INSIGHT

BEYOND COLLECTIVE COUNTERMEASURES AND TOWARDS AN AUTONOMOUS EXTERNAL SANCTIONING POWER? THE GENERAL COURT'S JUDGMENT IN CASE T-65/18 RENV, *VENEZUELA V COUNCIL*

EVA KASSOTI*

ABSTRACT: In case T-65/18 RENV *Venezuela v Council* the General Court was confronted with the question of the legality under international law of the EU's restrictive measures against Venezuela. The judgment is of particular importance as it feeds into the burgeoning discussion regarding the juridical nature, and lawfulness, of EU restrictive measures against third States under international law. This *Insight* summarizes the judgment and analyses the Court's line of argumentation and reasoning. It shows that the General Court here proclaimed an autonomous external sanctioning power stemming from the EU's values and objectives governing the Union's external action. The *Insight* argues that the General Court's approach leaves much to be desired in terms of reasoning on the basis of international law. The *Insight* argues that the restrictive measures against Venezuela could be considered lawful on the basis of the international legal regime governing countermeasures in response to violations of *erga omnes* obligations. By eschewing engagement with the broader international legal framework, the General Court here missed an opportunity to make a substantive contribution to the (evolving) law of collective countermeasures.

KEYWORDS: sanctions – countermeasures – retorsions – restrictive measures – Venezuela – *erga omnes* obligations.

I. INTRODUCTION

On 13 September 2023 the Grand Chamber of the General Court delivered its judgment in the *Venezuela v Council* case dismissing the action for annulment brought by Venezuela concerning restrictive measures imposed by the EU in view of the situation regarding human rights, the rule of law and democracy in the country.[1] In essence, these measures, initially adopted by the Council in 2017, amount to a prohibition on the provision of arms,

* Senior Researcher in EU and International Law, T.M.C. Asser Institute, e.kassoti@asser.nl.

[1] Case T-65/18 RENV *Venezuela v Council* ECLI:EU:T:2023:529.

ISSN 2499-8249
doi: 10.15166/2499-8249/755

military as well as surveillance equipment to any natural or legal person, entity or body in, or for use in, Venezuela since they might be used for internal repression.[2]

One of the most important aspects of the judgment is that the Grand Chamber addressed, for the very first time, questions regarding the legality of EU sanctions against third States under international law. The Court dismissed Venezuela's claim to the effect that the restrictive measures constitute unlawful countermeasures against Venezuela.[3] It proclaimed instead that the EU has autonomous sanctioning powers in the context of the Common Foreign and Security Policy (CFSP) to ensure the fulfilment of *erga omnes* obligations to respect fundamental principles of international law in accordance with the objectives and values of the Union as set out in arts 3(5) and 21 TEU.[4]

Undoubtedly, the judgment has important ramifications not only in the narrow context of challenges to restrictive measures before EU courts but also more broadly – feeding into different topical debates in EU and international law. From the outset, it needs to be stressed that while the Court of Justice of the European Union (CJEU) has clarified in its previous case-law that the Union can adopt independent restrictive measures "distinct from the measures specifically recommended by the UN Security Council", it has not had thus far examined the compatibility of those independent measures with international law.[5] The proposition that EU restrictive measures must be in full compliance with international law can be deduced from the text of art. 3(5) TEU and is also underscored in key EU documents. Both the "Basic Principles on the Use of Restrictive Measures (sanctions)" and the "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU CFSP" highlight that the introduction and implementation of such measures must be in accordance with international law.[6]

In this light, the case feeds into the burgeoning discussion regarding the juridical nature, and legality of EU restrictive measures against third States under international law.[7] While for some authors, the EU's measures against third States fall, and should be

[2] Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, arts 2, 3, 6 and 7; Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing the contested regulation in so far as that implementing regulation concerns it; Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, in so far as that decision concerns it.

[3] *Venezuela v Council* cit. paras 90-92.

