordonnih-sprav-ukrayini-dmitra-kuleba-na-debatah-generalnoyi-asambleyi-oon-situaciya-na-timchasovo-okupovanih-teritoriyah-ukrayini-23022022.

240. *Id.*

241. World Economic Forum, *Conflict, Sanctions and the Future of World Trade: White Paper* (2022), 3.

242. *Id*. at 4.

243. Minami Funakoshi, Hugh Lawson & Kannaki Deka, *Tracking Sanctions Against Russia*, REUTERS GRAPHICS, (Jul. 7, 2022), https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/.

Many of these sanctions *prima facie* violated trade obligations under the WTO-regime, but unlike the situation in 2014, at this point there were a number of factors in the conflict that made the sanctions easier to justify under the national security exception. Namely, the sheer scale of the Russian attack, the blatancy of Russia's violation of *jus ad bellum*, and the fact that its major global repercussions were on an entirely different level. These factors make it easier to argue that the sanctioning States' essential security interests were at stake, which was exactly what several States and international organizations, like the EU, did.

An illustrative statement was made by Josep Borrell Fontelles, the EU High Representative for Foreign Affairs and Security Policy, who emphasized that EU-sanctions were put in place because "[t]he behaviour of the Russian leadership constitutes a major threat to international peace and security."[244] Additionally, the EU and G7-nations expressly revoked Russia's Most-Favored-Nation status in response to its aggression, a step these nations had been unwilling to take earlier in the conflict.[245] As such, the violent escalation in Ukraine made it easier for States to accept the use of the national security exception and consider sanctions conforming to this exception as mere retorts. However, while some sanctions could be plausibly justified on the basis of the national security exception, other sanctions were put in place that are not covered by the WTO-regime, and which seem to constitute *prima facie* unlawful acts. Most notably, this included the EU's decision on February 25, 2022 to freeze the assets of Russian President Vladimir Putin and Russia's foreign minister, Sergey Lavrov.[246] If it is accepted, as discussed in Part II above, that freezing the assets of such high-ranking officials constitutes a *prima facie* violation of general international law,[247] such sanctions would require justification. One such justification could be a right to employ collective countermeasures; and, here, collective countermeasures upon request.

It should be noted that many of the States that employed sanctions against Russia also provided Ukraine with significant military assistance. This assistance could be justified under the right of collective self-defense in support of Ukraine, which muddies the legal picture. Namely, the question becomes whether this right of collective self-defense offers legal justification for the sanctions employed. None of the assisting States have made their views on the matter clear, and none of the assisting States have seemingly reported their support to the UN Security

244. Press Release, COUNCIL OF THE EUROPEAN UNION, Russia's Military Aggression Against Ukraine: EU Imposes Sanctions Against President Putin and Foreign Minister Lavrov and Adopts Wide Ranging Individual and Economic Sanctions (Feb. 25, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/russia-s-military-aggression-against-ukraine-eu-imposes-sanctions-against-president-putin-and-foreign-minister-lavrov-and-adopts-wide-ranging-individual-and-economic-sanctions/.

245. *See, e.g.*, THE WHITE HOUSE, FACT SHEET: United States, European Union, and G7 to Announce Further Economic Costs on Russia (Mar. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/.

246. Council of the European Union, *supra* note 244

247. I.C.J., *supra* note 69, at para. 51.

Council in accordance with Article 51 of the UN Charter. Accordingly, while some States have made generic references to their rights under Article 51 elsewhere, the extent and reach of this justification remains unclear.[248]

11.. Summing up

History offers several examples of situations involving collective countermeasures upon request. Among the considered cases, a few common traits can be identified. First, and perhaps most important, is that every case involves a response to serious violations of collective obligations.[249] Second, the intervening States usually act on the basis of specific requests, and often in situations of hypothetical causality. This supports Crawford's observation that "the victim State's reaction seems to have been treated as legally relevant, if not decisive, for all other States."[250] Finally, while I noted a few examples of protests against the actions taken, Tams and Dawidowicz each find an "astonishing" and "striking" lack of diplomatic protests against the taking of collective countermeasures, including in several of the situations discussed in this Article.[251] This is significant for our understanding of the events and for the potential development of customary international law. As such, significant practice on collective countermeasures upon request exists, which would point towards a finding that such measures could be lawful, at least in certain scenarios.

