Letter to the *Journal*

Today as Yesterday?
Unilateral Coercive Measures and Human Dignity

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I. Introduction

1. The question of so-called "unilateral coercive measures" (UCM) is not only important for the practice of international law, but essential for the very understanding of international law as a legal order. The terminology varies widely, and with it the concepts to which reference is made. The terms "reprisal", "retorsion", "countermeasure", "sanction", and "UCM", among several others, differ in their scope and implications, sometimes in important ways, but they also share a deeper dimension, i.e. the self-assessed and horizontal nature of the response to an event or action from another entity. This turns the question of "horizontal responses"—to use a neutral term—into much more than the analysis of a specific concept; more accurately, the question unveils the inner structure of the international legal order and the transformation it has undergone, particularly since the end of the Second World War. It is a vantage point from which a much wider reflection on the state of international law can be conducted.

2. A major contribution to this reflection is that of D. Alland in his

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1994 study of *justice privée et ordre juridique international*.[1] The term *justice privée* or "private justice" is not to be understood as a reference to international commercial (or investment) arbitration but as the legally recognized power of a subject of international law (or indeed domestic law) to assess the legality of a situation and take justice into its own hands. As Alland shows, international law makes significant room for such forms of self-assessed action and a proper understanding of such room is necessary to take a position both on the specific debate over UCM and on its more fundamental background. Indeed, the more a legal order makes room for private justice, the more the power disparities across subjects find expression not only in political but also in legal terms. The debate over UCMs therefore has roots that are as deep as the very possibility and structure of international law.

3. Here, again, terminology becomes an issue. International law, as law in general, is a language, and the selection of specific terms depends on what a proposition is intended to convey, not to convey or to leave ambiguous. Thus, whereas the term "retorsion" is unambiguously used to convey action which is inimical but lawful, the terms "reprisal" or, at present, "countermeasure" convey action which is normally unlawful except for the reason that it is justified as a response to prior unlawful conduct. The use of these terms does not say much about their unilateral or collective nature. The term "sanction" instead conveys the idea that it is a reaction to illegality adopted in a concerted (collective) manner, typically acting within or prompted by an international organization, although unilateral sanctions are also possible. The term UCM emphasises both the "unilateral" and the "coercive" nature of the measure, but both features remain ambiguous.[2] "Unilateral" is not understood as action by a single State but, rather, as action which has not been required or authorised by an international organization which has the power to do so. "Coercive" is intended to be more than merely inimical but not necessarily unlawful. Such is the—rather wide—scope ascribed to the very terminology of UCMs.

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1 D. Alland, Justice privée et ordre juridique international. Etude théorique des contre-mesures en droit international public (Paris: Pedone, 1994).

2 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, 10 February 2015, paras.7-13.

4. In such a context, asking whether UCMs are lawful or unlawful is self-defeating, because the very expression has been coined to cover action that is unlawful and unjustified, unlawful but justified, *and* lawful but inimical. In other words, it is an artificially created dilemma the answer to which must begin with a reformulation of the problem. But the deeper question of how far the exercise of "private justice" can be recognised in international law remains essential. The purpose of this piece is to use this question as a vantage point to explore what it tells us about the degree of transformation of international law from a horizontal to a mixed "horizontal-vertical" legal order. As we shall emphasise, such transformation is manifested not by the mere existence of limits to private justice (that only conveys that private justice is legally recognised to some extent) but by the values from which such limits increasingly arise (human dignity is perhaps the main one) and the legal mechanisms through which they find expression. When considered together, these values and mechanisms instil a significant degree of verticality in the international legal order.

II. The contemporary debate

5. The two major strands of the contemporary debate on private justice concern economic coercion [3] and "third-party" or "collective" or, still, "general interest" countermeasures.[4] In the first case, the debate unfolds mostly at the level of the primary norm (is the exercise of economic

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[3] See e.g. A. Hofer, 16 Chinese JIL (2017), 175, and the contributions of P.C.R. Terry and S. Jusoh/T. Sarmidi in this issue. See generally D. Bowett, Economic Coercion and Reprisals by States, 13 Virginia Journal of International Law (1972), 1; L. Boisson de Chazournes, Les contre-mesures dans les relations économiques internationales (Paris/Genève: Pedone/IUHEI, 1992); V. Lowe and A. Tzanakopoulos, Economic Warfare, Max Planck Encyclopedia of Public International Law (March 2013).

