PROPORTIONALITY OF COUNTERMEASURES AS A CONDITION OF THEIR LEGITIMACY

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Abstract: Under current international law, the use of countermeasures by a state is permissible if their application is carried out in response to a violation by another international legal entity of its obligations according to the law. However, despite their importance for the maintenance of the international legal order, international legal acts of a binding and recommendatory nature do not give an accurate answer to the question of what should be considered countermeasures, and therefore, in which case they can be considered legitimate. The paper considers one of the most controversial conditions for the legality of countermeasures taken by a state in response to a violation by another entity of international law of its obligations. It is argued that it is necessary in assessing the proportionality of countermeasures to be guided by criteria that allow an objective assessment of the nature of actions of the injured state in order to establish the legitimacy of the response measures. Bearing in mind that proportionality is an evaluation legal category, and the measurement of countermeasures taken by a state with a committed offense is a rather difficult task, when deciding on the legitimacy of countermeasures, it should be based on the criteria common to all. This is especially important, since countermeasures are taken decentralized, not by an international organization on behalf of the injured State or the international community as a whole, but by the victim itself. Therefore, the rules for the commission of such actions should be specified. Such criteria should be considered as the scope of the damage caused by the offense, the nature of the internationally wrongful act and the type of rights violated.

Keywords: countermeasures, sanctions, international legal responsibility, internationally wrongful act, state.

1 Introduction

Modern international law allows the possibility of the use of countermeasures by a state in response to a violation by another entity under international law of its obligations. It should be noted that at present any actions of entities under international law related to the introduction of any restrictions on states and their citizens are called sanctions, what is completely unfounded. This term has become more widespread than other related legal categories despite the fact that the sanctions have the grounds and conditions for their introduction that are clearly stipulated by international legal acts. Nevertheless, the countermeasures of states that, like sanctions, can be quite legitimate in the presence of certain pre-existing circumstances, are in most cases used either by inadequate subjects of international law or are beyond the response restrictive measures at all. In this regard, the formation of a clear understanding of the nature and essence of countermeasures is of great theoretical and practical importance, since their uniform understanding contributes to the strengthening of the international legal order.

2 Methodology

The study of such a complex institution of international law as countermeasures is impossible without paying due attention not only to the current international law norms of binding nature, but also to documents of a recommendatory nature, which are often regarded by theorists as ordinary norms of international law.

We believe this, first of all, should include the documents developed by the UN International Law Commission and recommended by the UN General Assembly, as well as open to signing by states the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as the "Articles on State Responsibility"), and the Articles on the Responsibility of International Organizations for Internationally Wrongful Acts ("Articles on the Responsibility of International Organizations").

Their significance cannot be overemphasized, especially from the point of view of the methodology of scientific cognition, since an exact definition of countermeasures is not contained in any international legal instrument. Indeed, the term "countermeasures" is used very rarely by international legal instruments. For example, in Article 9 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, only mention is made of the fact that the contracting states are implementing, developing or improving specific training programs for law enforcement and other bodies that deal in particular with routes and means used by suspects to participate in relevant offenses, particularly in transit states, and countermeasures. But the term is used in this international legal act in a different context that goes beyond interstate relations, although the definitions of countermeasures in the document are not consolidated.

However, the above Articles on Responsibility of States and the Articles on the Responsibility of International Organizations do not give an accurate answer to the question of what should be considered countermeasures. As a result, various definitions of this legal category can be found in the scientific literature. In particular, this term is defined as a reaction to a wrongful act of an international organization or a state, or the way the victim takes to respond to a wrongful act of an offender (Mirka, 2012).

3 Results and Discussion

Proceeding from the provisions of Article 22 of the Laws on Responsibility of States, as well as the Chapter Two of Part Three of this document, the most correct is the definition of a countermeasure as an act that would be considered as unlawful in accordance with international law, if is executed not in response to a violation by another entity of international law of their obligations.

In the course of work on the draft Articles on Responsibility of States, the UN International Law Commission used the term "sanctions" for a long time to refer to all the response measures of the injured international legal entities. However, at the final stage of work on the draft Articles on State responsibility, it was decided to replace the term with a more appropriate by its nature term "countermeasures", which is entirely justified, since there is a significant difference between sanctions and countermeasures. Countermeasures are taken directly by the state affected in response to a wrongful act of another state, while international sanctions are a measure of collective impact, taken by an international organization in order to compel an offender to fulfill its obligations with regard to its legal liability. Countermeasures in the literature are also called "unilateral" (Denis, 2010) and "horizontal" response actions, since this relationship is formed directly between the injured state and the offender (Kurdyukov, 1998). As is emphasized by M.V. Keschner, countermeasures constitute an element of a decentralized mechanism of coercion of an offending state and are seen as an instrument of implementation of responsibility that is not punitive (Keshner, 2015). Nevertheless, there is a theory in the literature about "individual sanctions" or targeted measures of influence (Volker, 2012).

In order to ensure the use of countermeasures within the legal framework, and also in order to limit the abuse of the right of states to take countermeasures, the conditions and grounds for their application have been enshrined in the Articles on responsibility of states. We believe, the greatest interest is caused by provisions on such a condition of the lawfulness of countermeasures as proportionality. This is due to the fact that, despite the indisputable recognition, both in scientific literature and in the practice of international judicial bodies, the proportionality is one of the main conditions for the use of countermeasures, and the procedure for its determining remains a debatable issue.

