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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Контрмеры и санкции

Алина Мирон

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Countermeasures and Sanctions

Alina Miron

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The present publication contains the text of lectures by Alina Miron on the topic “Countermeasures and Sanctions”, delivered by her within the frames of the Summer School on Public International Law 2019.

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Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

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Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катека («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

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Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

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CHAPTER 1:

Introduction. Rationale and Conceptual Clarifications

Section 1. Enforcement in the International Legal System: Taming Self-Help?

Countermeasures and sanctions are forms of unilateral enforcement against violations of international law. In this respect, the international legal system is notoriously primitive, in the sense that the victims of violations are also the main vindicators of their infringed rights. As Professor Vera Gowlland-Debbas wrote, "reactions to violations (…) have traditionally been unilateral, i.e., have taken the form of private justice. States enforced their own rights and, in invoking responsibility, freely determined the legal consequences they ascribed to other states' infringement of their rights, having recourse to coercive measures if necessary. In short, unpredictable decentralized reactions to violations of international law were and still are, to a large extent, the rule in international society."[1]

The Charter of the United Nations deprived States of the possibility to resort unilaterally to war, but not of the one to adopt peaceful measures of self-help. The Security Council, despite its exorbitant competences in the field of the use of force, was not conceived as an executive power. It is not a guardian of international legal order in general, but a guardian of international peace and security. And as Hans Kelsen had underlined in the early times of the Charter, the purpose of enforcement action under Chapter VII was "not to maintain or restore the law, but to maintain, or restore

[1] V. Gowlland-Debbas, "Security Council Change: The pressure of emerging international public policy", *International Journal*, Vol. 65, No. 1, UN sanctions (Winter 2009-10) 119.

peace, which is not necessarily identical with the law."[2] This remains largely true nowadays.

Decentralization in the implementation of State responsibility and the correlative absence of judicial and enforcement bodies, endowed with competence to impose sanctions on a violator, are among the most common complaints about international law.[3] But they are also quintessential characteristics of the present-day structure of the international legal system, which has outlived the establishment of a system of collective security. This classical structure can be described as *horizontal* (all States enjoy sovereign equality), *decentralized* (States have no superior authority above them) and mainly *self-appreciatory* (States are those to define in the first place the strength of their legal position and it is only incidentally that an international judicial organ would assess the merits of their unilateral positions).

These systemic characteristics stay in the background, even in the rather exceptional cases when centralized judicial institutions enjoy unfettered competence to adjudge upon violations of treaty obligations. Thus a WTO Panel noted that:

> "[T]he notion of enforcement contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects, and which is almost entirely absent from international law (action under Chapter VII of the United Nations Charter is arguably an exception, but it has no relevance in the present dispute). The possibility for states to take countermeasures, that is to try by their own actions to persuade other states to respect their obligations, is

[2] H. Kelsen, *The Law of the United Nations* (London: London Institute of World Affairs, 1950) 294; and H. Kelsen, "Collective security and collective self-defense under the Charter of the United Nations", *American Journal of International Law* 42, no. 4 (1948) 788.

[3] T. M. Franck, *Countermeasures and self-Help* (CUP 2009) 111.

itself an acknowledgement of the absence of any international body with enforcement powers".[4]

If the structure of the international system has not undergone any Copernican revolution since 1945, several important evolutions or at least tendencies must nonetheless be noted. The first comes from the regulation of counter-measures by ARSIWA (2001) which codified and crystallized the limits and conditions for counter-measures to be lawful. It is for the first time that these are collected in a single instrument, which has quickly become a reference. These conditions and limitations limit the margin of self-appreciation and introduce an obligation of motivation for States resorting to countermeasures. As such, ARSIWA can be seen as a legal tool for taming the excesses of unilateral private justice.

The second evolution comes from the growing tendency of the Security Council to act as a law-enforcement body. Of course, the mandatory decisions adopted by the Security Council under Chapter VII of the Charter are based upon political considerations, rather than legal reasoning. However, after 1990 and increasingly ever since, the Security Council has adopted enforcement measures presented as the consequences of prior violations of international law by the targeted entities. As underscored by Vera Gowland-Debbas, "in numerous cases, [decisions had] been based not only on a finding of fact, but also on one of law: linking threats to, or breaches of the peace to serious and grave breaches of international law; attributing these violations to certain entities; and, despite the evident political origin of this qualification, applying in consequence measures that divest states and individuals of certain legal rights." [5] The institutionalization of enforcement is certainly a sign of a more mature, less primitive legal system. At the same

[4] Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 7 October 2005, § 8.178.
[5] V. Gowland-Debbas, *op. cit*. fn. 3, 123.

time, since "the law must be the same for all, whether it protects or punishes",[6] such a tendency creates expectations of a more systematic, less aleatory intervention on the part of the Security Council. However, these expectations have not been met so far.

The third evolution consists in an exponential growth of unilateral coercive measures or as, they are usually called, "unilateral sanctions". The concept is largely undefined legally. But the working definition proposed by the Human Rights Council is sufficiently explanatory to be borrowed here: "the use of economic, trade or other measures taken by a State, group of States or international organizations acting autonomously to compel a change of policy of another State or to pressure individuals, groups or entities in targeted States to influence a course of action without the authorization of the Security Council."[7] These measures are unilateral if they do not qualify as measures of implementation of sanctions adopted by the Security Council.[8] Several dozen states and several thousand people are now subject to these types of measures. Of course, unilateral coercion has not emerged in recent years or even decades, but once isolated and scarce, coercive measures have become major instruments of the foreign policy of some States — indeed, it can be said that they are the tool par excellence in case of failure of negotiations. In this respect, a sparse past practice has developed into a systematic yet highly unregulated policy, which poses a challenge to the system of collective security.

These three major evolutions reveal the centripetal dynamics at work in the international system. The regulation of countermeasures is a dyke against an abusive exercise of this form of self-help. The conditions and limitations crystallized in ARSIWA

[6] Declaration of Human and Civic Rights of 26 August 1789, Article 6.
[7] Human Rights Council, Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability, UN doc. A/HRC/28/74 (2015) § 9.
[8] See below, p. 41.

are as many parameters for third parties to assess the legality of the counter-measures. As such, they are a form of international regulation and amount to *legislative multilateralism*. The practice of the Security Council is a different path towards a more integrated system, of an *institutional multilateralism*, an incipit institutionalization of enforcement. To be sure, for the moment, the action of the Security Council appears at best random if not arbitrary. Therefore, institutionalization cannot be said to rime with centralization. Institutional multilateralism remains weak and it is further weakened by the growth of unilateral enforcement measures, which appear as a disruptive form of resistance to any form of multilateralism. Through the adoption of unilateral coercive measures lacking any basis in international law, States show that they can still act without having to internationally justify their action, outside any existing institutional framework and thus circumvent any legislative or institutional multilateralism.

Before discussing the regime of countermeasures and the lack of regime of unilateral "sanctions", it is interesting to note how the progressive taming of self-help in international law was reflected by shifts in terminology. The present-day discussion on the use of the term "sanctions"[9] to designate unilateral coercive measures could be the sign of a new evolution in the law of enforcement, even though no consensual rules have so far developed in this respect.

Section 2. Conceptual and Terminological Evolutions

Several concepts have been devised in time to describe the phenomena of self-help in international law. *Reprisals* and *retaliation* are probably the oldest one. Etymologically, the term

[9] The inverted commas are meant to express disagreement with the wide usage of the term "sanctions", which has a legal connotation of empowerment to punish, which unilateral measures are lacking. On these terminological debates, see below, pp. 41-43.

"reprisal" is said to come from the French *reprendre* ("to re-take"). "Reprisals, indeed, initially involved the taking of property of the wrongdoer to the extent of the injury suffered. Being grounded on notions of collective liability, reprisals could be taken against any member of the community of the wrongdoer".[10] "Retaliation" comes from Late Latin *retaliare* "pay back in kind", a verb composed of *re-* "back" and the Latin "*talio*" ("exaction of payment in kind"), influenced by *talis* ("suchlike"). It is often associated with the idiom "an eye for an eye (and a tooth for a tooth)". Both words (reprisals and retaliation) are suggestive of a primitive system of restoration of justice, in which the subjects (victims) are also the agents of law-enforcement. The only limitation to the victims' power of self-appreciation comes from a vague idea of proportionality, meant to lower the risks of abuse and mistakes. As Professor Abi-Saab's noted, "in their armed version, predominant before the Charter, by the very nature of the means used, reprisals were measures of last resort, with a largely afflictive or punitive purpose, restoring the balance between the parties, by the infliction of an equivalent damage, in absence of a form of compensation."[11]

The first evolution of the regime consisted in a gradual regulation of the *means* of reprisals, even though no rules developed to restrict the *right* to resort to reprisals. For the first time in 1907, the Drago-Porter Convention prohibited the use of force for the recovery of debts and constituted the first limitation of the means of reaction. "Subsequently, the *Naulilaa Arbitration (Portugal/ Germany)* award of 1928 formally articulated the law of reprisals, including the requirements of a prior wrong, proportionality and *sommation*."[12]

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[10] F.I. Paddeu, *Countermeasures* (MPEPIL 2015) § 4.

[11] G. Abi-Saab, "Cours général de droit international public", *Recueil,* vol. 207 (1987) 297. Our translation from the original: "*Dans leur version armée, prédominante avant la Charte, de par la nature même des moyens utilisés, les représailles étaient des mesures de dernier recours, à but largement afflictif ou punitif, en rétablissant l'équilibre entre les parties, moyennant un dommage équivalent, faute de réparation*."

[12] F.I. Paddeu, *op. cit*. fn. 9, § 9.

