

## Summary

### *Counter Measures*

#### I.

1. The subject of counter-measures dealt with in the ILC-draft is based not only on the general historical development but also on the special foundation of decades of codification initiatives. Both developments refer to special questions concerning e.g. reprisals as well as to the structural change of public international law in general. This change includes the increasing importance of universal and regional international organizations, the progress of the protection of human rights and certain alterations in international environmental law.
2. The course of the ILC-draft is characterised by general warnings against the potentially dangerous practice of reprisals. On the other hand, as a consequence of the progress of international law in this field which is considered unsatisfactory, counter-measures are, in spite of all reservations qualified as a „for the time being indispensable“ instrument for the enforcement of international law. In this sense, counter-measures are described as the exercise of constraint with the specific aim of law enforcement.
3. The terminology of the ILC-draft differentiates between unilateral counter-measures exercised by a single state or a group of states and collective counter-measures exercised by international organizations. For the latter cases the term sanction is employed. The term unilateral counter-measure comprises first of all the traditional legal instrument of a reprisal even though this term itself is no longer used.
4. In this way the term counter-measure is relieved of unclear overlaps which existed between the traditional reprisal and belligerent actions. The counter-measure in the sense of the ILC-draft is clearly distinct from any belligerent action and thereby achieves a theoretical clarification. It does not comprise the legal instrument of retaliation.
5. Counter-measures refer to an enforcement of law which would be illegal as such, but which is tolerated under certain preconditions and within strict limits. The question remains open, whether the character of the original illegality is changed by the successful restoration of the status quo ante, whether it is cured or whether a metamorphosis which is difficult to explain courses it to slip into legality.

#### II

6. The normative, political and practical orientation of the international community, must be taken into consideration when evaluating the ILC-draft, and must be used as a starting point for this evaluation. Depending on the

judgment of the effective and legal range of activities of international organizations, reprisals have been qualified as more or less acceptable or even necessary in the past.

7. Current public international law does not comprise a general ban on reprisals. State practice still imposes on the individual state those tasks which international organizations are not capable of accomplishing, namely in the field of self-help.
8. The increasing network of norms caused by a worldwide creation of norms of differing provenance, sometimes results in the conclusion, that measures of protection used by the individual states have become superfluous. This shows a traditional confusion of the areas of normative claims and of the actual possibility of achieving these. Even the remodelling of Public International Law from a more bilateral to a more multilateral structure does not on the whole make counter-measures superfluous.
9. Into the gap between a normative claim orientated way of thinking, which assumes a closed system, and effectively realisable claims in the practice of states, falls the counter-measure in its specific function. The concept of the ILC assumes a system of Public International Law that is decentralised and in most cases of conflict, is organised without any coercive measures to achieve a peaceful resolution, so that the states, as before remain dependent on self-help.
10. If, despite serious reservations, the reception of regulations concerning counter-measures is at the end referred to as being „both necessary and useful“, this is based on an argumentation which is not very homogenous and is in itself contradictory.
11. An assessment of the rules about counter-measures must include their correlation to the rules about international crimes and those concerning the process of dispute settlement in part three.

### III

12. The regulations about counter-measures have picked up different demands and suggestions from academic literature and have subtly incorporated them. In this light the counter-measure appears as „ultima ratio“ which forces the offending state to comply with the law.
13. In contrast to the other regulations in the third chapter, Art. 47 shows the basic permissibility of counter-measures. Nevertheless, a different impression is given by the further serious limits which are imposed. The draft confirms the main idea, according to which one cannot ban but contain counter-measures. Three quarters of the relevant rules of the draft aim at a containment of state practice which is commonly considered as dangerous. As well as this there are the procedural rules in the third part of the draft, which provide for three steps; negotiation, consultation and independent arbitration, possibly by the ICJ.

14. The duty to hold preliminary consultations corresponds to a traditional demand and can even be regarded as a part of Public International customary law. It now appears as an independent step in the process, which eventually ends in a specially organised consultation process in front of a Conciliation Commission, before a clarification of the matter by the arbitration tribunal can follow. The suggested complex procedure itself shows that the concept of the ILC leads to time and effectiveness problems.
15. The question of duration becomes especially acute when in conjunction with the treatment of international crimes. The matter makes clear, the serious way in which the ILC has become involved in a problematical time question, which can, even for counter-measures, lead to promising attempts being annulled. In addition, the draft shows a definite indecision with the referral to a possible solution in the future through the second revision.