[4] *Ibid.* para. 113.

[5] Case C-348/12P *Council v Manufacturing Support & Procurement Kala-Naft*, ECLI:EU:C:2013:776 para. 109. See also, case T-485/15 *Alsharghawi v Council*, ECLI:EU:T:2016:520 paras 20-21.

[6] Council of the European Union, Sanctions Guidelines – Update, 4 May 2018, 5664/18, para. 9. Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions), 7 June 2004, 10198/1/04, para. 3.

[7] For the relevant debate see in general M Gestri, 'Sanctions, Collective Countermeasures and the EU' (2022) Italian Yearbook of International Law 67.

assessed, within the legal framework of collective countermeasures[8] as set out in the International Law Commission (ILC)'s Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[9] others see them as mere retorsions that remain largely unregulated by international law.[10] This is by no means a purely academic discussion. Venezuela's action before the CJEU forms part of a larger pattern of litigation initiated by the country to challenge the international legality of economic sanctions imposed against it. In 2020, Venezuela submitted a referral to the International Criminal Court (ICC) claiming that the economic sanctions imposed against it by the United States constitute a crime against humanity.[11] In 2021, it submitted a (revised) request for the establishment of a panel to review the World Trade Organisiation (WTO)-consistency of such sanctions.[12] Venezuela is not alone in considering that economic sanctions violate international law. The theme is a recurring one in UN General Assembly (GA) discussions and numerous UN GA as well as UN Human Rights Council resolutions – mainly supported by developing States – contest their legality largely on the grounds that they constitute an act of coercion contrary to principles of international law.[13]

Furthermore, the scope *ratione cause juris*[14] of the EU's sanctions put forward is of great significance in the debate on the Union's normative identity as a global actor. Here, the General Court propounded the idea that the Union is an enforcer of (international) *erga omnes* obligations in accordance with the values and objectives that govern the EU's external action. In this sense, the Court proclaimed that the EU's *external* sanctioning power stems from its *internal* mandate to observe international law and to advance democracy, the rule of law and human rights. By doing so, the Court ascribed quite far-

[8] ND White, 'Autonomous and Collective Sanctions in the International Legal Order' (2018) Italian Yearbook of International Law Online 1, 15-17.

[9] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries [2001] arts 49 and 54.

[10] See for example D Akande, P Akhavan and E Bjorge, 'Economic Sanctions, International Law, And Crimes against Humanity: Venezuela's ICC Referral' (2021) AJIL 493.

[11] International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Ms Fatou Bensouda, on the referral by Venezuela regarding the situation in its own territory* www.icc-cpi.int.

[12] World Trade Organisation, United States – Measures relating to Trade in Goods and Services, Request for the establishment of a panel by Venezuela (Revision), 16 March 2021, WT/DS574/2/Rev.1.

[13] See for example General Assembly, Resolution 78/202 of 19 December 2023 on human rights and unilateral coercive measures, UN Doc. A/RES/78/202; General Assembly, Resolution 69/180 of 30 January 2015 on human rights and unilateral coercive measures, UN Doc. A/RES/69/180; UN Human Rights Council, Resolution 15/24 of 6 October 2010 on human rights and unilateral coercive measures, UN Doc. A/HRC/RES/15/24; UN Human Rights Council, Resolution 24/14 of 8 October 2013 on human rights and unilateral coercive measures, UN Doc. A/HRC/RES/24/14. For an overview see A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention' (2017) Chinese Journal of International Law 175.

[14] For the legal cause of the EU's restrictive measures see C Beaucillon, 'The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions' in L Van Den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2016) 119-120.

reaching normative consequences to the Union's brief to contribute to the strict observance of international law contained in art. 3(5) TEU. This, in turn, verifies that, far from being of a programmatic nature, the provision in question has clear (external) normative effects[15] and also adds an important dimension to the EU's "good global actorness" narrative. By directly linking the Union's external sanctioning power to the Union's foreign policy objectives and values, the Court strongly reinforced the image of the Union as an ethical global actor seeking to promote respect for its fundamental values in the international arena – importantly, even in cases where the Union is not itself affected or directly injured by the target State's conduct.