[4] See M. Akehurst, Reprisals by Third States, 44 British Yearbook of International Law (1970), 1; J.I. Charney, Third State Remedies in International Law, 10 Michigan Journal of International Law (1989), 57; L. A. Sicilianos, Les réactions décentralisées à l'illicite, des contre-mesures à la légitime défense (Paris: LGDJ, 1990); D. Alland, Countermeasures of General Interest, 13 European Journal of International Law (2002), 1221; M. Davidowicz, Third-Party Countermeasures in International Law (Cambridge University Press, 2017).

coercion a breach of a primary norm of conduct, particularly a norm of general international law?). The analysis of UCMs and their compatibility with human rights is part of this broader debate. The debate relating to the second strand unfolds instead at the level of secondary norms (can a State other than the "injured State" adopt countermeasures against a State which has breached international law?). Although the second strand assumes certain characteristics in the relevant primary norms (e.g. their "peremptory" or at least *erga omnes* character), the focus remains on the absence of clarification of this question in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).[5]

6. The distinction between the level of primary and secondary norms is useful to frame the, sometimes confusing, terms of the more specific debate over UCMs and human rights. As noted earlier, UCMs is an expression coined to encompass three main hypotheses: (i) action which is unlawful (under a primary norm) and unjustified (under secondary norms); (ii) action which is unlawful (under a primary norm) but justified (under secondary norms); and (iii) action which is inimical but lawful (under the applicable primary norms). Analytically, any attempt to consider UCMs unlawful must therefore turn hypotheses (ii) and (iii) into hypothesis (i). To turn (ii) into (i), the analysis will unfold under the conditions for justification of otherwise unlawful action, particularly the conditions for the adoption of a valid countermeasure. This applies to countermeasures by both the "injured State" (whose action will be assessed in the light of the conditions for valid countermeasures) and third States (here the ILC Articles are of limited help, but the question of third States' "entitlement" to adopt countermeasures remains one governed by secondary norms). To turn (iii) into (i), the analysis will begin instead at the level of the primary norm before moving to the level of secondary norms. Is the UCM in question a breach of a primary norm of conduct? The answer can be sought in the primary norms arising from a treaty, but a general assessment will need to pay particular attention to primary norms arising from general international law and hence applicable to all. Only in the case a primary norm is breached will the analysis move to the level of secondary norms, and it will be similar to that

[5] Yearbook of the International Law Commission, 2001, vol. II (Part Two). Article 54 of the ILC Articles left this question open, and paragraph 6 of the commentary characterised the current state of the practice as "uncertain".

conducted for hypothesis (ii).

7. Importantly, in theory, this analytical cartography is applicable irrespective of whether the analysis of lawfulness (breach of a primary norm) or justification (under secondary norms) is conducted by one of the States involved (the self-assessment of a private justice situation) or by a third party *ex post facto*. In practice, however, who conducts the assessment makes a world of difference. The recognition of private justice or, to continue with the neutral terminology used earlier, of "horizontal responses" assumes that States themselves are recognised as possessing the power to assess the legality of the action of another State, irrespective of any involvement of a third party (e.g. an adjudicator). Despite significant developments in international adjudication, third party involvement—particularly that of an adjudicator—remains the exception rather than the rule.[6] The possibility that a self-assessment may later be reviewed does not remove the legal recognition of the power of self-assessment inherent to horizontal responses, which survives, for example, in the determination of the effects of the measure over time. A valid countermeasure will deploy its effects from the time of its adoption (not from the time of a subsequent judgment) until the end of the breach to which it responded. Thus, although international adjudication certainly instils a substantial degree of verticalization in otherwise horizontal relationships, it does not remove horizontality altogether.