At present, the word "reprisals" is still used in the field of humanitarian law, as equivalent to "belligerent reprisals", i.e. "action taken in time of international armed conflict, which may consist of violations of international humanitarian law."[13] However, even in this context, they are viewed with great suspicion. The Code of Customary International Humanitarian Law drafted by the International Committee of the Red Cross provides in Rule 145: "Where not prohibited by international law, belligerent reprisals are subject to stringent conditions." And the commentary adds: "The reticence to approve of the resort to belligerent reprisals, together with the stringent conditions found in official practice, indicates that the international community is increasingly opposed to the use of violations of international humanitarian law as a method of trying to enforce the law."[14]

Also a measure of self-help, *retorsion* is defined as "'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act."[15] Consisting of lawful measures, retorsion is not regulated by international law. Therefore the motivations for adopting acts of retorsion or their intensity are hardly challengeable, unless their cumulative effect is constitutive of a violation of an international rule like the one of non-intervention in the internal affairs of a State.[16]

The term "*countermeasures*" was seldom used before the 1970s. Its consecration came from the award in *Air Service Agreement of 27 March 1946*.[17] Shortly after the award, "the ILC substituted

[13] ILC, *Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001], *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), art. 22, 75 [3].
[14] ICRC, Customary International Humanitarian Law, CUP (2006), also online: <https://www.icrc.org/en/doc/resources/documents/publication/pcustom.htm>.
[15] ILC, fn. 13 above, 325 [3].
[16] See below p. 17 on the lawfulness of "sanctions".
[17] *Air Service Agreement of 27 March 1946 between the United States of America and France*, *RIAA*, vol. XVIII, pp. 417-493.

the word 'sanction' (…) with the word 'countermeasure' in its Draft Articles on State Responsibility."[18] Prior to the adoption of ARSIWA, the International Court of Justice used the same terminology in *Tehran Hostages*,[19] *Military and Paramilitary Activities*,[20] and *Gabcíkovo-Nagymaros Project*[21] judgments, thus greatly contributing to its dissemination. "Countermeasures" is now a generally accepted concept, used even in the context of particular regimes like WTO:

> "4.40 We note that the term 'countermeasures' is the general term used by the ILC in the context of its Draft Articles on State Responsibility, to designate temporary measures that injured States may take in response to breaches of obligations under international law.
>
> 4.41 We agree that this term, as understood in public international law, may *usefully inform our understanding of the same term*, as used in the SCM Agreement [Agreement on Subsidies and Countervailing Measures]. Indeed, we find that the term 'countermeasures', in the SCM Agreement, describes measures that are in the nature of countermeasures as defined in the ILC's Draft Articles on State Responsibility.
>
> 4.42 At this stage of our analysis, we therefore find that the term 'countermeasures' essentially characterizes the nature of the measures to be authorized, i.e. *temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of an obligation under the SCM Agreement*. This is also consistent

[18] D. Alland, "The Implementation of International Responsibility. The Definition of Countermeasures", in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of international Responsibility* (Oxford Commentaries in International Law 2010) 1127.
[19] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Merits) [1980] ICJ Rep [53].
[20] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep [201].
[21] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep [69].

with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility".[22]

Section 3. Definition of Countermeasures

Curiously, neither ARSIWA nor its commentaries define the concept of countermeasures. The WTO panel's conclusions quoted above gave a partial definition, insisting on the reactive and a priori unlawful character of the measures adopted. Denis Alland defines them as "pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more States against another State, when the former consider that the latter has committed an internationally wrongful act which could justify such a reaction."[23] In his definition, Alland adopts a voluntarist approach and puts the focus on the self-appreciation by the victim both of the wrongfulness of the initial act and of the appropriateness of its own reaction. Crawford's definition, inspired by an objectivist approach, is both circumstantial and purpose-oriented: "countermeasures involve non-compliance by one state with an international obligation owed towards another state, adopted in response to a prior breach of international law by that other state and aimed at inducing it to comply with its obligations of cessation and reparation."[24]

In all these definitions, the *functions of countermeasures* appear as distinctive characteristics. The first function is

[22] WTO, *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, Case No. WT/DS267/ARB/1, Decision by the Arbitrator, 31 August 2009, §§ 4.40–4.42 (footnotes omitted; emphasis added) and *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, §§ 4.30–4.32 (footnotes omitted).

[23] D. Alland, *op. cit.* fn. 18, 1135.

[24] J. Crawford, *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law 2013) 685.

that of a shield against wrongfulness. According to Article 22 ARSIWA, countermeasures are among the six circumstances precluding wrongfulness (consent, self-defence, countermeasures, force majeure, distress, necessity). Countermeasures have thus an *exculpatory function* and are invoked as a defence. But countermeasures serve also and foremost as means of implementation of State responsibility and, as such, of enforcement of international law. In this context, they play a double role: they are *reactive* tools intended to induce the wrongdoing State to comply with its obligations of cessation (if the wrongful act is continuing).[25] They also have a *reparatory function*, since their object is to obtain compensation for the damage inflicted. However, they are *not intended to be punitive*.[26]

To sum up, the essential characteristics of countermeasures are the following:

- they are unilateral acts and actions of a State;
- they are unlawful by nature (they amount to violations of international obligations), but become lawful by purpose, if they otherwise comply with the regime of countermeasures;
- they are adopted in reaction to a prior violation of international law;
- they are directed against the offending State;
- they are adopted to secure compliance with international obligations (and thus restore the law).

[25] ILC, fn. 13 above, art. 18, 70 [3].

[26] See also F.I. Paddeu, *op. cit.* fn. 10, §16: 1. "Countermeasures are thus instrumental in relation to the implementation of State responsibility; they have a purely remedial function and may not be used as a tool of repression or punishment (…). In other words, the countermeasure is not an end in itself, but only a means to an end."

Section 4. Countermeasures and Coterminous Contemporary Concepts

Distinction with suspension of treaty obligations for material breach (Article 60 of the Vienna Convention on the Law of Treaties). As reactions to prior violations, countermeasures must be distinguished from the suspension or termination of a treaty under Article 60 of the VCLT. The regime of countermeasures and the regime of termination/suspension for material breach differ both in the conditions under which States can resort to these measures of self-help and in their consequences. Amalgam is neither permitted nor suitable. "Where countermeasures are taken in accordance with [ARSIWA], the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied."[27]

For this reason, the conditions are also more stringent in the law of treaties. As the Court held in *Gabčíkovo-Nagymaros Project* "it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties."[28] Article 60, paragraph 1 of that Convention provides that: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the

[27] ILC, fn. 13 above, art. 22, 75 [4].

[28] *Gabčíkovo-Nagymaros Project,* fn.21 above [106]; See also ILC, fn. 13 above, 128 [4]: "Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach".

treaty or suspending its operation in whole or in part." The concept of "material breach" is defined in paragraph 3 of the same provision:

> "A material breach of a treaty, for the purposes of this article, consists in:
>
> (a) A repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty".

In *Gabčíkovo-Nagymaros Project*, the ICJ did not analyse the concept of material breach and simply concluded that Slovakia showed willingness to comply and that, in the circumstances of the case, the invocation of termination by Hungary was premature.[29] A more thorough interpretation of Article 60, paragraph 3 VCLT may be found in the partial award in the *Slovenia/Croatia* case. In this case, Slovenia's Agent was found to have had impermissible communications with the arbitrator of Slovenian nationality, during the phase of deliberations. Following the resignation of this faulty arbitrator, as well as the one of Croatian nationality, the Tribunal was reconstituted. Before deciding on the merits, the Tribunal addressed Croatia's claim of termination of the Arbitration Agreement and consequently of the arbitration process. The Tribunal's analysis deserves to be quoted *in extenso*:

> "213. To 'repudiate' an agreement amounts to a 'refus[al] to fulfil or discharge' it. A repudiation of a treaty, as contemplated under Article 60, paragraph 3, subparagraph (a) of the Vienna Convention, involves the rejection of a treaty as a whole by the defaulting party. (…) In the Tribunal's view, the right of a party to seek the termination of a treaty on the ground that the other party has repudiated it is closely related to the principle *inadimplenti non est adimplendum*. To safeguard expectations of

[29] *Gabčíkovo-Nagymaros Project,* fn. 21 above [107]-[109].

reciprocity underlying a treaty relationship, a party should not be required to perform a treaty that the other party has clearly and definitively rejected. (…)

214. (…) A repudiation of the Agreement as a whole must be distinguished from a purported breach of any of its provisions, which may constitute a material breach under Article 60, paragraph 3, subparagraph (b) of the Vienna Convention.

215. Turning, then, to Article 60, paragraph 3, subparagraph (b) of the Vienna Convention, the Tribunal first observes that Article 60, paragraph 3, subparagraph (b) *does not refer to the intensity or the gravity of the breach*, but instead requires that the *provision breached be essential for the accomplishment of the treaty's object and purpose*. (…)

218. It results from the text itself of Article 60, paragraph 3, subparagraph (b) and from the jurisprudence thus recalled that a tribunal having to apply that provision must *first determine the object and purpose of the treaty* which has been breached. Termination of a treaty due to such a breach under Article 60, paragraph 1 is warranted only if the breach defeats the object and purpose of the treaty. (…)

219. The treaty in question is of a specific kind. It is an arbitration agreement. As stated by the ICJ, 'when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits'. In the present case, the Arbitration Agreement notes in its preamble that, 'through numerous attempts, the Parties have not resolved their territorial and maritime dispute in the course of the past years". It contemplates the constitution of an arbitral tribunal, fixes its composition and task and determines the applicable

law and procedure to be followed. It finally states that '[t]he award shall be binding on the Parties and shall constitute a definitive settlement of the dispute'. The Arbitration Agreement, accordingly, is *premised on a desire for the peaceful and definitive settlement of a dispute that had theretofore been incapable of amicable resolution*.

220. However, this was *not the only object and purpose of the Arbitration Agreement*. (…) Indeed, the Agreement is intimately tied to the process of Croatia's accession to the European Union; Article 11, paragraph 3, for instance, provided that '[a]ll procedural time limits expressed in this Agreement shall start to apply from the date of the signature of Croatia's European Union Accession Treaty.' The Agreement was negotiated with the full support of the European Union, and the Presidency of the Council of the European Union witnessed the signature of the Agreement. Thus, a *nexus was established between the settlement of the territorial and maritime dispute and the accession of Croatia to the European Union*.

221. Croatia entered the European Union and the arbitral process started. It would have to be stopped if the breaches of the Arbitration Agreement by Slovenia entitled Croatia unilaterally to terminate the Agreement in accordance with Article 65 of the Vienna Convention. In such a case, only one of the 'objects and purposes' of the Agreement, as it were, would be achieved. However, as will appear later, this result does not arise in the present case.

222. The remaining object and purpose of the Arbitration Agreement is the settlement of the maritime and territorial dispute between the Parties in accordance with the applicable rules. *The decisive question is whether the breaches of the Agreement by Slovenia rendered the accomplishment of this object and purpose impossible*. (…)

> 225. Accordingly, and in view of the remedial action taken, the Tribunal determines that the breaches of the Arbitration Agreement by Slovenia do not render the continuation of the proceedings impossible and, therefore, do not defeat the object and purpose of the Agreement. Accordingly, Croatia was not entitled to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention. The Arbitration Agreement remains in force".[30]

Exceptio non adimpleti contractus. Prior to the codification of the law of responsibility by ARSIWA, there were intense discussions in academia on the general principle of *exceptio non adimpleti contractus* (exception of non-performance). This would permit one State to withhold performance of those of its own obligations which are reciprocal to, i.e., linked in a synallagmatic relationship, with the obligations violated by the other party. The *exceptio* is an urban myth of international law — it appears at times in the opinions of some judges[31] and in various academic writings, it is said to be "so universally recognized, that it must be applied in international relations also".[32] Yet it has never made it to the level of an official recognition.