The structure of this *Insight* is as follows. Section II briefly maps out the factual and legal context of the case and summarizes the Court's findings. Section III.1 critically analyses the Court's line of argumentation and reasoning on arguably the most important aspect of the judgment, namely the legality under international law of the EU's sanctions against Venezuela. Section III.2 explores the international legal nature of the EU's restrictive measures against Venezuela, while section IV offers some concluding remarks.

II. Judgment of the Court

In 2018, Venezuela brought an action before the General Court seeking the annulment of restrictive measures imposed against it by the Council. In its 2019 judgment the General Court dismissed the action by ruling that Venezuela was not directly concerned by those measures, and thus, that it lacked standing under art. 263(4) TFEU.[16] On appeal, the Grand Chamber of the Court of Justice found that Venezuela, as a State with international legal personhood, must be regarded as a legal person within the meaning of art. 263(4) TFEU and that it is directly concerned by the restrictive measures.[17] On this basis, the Court of Justice referred the case back to the General Court for judgment on the merits.

The General Court began its analysis by making a preliminary point on the nature of the restrictive measures at issue. It clarified that the measures at bar are of general application since they do not target identified natural or legal persons but apply to objectively determined situations and to general and abstract categories of addressees.[18]

[15] For discussion see E Kassoti and RA Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in P García Andrade (ed.), *Interacciones entre el derecho de la Unión Europea y el derecho internacional público* (Tirant lo Blanch 2023) 19.

[16] Case T-65/18 *Venezuela v Council* ECLI:EU:T:2019:649.

[17] Case C-872/19 P *Venezuela v Council (Affectation d'un État tiers)* ECLI:EU:C:2021:507. For comment see L Lonardo and E Ruiz Cairo, 'The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures, Case C-872/19 P, *Venezuela v Council*' (2022) EuConst 114. E Kassoti and A Carrozzini, 'A Curia Mundi? The CJEU's Judgment in Case C-872/19 P Venezuela v Council' (16 August 2021) EU Law Analysis eulawanalysis.blogspot.com.

[18] *Venezuela v Council* cit. paras 29-35.

Against this backdrop, it continued by examining the pleas invoked by Venezuela to challenge the restrictive measures.

First, the General Court held that Venezuela had no right to be heard prior to the adoption of the contested measures since these are measures of general application.[19] The Treaties contain no provision requiring the Council to inform any person potentially affected by a measure of general application.[20] Furthermore, the Court stressed that the disruption of economic relations with a third State is an important external policy choice taken with a view to influencing a particular international situation. Requiring the Council to hear the third country prior to the adoption of such measures would undermine their intended effect, namely, to exert pressure on the third State in order to change its behaviour.[21]

The Court also rejected the argument that the contested measures do not contain a sufficient statement of reasons. It found that both the overall situation leading to the adoption of the measures, namely *a continuing deterioration of democracy, the rule of law and human rights,* and the objectives pursued thereby, namely preventing the risk of further violence, excessive use of force and violations of human rights, were amply set out in the text of the contested measures and thus, they could not be unbeknown to Venezuela.[22]

Regarding the argument alleging material inaccuracy of the facts, as well as a manifest error in assessing the political situation in Venezuela, the Court recalled that according to settled case-law the Council enjoys broad discretion regarding what to take into consideration for the purpose of adopting economic and financial measures in the context of the CFSP. As a result, in this context, the EU Courts' review is limited and restricted to reviewing whether there has been a manifest error of assessment.[23] The Court found that the Council relied on credible and reliable information in order to assess the situation in Venezuela, including reports by Human Rights Watch, the Organization of American States, and the Inter-American Commission on Human Rights.[24] This conclusion cannot be called into question by internal reports furnished by Venezuela which find no support from sources outside the government and whose probative value is therefore low.[25] In this light, the Court held that the Council was able to conclude, without making a manifest error of assessment, that there were threats to democracy, the rule of law and human rights in Venezuela.[26]