V. *OPINIO JURIS* ON COLLECTIVE COUNTERMEASURES UPON REQUEST

In the above review of practice, I provide an overview of key instances in history where States have taken (or threatened to take) countermeasures, despite not being a directly injured party. This regularly occurs upon receiving requests from States that are directly injured. However, it is rare that the intervening States make their legal reasoning clear in this regard. Therefore, it is useful to complement this review of practice with a separate review of expressions of legal opinion on this topic.

The best source for such expressions of legal opinion is the ARSIWA debate. During this process, States debated different draft versions of the text, which would have expressly allowed for collective countermeasures, removing the

248. *See* MINISTRY OF FOREIGN AFFAIRS OF DENMARK, URU Alm.del – endeligt svar på spørgsmål 185 (Jun. 14, 2022); MINISTRY OF FOREIGN AFFAIRS OF NORWAY, Norsk våbenstøtte til Ukraina og folkeretten (May 10, 2022), https://www.regjeringen.no/no/aktuelt/vaapen_folkerett/id2903706/.

249. *See similarly* TAMS, *supra* note 23, at 230; Crawford's Third Report, *supra* note 34, at para. 399.

250. Crawford's Third Report, *supra* note 34, at para. 400.

251. TAMS, *supra* note 23, at 236–37; DAWIDOWICZ, *supra* note 1, at 244–45.

option of silence and forcing States to provide justification. States' responses during these debates are a helpful addition to the above review of practice.

A. The 1996-draft

While the ARSIWA-process, in principle, reached all the way back to the 1950's, the first key debate on collective countermeasures took place when a 1996-version of the Draft Articles was being put together. This draft would have allowed States to take collective countermeasures through a legal structure in which lesser breaches of international law ("international delicts") were treated as legally distinct from more serious breaches ("international crimes").[252] One consequence of this distinction would be that in cases involving "international crimes," *all* States would be defined as injured States and therefore allowed to take countermeasures irrespective of their actual closeness to the damage done.[253] Though this construct was rejected when it went up for debate among States, it is important to understand that most States that expressed criticism were focused on the legal structure itself rather than its specific consequences. While the implication of this criticism was to reject the proposed system, only a few States explicitly opposed the idea of collective countermeasures.

Most States that remarked on the draft thus stopped short of criticizing the idea of collective countermeasures and, according to Christian J. Tams, only three States (Japan, France, and the Czech Republic) "specifically warned against recognizing a right of all States to adopt countermeasures in response to international crimes."[254] "In contrast," Tams explains, "a considerable number of other States, either directly or in a general way, endorsed the rules on countermeasures."[255] On that basis, Tams concluded that "the majority of governments seemed prepared to recognise a right of all States to take countermeasures in response to those serious breaches of obligations *erga omnes* that amounted to international crime."[256]

While I broadly agree with Tams' analysis, it is necessary to discuss some more specific findings. In particular, it seems useful to look closer at James Crawford's understanding of this matter, as expressed in his *Third Report on State Responsibility*. Here, Crawford explains that most States expressed serious concerns about the wording of Article 40, mainly because it provided rights for multiple States at the same time. Accordingly, some States found disconcerting

252. INT'L L. COMM'N, Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, in Rep. on the Work of its Forty-eighth Session, U.N. Doc. A/51/10 and Corr. 1 (1996) [hereinafter 1996-version of ARSIWA], Article 19.

253. *See* 1996-version of ARSIWA, Articles 40(3) and 47; TAMS, *supra* note 23, at 774; Crawford's Third Report, *supra* note 34, at para. 94.