8. But this observation is important because horizontal responses may be limited in ways that, in practice, greatly facilitate access to adjudication or quasi-adjudication. As discussed next, the manifestations of "human dignity" in international law have taken many forms, including primary norms of conduct (human rights and their correlative obligations for States), the violation of which can be reviewed by a dense network of courts and committees, as well as secondary norms, such as the rules formulated in Article 50(1)(b) and (c) of the ILC Articles, which transform certain primary norms of human rights and humanitarian law into secondary norms placing conditions for the validity of countermeasures.

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[6] See P.M. Dupuy and J.E. Viñuales, The Challenge of "Proliferation": An Anatomy of the Debate, in: C. Romano, K. Alter, Y. Shany (eds.), The Oxford Handbook of International Adjudication (Oxford University Press, 2014), 135-157.

III. Values and the verticalization of international law

9. Limits to UCMs arise more and more from fundamental values recognised at the international level. In particular, the value of human dignity has found expression in international law through different legal instruments, understood here as ways of formulating a norm (principles, obligations, rights, crimes). These instruments, most widely relied upon in specific areas of law, have introduced important limits to private justice in general and to certain forms of UCMs specifically, making them unlawful and widening the forums before which they can be characterised as such. Such legal manifestations of human dignity have turned a range of actions/omissions falling under the hypotheses (ii) and (iii) described above into hypothesis (i).

10. Some illustrations can clarify how instruments that express human dignity can transform measures from lawful into unlawful, under the applicable primary norms. In international humanitarian law (IHL), the insertion of the *Martens Clause* into the preambles of the Second Hague Convention of 1899 (para.9) and of the Fourth Hague Convention of 1907 (para.8) signalled the recognition of legal restraints on the conduct of hostilities. The principle of humanity introduced with the clause constituted a limiting factor on the freedom of States to do what is not expressly prohibited by the law. Today, the influence of the Martens Clause on the battlefield goes hand in hand with the application of other central principles of IHL, including the requirements of distinction and proportionality and the prohibition of unnecessary suffering. Along this line, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Additional Protocol I of 1977, reprisals are expressly prohibited against defined classes of protected persons.[7] Moreover, article 54 (1) of Additional Protocol I declares that

[7] Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, Article 2; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, article 2; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, article 46; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, article 47; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August

"[s]tarvation of civilians as a method of warfare is prohibited".[8]

11. Similarly, international human rights law (IHRL) expresses the centrality of human dignity, which is recognised as a foundational principle of the international legal order as well as a primary "mother" human right. In the first sense, human dignity "is the foundation of freedom, justice and peace in the world",[9] and "social progress and development" are founded on respect for human dignity.[10] In the second expression, the "(inherent) right to respect for human dignity"[11] is understood as the source of all other fundamental human rights. In particular, human rights treaties consider specific human rights deriving from human dignity as non-derogable in time of war or of other public emergency.[12] In parallel with the prohibition set in

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1949, 75 UNTS 135, article 13, third paragraph; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, article 33, third paragraph; articles 51 (6), 52(1), 53(c), 54(4), 55(2) and 56 (4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, 1977.

8 See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75; see also Article 14, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609; see also Military manuals, for example, of Argentina (para.9), Australia (paras.10–11), Belgium (para.12), France (paras.17–18), Germany (para.19), Israel (para.22), Netherlands (para.26), Russian Federation (para.29), Spain (para.30), United Kingdom (para.34), United States (para.35) and Yugoslavia (para.36), all referred to in J.M. Henckaerts and L. Doswald-Beck, 2 Customary International Humanitarian Law (Cambridge University Press, 2005), chapter 17.

9 Preamble, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

10 Article 2, Declaration on Social Progress and Development**,** Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969; General Comment No. 13 (Twenty-first session, 1999), The right to education (article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para..

11 See, for example, Article 3, General Assembly resolution 3447 (XXX), Declaration on the Rights of Disabled Persons, of 9 December 1975.