The General Court also rejected Venezuela's arguments to the effect that the measures constitute unlawful countermeasures and that there has been a violation of international

[19] *Ibid*. paras 36-45.
[20] *Ibid*. para. 39.
[21] *Ibid*. para. 42.
[22] *Ibid*. paras 46-58.
[23] *Ibid*. paras 63-64.
[24] *Ibid*. paras 67-71.
[25] *Ibid*. para. 75.
[26] *Ibid*. para. 75.

law. In this respect, the Court first considered that the measures at bar do not constitute countermeasures within the meaning of international law since the conditions for the imposition of such countermeasures, as set out in the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, have not been followed *in casu*.[27] In this light, the Court found that the adoption of the restrictive measures did not amount to a breach of the international law obligation of non-intervention.[28] The General Court added that Venezuela had not established the existence of "a general practice accepted as law", within the meaning of art. 38(1)(b) of the ICJ Statute, requiring authorisation to be obtained by the United Nations Security Council prior to the adoption by the Council of restrictive measures.[29]

Next, the General Court rejected the arguments alleging infringement of the WTO Agreements. The Court recalled that, according to its settled case-law, the WTO agreements are not in principle among the rules in the light of which EU acts are reviewed save for cases where the Union intended to implement a particular obligation assumed in the context of the WTO, or where the act refers expressly to specific provisions of the WTO agreements.[30] In the case at hand, the restrictive measures do not expressly refer to provisions of the WTO Agreements and, similarly, Venezuela failed to indicate how the Union was implementing any WTO obligations by means of the contested measures.[31] Finally, the General Court also rejected the argument alleging exercise, by the Council, of extraterritorial jurisdiction. It was noted that the measures at issue apply to persons and situations falling within the (*ratione loci* or *ratione personae*) jurisdiction of the Member States.[32] The General Court stressed that the Council's power to adopt restrictive measures falls within a context of independent measures of the Union adopted in the context of the CFSP which are intended, *inter alia*, to ensure respect for the *erga omnes* obligations to respect the principles derived from general international law and international instruments of a universal, or quasi-universal nature, such as art. 1 of the UN Charter.[33] On this basis, the General Court dismissed Venezuela's action in its entirety.

[27] *Ibid*. paras 83-91.
[28] *Ibid*. para. 92.
[29] *Ibid*. paras 95-98.
[30] *Ibid*. para. 107.
[31] *Ibid*. paras 105-106.
[32] *Ibid*. para. 111.
[33] *Ibid*. para. 113.

III. Analysis and comment

III.1. The General Court's treatment of Venezuela's international law arguments

The first three pleas adduced by Venezuela, namely infringement of the right to be heard, failure to fulfil the obligation to state reasons and material inaccuracy of the facts, were based on EU law. In dismissing those pleas, the General Court relied on settled case-law[34] and on the factual context surrounding the case[35] and thus, its conclusions are straightforward and rather unsurprising. In its fourth plea, Venezuela relied on international law alleging that the measures at bar constitute countermeasures adopted in breach of customary international law and the WTO agreements. The General Court's line of argumentation and conclusions in relation to this final plea invite closer scrutiny.

Essentially, the Court here dismissed Venezuela's claim to the effect that the measures against it constitute *unlawful* countermeasures under international law by arguing that they do not qualify as *countermeasures* as such – within the meaning of the ILC's Draft Articles on State Responsibility. Instead, the General Court claimed that they constitute independent EU measures adopted in accordance with arts 3(5) and 21 TEU intended to ensure the fulfilment of *erga omnes* obligations to respect international law.[36]

This proposition is problematic on a number of grounds. First, the General Court left unanswered the question of the international legal nature of the measures in question. Arts 3(5) and 21 TEU, upon which the international legal force of the measures was grounded, are *res inter alios acta* for Venezuela as a third State. Accordingly, the provisions invoked by the General Court cannot provide a legal justification for EU sanctions that would otherwise be unlawful. That justification must be sought elsewhere in international law.