254. TAMS, *supra* note 23, at 244.

255. *Id.*

256. *Id.*

the idea that States would have, in the words of an Austrian representative, "a competitive or cumulative competence … to invoke legal consequences of a violation."[257] Similarly, a United States representative warned that creating a system where all States could be considered individually injured could give rise to several claims over the same infringement.[258]

This criticism often focused on the problem of having a broad set of States considered "injured," without also having tools to differentiate between them and their individual rights. Some skeptical States, like Austria and France, therefore focused on the idea of creating rules that treated different kinds of injured States differently. In discussing the right of reparations, for example, representatives from Austria and France pointed out that a State should be "directly affected" or have "suffered special material or moral damage" to get reparations.[259] In relation to the potential for multiparty disputes, the United Kingdom noted that it would "be helpful for the Commission to consider whether there are any circumstances in which the right of States to consider themselves 'injured,' and hence entitled to exercise the powers of 'injured States,' should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the 'breach.'"[260] Similarly, when commenting on Article 47, the United Kingdom noted that it was concerned about the rights of States "principally affected" in cases where other States might want to use their status as an "injured State" to take countermeasures, while the State principally affected would prefer for none to be taken.[261] The main concern was to ensure that States not directly affected by a breach should not be able to trample on the rights of States that *were* directly affected.

As such, the few States that were critical of the unitary concept of an "injured State" were mostly focused on ensuring that the proposed system would not infringe upon the rights of directly or principally affected States but did not question the collective construct. This is a useful consideration to have in mind, because it is precisely these kinds of concerns that are addressed through the articulation of a right to take collective countermeasures upon request. Consequently, the main line of criticism regarding the 1996-draft is simply not relevant for the kinds of collective countermeasures discussed in this Article.

B. The 2000-draft

The next big step in the discussion, related to the 2000-draft version of ARSIWA, prompted much more debate about collective countermeasures. This was because of the inclusion of a new Article 54 in the draft that dealt with this

257. *Comments and Observations Received by Governments*, 1998 Y.B. Int'l L Comm'n No. 2, at 81, U.N. Doc. A/CN.4/488 and Add. 1–3, at 141 (Austria) [hereinafter 1998-written comments].

258. *Id*. at 144 (USA).

259. *Id*. at 138–39 (Austria and France).

260. *Id*. at 141 (United Kingdom).

261. *Id*. at 154 (United Kingdom).

issue explicitly. While this draft article was also eventually rejected, it would have expressly allowed for collective countermeasures. The article's first paragraph explained that third-party States could, in situations involving essentially breaches of *erga omnes (partes)* norms, "take countermeasures at the request and on behalf of any State injured by the breach."[262] This was an explicit articulation of a right to take collective countermeasures upon request. Accordingly, the reactions of States to Article 54(1) are key for our purposes.

The second paragraph of the article, read in conjunction with draft Article 41, explained that in cases involving a "serious breach" of "an obligation owed to the international community as a whole and essential for the protection of its fundamental interests," "any State may take countermeasures … in the interest of the beneficiaries of the obligation breached." This rule did not require the consent of an injured State and contained the right to take humanitarian intervention-style collective countermeasures.

Accordingly, the 2000-draft contained a much clearer articulation of the idea of collective countermeasures than the 1996-draft, and Crawford noted that this was the "most controversial change" made to the chapter on countermeasures, which seemed to surprise him.[263] The reason was that the effect of replacing the proposed 1996-system with the new 2000-system was "to reduce the extent to which countermeasures [could] be taken in a community interest,"[264] which narrowed the right to take countermeasures. Crawford speculated that critics had "not appreciated" that the 1996-version "went much further" than the 2000-version, [265] and that the "convoluted character" of the 1996-draft likely "prevented Governments from focusing on the problem."[266] However, as Crawford later noted in 2001, this was "no longer the case."[267]

If we look closer at various States' reactions to the new draft Article 54, we get a better sense of *opinio juris* at the time. This material has led scholars to very different conclusions. Crawford explained in his *Fourth Report on State Responsibility* that the "thrust of Government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilizing."[268] Christian J. Tams, however, found that governments showed "a surprisingly nuanced spectre of views," at least "[c]ompared to the Special

262. INT'L L. COMM'N, Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, in Rep. on the Work of its Fifty-Second Session, U.N. Doc. A/55/10 (2000) [hereinafter 2000-version of ARSIWA], 139.