The *exceptio* was implicitly left out of the VCLT[33] and considered to be subsumed in the concept of countermeasures in ARSIWA.[34] The ICJ refrained both from consecrating and from burying *the exceptio*, as it could have done in the case *Application of the Interim Accord of 13 September 1995*. In this case, Greece

[30] *Republic of Slovenia v. Republic of Croatia* (Partial Award) (2016) §§ 213-225 (emphasis added).
[31] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* (Merits) [2011] ICJ [114]-[117] and the Separate Opinion of Judge Simma [2]-[20].
[32] *Diversion of Water from the Meuse (Netherlands v. Belgium),* Dissenting opinion by Judge Anzilotti, (Merits) PCIJ [1937] 50.
[33] D. Azaria, *Exception of Non-Performance* (MPEPIL 2015) §§ 4-5.
[34] J. Crawford, *op. cit.* fn. 24, at J. Crawford, *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law 2013) 678-682.

had raised objections to FYROM's entry into NATO and the Court held this conduct to be a violation of the Interim Accord. As means of defence, the respondent invoked several forms of self-help (*exceptio*, suspension under Article 60 VCLT and countermeasures). The ICJ dodged the question of the existence of the *exceptio* as a general principle, noting that Greece's three defences were all based on the condition of a prior violation of international law by FYROM. Since it found that no violation could be attributable to FYROM, Greece could therefore not rely on any of these defences:

> "The Respondent has thus failed to establish that *the conditions which it has itself asserted* would be necessary for the application of the *exceptio* have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law".[35]

Judge Simma rightly criticized this extreme application of the principle of economy of means, which led the Court to adopt its decision on the basis of an un-identified legal rule:

> "Such abstinence will once again disappoint those observers who might have expected some illuminating words on rather controversial questions of law; a decision a little less "transactional" in a matter in which the Court could have afforded to speak out. As concerns the *exceptio non adimpleti contractus* in particular, it appears that the Court openly shies away from taking a stand. (...) That much about *jura novit curia*".[36]

[35] *Application of the Interim Accord*, above fn. 31 above, [161].
[36] *Ibid*., Separate Opinion of Judge Simma [6] (emphasis added).

CHAPTER 2:

The Regime of Counter-Measures: International Regulation of Their Conditions and Limits

Articles 49 to 53 of ARSIWA establish conditions regulating the lawfulness of countermeasures. Their lawfulness is extrinsically determined by the priori wrongful act of a State (conditions 1 & 2 below) and intrinsically by a series of substantive and procedural conditions aiming at circumscribing their potentially noxious effects (conditions 3 to 6 below):

1. the identification and establishment of a prior unlawful act;
2. the target of the countermeasures (the offending State);
3. the material object of countermeasures (permitted and excluded);
4. the effect *ratione temporis* of countermeasures (temporary and reversible);
5. proportionality;
6. procedural conditions (*notification/sommation*).

These conditions are as many tools to reduce arbitrary or abusive recourse to countermeasures. They put on the State resorting to countermeasures the burden of justifying their necessity. Short of substituting this form of private justice by a centralized mechanism of control and enforcement, the ILC provided for substantive rules which allow to assess the lawfulness of countermeasures. In the absence of a judicial mechanism to make such determination, these conditions may at least serve the purpose of civilizing the dialogue between the offending and the injured State, by providing a common set of rules of reference.

Section 1. Identification and Establishment of a Prior Unlawful Act

A. Self-Appreciation on the Basis of Objective Standards

Countermeasures can be resorted to in case of the *existence of a prior unlawful act*. An act is unlawful if it breaches an international obligation. The purpose of countermeasure is to restore compliance with particular, well-identified international obligations. It is not to punish or induce a State to change its policy in general or even less to provoke a change of regime.

The injured State is the first to qualify the acts by another State as a violation of international law. It enjoys indeed the privilege of self-appreciation of the existence of a prior unlawful act by another State and does not need to seek a prior qualification of unlawfulness or an authorization by any third party, unless special rules provide for, like in the WTO regime. As Alland noted, "the unilateral character of countermeasures goes hand in hand with their self-assessed character."[37] This power of self-appreciation was confirmed by the arbitral tribunal's remark in the *Air Service Agreement* case, to the effect that "each State establishes for itself its legal situation vis-à-vis other States".[38]

But this unilateral assessment is part of a bilateral dialogue between the offending and the injured State, and the conditions established in Articles 49 to 52 provide a framework of reference in this respect. These are *objective standards*, useful not only for the interested States, but also for third parties (judicial or other), which may be called to express a view on the legal positions of the offending and injured State. A State which does not seek in any way to identify the legal rules violated prior to the adoption of countermeasures and does not rely on any prior notification will have a hard time to justify, *a posteriori,* the lawfulness of its conduct.

[37] D. Alland, *op. cit.* fn. 18, at 1129.
[38] *Air Service Agreement,* fn. 17 above, 416 [81].

As Professor Abi-Saab noted, "[i]t is therefore at its own risk, legally speaking, that [the injured State] undertakes these measures, in the event that its 'self-interpretation' (or qualification of the facts or situation and its subsequent reaction) is subsequently rejected by a competent judicial or political body."[39]

The objective qualification of a wrongful act by an institutional body is an antidote to subjectivity and to the risks of mistake triggered by any unilateral appreciation.[40] When such a body is a judicial one, the quality of the legal reasoning and the guarantees of the legal process make the analysis difficult to challenge. This applies in particular to the advisory opinions of the International Court of Justice, which formally lack binding effect, but carry nonetheless great legal weight. In some of its advisory opinions, like the *Wall* and the *Chagos* one, the Court not only gave abstract interpretations of the law, but also reached the conclusions that Israel,[41] on the one hand, and the United Kingdom on the other,[42] violated international law. Such statements of responsibility implicitly authorize at least the injured States, and possibly third States, to adopt countermeasures. As far as the Chagos case is concerned, a chamber of ITLOS considered that the ICJ's advisory

[39] G. Abi-Saab, *op. cit.* fn. 11, 299. Our translation from the original: "*C'est donc à ses risques et périls, juridiquement parlant, qu'il entreprend ces mesures, au cas où son 'auto-interprétation' (ou qualification des faits ou de la situation et de sa réaction subséquente) est rejetée par la suite par un organe juridictionnel ou politique compétent.*"
[40] In the same vein, Professor Abi-Saab insisted that: "The situation is very different if there is a social 'finding' of the violation, even if it is not accompanied by a decision on the measures to be taken. In this case, the injured State, by taking the countermeasures it considers appropriate, does not run a risk in the first category, but the risk remains in the second (compliance with the conditions of countermeasures)." Our translation from the original : "*La situation est très différente s'il existe une 'constatation' sociale de la violation, même si elle n'est pas assortie de décision quant aux mesures à prendre. Dans ce cas, l'Etat lésé, en prenant les contre-mesures qu'il considère appropriées, ne court pas de risque quant à la première catégorie, mais le risque subsiste quant à la seconde (le respect des conditions)*." (*Ibid.*, at 299).
[41] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory opinion) [2004] ICJ Rep [114]-[137].
[42] *Ibid.,* [177]-[182].

opinion constituted an "authoritative determination of the main issues relating to sovereignty claims"[43] and distinguished it from other law of the sea cases in which the sovereignty disputes had not been the object of an objective determination by other judicial bodies.[44]

Resolutions of the General Assembly of the United Nations which provide legal determinations, insofar as they qualify a factual situation as a violation of international law, may equally have a legitimizing effect, though to a lesser extent than the advisory opinions.[45] As held by the arbitral tribunal in the *Coastal State Rights* case, "the effect of factual and legal determination made in UNGA resolutions depends largely on their content and the conditions and context of their adoption. So does the weight to be given to such resolutions by an international court or tribunal."[46] Regarding the General Assembly resolutions concerning the situation in the Crimea,[47] the tribunal noted they were of an ambiguous content

[43] *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Preliminary Objections) [2021] [244]. On the legal effect of an advisory opinion of the ICJ, see also § 202-212.

[44] Referring to the PCA arbitration *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, in which the question of sovereignty over Crimea was raised (*ibid*., at § 244).

[45] C.J.R. Dugard, "The Legal Effect of United Nations Resolutions on Apartheid", *South African Law Journal* 83 (1966), 44-59 at 47-48; M. Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *European Journal of International Law* 165, 2006, 879-906**;** See for example the use of A/RES/2625 of 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory opinion) [2019] ICJ [180]; also A/RES/2145 of 27 October 1966 in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory opinion) [1971] ICJ [95].

[46] PCA *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)* (Preliminary Objections) [2020] § 174.

[47] A/RES/73/194 of 17 December 2018 (Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov); A/RES/73/263 of 22 December 2018 (Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine).

and of a hortatory effect and took account of the divisive votes and opinions expressed during their adoption to conclude that they were not authoritative for resolving the sovereignty dispute.[48] That dispute remains pending in international law,[49] but is outside of the scope of the jurisdiction of an arbitral tribunal established under Annex VII of UNCLOS.

B. Determination of an Unlawful Act in the Presence of Security Exceptions

According to Article 12 ARSIWA, "[t]here is a breach of an international obligation when an act of a State is not in conformity with what is required of it by that obligation, regardless of its origin and character". However, in some instance, the qualification of a prior unlawful act may be challenging, in particular when a legal rule is assorted by exceptions. An act may appear at first sight as unlawful because contrary to one State's treaty obligations for instance, but ultimately reveal itself as lawful because permitted by one particular clause of that treaty.

A notorious example is provided by the security clauses inserted in some bilateral or multilateral treaties, allowing States to liberate themselves from their obligations, if the circumstances provided therein are fulfilled. The objective assessment of these clauses is all the more difficult that States enjoy discretion to appreciate their security needs. The security exception could thus be invoked as a blank cheque to prevent the qualification of an act as internationally wrongful.

Well-known security clauses inserted in some bilateral treaties were submitted to judicial scrutiny, like those in the treaties of commerce and amity signed by US with Nicaragua and Iran respectively: "The present Treaty shall not preclude the application of measures: d) … necessary to protect [one Party's] essential

[48] *Dispute Concerning Coastal State Rights* fn. 46 above, §§ 171-178.
[49] *Ibid*. § 178.

security interests." In *Military and Paramilitary Activities* case, the US claimed that the Sandinista revolution posed an unusual threat to its security and foreign policy. The ICJ took upon itself the power to assess both the security interests at stake and the necessity of the means of retaliation adopted by US, in particular the use of force against Nicaragua's territory and a comprehensive economic embargo:

> "[The] concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether *the risk run by these 'essential security interests' is reasonable*, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'".[50]

Without substituting its appreciation to that of the interested State, the Court submitted the necessity requirement to a test of plausibility:

> "[T]he Court emphasizes the importance of the word 'necessary' in Article XXI: *the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose*. Taking into account the whole situation of the United States in relation to Central America (...), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as 'necessary' to protect the essential security interests of the United States.
>
> As to the trade embargo (...) *whether a measure is necessary to protect the essential security interests of a party is not (...) purely a question for the subjective judgment of the party*; the text does not refer to what the party 'considers necessary' for

[50] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep [224] (emphasis added).

> that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests..".[51]

The *standard of judicial review* of the security exception remains nonetheless low. Even if the ICJ considered itself empowered to control both the existence of a threat to the security interests and the necessity of the measures of retaliation adopted, its assessment was actually based upon the justifications provided by the US. And in this case, the sincerity and the credibility of their motivation did not convince the Court. Its review was thus a review of the motivation provided, rather than of the measures themselves. But the Court did not substitute itself to State's authorities and made no judgment of the opportunity of the measures adopted by the US.

The reasoning was slightly different in the *Oil Platforms* case. The US had bombed a number of Iranian oil platforms, in response to a number of attacks on Kuwaiti ships, flying US and UK flags. One of the issues before the Court was whether US's use of force in these circumstances could be justified as self-defence. But US also claimed that, while its attacks may appear as violations of Art X of the 1955 Treaty of Amity with Iran (according to which "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation"), they were nonetheless justified under the essential security clause of Art XX, paragraph 1 (d) of that Treaty.[52] The Court had therefore to determine whether the bombing of Iranian oil platforms was "necessary to protect [US]

[51] *Ibid*., at 282 (emphasis added).
[52] "The present Treaty shall not preclude the application of measures: d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

essential security interests".[53] To this effect, it conflated the self-defence and the security arguments, considering that "action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in (…) 'as necessary to protect the essential security interests' of a party"[54]. The reason for such conflation is that the US themselves claimed, before and during the proceedings, that the real dispute about the parties was about the use of force and self-defence.