Secondly, the General Court's argument that the measures at hand do not constitute countermeasures because the procedural conditions for adopting such measures under the law of international responsibility (namely, prior notification of the responsible State) had not been followed *in casu* is also problematic.[37] The General Court seems to have applied some tortured logic here. It assumes that it is unthinkable for the Union to have acted contrary to international law and concludes that since the procedural conditions for adopting an international act are not met, then the Union did not intend to adopt that

[34] *Ibid*. paras 39, 43, 49 and 63.

[35] *Ibid*. paras 57 and 68-74.

[36] *Ibid*. para. 113.

[37] *Ibid*. para. 91. Regarding the procedural conditions relating to resort to countermeasures, the General Court cited to the International Court of Justice's judgment ICJ *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [25 September 1997] para. 84.

act. This "it cannot be what it should not be" argument[38] is not, however, very convincing and more by way of evidence should have been adduced to corroborate the claim that the measures in question do not qualify as countermeasures.

In a similar vein, the reliance on Venezuela's statement (given in response to a question posed during the proceedings) that it had not committed an internationally wrongful act triggering the adoption of the restrictive measures is bound to raise some eyebrows.[39] The General Court's argument goes as follows: since under the law of international responsibility countermeasures are responses to internationally wrongful acts, the fact that Venezuela denied the commission of any wrongful acts entails that the measures at bar cannot qualify as countermeasures.[40] This is, however, paradoxical. It would entail that for a challenge of the type discussed here to succeed, the third State would have to first admit that it has engaged into internationally wrongful conduct. This is also not supported by international judicial practice; in the context of determining the lawfulness of countermeasures, international judicial bodies make an independent assessment of the prior conduct of the responsible State.[41]

Finally, the finding to the effect that Venezuela did not commit any internationally wrongful acts also sits uncomfortably with the General Court's pronouncement later on in the judgment that the measures at hand are independent EU measures intended to ensure fulfilment of *erga omnes* obligations to respect international law.[42] The invocation of the international law concept of *erga omnes* obligations, namely obligations owed to the international community as a whole, to justify the Union's legal interest, as a non-injured party, in Venezuela's compliance with its international law obligations logically entails that, at the time of adoption of the measures, Venezuela *did not comply* with the relevant international law obligations – in the EU's opinion at least.[43] Otherwise, there would be no reason to adopt the measures at the first place. It bears noting in this context that, by way of contrast to the present judgment, in its 2022 ruling in *RT France*, the

[38] Other variants of this "it cannot be what it should not be" argument can also be found in the CJEU's judgments in case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:973, paras 83 and 123 and case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:18 para. 71. For criticism see E Kassoti, 'Between *Sollen* and *Sein:* The CJEU's Reliance on International Law in the Interpretation of Economic Agreements covering Occupied Territories' (2020) LJIL 13-15. See however *contra* E Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker' (2018) CMLRev 569.

[39] *Venezuela v Council* cit. para. 91.

[40] *Ibid.*

[41] See for example *Gabčíkovo-Nagymaros Project* cit. para. 83. ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* [5 December 2011] paras 124-160.

[42] *Venezuela v Council* cit. para. 113. For the concept of *erga omnes* obligations, the General Court referred to the ICJ's judgment in *Barcelona Traction*: ICJ *Case concerning the Barcelona Traction, Light and Power Company, Limited* (*New Application: 1962)* (*Belgium v Spain*) [5 February 1970] paras 33-34.

[43] See *mutatis mutandis* ICJ *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) [20 July 2012] paras 68-69.