263. Crawford's Fourth Report, *supra* note 17, at para. 59.

264. *Id.*

265. James Crawford, Jacqueline Peel, Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 981 (2001).

266. Crawford's Fourth Report, *supra* note 17, at para. 59.

267. *Id.*

268. *Id*. at para 72.

Rapporteur's clear-cut assessment."[269] Indeed, upon analyzing these statements, Tams concludes that Article 54 "was by no means generally rejected" and that Crawford's understanding seemed "rather difficult to sustain."[270] I believe that this latter view is the most balanced reading of the State comments. Indeed, I believe that the case becomes even clearer when we focus our attention specifically on the issue of collective countermeasures upon request, as articulated in Article 54(1), rather than the broader idea of collective countermeasures *per se*.

Indeed, a closer examination of the expressions of State opinion during this debate makes it possible to divide the views on Article 54 into three rough groups: first, the majority of State representatives, who mostly expressed support for the ideas contained in Article 54[271]; second, another large group, who criticized Article 54, or elements thereof, but did not unequivocally reject it[272]; and, finally, a smaller group that rejected the article.[273]

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269. TAMS, *supra* note 23, at 246.

270. *Id.* at 247.

271. This group includes Argentina in Sixth Committee of the General Assembly, *summary records of the 15th meeting*, U.N. Doc. A/C.6/55/SR.15 (2000), para. 66 [hereinafter A/C.6/55/SR.15]; Australia in Sixth Committee of the General Assembly, *summary records of the 16th meeting*, U.N. Doc. A/C.6/55/SR.16 (2000), para. 41 [hereinafter A/C.6/55/SR.16]; Austria in Sixth Committee of the General Assembly, *summary records of the 17th meeting*, U.N. Doc. A/C.6/55/SR.17 (2000), para. 76–80 [hereinafter A/C.6/55/SR.17]; Bahrain in Sixth Committee of the General Assembly, *summary records of the 19th meeting*, U.N. Doc. A/C.6/55/SR.19 (2000), para. 87 [hereinafter A/C.6/55/SR.19]; Chile in A/C.6/55/SR.17, para 48; Costa Rica in A/C.6/55/SR.17, para. 63; Denmark (for the Nordic Countries) in *Comments and observations received by Governments*, 2001 Y.B. Int'l L Comm'n No. 2, at 42, U.N. Doc. A/CN.4/515 and Add. 1–3, at 83 [hereinafter 2001-written comments]; France in 2001-written comments, at 15–16, 18; Germany in Sixth Committee of the General Assembly, *summary records of the 14th meeting*, U.N. Doc. A/C.6/55/SR.14 (2000), para. 54 [hereinafter A/C.6/55/SR.14]; Greece in A/C.6/55/SR.17, para 85; Italy in A/C.6/55/SR.16, para 28; Mongolia in A/C.6/55/SR.14, para 56; Netherlands in 2001-written comments, at 87; New Zealand in Sixth Committee of the General Assembly, *summary records of the 11th meeting*, U.N. Doc. A/C.6/56/SR.11 (2001), para. 46 [hereinafter A/C.6/56/SR.11]; A/C.6/55/SR.16, para. 7; Slovenia in Sixth Committee of the General Assembly, *summary records of the 18th meeting*, U.N. Doc. A/C.6/55/SR.18 (2000), para. 27 [hereinafter A/C.6/55/SR.18]; South Africa (for the SADC members) in A/C.6/55/SR.14, para 24–25; Spain in A/C.6/55/SR.16, paras. 13 and 16; Switzerland in A/C.6/55/SR.18, para. 81; and the United States in 2001-written comments, at 84; A/C.6/55/SR.18, para. 69–70.

272. This group includes Algeria in A/C.6/55/SR.18, *supra* note 271, at para. 5; Botswana in A/C.6/55/SR.15, *supra* note 271, at para. 62–63; Brazil in A/C.6/55/SR.18, *supra* note 271, at para 65; Cameroon in Sixth Committee of the General Assembly, *summary records of the 24th meeting*, U.N. Doc. A/C.6/55/SR.24 (2000), para. 60–64; Columbia (for the Rio Group) in Sixth Committee of the General Assembly, *summary records of the 23rd meeting*, U.N. Doc. A/C.6/55/SR.23 (2000), para. 4; India in A/C.6/55/SR.15, *supra* note 271, at para. 29–35; Iran in A/C.6/55/SR.15, *supra* note 271, at para. 13–18; Poland in A/C.6/55/SR.18, *supra* note 271, at para. 48–49; Tanzania in A/C.6/55/SR.14, *supra* note 271, at para 50, and the United Kingdom in A/C.6/55/SR.14, *supra* note 271, at para. 31–32.

