**Workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations, in particular their socioeconomic impact on women and children, in the States targeted**

**Session II: Mechanisms to assess and mitigate the adverse impact of unilateral coercive measures and ensure accountability**

Legal Mechanisms to Assess and Mitigate Adverse Human Rights Impact of Unilateral Sanctions Through Accountability

Antonios Tzanakopoulos DPhil (Oxon), LLM mult (NYU; Athens)

Associate Professor of Public International Law, University of Oxford

**I. ‘Unilateral coercive measures’: Definition**

1. A unilateral coercive measure is understood as a measure that is in the first instance unlawful under international law, but whose wrongfulness is precluded due to the fact that it is taken by a State (or a plurality of States[[1]](#footnote-1)) that has been injured by an internationally wrongful act against the State that bears responsibility for the internationally wrongful act. A ‘unilateral coercive measure’ then is a countermeasure within the meaning of general international law as reflected in Articles 49 to 54 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (Articles on State Responsibility, ARSIWA).
2. What this definition excludes is so-called ‘retorsions’, that is unfriendly but lawful acts by one State (or a plurality of States) against another. Retorsions being inherently lawful, there can be no question of them violating any human rights obligations and engaging the responsibility of the State resorting to them. Though they may be ‘coercive’ in a non-technical sense, if they reach the level of coercion as a technical legal term, they are no longer lawful in that they constitute prohibited intervention under international law (and thus they no longer qualify as retorsions).
3. This neatly highlights the requirement that ‘unilateral coercive measures’—or simply countermeasures—must be in violation of some obligation of the State resorting to them (but that violation is justified in the instance because it is a response to a previous violation—a tit for tat). There are two possibilities in this respect: that the countermeasure violates a human rights obligation of the State resorting to it; or that the countermeasure violates some other obligation of the State resorting to it but has some adverse consequences on the enjoyment of human rights in the target State. These two possibilities are taken up in turn under (II) and (III) below.

**II. Human Rights Obligations: Scope of Application and Extraterritoriality**

1. The International Law Commission’s Articles on State Responsibility indicate that countermeasures may not breach human rights obligations (as well as other specific obligations referring to humanitarian law, the prohibition of the use of force, diplomatic law, and other *jus cogens* obligations). However, this refers to the human rights obligations of the State resorting to the countermeasures, which are generally applicable only in situations where that State exercises jurisdiction. This is not necessarily limited to the reacting State’s territory. Human rights obligations may also apply extraterritorially, to the extent that the reacting State exercises jurisdiction, whether under the spatial or under the personal model.
2. However, unlike situations of occupation or extraterritorial presence of State organs, the State taking countermeasures will not normally exercise any jurisdiction in the territory of the target State. While then the reacting State will not be allowed to breach human rights obligations—say against nationals of the target State present in its territory or otherwise within its jurisdiction—by way of countermeasures, it is under no obligation to enable human rights protection within the jurisdiction of the target State. As such, the prohibition of countermeasures affecting human rights obligations does not, in and of itself, prohibit countermeasures that have an adverse impact on the enjoyment of human rights in the target State.

**III. Assessing the Adverse Impact of Countermeasures on the Enjoyment of Human Rights**

1. Any countermeasures taken by the reacting State are likely to affect the target State’s ability to comply with its own human rights obligations. This is particularly so when the countermeasure taken is a countermeasure restricting trade or economic or financial relations between the two States; when countermeasures are taken by a plurality of injured States (or a plurality of States other than the injured State in the case of an alleged violation of an obligation *erga omnes*, eg), which may have a compounding effect on the target State; and, finally, when regional international organisations (the EU, eg) react through the adoption of unilateral coercive measures, again due to the compounding effect of such measures taken by a significant number of regional powers.
2. The capacity of such measures to adversely impact the enjoyment of human rights in the target State is particularly pronounced when a powerful State (or a group of States) reacts through asset freezing or suspending trade with a weak State. This will evidently put significant strain on the State’s resources and may affect its ability to respect and protect human rights, especially those requiring positive action on the part of the State. This is not only limited to economic, social and cultural rights, but also to most civil and political rights—most of them include recognised positive obligations, which require resources.
3. The legal mechanism for assessing the impact of these countermeasures under international law is the principle of proportionality (and limited exclusions of countermeasures as per Article 50). According to ARSIWA, the countermeasure taken must be commensurate with the injury suffered by the injured, and now reacting, State. Any countermeasure that would clearly affect the target State’s ability to comply with its human rights obligations would then be disproportionate and as such unlawful. This is because a countermeasure resulting in (further) human rights violations could not be commensurate to whatever injury the reacting State may have suffered.
4. However, it will not be easy to establish that the target State’s inability to comply with human rights obligations is a (direct) result of the countermeasure. The assessment can only be made ad hoc and on the basis of the facts of the relevant case, but the obvious problem/defence would be that the target State may well simply divert funds from other purposes to the protection of human rights. It simply elects not to do so, but rather opts to channel the consequences of the countermeasure directly against those within its jurisdiction (and indeed the target State may do so for a variety of reasons and with various purposes, including stirring popular sentiment, or deflecting the hit against the State elite, etc).
5. That being said, far-reaching countermeasures which starve the target State of resources (such as multilateral measures imposing blanket embargoes, or freezing of all available assets of the State, and the like) will be disproportionate on their face, and in the extreme will also violate the prohibition of intervention. It is to be remembered that countermeasures aim at inducing compliance of the target State with a breached international obligation, but may not cross the line into intervention in the domestic affairs of the target State, seeking, eg, a government change or the adoption of a certain political or economic system of government. Such extreme countermeasures will be unlawful and will engage the responsibility of the State(s) taking them.
6. In the absolute extreme, countermeasures may reach the level of economic warfare. Economic warfare is not a term of art in international law, but the point here is to highlight to extreme countermeasures which lead to the starvation of the population of the target State, or that lead to other grave violations of fundamental human rights of the population, such as access to medical resources. Such measures will by definition be unlawful as disproportionate, and if military means are employed to enforce them (eg, blockade) they will constitute a violation of the prohibition of the use of force and will result in an armed conflict which will call international humanitarian law (and its specific protections over the civilian population) into application.