The ICJ proceeded to a teleological and systemic interpretation of the security clause to conclude that it could not justify measures involving unlawful use of force in international law:

> "*The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force*. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty."[55]

In the end, the Court considered that, in the case *sub judice*, the assessment of the necessity of the measures adopted largely overlapped with the materialization of a situation of self-defence:

> "In the present case, the question whether the measures taken were 'necessary' overlaps with the question of their validity

[53] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep [32]-[34].
[54] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, above fn. 20, [224].
[55] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep [41] (emphasis added). Interestingly, the Court based this conclusion on the principles of teleological and systemic interpretation, rather than any *jus cogens* value of the prohibition of the use of force.

> as acts of self-defence. (…) The criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (…)".[56]

The security exception came also before the European Court of Justice, in the context of the challenge by targeted entities of the EU restrictive measures, adopted against Russia following the takeover of Crimea and the events in Donbass. These entities contested the compatibility of these measures with the 1994 EU-Russia Partnership Agreement. However, this one provides in its Article 99:

> "Nothing in this Agreement shall prevent a Party from taking any measures:
>
> (1) which it considers necessary for the protection of its essential security interests:
>
> (d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security".

In the *Rosneft* case, the Grand Chamber of the ECJ conflated security interests and international peace and security, considering that the latter deserved protection through the activation of the security clause, even if the European Union or its member States were not directly affected:

> "[T]he wording of that provision does not require that the 'war' or 'serious international tension constituting a threat of war' refer to a war directly affecting the territory of the European Union. Accordingly, events which take place in a country bordering the European Union, such as those, which have occurred in Ukraine and which have given rise to the restrictive measures at issue

[56] *Ibid.* [43]; see also *ibid.* [78].

> in the main proceedings, are capable of justifying measures designed to protect essential European Union security interests and to maintain peace and international security, in accordance with the specified objective, under the first subparagraph of Article 21(1) and Article 21(2)(c) TEU, of the Union's external action, with due regard to the principles and purposes of the Charter of the United Nations".[57]

Like the ICJ in the *Military and Paramilitary Activities* judgments,[58] the ECJ exercised minimal judicial control over political discretion in the *Rosneft* case. The Court broadly verified the motivation provided by Council and the broad adequacy between the measures and the objectives to be reached. This very low threshold of control applies to the appreciation of the necessity of the regime of restrictive measures, but also to the adequacy of the individual restrictive measures adopted as "targeted sanctions":

> "113. As regards the question whether the adoption of the restrictive measures at issue in the main proceedings was necessary for the protection of essential European Union security interests and the maintenance of peace and international security, it must be borne in mind that *the Council has a broad discretion in areas which involve the making by that institution of political, economic and social choices,* and in which it is called upon to undertake complex assessments (…).
>
> 115. Further, as is stated in recital (2) of Regulation No 833/2014, it is *apparent from those statements that the aim of the restrictive measures* prescribed by the contested acts was *to promote a peaceful settlement* of the crisis in Ukraine. *That objective is consistent with the objective of maintaining peace and*

[57] ECJ (Grand Chamber), *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others* [2017] C-72/15, § 112.
[58] *Military and Paramilitary Activities in and against Nicaragua,* above fn. 20, [32]-[33].

international security, in accordance with the objectives of the Union's external action set out in Article 21 TEU.

116. In those circumstances, taking into consideration *the broad discretion enjoyed by the Council* in this area, that institution could take the view that the adoption of the restrictive measures at issue in the main proceedings was necessary for the protection of essential European Union security interests and for the maintenance of peace and international security, within the meaning of Article 99 of the EU-Russia Partnership Agreement".[59]

The security clause is also found in some multilateral treaties. Article XXI of GATT being among the best-known examples:

"Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

[59] ECJ, *Rosneft*, above fn. 57, §§ 113-116 (emphasis added).

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

The clause finally[60] came to scrutiny before a WTO Panel in 2019, in the case *Russia — Measures Concerning Traffic in Transit*.[61] The Panel rejected Russia's claim according to which the clause was "self-judging" and the measures adopted in pursuance of security interests were immune from judicial control.[62] For the first time, a panel gave objective definitions of the concept of "essential security interests" and "emergency in international situations", providing thus parameters to appreciate whether there is a threat and whether the measures adopted are necessary to meet it. According to the Panel:

"*'Essential security interests',* 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*

[60] WTO, *Analytical Index*, Article XXI — Security Exceptions, [602] fn. 19 or at [604] fn. 36.

[61] WTO Panel Report, 5 April 2019, *Russia — Measures Concerning Traffic in Transit*, WT/DS512. The Panel's interpretation of the security exception is likely to have important consequences for other pending disputes, among which the dispute between Qatar and the UAE concerning the blockade imposed in 2017 (*United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526) and several WTO challenges to the duties that the United States imposed on steel and aluminium imports (*United States — Certain Measures on Steel and Aluminium Products*, WT/DS544).

[62] *Ibid*., § 7.129. Russia's claim could have found some support in the ICJ's analogy in the *Military and paramilitary activities* judgement, according to which: "That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc." (*Military and Paramilitary Activities*, above fn. 20, [222]).

its population from external threats, and the maintenance of law and public order internally".[63]

However, the Panel also insisted upon the large margin of appreciation (or at least subjectivity) left to the State, which is essentially qualified only by the obligation of good faith:

"The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the *particular situation and perceptions of the state in question*, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to *every Member to define what it considers to be its essential security interests*. However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 *in good faith*".[64]

The Panel held the security threat and the emergency in international relations to be cognate yet distinct from a situation of war, which is an extreme sub-category of the former:

"[T]he less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from *armed conflict, or a situation of breakdown of law and public order* (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise".[65]

[63] *Ibid.*, at § 7.130.
[64] *Ibid.*, §§ 7.131-7.132 (emphasis added).
[65] *Ibid.*, § 7.135 (emphasis added).

Not only did the Panel objectively define concepts which were usually left to the appreciation of States, but it also looked into the necessity of the measures adopted and their connection with the threat to security or the emergency invoked:

> "Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue *meet a minimum requirement of plausibility* in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests".[66]

This being said, the connection-criterion is a low one:

> "[I]t is for Russia to determine the 'necessity' of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause 'which it considers' is to be given legal effect".[67]

As the ICJ and the ECJ, the standard of review retained by the WTO Panel is therefore low. The Panel also insisted that the State invoking the security exception has the *obligation to motivate*, that is to provide a cogent and articulated reasoning, that the conditions for the exception to arise were met:

> "It is therefore 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".[68]

If a factual situation does not *a priori* fall within the definition of the security and emergency concepts or if the State's measures appear at first sight disconnected from their stated purposes, then the State has an enhanced obligation of motivation:

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[66] *Ibid.*, § 7.138 (emphasis added).
[67] *Ibid*.
[68] *Ibid*, § 7.134.

> "In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict".[69]

Section 2. The Target of Countermeasures

According to Article 49 ARSIWA, the injured State can adopt countermeasures only "against a State which is responsible for an internationally wrongful act", being understood that the rules of attribution in Articles 4 to 11 ARSIWA apply for this purpose. However, the wrongful act may have a double attribution, in cases where there is a decision by an international organization, giving rise to an obligation for member States to adopt implementing measures (typically the case for resolutions of the Security Council adopted under Chapter VII of the Charter). In that case, one may wonder whether the injured State could adopt *countermeasures both against the international organization and the implementing States*. Article 48-1 of ILC Draft Articles on Responsibility of International Organizations allows for cumulative/dual responsibility:

> "Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act".

Therefore, countermeasures, as tools for the implementation of responsibility, can in principle be directed against both entities.

The question of *private parties* (be they nationals of the targeting State or even nationals of third States) is different though. Countermeasures, particularly those intervening in economic fields,

[69] *Ibid*., § 7.135.

may affect their rights or interests. According to the commentary of Article 49 ARSIWA: "This does not mean that countermeasures may not *incidentally affect the position* of third States or indeed other third parties. (…) *If they have no individual rights in the matter they cannot complain*."[70] This distinction between rights and interests is a restatement of the *obiter dictum* of the ICJ in the *Barcelona Traction* case:

> "This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. (…) Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. *Not a mere interest affected, but solely a right infringed involves responsibility*".[71]

Such a distinction is based on the identification of the rules of international law which grant rights to any such third party. This is a classical exercise in case of States' rights, but a less obvious one in relation to private entities. Leaving aside the case of human rights or international humanitarian law (which cannot in any case be affected by countermeasures — see *infra*), the rights granted to private parties in the economic field are not necessarily international by nature.

It is unsurprising that investment tribunals, which considered whether countermeasures could be a defence for a State in case of violations of investors' rights, provided quite contradictory analyses. In three NAFTA cases,[72] Mexico invoked countermeasures as a circumstance precluding the wrongfulness of any breach of its

[70] ILC, fn. 13 above, art. 49, 130 [5] (emphasis added).
[71] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary objections) [1970] ICJ Rep [46] (emphasis added); see also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep [155].
[72] *ADM v. Mexico* [2007]; *CPI v. Mexico* [2008]; *Cargill* [2009].

obligations under NAFTA vis-à-vis investors.[73] These cases raise an interesting jurisdictional and admissibility question, which is to determine whether the defence of countermeasures could at all be raised in investment arbitrations. Indeed, any determination on the lawfulness of countermeasures implies a determination of the international responsibility of the target State, which is not a party to these proceedings. Such a determination is in principle outside the scope of jurisdiction of the tribunal, according to the *Monetary Gold* principle.[74] But none of the NAFTA tribunals reached any conclusion on this preliminary point.

On merits, Mexico's invocation of countermeasures was rejected in all three cases, but the tribunals' reasoning differed significantly. As summarized by Kate Parlett:

> "The tribunal in *ADM v. Mexico* [2007] rejected Mexico's countermeasures plea because it concluded that (a) the measure was not adopted to induce compliance with NAFTA by the US

[73] The proceedings were initiated against Mexico by American agricultural companies, relating to the imposition of a 20 per cent tax by Mexico on soft drink bottlers using the sweetener High Fructose Corn Syrup (HFCS). In response to its alleged violation of the national treatment standard in Article 1102 of NAFTA, Mexico argued that it had imposed the tax as a countermeasure against two violations of NAFTA by the United States. All three NAFTA tribunals have issued redacted awards (see K. Parlett, "The application of the rules on countermeasures in investment claims", in *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford* (LSEPS 2015) 397).