General Court expressly characterised the restrictive measures against Russia as a reaction to the latter's violation of *erga omnes* obligations under international law.[44]

Overall, the General Court's approach leaves much to be desired. It mostly relied on internal, EU law, reasoning and failed to engage in depth with the broader international legal framework. However, as it will be shown below, substantive engagement with Venezuela's international law arguments could have yielded the same result, *i.e.* upholding the lawfulness of the restrictive measures – both under EU and international law.

III.2. The international legal nature of the restrictive measures against Venezuela: retorsions or countermeasures?

In the context of determining the legality under international law of the measures against Venezuela a useful point of departure is the distinction between retorsions, namely "unfriendly acts" which do not in themselves violate any rules of international law, and countermeasures, namely acts that are intrinsically unlawful and which are adopted in response to prior breaches of international law by the targeted State with a view to inducing the latter to comply with its international law obligations.[45] Under certain conditions, countermeasures do not constitute internationally wrongful acts, and thus, they do not engage the international responsibility of the State taking them.[46] In this light, if the EU's measures against Venezuela qualify as retorsions then they raise no issues under international law. However, things are different if these measures are incompatible with obligations incumbent on the EU on the basis of international customary or treaty law. Determining whether certain acts qualify as retorsions or countermeasures cannot be made in the abstract. It requires a careful examination of the legal and factual context of the case taking also into account the customary and treaty law rules applicable between the parties.

In casu, Venezuela claimed that the restrictive measures violated the principle of non-intervention as well as the WTO agreements. However, there is evidence to suggest that measures amounting to economic sanctions, such as those at bar,[47] do not breach the principle of non-intervention and thus, they can be considered as mere retorsions.[48] In *Nicaragua*, the International Court of Justice (ICJ) concluded that the US sanctions policy against Nicaragua, which amounted to a total trade embargo, did not violate the

[44] Case T-125/22 *RT France v Council* ECLI:EU:T:2022:483 para. 86.

[45] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, cit. p. 128. See also J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 685.

[46] Arts 52-54 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, cit.

[47] *Venezuela v Council* cit. para. 102.

[48] A Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) Cambridge International Law Journal 616.

customary principle of non-intervention.[49] Similarly, the ILC's commentary to the Draft Articles on State Responsibility expressly acknowledges that acts of retorsion may include "embargos of various kinds".[50] Furthermore, in the context of determining whether particular conduct falls within the scope of the prohibition of non-intervention, much depends on the element of *coercion*. According to the ICJ, intervention is wrongful "when it uses methods of coercion" in regard to "matters in which each State is permitted, by the principle of State sovereignty, to decide freely." [51] This high threshold does not seem to have been met here. There is no evidence to suggest that the restrictive measures imposed by the EU *have caused* Venezuela to change its course of conduct in the domestic sphere. By the same token, it cannot be seriously argued that the deterioration of human rights is a matter on which Venezuela is to decide freely.

At the same time, the (limited) evidence militating in favour of considering economic measures such as those at hand as contravening the principle of non-intervention needs to be assessed. As mentioned previously, there are numerous UN General Assembly resolutions condemning the use of economic measures to influence a State's domestic affairs.[52] The 1970 UN General Assembly Friendly Relations Declaration also contains a provision against economic coercion.[53] The normative value of these resolutions is however debatable and arguably, they reflect a division of opinion between developing and developed States on the matter.[54] As such, it is difficult to argue that, as a matter of positive international law, a clear and precise prohibition against economic measures exists.[55] At most, one could claim that it is simply unclear "to what extent the principle of non-intervention prohibits certain economic sanctions."[56]

However, even in this scenario, the General Court could have probed deeper in order to ensure that the restrictive measures do not violate international law. This is all the more so since the EU Sanctions Guidelines stress that "the introduction and implementation of restrictive measures must always be in accordance with international law."[57] More particularly, the General Court could have explored whether, in the hypothetical

[49] ICJ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [27 June 1986] paras 244-245.