12 See article 4 of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999; article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4

IHL, article 1(2) of the International Covenant on Civil and Political Rights (ICCPR) (and of the International Covenant on Economic, Social and Cultural Rights, ICESCR) declare, "[i]n no case may a people be deprived of its own means of subsistence". Thus, the primary norm expressly protecting human dignity ultimately acts as an obligation-creating norm. The obligations to respect,[13] protect[14] and ensure dignity[15] derive directly from its legal substance. For instance, in relation to article 17 of the ICCPR on the right to have recognised reputation, honour and dignity, the Human Rights Committee has affirmed that States are under "an obligation to provide adequate legislation to that end" and "[p]rovision must also be made for everyone to be able to protect himself or herself effectively against any unlawful attacks that do occur".[16]

12. Since 1945, human dignity has also been enshrined in many other legal forms, most notably in the definition of international crimes, with the Nuremberg Statute,[17] which included for the first time an international definition of crimes "against humanity",[18] and in the corollary of an international prosecution of such crimes. The institutional framework for the international prosecution of international crimes which was developed in the 1990s and reached an apex with the adoption of the 1998 Rome

November 1950, ETS 5; and article 27 of the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

13 Article 37, (c), Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3 [CRC]; Article 10, ICCPR.

14 Article 21, Universal Declaration on the Human Genome and Human Rights (emphasis added).

15 Principle 11, para.3, Part I, UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 (emphasis added); Article 23, CRC; Global Compact for Safe, Orderly and Regular Migration, Resolution adopted by the General Assembly on 19 December 2018, A/RES/73/195, 11 January 2019, para.37(d), under "Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration".

16 Khidirnazar Allakulov v. Uzbekistan, communication No. 2430/2014, CCPR/C/120/D/2430/2014, 22 August 2017, para.7.6; See the Committee's General Comment No. 16 (1988) on the right to privacy, para.11.

17 United Nations, Charter of the International Military Tribunal—Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945.

18 Ibid., Article 6(c).

Statute of the International Criminal Court provided, in addition, a network of mechanisms for the protection of human dignity through international criminal law (ICL).

13. Thus, the recognition of human dignity has translated considerations of humanity into a series of legal norms, both "primary" and "secondary", in areas of international law, such as IHL, IHRL and ICL. These norms have placed important limitations on the lawfulness of "horizontal responses" or UCMs. Because human dignity is distinct from the traditional interests of States, i.e. the interests a State can dispose of transactionally, and because the legal expressions of human dignity in international law, both through certain instruments (principles, obligations, human rights and international crimes) and through certain institutions (adjudicatory and quasi-adjudicatory bodies), exclude or significantly limit the horizontal or transactional dimension of classical international law, their implications are far-reaching. They cannot be merely seen as traditional limitations to unilateral action (e.g. the principle of non-intervention, the prohibition of the use of force, encroachments on the territorial integrity of a State, etc.). A State can authorise another State to intervene in its internal affairs, but it does not have the legal power to permit other States to encroach on the manifestations of human dignity of the peoples and individuals under its jurisdiction.

14. Some of these legal manifestations are "primary norms" that specifically aim to protect human dignity by banning or restricting certain conduct. Thus, conduct under hypothesis (iii) in violation of such primary norms is no longer merely inimical; it is unlawful. Importantly, these primary norms are to a significant extent taken up and made to perform also the function of "secondary norms" limiting the possibility of justification, thus making the bulk of situations which are unlawful under (iii) also unjustified, hence moving from (iii) and (ii) directly to (i) in a single blow. Indeed, article 50(1) of the ILC Articles clearly states that "countermeasures shall not affect […] (a) obligations for the protection of fundamental human rights; (b) obligations of a humanitarian character prohibiting reprisals".[19] This understanding of the limitations on countermeasures has deep historical roots. In a resolution dating back to 1934, the *Institut de droit*

[19] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, See Portuguese Colonies case (Naulilaa incident), II RIAA 1011 (1928), at 1026.

international declared that a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[20] The same logic underpins more recent illustrations of such limitations. Due to the collateral effects on civilian populations, economic sanctions "should always take full account" of the provisions of the ICESCR.[21] The safeguards of IHL have been established primarily to protect civilians in times of war, but "there is no reason why those safeguards should not apply to economic sanctions imposed in the course of or outside an armed conflict."[22] Importantly, article 50(1)(d) of the ILC Articles reaffirms, in line with article 26, that the circumstances precluding wrongfulness described in chapter V of Part One do not affect the wrongfulness of any act of a State not in accordance with an obligation set by a peremptory norm of international law.