[74] The Monetary Gold principle was discussed in some investment arbitrations: "The Monetary Gold principle represents a narrow doctrine of judicial restraint developed by the International Court in the context of inter-State disputes, and its application is subject to strict limits. The principle only applies if the rights and interests of an absent State are a pre-requisite for, and form the very subject matter of, the claimant's claim and the decision to be rendered. Jurisdiction should not be declined if the finding involving an absent third party is merely a finding of fact, or the decision might affect the legal interests of a non-party State, or the decision could well have practical effects for such State. Nor is it sufficient to establish that such legal interests may be indirectly determined" (*Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. Kingdom of Belgium* (Arbitration Tribunal) (Award) (2015), ICSID Case No. ARB/12/29, [127]).

> and (b) it did not meet the proportionality requirements for a valid countermeasure under customary international law. (…)
>
> The tribunal in *CPI v. Mexico* [2008] concluded that countermeasures as a circumstance precluding wrongfulness are not applicable to Chapter XI claims under NAFTA, because NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals, and countermeasures cannot affect the rights of third parties. (…)
>
> In the third decision, the tribunal in *Cargill* [2009] also rejected Mexico's countermeasures defence, ostensibly on the basis that investors possess rights under NAFTA against which, a countermeasure, directed to an allegedly wrongful act committed by the US, could not be taken. (…) The tribunal noted that the parties 'have characterized the issue before the Tribunal as whether NAFTA Chapter XI investors possess not only procedural rights of access, but also substantive rights'. The tribunal indicated its view that investors held rights under Chapter XI which were not 'mere procedural rights of access'".[75]

Section 3. The Object of Countermeasures

A countermeasure is normally an international wrongful act, adopted however in circumstances which preclude its wrongfulness. Article 49-2 of ARSIWA provides accordingly that "countermeasures are limited to the non-performance for the time being of international obligations". But ARSIWA does not pre-determine the content of the countermeasures which a State can adopt. The power of self-appreciation of the injured State extends indeed to these aspects too. The scope *ratione materiae* of admissible countermeasures is only determined in a negative matter. First, countermeasures need

[75] K. Parlett, *op. cit.* fn. 73 (see K. Parlett, "The application of the rules on countermeasures in investment claims", in *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford* (LSEPS 2015) [398]-[401].

not to be reciprocal, in the sense that there is no requirement that "countermeasures [be] limited to suspension of performance of the same or a closely related obligation."[76]

Second, Article 50 of ARSIWA identifies the obligations which cannot be affected by countermeasures and provides an important material limitation to the injured State's power of self-appreciation:

"Art. 50 Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents."

According to the ILC's commentary, "[t]he obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which by reason of their character must not be the subject of countermeasures at all. Paragraph

[76] ILC, fn. 13 above, 129 [5].

2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes."[77]

The prohibition to resort to force is logical, due to the *jus cogens* character of this rule. Moreover, all the evolution of the law of reprisals/countermeasures was directed to limit recourse to force.[78] In the *Corfu Channel* case, the ICJ did not consider lawful the military countermeasures of self-help taken by the British navy, even though it mitigated this finding by Albania's own violations of the obligation of due diligence:

> "The United Kingdom Agent (...) has further classified 'Operation Retail' among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty".[79]

In the same vein, in *Guyana v. Suriname*, the Tribunal considered that Suriname's forceful reaction to Guyana's explorations in the disputed maritime area, which it held to be a violation of the obligation of restrain of Article 83, paragraph 3 of UNCLOS, amounted to a threat to the use of force and could not qualify as lawful countermeasure:

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[77] *Ibid.*, art. 50, 131 [2].
[78] See above, p. 15.
[79] *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep 35.

> "It is a well established principle of international law that countermeasures may not involve the use of force. This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. (…) Peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under the Convention. (…) As it involved the threat of force, Suriname's action against the *C.E. Thornton* cannot have been a lawful countermeasure".[80]

The inviolability of diplomatic agents, premises and archives is equally excluded from the array of countermeasures an injured State may adopt. The law on diplomatic and consular relations is considered a *self-contained regime*, which provides in itself the lawful responses that an injured State can adopt. It matters little if these reactions are only responsive or punitive; as long as they stay within the bounds of the diplomatic and consular regime, they are lawful in international law. In the *Tehran Hostages* case, the ICJ underlined the importance of preserving the exclusive character of the means of self-help provided in the Vienna Conventions on Diplomatic and Consular Relations, on which the delicate equilibrium and the efficiency of the regime rested:

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members if the mission and *specifies the means at the disposal of the receiving State to counter*

[80] *The delimitation of the maritime boundary between Guyana and Suriname (Guyana v. Suriname)* (Arbitration tribunal) (Award) (2007) PCA ICGJ 370, § 446. For other examples when the use of force was invoked as a right of self-help, see T. M. Franck, *op. cit.* fn. 3, 131.

> *any such abuse*. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once".[81]

The commentary to Article 50 ARSIWA specifies that this exclusivity applies only to the unconditional obligations of the diplomatic regime ("obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict").[82] By contrast, privileges which the sending and the receiving State recognize to each other on reciprocal grounds may be affected by countermeasures, provided that the other conditions in ARSIWA are complied with.

The relationship between countermeasures and dispute-settlement proceedings is a more complex one. The possibility to resort to arbitration or judicial settlement does not constitute a bar to the adoption of countermeasures. As such, countermeasures are not a last resort, but a most natural tool for the implementation of State responsibility. By contrast, judicial settlement remains "simply an alternative to the direct and friendly settlement of such disputes between the Parties".[83] Unsurprisingly therefore, the tentative by the Special Rapporteur Arangio-Ruiz to introduce a compulsory system of judicial settlement in case of disputes arising out of the implementation of State responsibility, including by

[81] *United States Diplomatic and Consular Staff in Tehran*, fn. 19 above [86] (emphasis added).
[82] ILC, fn. 13 above, art. 50, 133 [14].
[83] *Free Zones of Upper Savoy and the District of Gex*, PCIJ Series A No. 22, at 13 [see also *Frontier Dispute* (1986) ICJ Rep [46]].

the adoption of countermeasures, was ill-omened.[84] Article 50, paragraph 2 of ARSIWA provides more modestly that "[a] State taking countermeasures is not relieved from fulfilling its obligations: (a) Under any dispute settlement procedure applicable between it and the responsible State." The exact consequences of this reservation-clause depend upon the specific obligations which a treaty may create in terms of dispute settlement. They may consist in prior negotiations, or a tentative of conciliation, or be more sophisticated and complex, like in the WTO regime.

The situation is different in case of *ongoing judicial proceedings*. Article 50, paragraph 3 of ARSIWA provides that:

> "Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties".

It is not sure that this provision codifies customary international law, as practice and opinio juris may be lacking in this respect. However, resort to countermeasures in these circumstances generally triggers an aggravation of the dispute, which affects not only the bilateral relationship between the offending and the injured State, but also the mission of the judicial body. As the ICJ held in the *Tehran* case:

> "[A]n operation [the incursion into the territory of Iran made by United States military units] undertaken in those circumstances

[84] G. Arangio-Ruiz, "Counter-measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission" and B. Simma, "Counter-measures and Dispute Settlement: A Plea for a Different Balance", in *European Journal of International Law*, (1994) 51; A. Pellet, "La codification du droit de la responsabilité internationale : Tâtonnements et affrontements", in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *L'ordre juridique international, un système en quête d'équité et d'universalité,* Liber Amicorum *Georges Abi-Saab* (M. Nijhoff 2001) 297-298.

> [during the proceedings which the Court had made an effort to accelerate], from whatever motive, is *of a kind calculated to undermine respect for the judicial process in international relations* (...)".[85]

In the same vein, in the *Corfu Channel* case, the Court rejected United Kingdom's justification according to which its military intervention in waters under Albanian sovereignty was meant to secure evidence for the proceedings before it:

> "The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. *Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself*".[86]

The unlawfulness of countermeasures, during judicial proceedings dealing with the same underlying questions of responsibility, may find further justification in the existence of alternative means to reach the same result, namely in the power of a competent tribunal to adopt *provisional measures*. According to the ARISIWA Commentary,

> "The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal

[85] *United States Diplomatic and Consular Staff in Tehran*, fn. 19 above [93] (emphasis added).
[86] *Corfu Channel*, fn. 79 above, 35 (emphasis added).

is available to hear it, will perform a function essentially equivalent to that of countermeasures".[87]

Furthermore, the adoption of countermeasures *pendente lite* may constitute a violation of an order of provisional measures which contains an obligation not to aggravate the dispute in its dispositive part.[88]

This limitation of the possibility to resort to countermeasures only exists if a tribunal is in a position to deal with the case. "For these purposes a dispute is not pending before an ad hoc tribunal established pursuant to a treaty *until the tribunal is actually constituted* (...)."[89] However, there are situations when this general consideration cannot apply. For instance, Article 290, paragraph 5 of UNCLOS provides that: "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea (...) may prescribe, modify or revoke provisional measures...". The special jurisdiction of ITLOS to adopt provisional measures *before* the constitution of an arbitral tribunal may be interpreted to deprive States of their power to adopt countermeasures in parallel to judicial proceedings introduced under Part XV of UNCLOS. It is also

[87] ILC, fn. 13 above, art. 52, 136 [8]. In the same vein, the award in *Air Service Agreement*: "The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection." (*Air Service Agreement,* fn. 17 above [96]).

[88] See for instance, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Provisional measures) [2011] ICJ Rep [86].

[89] ILC, fn. 13 above, art. 52, 136 [8].

within this context that must be resituated the Tribunal's argument in *Guyana v. Suriname*, according to which the latter could have resorted to UNCLOS part XV's procedures instead of sending a frigate to stop the oil exploration campaign:

> "Peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under the Convention. A State faced with a such a dispute should resort to the compulsory procedures provided for in Section 2 of Part XV of the Convention, which provide among other things that, where the urgency of the situation so requires, a State may request that ITLOS prescribe provisional measures".[90]

Section 4. Conditions *Ratione Temporis*

The temporal conditions of countermeasures are intrinsically linked to their rationale, which is to induce the offending State to comply with its international obligations.[91] Thus, countermeasures must in principle be temporary and reversible: "Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of the performance of the obligation in question." (Article 49-3 of ARSIWA). Having in mind this rationale, the obligation to terminate countermeasures "as soon as the responsible State has complied with its obligations"[92] is also logical.

Since they amount to temporary non-compliance with international obligations, countermeasures may be all the more difficult to distinguish from the suspension of treaty obligations. Despite a theoretical separation of treaty law and responsibility law, common features remain. For instance, Article 72, paragraph 2 of

[90] *Delimitation of the maritime boundary between Guyana and Suriname*, fn. 80 above, [446].
[91] See above p. 13 on the justification of countermeasures.
[92] ILC, fn. 13 above, art. 53, 137.

the VCLT provides that "[d]uring the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty." Of course, Article 72 of the VCLT deals with the "consequences of the suspension of the operation of a treaty" in whole, but States often claim only partial suspension of some of the provisions,[93] making it all the more difficult to distinguish countermeasures from suspension. Yet, the regimes remain distinct both in their conditions of applicability and in their consequences.[94]

Section 5. Proportionality

Article 51 ARSIWA establishes a **positive obligation of proportionality**: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." In a context where there is much concern as to the possible abuse of countermeasures, the obligation of proportionality can be seen as a "brake on escalating cycles of transactional violence".[95]

The question is how proportionality can be measured. It is clearly more than a prohibition of abuse. In the *Air Services* arbitration, it was described as "[s]ome degree of equivalence with the alleged breach."[96] Proportionality is thus an approximative gauge, which cannot be quantified. In some instances, like violations of human rights or of territorial sovereignty, it is in any case impossible to provide for a quantitative criterion to evaluate the gravity of the breach. But even when a quantitative evaluation is possible, like in the *Air Services* case, the tribunal rejected "the tooth for a tooth,

[93] N. Clarenc, *La suspension des engagements internationaux* (Dalloz 162) 45-50.
[94] See above, p. 13.
[95] T. Franck, "On Proportionality of Countermeasures in International Law", 102 *AJIL* 715 (2008) at 715.
[96] *Air Service Agreement*, fn. 17 above, 416 [83].

eye for an eye" approach[97] and held the relevant criterion to be the "gravity of the internationally wrongful act and the rights in question".[98]

Section 6. Procedural Requirements

Article 52 (Conditions relating to resort to countermeasures) sets out important procedural constraints upon an injured State resorting to countermeasures:

> "1. Before taking countermeasures, an injured State shall:
>
> (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
>
> (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
>
> 2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights".