**IV. Mitigating the Adverse Impact of Countermeasures *Through* Accountability**

1. There are many ways in which a reacting State may seek to mitigate the adverse impact of countermeasures on the enjoyment of human rights in the target State. These include carefully targeted countermeasures against the responsible State’s political and economic elite, such as targeted asset freezes and travel bans (rather than blanket freezes of the State’s assets or a complete suspension of air links) or measures targeting specific commodities and/or arms (rather than comprehensive embargoes). But this is very much an exercise in restraint on the part of the reacting State, to the extent that even comprehensive freezes or embargoes would not violate the principles of proportionality and non-intervention.
2. The more difficult question, however, is whether and to what extent the adverse impact of countermeasures on human rights may be mitigated (or even eliminated) through accountability mechanisms. Accountability is rather nebulous term, at best an umbrella term, which may take different forms: political, financial, reputational, and legal—among others. Legal accountability—or the international responsibility of the acting State (or international organisation)—will be the focus of this section.
3. In the decentralised international legal order, States are in the first instance *judices in causae suae*: they auto-interpret the rules of international law, auto-determine their violation, and finally they react through self-help (mainly countermeasures) when they consider that these rules have been violated. This means that a State may consider that a rule has been violated, and take countermeasures that it deems to be proportionate against a State that the first State alleges to have violated the rule. The target State may of course disagree with the determinations of the State resorting to countermeasures: it may consider that it has not violated the rule or that the countermeasure imposed is disproportionate or otherwise unlawful. The emerging dispute will have to be resolved peacefully, whether through diplomatic or adjudicatory means.
4. The diplomatic means available for resolving the dispute have the obvious drawback that any imbalance in the relative power of the States parties to the dispute may hamper progress. For a weak State targeted by countermeasures, the best protection against what it considers to be unlawful countermeasures will be adjudication. However, this may be difficult to achieve: judicial settlement of dispute is premised on consent of all parties to the dispute. The target State may challenge the countermeasures before the International Court of Justice or other international courts or tribunals by relying on previously indicated consent by the reacting State through unilateral declarations (eg under the ICJ Statute) or through compromissory clauses in bilateral or multilateral treaties. It could then seek to enjoin the reacting State from continuing to impose the countermeasures found to be unlawful.
5. This most effective avenue, however, is also the most rare. It further has the drawback that it relies on the willingness of the target State to challenge the countermeasures against it. The population, which is the one suffering from the adverse impact on the enjoyment of its human rights, has no direct say in the matter. Individuals and legal entities in the targeted State will also most likely be unable to directly challenge the countermeasures imposed by the reacting State directly. What they could do is seek to challenge the conduct of their own (targeted) State in its domestic courts, with a view to a change in that conduct which will ensure the cessation of the countermeasures against it. Rather than seeking legal accountability of the reacting State, this approach seeks to hold the target State to account for its own conduct. But this is also an avenue with limited prospects of success.
6. One final possibility for a legal (if decentralised) reaction to disproportionate countermeasures affecting the enjoyment of human rights may be the reaction of States other than the reacting and the target State. Third States may argue that the disproportionate countermeasures affecting human rights constitute a breach of an obligation *erga omnes*, which would allow them in turn to react by imposing their own countermeasures on the originally reacting State. This would of course assume a sense of solidarity rarely seen in the international community—at least the case of the US embargo on Cuba partly attests to that. Still, it is an option for legal reaction that cannot be ruled out.
7. It appears then that international law is not particularly well equipped to mitigate the adverse impact of unilateral coercive measures (countermeasures) on the enjoyment of human rights in the target State: while legal regulation exists, its enforcement is subject to numerous constraints. The best mechanism for mitigating the adverse impact in these circumstances may be to seek to mobilise public opinion against the reacting State (for imposing disproportionate measures) or the target State (for channeling the adverse effects to the population). This mechanism worked in the case of UN sanctions against Iraq, when it became clear that the comprehensive embargo against the country was having disproportionate and devastating effects on the population. Also in other circumstances of UN sanctions, the mobilisation of public opinion, in conjuction with decentralised reactions by States and even individuals in domestic courts, has led to a suspension of the offending sanctions or a significant amelioration of the regime to limit the adverse effects on the enjoyment of human rights. The cases of the sanctions against Libya in 1992-1998 and the case of the Al-Qaida/Taliban sanctions since 1999 are instructive examples.
1. Even though the measure is not literally unilateral, but rather multilateral, in such an instance, ‘unilateral’ measures are meant to include such multilateral responses to the extent that these are not ‘collective’. Collective coercive measures can only be taken by international organisations, in particular the United Nations when acting under Chapter VII of the UN Charter. [↑](#footnote-ref-1)