273. This group includes China in A/C.6/55/SR.14, *supra* note 271, at para. 40–41; Cuba in A/C.6/55/SR.18, *supra* note 271, at para. 59–61; Israel in A/C.6/55/SR.15, *supra* note 271, at para. 25–26; Japan in A/C.6/55/SR.14, *supra* note 271, at para. 61; 2001-written comments, *supra* note 271, at 93–94; Libya in Sixth Committee of the General Assembly, *summary records of the 22nd meeting*, U.N. Doc. A/C.6/55/SR.22 (2000), para. 52; Mexico in Sixth Committee of the General Assembly,

While this grouping is a simplification, it is aimed at providing a useful outline of the situation. Several caveats should be made, as it can be difficult to discern if the States considered the issue a codification of international law or an expression of progressive development.[274] It is also unclear to what extent they based their views on the ILC-review of State practice, which, as discussed above, seems wanting.[275] Irrespective of such caveats, a few points can be made about the general approach of the States.

Firstly, in relation to the supportive States, their expressions of support generally included statements such as Argentina's simple recognition that Article 54 was "acceptable,"[276] Spain's "generally positive" attitude towards the article,[277] Austria's implicit support expressed through efforts to improve the article,[278] and the Nordic approach, which was expressly supportive.[279] When the 2000-version of Article 54 was eventually dropped, some States, such as Mongolia, "regretted" this change because, "[a]s a small State, Mongolia believed that the option of collective action […] should have been preserved in the draft articles."[280] Almost all of the supportive States are defined as such because they accepted Article 54 in its entirety, though a few did express some skepticism about letting the right to take countermeasures be dependent on a request.[281] What is more interesting is the specific strands of skepticism expressed by States that were not so supportive of Article 54. Notably, their criticism was far more focused on countermeasures without requests, as expressed in Article 54(2), than countermeasures made upon request, as expressed in Article 54(1).

The views expressed by the United Kingdom reflect a common line of criticism. In their written comments, the U.K. explained that it had concerns about the Draft Articles relating to countermeasures, including "the role of the injured State in deciding whether or not countermeasures are to be taken 'on its behalf.'"[282] Specifically, the U.K. argued that, in relation to Article 54(2), the proposed system would be "highly destabilizing" because it "would enable any State to take countermeasures even when an injured State itself chose not to do

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summary records of the 20th meeting, U.N. Doc. A/C.6/55/SR.20 (2000), para. 35–37; Russia in A/C.6/55/SR.18, *supra* note 271, at para. 51.

274. *See* phrasing of the Nordic Countries in A/C.6/56/SR.11, *supra* note 271, at para. 30–33.

275. *See* representative of South Africa in Sixth Committee of the General Assembly, *Summary Records of the 12th Meeting*, U.N. Doc. A/C.6/56/SR.12 (2001), para. 23.

276. A/C.6/55/SR.15, *supra* note 271, at para. 23.

277. A/C.6/55/SR.16, *supra* note 271, at para. 16.

278. A/C.6/55/SR.17, *supra* note 271, at para. 76–78; 2001-written comments, *supra* note 271, at 93.

279. *See, e.g.*, Bahrain, in A/C.6/55/SR.19, *supra* note 271, at para. 87.

280. A/C.6/55/SR.14, *supra* note 271, at para. 56.

281. 2001-written comments, *supra* note 271, at 91 (France) and 93 (Netherlands).

282. 2001-written comments, *supra* note 271, at 84.

so."[283] The problem pointed out by the U.K. was the risk of undermining the injured State. The U.K. didn't express such concerns about Article 54(1).