These two cumulative requirements contain therefore a *sommation* (call for cessation) and a *prior notification* of countermeasures. It is only in urgent situations that an injured State is liberated from these procedural requirements. According

[97] "[I]t is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries." (*Ibid*.)

[98] *Ibid.* For an assessment of proportionality by WTO panels, see G. Cook, "*A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP 2015), 101-104.

to ARSIWA Commentary, this provision is merely a codification of customary rules: "This requirement (sometimes referred to as '*sommation*') was stressed both by the Tribunal in the *Air Services* arbitration and by the International Court in the *Gabčíkovo-Nagymaros Project* case. It also appears to reflect a general practice."[99]

But the formulation of these two requirements is less mundane than the commentary suggests. Indeed, they impose on States a duty to justify their unilateral actions, to motivate their unilateral decisions, even summarily by reference to international law. In principle, such requirements are particularly effective for counter-balancing the power of self-appreciation of States and for preventing abuse of countermeasures. They are also a powerful tool for pushing States to dialogue.

[99] ILC, fn. 13 above, art. 52, 136 [3].

CHAPTER 3:

Countermeasures in the General Interest: Where Do We Stand?

Section 1. Distinction between Invocation of Responsibility and Countermeasures Based on the Concept of Injured State

ARSIWA draws a distinction between *standing to invoke responsibility* and entitlement to adopt countermeasures by non-injured State, as being two distinct forms of implementation of responsibility. Invocation is defined as "taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal."[100] "Central to the invocation of responsibility is the concept of the injured State. This is *the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act*."[101] This concept is introduced in article 42, which provides:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
>
> (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) Specially affects that State; or

[100] *Ibid.*, art. 42, 117 [2].
[101] *Ibid.*, 116 [2].

> (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".

Leaving aside the purely bilateral relations (which can be established within the framework of a bilateral treaty, but also of a multilateral one or even under customary international law — e.g.: diplomatic relations), a State may qualify as injured even in case of obligations owed *erga omnes*, provided that it is "affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[102] A text-book example is the pollution on high seas, which affects differently the coastal States. Finally, Article 42, paragraph b (ii) concerns the category of integral obligations, "whose performance is effectively conditioned upon and requires the performance of each"[103] of the other parties. Logically, violations by one State have immediate consequences on the position of all the others (e.g.: the Antarctic Treaty).

Article 48, paragraph 1 (Invocation of responsibility by a State other than an injured State) extends to States other than the injured State the *standing to invoke responsibility* for the protection of a "collective interest" or in case of breaches of "obligation owed to the international community as a whole". There is no doubt that this broad standing has been confirmed by the latest case-law, at least in relation to obligations *erga omnes partes* based on multilateral treaties. A clear confirmation came from the ICJ's decision in the *Hissène Habré* case:

> "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. (…) All the other States parties have a common interest in compliance with these obligations by the State in

[102] *Ibid.*, art. 42, 119 [12].
[103] *Ibid.*, art. 42, 119 [13].

> whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties 'have a legal interest' in the protection of the rights involved (…). *These obligations may be defined as 'obligations erga omnes partes' in the sense that each State party has an interest in compliance with them in any given case*. (…)

The *common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation* of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end".[104]

However, these judicial developments do not resolve the question of entitlement for non-injured States to adopt countermeasures. It is hard to find in ARSIWA a basis of entitlement: Article 48, paragraph 2 restricts the spectrum of action of the non-injured State to claims of cessation and performance of reparation. Notably, Article 48 does not mention the possibility to take countermeasures in the collective interest.

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[104] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep [68]-[69] (emphasis added). For a confirmation of standing to invoke responsibility in case of violations of obligations *erga omnes partes*, see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Provisional Measures) [2020] ICJ Rep [17] at §§ 41-42. But the Court has not yet had the occasion to confirm this standing in case of obligations *erga omnes* (or *jus cogens*), when the Applicant does not rely on a treaty-relationship with the Defendant (see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections)* (Declaration Xue) [2016] ICJ Rep [1031]-[1032] at § 8.

"Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached".

Article 54 (Measures taken by States other than an injured State) cannot constitute either a basis of entitlement for non-injured States to adopt countermeasures:

"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".

This safeguard clause mentions indeed the possibility for third States to "take lawful measures" in reaction, but precisely because they are lawful, such measures could not qualify as countermeasures within the meaning given to this concept in ARSIWA.

Since the non-injured States enjoy anyway the possibility to adopt lawful measures, one may wonder what is the *effet utile* of this provision. The drafting of Article 54 cannot be understood without knowing its drafting history. In 2000, the Special Rapporteur James Crawford proposed a draft article 54 which gave a double entitlement to non-injured States to adopt countermeasures:

"1. Any State entitled under article 49, paragraph 1, to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter.

2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligation breached

3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled".[105]

This entitlement would have applied:

1. at the request of the injured-State, on account that "[t]here seems to be no reason why a state injured by a breach of a multilateral obligation should be left alone to seek redress for the breach. Bilateral countermeasures strongly favour states that are more powerful; if weaker states are forced to resort to bilateral countermeasures without support of interested third states, serious breaches may go unremedied".[106]

2. to all States in case of violations of the right to self-determination or human rights and in the interest of the beneficiaries of these obligations, on account that no injured State could be defined in these circumstances.[107]

Draft Article 54 in its 2000 version was welcome by progressive academia[108] and heavily criticized by States.[109] The ILC was consequently caught in a dilemma: "deleting the provision on

[105] ILC, Report of the International Law Commission on the work of its fifty-second session (1 May–9 June and 10 July–18 August 2000), *Yearbook of the International Law Commission*, vol. 2, 2000, A/55/10, art. 54, 70-71.
[106] J. Crawford, *State Responsibility: The General Part*, *op. cit.* fn. 24, 704.
[107] L.-A. Sicilianos, "The Implementation of International Responsibility. Ch.80 Countermeasures", in *The Law of international Responsibility*, *op. cit.* fn. 18, 1143-1144.
[108] *Ibid.*, 1143-1144; A. Pellet, "Les articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite. Suite — et fin?", *Annuaire français de droit international* 48, 2002, 20, § 19.
[109] ILC, *Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur*, A/CN.4/517 and Add.1, 2001, 18; L-A. Sicilianos, *op. cit.* fn. 107, 1140-1141.

collective countermeasures altogether would leave the impression that countermeasures were restricted to unilateral measures by injured States (…). [But as such], the draft provision was too controversial to survive. (…) Ultimately (…) the ILC replaced the draft provision with a saving clause. (…) *Thus the articles in their final form do not regulate countermeasures by states other than an injured state*. Article 54 (…) is a compromise intended to reserve the position and leave the resolution of the matter for further developments in international law and practice."[110]

The reason provided by the ILC for stepping back from the 2000 draft relied on the alleged scarcity of State practice, an assessment considered to be incorrect by some authors.[111] To quote Federica Paddeu:

> "Contrary to the ASR's view, these works conclude that the practice is neither limited, nor embryonic, nor selective, and they endorse the recognition at customary law of the right of States other than the injured State to resort to countermeasures in the event of a serious breach of an obligation owed to the international community as a whole".[112]

This being said, the examples given by academia do not necessarily amount to countermeasures, simply because they are not unlawful acts, but measures of retorsion which do not violate international law (for instance: expulsion of diplomats, bilateral military cooperation, arms embargoes etc…), unless there are special rights protected under special treaty regimes. This being said, the rise in the past two decades of unilateral enforcement through restrictive measures adopted by non-injured States and

[110] J. Crawford, *State Responsibility: The General Part*, *op. cit.* fn. 24, 705-706 (emphasis added).
[111] L-A. Sicilianos, *op. cit.* fn. 107, 1145-1148; M. Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017), pointing to numerous examples of State practice.
[112] F.I. Paddeu, *op. cit.* fn. 10, § 40.

international organizations does raise the question of a possible evolution of the law since 2001.[113]

Section 2. Articulation with other Consequences of Breaches of *Jus Cogens* (Peremptory Norms)

It should be recalled that Article 41, paragraph 1 of ARSIWA provides that, in case of grave breaches of peremptory norms, all States have a *duty to cooperate towards cessation of the unlawful act*[114] *and for two distinct duties of non-recognition and of non-assistance*: "No State shall recognize as lawful a situated created by a serious breach (…), nor render aid or assistance in maintaining that situation". One may wonder whether measures adopted as retaliation to breaches of peremptory norms could be analysed as fulfilment of special obligations incumbent under Article 41 of ARSIWA.

A *duty of non-recognition* implies that States "refrain from acts and actions, from taking attitudes that imply the recognition of the acts offending against peremptory norms."[115] The archetypal example the duty of non-recognition applies to territorial acquisitions resulting from violation of the prohibition of the use of force or of the right to self-determination. The Advisory Opinion of the ICJ in the *Namibia* case shows the interplay between the duty of non-recognition and the binding decisions of the Security Council which state the unlawfulness of territorial occupation:

> "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. (…)

[113] See above, pp. 41-44.
[114] "States shall cooperate to put an end through lawful means any serious breach within the meaning of article 40".
[115] A. Orakhelashvili, "The Idea of European International Law", *European Journal of International Law* 17 (2), 2006, 282.

The member States of the United Nations are (...) under *obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia*. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below".[116]

The Court derived the obligation of non-recognition from the binding character of the Security Council resolutions, rather than from the peremptory value of the norm violated, in particular the right to self-determination. General international law, as reflected by Article 41 of ARSIWA, has developed in the direction of an extension of the obligation of non-recognition in cases of violations of peremptory norms. However, the field remains largely unexplored, for beyond the assertion of a general principle of recognition, its particular consequences remain largely undetermined.