The provision on proportionality of countermeasures appeared in the articles on the responsibility of states (Article 51), including due to the practice of international judicial bodies. In particular, within the framework of the international arbitration of 1978 on the dispute between France and the United States on air transport, the question of the proportionality of the US prohibitive measures was considered in some detail (Villalobos Antúnez, 2016). However, in its decision on the case, the

arbitration stressed that determining the proportionality of countermeasures is a rather complex task and therefore can only be approximate. According to I.I. Lukashuk, such a conclusion of arbitration is not surprising, since much depends on the circumstances of a particular case, but such approximations may give rise to the abuse of countermeasures (Lukashuk, 2004).

Bearing in mind that proportionality is an evaluation legal category, and the comparison of the countermeasures taken by the state with the committed offense is quite a difficult task, then the decision-making on the validity of countermeasures should be based on the criteria common to all. This is especially important, since countermeasures are taken decentralized, not by an international organization on behalf of the injured state or the international community as a whole, but by the victim himself. Therefore, the rules for commissioning such actions should be specified.

Earlier in the scientific literature, the need to use equivalent response measures was emphasized, meaning that equivalence is the quantitative measure of the actions of the offender and the victim. E. Kannizaro rightly emphasized that by establishing equivalence as a link between the committed offense and the response, the principle of proportionality reduces the unnecessarily wide choice of ways on responding to the actions of the offender, thereby minimizing the possibility of abuse of the law. However, countermeasure thereby converted into personal revenge (Enzo, 2001).

4 Summary

Undoubtedly, transformation of a countermeasure into medieval retribution based on the principle “an eye for an eye” is absolutely unacceptable at the present stage of the development of international relations. However, the complete exclusion of reciprocity between a harm-doer and its victim appears to be incorrect. Reciprocity in both international public and private international law plays an indisputable role in the construction of interstate relations. And the application of this principle in determining the proportionality of countermeasures may be effective when, for example, there is a breach of a bilateral obligation. Such a view is found, in particular, in the practice of international judicial bodies. Thus, in the case of application of the interim Agreement dated 13.09.1995 (the Former Yugoslav Republic of Macedonia v. Greece), the Judge Zimma expressed his separate opinion on the decision adopted on 05.12.2011 by The International Court of Justice of the United Nations. He pointed out that in international law the principle of reciprocity is still afloat and, when applying various methods of self-defense, it is the main means by which states can seek to assert their rights. This principle, in his opinion, is especially evident in the functioning of international legal mechanisms for the application of sanctions, including, among other things, countermeasures and mutual refusal to fulfill the treaty (Mamedov, 2017).

However, when deciding on the proportionality of countermeasures, the application of the reciprocity principle is not always acceptable, in particular, in cases where there is a violation of human rights, violation of peremptory norms of international law, and norms of international law governing multilateral relations. Violation of these norms is carried out in relation to not one state, but a group of states, or the international community as a whole. Consequently, the uses of a mirrored response by the injured state will not only cause damage to the wrongdoing state, but also other states that are part of this group.

In foreign literature, attention is also drawn to the fact that the criterion of reciprocity can be used in deciding the proportionality of countermeasures, but it directly contradicts another criterion "means-goal" which seems more adequate to the nature of these legal relationships, since the legality of countermeasures depends directly on the purposes of their application. And there can be only two goals of applying the retaliatory measures: either to induce (violate) the offender to begin to fulfill the international obligation that it has violated, or, if it is impossible to restore the previous situation, to induce (compel) compensation for the damage caused.

The need to commensurate the countermeasures used with their purposes (cessation of the wrongful act and the provision of appropriate reparation) is also specified in the domestic literature (Keshner, 2012). In essence, the criterion "means-goal" is based on determining the acceptability of means to achieve the goal of countermeasures. Consequently, the question of proportionality depends directly on the legitimacy of the set goal of the countermeasure, which it is entirely permissible to resort to if its purpose is legitimate (Kretzmer, 2013).

We believe that this approach is the most correct, since countermeasures should not be punitive. They should not be used to punish the offender, but to encourage it to fulfill its international obligations. The aggrieved party should not be guided by the desire to implement retaliation, and the measures taken by it should not damage international peace and security. Therefore, under no circumstances, countermeasures should be reduced to the use of force, as explicitly stated in the Articles on State Responsibility, and in numerous comments of states on the Articles.

5 Conclusion

From the analysis of the provisions of the Articles on the Responsibility of States, as well as the practice of the international judicial authorities, we can conclude that in determining proportionality of countermeasures it is advisable to base on the amount of damage inflicted on the injured state, as well as on the nature of the violated rights and the type of international offense. Such a conclusion can be drawn, in particular, from an analysis of the decision of the International Court of Justice in the case of the Gabčíkovo-Nagymaros project, in which the Court pointed out the disproportionate measures taken by Czechoslovakia in relation to Hungary [12].

Thus, in determining the proportionality of state countermeasures against the offender, it is necessary to be guided by criteria that allow an objective assessment of the nature of the actions on the part of the injured State in order to establish the legitimacy of countermeasures. First of all, it is necessary to be guided by the criterion of the size of the damage caused by the offense. In addition to this criterion, one should also take into account the nature of the internationally wrongful act (its degree deed) and the rights affected by the offense.

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