#### IV

16. The correct procedural 'three step' to dispute resolution through arbitration are dogmatically divided by specific rules concerning interim measures of protection, in order to allow the injured state the possibility to speedily protect its claims, e.g. through blocking accounts held by the offending state in the injured state. The intermediary measures, which are described as urgent temporary measures, are not in any way intended to replace the arbitration route, but are available in certain special situations.
17. The commentary on the temporary measures of protection awakes at first the impression, as if the Commission has selectively taken a step away from a contemporary dogmatic counter-measure back to a traditional function of the reprisal, through speedy, and possibly risky self-help measures taken by the injured state in order to effectively put the offending state under pressure, so that the reinstatement of a law abiding state of affairs can be attained.
18. This impression is deceptive in so far that it is intended that through intermediate measures the legal institution 'Counter-measures' will be divided into two separate legal units each with a different agenda for the use of actually effective measures.
19. The portrayal of this legal starting point as a necessary balance between differing interests, makes the dogmatic and practical consequences appear harmless. The outlet opened by temporary measures of protection could increase rather than minimise the dangers.

#### V

20. Art. 50 of the draft contains five grounds of prohibition, that taken separately appear plausible and obvious, however taken as a whole they create a thick and fairly problematical web of specific grounds of prohibition for counter-measures. The question of the remaining legal framework for necessary and effective self-help is thus raised. In addition to the fence

erected in Art. 50 which protects the community of states as well as the offending state come the other in any case intended restrictions which limit the political scope for permissible unilateral counter-measures.

21. The grounds of prohibition include the violence ban of the UN Charter, the protection of diplomatic and consular personnel including the relevant institutions, basic human rights, the preemptory rules of general Public International law, but also excessive economic or political pressure, which could endanger the territorial integrity or the political independence of the offending state.
22. That which can be regarded in a general sense as unproblematic, can be seen from a different perspective with respect to counter-measures. Despite the difficult distinction between military action and economic pressure, the conception of the ILC corresponds to the idea of concentrating military self-help within the confines of Art. 51 UN Charter and leaving no space for unilateral counter-measures.
23. It remains unclear whether extreme economic and political pressure basically is allowed, if this does not endanger the political independence and economic stability of the offending state. Drawing conclusions from the regulations concerning crime in Public International Law, one can on the whole assume a far reaching economic effect of counter-measures.
24. For the individual injured state which is dependent on rapid self-help, the formally erected basic human rights barrier shows itself to be problematical, when in a decentrally organised community of states owing to regional and cultural differences it is no longer clear, which human rights have to be regarded as basic or elementary rights.
25. Even the traditional restrictions of proportionality can mean a constraint on counter-measures which is contrary to their purpose. For the interpretation of Art. 49 results from this, the dogmatic and practical task, of not judging the question of proportionality without paying regard to a sensible function of counter-measures.
26. An attempt to restrict reprisals which only aims at minimising damage disregards their function and does not do justice to this task. More attention should be paid to the contribution to practical law-keeping, which counter-measures as an act of self-help can achieve, when used within suitable boundaries. If the preservation of the existing law and the restitution of the injured law can be said to be part of the general interest of Public International law, then specifically aimed undertakings of this kind are therefore to be respected as being compliant with Public International Law, even if they do not derive from a predetermined process in an international organisation.
27. If the conflict is taken up by a major international organisation with legal personality, then the sanctions decided on take precedence over the counter-measures of the individual state. A reasonable codification would have examined in detail the consequences of the considerably restricted but basical-

ly retained assumption concerning the national sovereignty of states, even if it were only to stem an excessive and incorrect use of counter-measures by states.

28. The increased assumption of erga-omnes duties, raises the question of legal certainty in current Public International Law. Independent from this remains the question of the still existing duty to assist which can be relevant in the case of serious breaches of law. With the sub-division of multilateral treaties in bilateral special relationships, it is possible to differentiate between types of treaties more according to their function.
29. The hoped for increase in effectiveness through precise obligations to have disputes settled by a court can scarcely be expected from the procedure intended by the ILC. In a decentral and restrictively organised legal system overloading the central institutions promises little success, even when, as in the case of the ICJ, remarkable successes have been seen in other areas. A certain letting-up can be expected as a result of the increased inclusion of regional organisations. The path for counter-measures will lead consistently to clarification of the matter by an independent body, however this will not be achieved by the suggestions in the ILC-draft.