Indeed, the obligation of non-recognition cannot amount only to an obligation not to adopt a formal position of recognition.[117] If it has to have any meaning, if must equally address the practical consequences, which are not necessarily preceded by an act of formal recognition. In Namibia's case, the Security Council had called "upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution."[118] In its Advisory Opinion, the Court detailed further concrete consequences, which it derived not only from the Security Council resolution, but also from general

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory opinion) [1971] ICJ Rep § 117 and 119 (emphasis added).
[117] The Proclamation on Recognizing the Golan Heights as Part of the State of Israel, signed by US President Trump on 25 March 2019 is an example of a violation of the obligation of non-recognition by a declaratory act <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel//>.
[118] UNSC Res 276 (1970), § 5.

international law. According to the Court, the ways of implementing the duty of non-recognition are broad-ranging:

> "122. [M]ember States are under *obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia*. With respect to existing *bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia* which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.
>
> 123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to *abstain from sending diplomatic or special missions* to South Africa including in their jurisdiction the Territory of Namibia, to *abstain from sending consular agents to Namibia*, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.
>
> 124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States *the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia* which may entrench its authority over the Territory".[119]

[119] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, above fn. 116, [122]-[124] (emphasis added).

According to these paragraphs, the duty of non-recognition implies not only a duty to abstain, but it could involve a positive conduct consisting of not fulfilling certain treaty obligations. This conduct would *a priori* be unlawful in international law, were it not for the application of the duty of non-recognition.

In the more recent Advisory Opinion in the *Chagos* case, the ICJ was more cautious in asserting obligations for third States. The Court recognized that "respect for the right to self-determination is an obligation *erga omnes*, [and] all States have a legal interest in protecting that right (…)."[120] In relation to third States, it held that: "while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, *all Member States must co-operate* with the United Nations to put those modalities into effect."[121] The ICJ seems to have fallen short from concluding that there was a duty of non-recognition.[122] The resolution subsequently adopted by the Generally Assembly specifies that the duty to cooperate implies an obligation not to recognize, but commends this duty only to the UN, its specialized agencies and all other international, regional and intergovernmental organizations. By contrast, States are only called upon to cooperate:

> "5. Calls upon *all Member States to cooperate* with the United Nations to ensure the completion of the decolonization of Mauritius as rapidly as possible, and to refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution;
>
> 6. Calls upon the United Nations and all its specialized agencies *to recognize that the Chagos Archipelago forms an integral part*

[120] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory opinion) [2019] ICJ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory opinion) [2019] ICJ [180].
[121] *Ibid.*
[122] *Ibid.*, [180]-[182].

of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and *to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory';*

7. Calls upon all other international, regional and intergovernmental organizations, including those established by treaty, to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory'".[123]

This resolution on Chagos contrasts with the one condemning the alteration of the status of Crimea:

"5. Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;

6. *Calls upon all States*, international organizations and specialized agencies *not to recognize* any *alteration of the status* of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and *to refrain from any action or dealing that might be interpreted as recognizing any such altered status*".[124]

[123] A/RES/73/295, 22 May 2019 (Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965).

[124] A/RES/68/262, 27 March 2014 (Territorial integrity of Ukraine) (emphasis added). The resolution was adopted by 100 votes to 11, with 58 abstentions, see General Assembly of United Nations, *Meeting Record about Draft resolution (A/68/L.39)*, A/68/PV.80, 27 March 2014). Support for the subsequent resolutions on the same topic somewhat lowered. See for example A/RES/73/263 of 22 December 2018 (Situation of human rights *in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine)*. The resolution was adopted by 65 votes to 27, with 70 abstentions.

Some of the restrictive measures adopted by EU against Russia (such as embargoes of imports and exports from and towards Crimea and Sebastopol) indeed refer to non-recognition, identified however not as an obligation, but as a "policy":

> "As part of the Union's non-recognition policy of the illegal annexation of Crimea and Sevastopol, the Council regards the construction of the Kerch Bridge as a further action undermining the territorial integrity, sovereignty and independence of Ukraine".[125]

The addressees of the obligations of non-recognition and cooperation to put an end to *jus cogens* violations are mainly States and international organizations with a political mandate. To put it differently, international judicial organs do not consider themselves bound by these obligations, as this may interfere with their mission to assess on an objective and impartial basis the claims of the parties.[126]

[125] Council Decision (CFSP) 2018/1085 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, 30 July 2018, *Official Journal of the European Union*, L. 194/147, 31 July 2018. See also Council Regulation n° 692/2014.
[126] *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* supra fn. 43, at § 230.

CHAPTER 4:

Countermeasures and Sanctions

Section 1. Terminological and Conceptual Conflations

Even if Roberto Ago had initially used the term of "sanctions" instead of countermeasures,[127] in the final version of its work, the ILC deliberately reserved this term to designate institutional reactions to violations of international law, that is "measures taken in accordance with the constituent instrument of some international organization."[128] According to Denis Alland, "it is often the case that measures decided by an international organization escape the subjectivity of the lone reacting State, for they are decided within the framework of a system more or less centralized, which is precisely the element that justifies them being distinguished from countermeasures."[129]

The prototypal sanctions remain those adopted by the Security Council under Chapter VII of the Charter. They can encompass a

[127] See for example ILC, Addendum — Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur — the internationally wrongful act of the State, source of international responsibility (part 1), *Yearbook of the International Law Commission*, vol. II (1), 1980, A/CN.4/318/Add.5-7, 43, § 63.

[128] ILC, fn. 13 above, art. 22, 75 [3].

[129] D. Alland, *op. cit.* fn. 18, 1135; see also G. Abi-Saab : "*Cependant, dans le cadre de l'article 41, le droit ne saisit et ne mobilise ces mesures à ses propres fins qu'en tant que 'mesures collectives'. C'est le caractère collectif, ou l'agrégation de ces mesures, plutôt que leur nature intrinsèque, qui les rend 'productives' ou 'efficaces' en tant que 'sanction'; car elles servent — de par ce caractère même — à l'isolement de l'Etat cible et à sa mise au ban de la communauté internationale ; ce que ces mesures, prises individuellement, ne peuvent ni signifier ni produire. En d'autres termes, le passage du niveau individuel au niveau collectif, dans le cadre d'une décision du Conseil de sécurité (ou d'une recommandation de l'Assemblée générale), opère une transformation qualitative dans la nature de ces mesures, juridiquement parlant. C'est seulement à ce niveau qu'elles sont saisies par le droit, car il n'y a aucune nécessité logique pour que ce qui intéresse le droit en tant que phénomène collectif, l'intéresse aussi en tant que phénomène individuel.*" (*op. cit.* fn. 11, 295-296).

very wide range of acts, including the use of armed force. The European Union can also adopt sanctions against its member States. Being an integrated and hierarchical legal system, most of the EU sanction-mechanisms correspond to the principle of separation of functions (they are not adopted by the injured State, but by a central organ and they are prone to judicial control, in particular through the infringement procedure). Judicial enforcement did not however entirely supplant the political mechanisms of sanctions. For instance, the procedure of Article 7 of TEU was envisaged as a mechanism to deter member States from backsliding on fundamental European values, which include "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." The mechanism involves the Commission, the Parliament and 1/3 of Member States as agents for proposal and the EU Council as the deciding authority. The spectrum of sanctions at the disposal of the EU Council is broad: "suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights" (Article 7, paragraph 3 of TEU). In 2018, the European Parliament voted to trigger the application of this provision against Poland and Hungary.[130]

Section 2. An Indefinable Concept, an Indeterminate Regime

Sanctions adopted by international organizations are outside the scope of ARSIWA. According to the ARSIWA Commentary:

> "It is vital (…) to distinguish between individual measures, whether taken by one State or by a group of States each acting

[130] European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

> in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organisations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles. More generally *the Articles do not cover the case were action is taken by an international organization*, even though the member States may direct or control its conduct".[131]

It is questionable whether such broad exclusion of all measures adopted by international organizations is warranted, only on account that such measures were collectively adopted. One may wonder in particular whether measures adopted by an international organization against third States (and not against its members), pursuant not to its constituent instrument, but to general international law, can be entirely excluded from the scope ARSIWA. These measures are unilateral in nature, even if they were adopted through a process of collective decision-making. Of course, ARSIWA only deals with the responsibility of States and from this point of view, their exclusion is understandable. However, sanctions adopted by international organizations are generally followed by the adoption of national measures of implementation adopted by States. The legality of such domestic measures may be contested by the State target.

Institutional sanctions against non-member States are also excluded from the operation of the ILC's project on Responsibility of International Organizations (2011): "The present draft articles do not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State."[132] This exclusion was justified by the fact that the draft only dealt with the responsibility of international

[131] ILC, fn. 13 above, art. 54, 137 [2] (emphasis added).
[132] ILC, *Draft articles on the responsibility of international organizations, with commentaries*, 2011, A/66/10, art. 22, 72 [2].

organizations and countermeasures directed against them. This being said and quite confusingly, "[p]aragraphs 2 and 3 [of Article 22] address the question whether countermeasures may be taken by an *injured international organization against its members*, whether States or international organizations, when they are internationally responsible towards the former organization. [However, according to the ILC] Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures." The cumulative effect of the exclusions of institutional reactions from the 2001 and the 2011 projects is that "sanctions" adopted by international organizations, and not directed against their members, are entirely in a legal limbo.

The latest practice adds much to the confusion. The term "sanctions" is now extensively and abusively used to designate *all types of coercive measures, adopted by a State or by an international organization, either pursuant to its constitutional treaty or without any specified legal basis in international law*. This abusive terminological conflation appears as inappropriate, since it gives to unilateral measures the anoint of the legal authority and they seem to presume that a State is entitled to adopt such measures.[133] However, this question is highly debated.

Some authors proposed to acknowledge this extensive use in practice and analyse these measures as a distinctive category of "peaceful unilateral coercive measures adopted *by a non-directly injured State (or IO)* in defence of the public interest and not otherwise justified under international law".[134] Of course, these proposals attempt to revive the countermeasures in the collective interest, which were left aside by the ILC in 2001[135]. This being

[133] On the issue of "sanctions" in international law, see G. Abi-Saab, *op. cit.* fn. 11, 116-118; A. Miron, A. Pellet, "Sanctions" (MPEPIL 2011).
[134] A. Pellet, "Unilateral Sanctions and International Law", *Yearbook of Institute of International Law — Tallinn Session — Volume 76* (Pedone 2015) 726 (emphasis added).
[135] ILC, fn. 13 above, art. 54, 137 [2].

said, all unilateral coercive measures do not necessarily constitute reactions to violations of peremptory norms, motivated by the defense of a collective interest. On the contrary, some of the most resounding unilateral coercive measures (like US sanctions against Iran) were mainly tools to further purely national interests.

The table below is an attempt to draw a comparison between countermeasures and unilateral coercive measures. However, it is necessarily tentative, for the practice of unilateral coercive measures remains chaotic and hardly regulated, notwithstanding the fact that they have become a major tool of international relations in the last two decades. This practice is particularly difficult to assess since the statistical data available mixes the sanctions adopted pursuant to Security Council resolutions, those targeting the same countries but going beyond the measures adopted by the Security Council, targeted measures adopted on account of violations of multilateral conventions such of those against corruption and coercive measures which do not rely on any of the foundations identified above (as for instance, US sanctions against Iran or EU sanctions against Russia).