[50] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, cit., p. 128.

[51] ICJ *Case concerning Military and Paramilitary Activities in and against* cit. para. 205.

[52] See above fn. 13.

[53] General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 24 October 1970, UN Doc A/RES/2625(XXV).

[54] A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention' cit.

[55] G Puma, 'The Principle of Non-Intervention in the Face of the Venezuelan Crisis' (2021) QuestIntlL 21.

[56] T Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' in L Van Den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2016) 25.

[57] Council of the European Union, Sanctions Guidelines – Update cit. para. 9.

scenario that the measures at hand are considered as contravening the customary law principle of non-intervention, they could still be regarded as lawful on the basis of the regime governing countermeasures.

Before elaborating on this point, a few words should be said at this juncture about Venezuela's argument alleging infringement of the WTO agreements. The General Court here followed established case-law ruling that the lack of direct effect of WTO rules prevents the judicial review of EU acts in the light of those rules.[58] Although this approach is technically correct, it does leave the question of WTO-consistency of the restrictive measures open. The EU Sanctions Guidelines expressly acknowledge that restrictive measures could be in some cases incompatible with WTO law.[59] It would be beyond the scope of the present *Insight* to provide a detailed examination of the lawfulness of the measures against Venezuela under WTO rules.[60] However, it suffices to mention that the measures seem to be *prima facie* inconsistent with the principle of non-discrimination, the prohibition on quantitative restrictions and most favourite nation treatment under the General Agreement on Tariffs and Trade regime.[61] It would however be possible for the General Court to ensure that the issue of the WTO-consistency of the measures is not left unanswered. As mentioned above in relation to the principle of non-intervention, the General Court could have explored the possibility that even if *arguendo* the measures were considered as WTO incompatible, they could still be justified as lawful countermeasures.

Thus, even in case of *prima facie* inconsistency of EU restrictive measures with obligations under international law, their lawfulness could still be based upon the doctrine of collective countermeasures as reflected in art. 54 of the ILC's Articles on State Responsibility. The provision contemplates the possibility that States, other than the one directly injured by an internationally wrongful act, may have recourse to countermeasures in case of breach of an obligation owed to the international community as a whole (*erga omnes*).[62] Interestingly enough, when assessing the relevant practice, the ILC referred to a number of instances involving EU economic sanctions (*e.g.* collective measures against Yugoslavia). In a similar vein, the commentary to the corresponding provision in the 2011 Draft Articles on the Responsibility of International Organizations expressly states that most of the relevant practice (namely the taking of countermeasures by an international organization in

[58] *Venezuela v Council* cit. para. 107.

[59] Council of the European Union, Sanctions Guidelines – Update, cit. para. 11.

[60] On the sparse practice of challenging restrictive measures before the WTO see L Chercheneff, 'Challenging Unilateral and Extraterritorial Sanctions under International economic Law: Exploring Leads at the WTO and the OECD' in L Van Den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2016) 239.

[61] For analysis see M Gestri, 'Sanctions, Collective Countermeasures and the EU' cit. 84. T Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' cit. 30. I Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill 2022) 223-270.

[62] Art. 54 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries cit.

response to violations of *erga omnes* obligations) originates from the EU.[63] At the same time, the provision stirred much debate and the commentary to the 2001 Draft Articles states that "practice on this subject is limited and rather embryonic" and thus, the Commission decided to leave the matter open to be determined by the further development of international law.[64] A decade later, the Commission espoused the same approach in the 2011 Draft Articles on the Responsibility of International Organizations.[65]

However, more recent accounts reveal that modern practice on collective countermeasures can hardly be described as "embryonic". As Dawidowicz's thorough studies on the issue reveal, there is currently considerable practice in favour of accepting collective countermeasures emanating from States on all continents and from international organizations such as the EU, the African Union and Economic Community of West African States.[66] This position is also espoused by other authors.[67]

In this light, the EU's measures against Venezuela could be justified on the basis of art. 54 of the ILC Draft Articles on State Responsibility as countermeasures in reaction to Venezuela's violation of *erga omnes* norms. This is particularly the case since the General Court expressly invoked the concept of "obligations owed to the international community as a whole"; a reference, which, as seen above, does not really comport with the proposition that Venezuela has not engaged in an internationally wrongful act – as per the General Court's line of reasoning.