15. Therefore, the legal manifestations of the fundamental value of human dignity are able to touch upon both primary and secondary norms rendering an action unlawful (under a primary norm) and unjustified (under secondary norms), and thereby moving from (iii) to (i) in a single stroke.

IV. Concluding observations

16. Three basic conclusions can be drawn from the analysis conducted above. First, the debate regarding the lawfulness of UCMs as a single category of measures is self-defeating. The very term UCM is intended to bring under the same label a diversity of hypotheses, which must be distinguished in order to enable an assessment of lawfulness. In other words, it is not possible to say whether UCMs are lawful or unlawful precisely because the type of measures that fall under the scope of this label can be both lawful and unlawful. In order to address the lawfulness of UCMs, it is necessary to rely on a finer-grained analytical cartography which

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[20] Annuaire de l'Institut de Droit International, vol. 38 (1934), 710.

[21] E/C.12/1997/8, para.1.

[22] Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, A/HRC/39/54 (10–28 Sept. 2018), 9, which, for instance, makes references to the reimposition of a comprehensive trade embargo on the Islamic Republic of Iran in May 2018 by the USA; Hans-Peter Gasser, Collective economic sanctions and international humanitarian law. An enforcement measure under the United Nations Charter and the right of civilians to immunity: an unavoidable clash of policy goals?, 56 ZaöRV, 871-880.

distinguishes action: which is both unlawful and unjustified (hypothesis (i)), which is unlawful but justified (hypothesis (ii)), and which is lawful but inimical (hypothesis (iii)). For UCMs to be prohibited, all the actions/omissions falling under the definition of UCMs would have to fall under hypothesis (i), which is by definition not the case. But it may be the case for a sub-set of such actions/omissions.

17. Secondly, the sub-set of actions/omissions that are in violation of certain legal manifestations of human dignity (e.g. certain principles, obligations, human rights, international crimes) can be analysed under this more granular analytical cartography. At this analytical level, there is a significant difference between norms governing "horizontal" or transactional relations among States and norms expressing human dignity: whereas in the first case, a two-step analysis is normally—but not always[23]—required (i.e. the conduct is unlawful under a given primary norm and it is not justified under secondary norms), moving from (iii) to (ii) and then to (i), in the second case the very primary norms that make a conduct unlawful are subsequently made to play at the level of secondary norms to make it also unjustified, thus moving from (iii) to (i) in one stroke. This is not the case for every legal manifestation of human dignity in international law but of a substantial part of them (Article 50(1)(b), (c) and (d) of the ILC Articles).

18. Thirdly, the nature of human dignity as a value and its legal and institutional expression add a strong component of verticality in the assessment of UCMs. This has important implications both at the theoretical and practical levels. At the theoretical level, the exercise of "private justice" is deprived of one of its fundamental corollaries, i.e. the possibility of "transacting" justice. Human dignity cannot be given away by either the State who takes the initial action or by the State that adopts a horizontal response. Cooperation remains, of course, possible but only to protect human dignity, with no lawfully recognised concession on this front (as an example, one can think of the forced population exchanges of classical international law, which were recognised despite their encroachment on human dignity). Thus, perhaps the main manifestation of the horizontal structure of classical international law, namely enforcement

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[23] The main example is the prohibition of the use of force, which operates both as a primary norm and as a limitation to the validity of countermeasures.

through reprisals, is now placed under a new "vertical" light stemming from the legal expressions of human dignity. At the practical level, a constitutive aspect of reprisals (and of private justice in general), i.e. the self-assessment of the lawfulness of the situation to which the horizontal action responds, is also significantly limited, because it is increasingly brought under the remit of a dense network of courts and committees with power to legally assess the situation.

19. Over the last century and a half, and particularly since 1945, human dignity has transformed the foundations of international law. Its effects are felt virtually everywhere, even in the strong-holds of the old horizontal logic, such as reprisals or countermeasures. Placed in such a context, the debate about the legality of UCMs is much more than a technical question. It is an indicator of the state of international law, which suggests that today is no longer like yesterday.