Countermeasures	**Unilateral coercive measures (improperly called "sanctions")**
1° unilateral	1° unilateral or institutional
2° reactive to a prior violation of international law	2° reactive, punitive or conservative
3° law-enforcement	3° law/will or peace-enforcement
4° regulated ILC	4° largely anarchic
5° *a priori* unlawful, but circumstance precluding wrongfulness	5° lawful or unlawful
6° coercive or not	6° coercive

The phenomenon is so complex that a new legal discipline has developed in recent years: *compliance* aims to support companies in ensuring that their practices are in conformity with the various "sanctions" regimes. Compliance is now taught in master degrees and big law firms and multinational companies have specific departments devoted to it. Regrettably however, these programmes make no distinction between sanctions decided by the Security

Council and unilateral measures. Compliance has thus become an effective tool for implementing coercive measures, including unilateral measures, since the latter are treated in the same way as institutional sanctions.

Section 3. The Lawfulness of Unilateral Coercive Measures: a Grey Zone

The issue of the lawfulness of unilateral coercive measures cannot be easily solved. If the question of States' entitlement to adopt such measures as reactions to violations of international law was resolved in a positive matter, their liceity would be hard to challenge (provided of course that the conditions set out for countermeasures are respected). But for the moment, this entitlement is left in abeyance.

Can unilateral coercive measures amount to violations of international law? If such measures can qualify as violations of specific treaty obligations, the question is more easily solved. And it is on this basis that most challenges against unilateral coercive measures were made.[136]

But beyond violations of specific treaty obligations, could unilateral coercive measures amount also to violations of *general* international law?[137] According to Article 18 of ARSIWA (Coercion of another State),

> "A State which coerces another State to commit an act is internationally responsible for that act if:

[136] WTO, *United States — The Cuban Liberty and Democratic Solidarity Act (US — Helms Burton)*, Request for consultations, WT/DS38/1, 3 May 1996; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2019] ICJ [33].

[137] For further analysis, see A. Miron, "Rapport général", *Extraterritorialités et droit international. SFDI Colloque d'Angers*, to be published in 2020.

> (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
>
> (b) The coercing State does so with knowledge of the circumstances of the act".

But coercion does not have an unequivocal definition in international law. According to the famous *dictum* of the PCIJ in the *Lotus* case, "the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State."[138] This *dictum* is generally subject to a restrictive interpretation, according to which by coercion it is understood the exercise of any form of physical constraint in foreign territory. However, this is not necessarily correct, and the terms of the judgment are broader — *the exercise of any form of power in foreign territory* — is clearly a concept more encompassing than physical coercion. Thus, any act, even indirectly coercive, should be held as prohibited if it is the exercise of a prerogative of public authority in foreign territory. The draft resolution proposed by the Special Rapporteur François Rigaux for the Berlin session (1999) of the *Institut de droit international* insists that:

> "The notion of coercion cannot be limited to material acts of physical coercion (...). The location criterion that correctly applies to such acts is powerless to capture other forms of coercion, such as the threat of the use of force, deprivation of property or economic sanctions. The *mere statement of such threats*, which may only be carried out on the territory of the State of the authorities from which they originate, is likely to exert *a form of constraint on the conduct of their recipients*

[138] *The S.S. "Lotus" (French Republic v. Turkish Republic)* (Merits) [1927] PCIJ 18.

> anywhere, a constraint which, although indirect, is nevertheless certain".[139]

In the same vein, the ILC, in its commentary of Article 18 ARSIWA, considers that coercion goes beyond unlawful use of force or any other form of physical coercion in foreign territory;

> "Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion. (…) However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached".[140]

Even if the commentary does not consider serious economic pressure to be unlawful as such, it does remind that "[a]s a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve *intervention*, i.e. coercive interference, in the affairs of another State."[141] However, the conditions under which unilateral coercive measures amount to a violation of the principle of non-intervention are subject to discussion. Acts of economic pressure were not considered by the ICJ to amount to unlawful intervention: "the Court (…) is unable to regard such action on the economic plane [cessation of economic aid, reduction of quotas of sugar import

[139] F. Rigaux, "Extraterritorial Jurisdiction of States", *Yearbook of the Institute of International Law* [1999] 563 (emphasis added). Our translation from the original: "La notion de contrainte ne saurait être limitée aux actes matériels de coercition physique exercés (…). Le critère de localisation qui s'applique correctement à de tels actes est impuissant à saisir d'autres formes de contrainte, telles que la menace du recours à la force, de la privation d'un bien ou de sanctions économiques. Le *seul énoncé de telles menaces*, qui ne sauraient être mises à exécution que sur le territoire de l'Etat des autorités duquel elles émanent, est de nature à exercer une *forme de contrainte sur le comportement de leurs destinataires en quelque lieu que ce soit,* contrainte qui, pour être indirecte, n'en est pas moins certaine."

[140] ILC, fn. 13 above, art. 18, 70 [3].

[141] *Ibid.*, Art. 18, 70 [3] (emphasis added).

and trade embargo] as is here complained of as a breach of the customary-law principle of non-intervention." [142]

At the same time, the Court insisted that a violation of the principle of non-intervention does not only result from the use of force:

> "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones". [143]

It is therefore the finality of the measures of coercion which is decisive for the appreciation of their lawfulness with regards to the principle of non-intervention. If that finality aims at preventing a State from making choices which are quintessential to its sovereignty, then unilateral restrictive measures may be declared unlawful. To put it in simplistic terms, economic pressure may be permissible if it aims at a change of some specific policies, not if it aims at a change of the political regime. A similar idea is contained in the argument of *abuse of rights*: "their use in an 'inappropriate or disproportionate' manner as a pretext for undeclared purposes would reveal the bad faith of their author and would fall under the prohibition of abuse of rights or intervention." [144] Interestingly, in the *Rosneft* case, the ECJ considered whether the adoption of restrictive measures by EU against Russia could amount to a misuse of powers, which would be constituted if "the restrictive measures at issue

[142] *Military and Paramilitary Activities in and against Nicaragua*, fn. 20 above, [245]; See also J-M. Thouvenin, "Sanctions économiques et droit international" (*Droit* n°57 (2013) 161-176).
[143] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ above fn. 20, [205].
[144] G. Abi-Saab, *op. cit.* fn. 11, 205.

in the main proceedings were adopted for ends other than those stated in the contested acts".[145] The Grand Chamber concluded in the negative: "The legality of a measure adopted in those areas can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue" [146]. And it added that in that case there was "a reasonable relationship between the content of the contested acts and the objective pursued by them." [147]

The lawfulness of unilateral coercive measures can also be challenged with respect to human rights obligations. The impact of sanctions adopted by the Security Council on *the human rights* of the population has been discussed at length. In the mid-1990, this led to a shift in the practice of the Security Council from general embargoes to targeted sanctions. In its General Comment 8 (1997), the Committee on Economic, Social and Cultural Rights discussed the effect of economic coercive measures on civilian populations and especially on children, both in relation to UN sanctions and with unilateral measures. If economic coercion is so drastic as to deprive a population of its means of subsistence, this arguably amounts to a violation of Article 1 (2) of the two United Nations Covenants on Human Rights. Humanitarian concerns go nonetheless beyond these extreme considerations. Notably, in the case *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, in which Iran challenged the US "sanctions", the ICJ granted a limited number of provisional measures on account that:

> "The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation

[145] ECJ, *Rosneft* case, fn. 57 above, [136].
[146] *Ibid.*, [146].
[147] *Ibid.*, [147].

safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment may have a serious detrimental impact on the health and lives of individuals on the territory of Iran".[148]

The legality of targeted sanctions was mainly challenged before the European Court of Justice[149] and the European Court of Human Rights[150] on account of breaches of the human rights of the persons listed. There is already a vast literature on this topic, which could hardly be summarized in a paragraph or two.

Finally, unilateral coercive measures put the Charter *system of collective security* to the test.[151] The adoption of unilateral coercive measures by regional organizations appear at odds with Article 53

[148] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2019] ICJ [91] ; See also United Nations, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy*, A/HRC/19/33, 10 August 2015.

[149] Among a long series of judgments concerning targeted sanctions, ECJ (Grand Chamber), *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P. [2008] (Kadi I); ECJ (Grand Chamber) *European Commission and Others v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, [2013] (Kadi II).

[150] See the land-mark judgment of the ECHR (Grand Chamber), *Al-Dulimi and Montana Management INC. v. Switerland* [2016] [148].

[151] This was broadly one of Russia's arguments against unilateral coercive measures during SC discussions, *UN Doc.* S/PV.7323, 14-19. Russia and China voiced their views that unilateral coercive measures defeat the objects and purposes of measures imposed by the Security Council and are not based on international law (The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, § 6).

of the Charter, which States: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." And what States cannot do through regional arrangements, they could hardly be able to do all alone. Of course, the interpretation of "enforcement action" in this provision may be different from the one given to the same terms under Chapter VII, which encompasses both peaceful coercive measures and the use of force.[152] However, the considerable increase and systematic use of unilateral coercive measures can also be seen as a form of circumventing the Charter, when the conditions for adoption of Security Council resolutions cannot be met.

It cannot be ignored however that this increase of unilateral coercive measures is also a consequence of multiple failures of the UNSC. Taking a naïve stance, one may say that States would prefer to use the UNSC, not only to give themselves a guarantee of legitimacy, but also to increase their effectiveness due to the universality of implementation of its resolutions. Unilateral action would thus be taken reluctantly and only when the UNSC is blocked by a veto. This would be in sum the *unilateralism of substitution*. But some of the unilateral "sanctions" have clearly been adopted to defeat the UN process — the US unilateral coercive measures against Iran fall into this category of *circumventing unilateralism*. In this context, the US have established themselves as parallel guardians of international security. In addition, through aggressive extraterritorial enforcement of their "sanctions" regime, the US can achieve a universality practically equivalent to that of a UNSC resolution. Through extraterritoriality, a unilateral regime acquires universal applicability. Extraterritoriality becomes indeed tool of

[152] See R. Kolb, "Article 53 de la Charte des Nations Unies", in J-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies: commentaire article par article* (Economica 2005) 1415-1416.

globalized obedience which shapes not only the foreign policy of the original state, but also *de facto* that of other States.

Section 4. Conclusion

In the current state of the international legal system, countermeasures are as abhorred as inevitable. Abhorred and considered with circumspection since they are prone to abuse in the hands of the more powerful States. Abhorred also because they represent a form of private justice which speaks tones about the major short-comes of the system, revealing the absence of any centralized form of law-enforcement.[153] But it is this very absence that renders inevitable the use of countermeasures and this fact will not disappear with a magic wand. This being said, the ILC managed nonetheless to adopt a number of guarantees against abuse and, due to ARSIWA, the regime of countermeasures stabilized to a considerable extent (which does not mean that all grey zones disappeared).

This is in stark contrast with the treatment reserved to unilateral coercive measures adopted either by States individually or through regional organizations. The issue was left outside the scope of the two projects of codification of State and international organizations' responsibility for wrongful act. It was also considered to be too slippery or unripe for codification to be taken up by the Institute of International Law. Yet, considering their systematic use as a tool of foreign policy in the past two decades, it is urgent that the topic be taken up again. It may be that no-one can provide a definitive answer to the question of entitlement to resort to the unilateral coercive measures or to their liceity. But their systematic use raises the broader question of the efficiency of the system of collective security and ultimately of its survival. From this point of view also, the question of their place in international law needs to be addressed.

[153] G. Abi-Saab, *op. cit.* fn. 11, 275.

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