The legal regime on countermeasures stipulates certain procedural conditions governing recourse thereto since such measures often have important consequences for the responsible State.[68] Art. 52(1) of the ILC Draft Articles on State Responsibility sets out two basic requirements. According to the provision, a State intending to adopt countermeasures must: a) afford the opportunity to the responsible State to answer allegations of wrongfulness and to reconsider its position; and b) notify the responsible State of the decision to take countermeasures and offer to negotiate. Both conditions seem to be

[63] Art. 49 Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, with commentaries [2011].

[64] Art. 54 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries cit. 129.

[65] Art. 49 Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, with commentaries cit. 90.

[66] M Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) 111-238. M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their relationship to the UN Security Council' (2007) BYIL 333.

[67] See for example T Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', cit., 46. C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge University Press 2005) 249; M Dawidowicz 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their relationship to the UN Security Council' cit. 333; E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community* (Routledge 2010) 231.

[68] J Crawford, *State Responsibility: The General Part* cit. 700-701.

fulfilled in the case at hand. Prior to the adoption of the restrictive measures, the Union had repeatedly expressed concern over the deterioration of human rights, democracy and the rule of law in the country and it had called upon Venezuela to fulfil its international obligations.[69] Furthermore the 2017 Council Decision adopting the restrictive measures serves as a "trigger-statement" notifying Venezuela of the adoption of the measures against it and setting out the requisite corrective action – thereby fulfilling the notification obligation.[70] The Decision also expressly stipulates that the aim of the measures is to foster "a credible and meaningful process that can lead to a peaceful negotiated solution" – thereby fulfilling the "offer to negotiate" requirement.[71]

In this light, it becomes apparent that even if prima facie incompatible with customary international law norms or the WTO agreements, the restrictive measures against Venezuela can be considered as lawful countermeasures under international law.

IV. Conclusion

The General Court missed an opportunity to clarify the international legal nature of restrictive measures adopted by the Union against third States. As seen above, the lawfulness of the measures against Venezuela could have been justified on the basis of the international law regime governing countermeasures. This is regrettable particularly in light of the fact that in the literature, the EU has been characterised as a "trailblazer" for collective countermeasures in response to violations of *erga omnes* obligations.[72] The General Court's claim of an autonomous external sanctioning power on the basis of the EU treaties is controversial and unsubstantiated in terms of international law.[73] It is hoped that in its future case-law on the matter, the CJEU will engage extensively with the broader international legal framework of collective countermeasures – thereby, also making a substantive contribution to the development of international law in that particular field.

[69] See for example Council conclusions on Venezuela of 15 May 2017. Declaration of the High Representative Federica Mogherini on behalf of the EU on Venezuela of 2 August 2017.

[70] M Dawidowizc, *Third-Party Countermeasures in International Law* cit. 378.

[71] Also, according to M Dawidowicz, "practice concerning third-party countermeasures demonstrates (perhaps unsurprisingly) that their adoption is normally accompanied by a flurry of parallel diplomatic activity aimed at resolving the dispute; as such, it broadly conforms with the principle established in art. 52(1)(b) [...]" (*Ibid.* 379).

[72] M Gestri, 'Sanctions, Collective Countermeasures and the EU' cit. 99.

[73] N D White, 'Autonomous and Collective Sanctions in the International Legal Order' cit. 17. See also D Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) AJIL 140-145.