Along similar lines, Jordan argued that "[w]hile it was acceptable to take collective countermeasures in the context of an initiative undertaken at the request of or on behalf of an 'injured State,' the issue of whether to authorize 'any' State to take countermeasures against the author of a serious breach of the essential obligations owed to the international community needed to be studied further."[284] A similar sentiment can be identified in statements from Botswana, Iran, and Poland, for example.[285] A large portion of the skepticism was thus really about collective countermeasures without request, not collective countermeasures upon request.

Finally, if we move to the States that essentially rejected Article 54, a similar approach was prominent. Although these States did reject the article in its entirety, they were clearly more critical of Article 54(2) than 54(1). Japan, for example, was much more explicit about calling for the deletion of Article 54(2) than Article 54(1),[286] and argued that the former went "far beyond the progressive development of international law."[287] Similarly, Cuba called for the deletion of Article 54 in its entirety but was far more critical of article 54(2), which "went well beyond the progressive development of international law."[288]

On this basis, we can draw the following conclusions: First, it seems that most States accepted Article 54 in its entirety; second, many of the States that expressed skepticism were primarily skeptical about Article 54(2) and not 54(1); third, even among the States that rejected Article 54 in its entirety, the critical focus was mostly on Article 54(2). Nevertheless, Crawford and the ILC felt that they did not have enough support to justify keeping the 2000-version of Article 54 alive, and they therefore opted to replace it with a savings clause. In this regard, it is worth noting Crawford's argument against simply deleting the article:

> …the mere deletion of article 54 will carry the implication that countermeasures can only be taken by injured States, narrowly defined. The current state of international law on measures taken in the general or common interest is no doubt uncertain. But it cannot be the case, in the Special Rapporteur's view, that countermeasures in aid of compliance with international law are limited to breaches affecting the individual interests of powerful States or their allies.[289]

Accordingly, the main point of including a savings clause was to prevent the formation of an overly narrow understanding of the law.

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283. *Id*. at 94.

284. A/C.6/55/SR.18, *supra* note 271, at para. 17.

285. *See* A/C.6/55/SR.15, *supra* note 271, at paras. 63 (Botswana) and 17 (Iran); *Id*. at para. 48 (Poland); 2001-written comments, *supra* note 271, at 94 (Poland).

286. 2001-written comments, *supra* note 271, at 93.

287. *Id*. at 94.

288. A/C.6/55/SR.18, *supra* note 271, at para. 59–61.

289. Crawford's Fourth Report, *supra* note 17, at para. 74.

VI. CONCLUSION

This Article has analyzed three common arguments made against the legality of collective countermeasures and assessed their validity in relation to collective countermeasures taken "upon request" from an injured State. The first argument, that the *Nicaragua*-judgment renders such measures unlawful, was found unpersuasive because of a lack of clarity in the judgment, and because the Court's findings are fact-specific. Indeed, it seems likely that the Court might have come to another conclusion if the underlying factual situation had been different. The second argument, that State practice is too limited to support a right to collective countermeasures, was also found unpersuasive because of the availability of evidence of State practice on collective countermeasures, including on collective countermeasures upon request. The third argument, that the available expressions of *opinio juris* on the matter are mainly negative, was also considered unpersuasive given, firstly, that previous scholarship on expressions of *opinio juris* during the ARSIWA-process found that conclusion questionable in general, and secondly, because a more focused analysis revealed that most States accepted the idea of collective countermeasures and that skeptics focused mostly on collective countermeasures enacted without a request. To those expressions of *opinio juris*, we can add the specific statements relating to the cyber domain referenced in the beginning of this Article.

The goal of this Article has been to determine if the usual arguments made against the legality of collective countermeasures seem valid in relation to measures taken "upon request." This Article argues that they do not. Reaching this conclusion involves identifying evidence of State practice and *opinio juris* that can potentially carry the pronouncement of a customary international norm. This leads to the tricky question of whether *enough* practice and expressions of *opinio juris* exist to suggest that we have a "general practice that is accepted as law."[290] While this Article does not provide a definitive answer to that question, it does show that we are much closer to finding a customary international norm on this matter than what is commonly understood.

290. ILC-customary international law, *supra* note 68, at 124.