

Summary

1. Countermeasures, the core of which are reprisals, are in need of a disciplining legal regime in order to prevent public international law from being ignored.
2. Modern public international law is characterized by a lack of legal norms, the development of community interests, the increasing restriction of domestic jurisdiction (*domaine réservé*), a prohibition of the use of military force in international affairs and by opening up of opportunities for co-operation. At the same time, however, it still suffers from the traditional weakness of an absence of any formal enforcement regime. The applicability of reprisals (as countermeasures) depends on the relationship between these two areas of development in public international law.
3. Retorsions, in contrast to reprisals, do not require the establishment of a legal regime.
4. Reprisals are a response to some form of illegal conduct or omission on the part of a subject of public international law. In determining whether or not such a response should be made, and if so in what form, the injured party is confronted with difficult issues to assess.
5. Whether or not reprisals may be taken against imminent wrongful acts depends on whether the existing situation would be regarded as already wrongful under public international law.
6. A subject which commits a continuing breach of primary rules of public international law may be induced by means of reprisals not only to comply with such primary rules but also with secondary rules which have been breached as a result of the continuing wrongful act.
7. In principle the group of injured subjects of public international law and those which may take reprisals coincide. Exceptions, albeit theoretical ones, might exist in so far as the breach of an international obligation has taken place within a „self-contained“ regime. In respect of a violation of a rule having effect *erga omnes*, all public international law subjects are injured and may resort to reprisals. There may be a gradation of such a right of reprisal although this will only occur where the rights of a particular subject or subjects have been directly violated. The reaction of this subject or these subjects will set the benchmark for the reaction of the other subjects.
8. According to general principles of public international law and pursuant to their constituting treaties, international organizations may also take reprisals. They may, in turn, also become the target of reprisals. This is also true of the relationship between the organization and its member States.
9. It is open to an injured subject of public international law in principle, to refuse to comply with any of its public international law obligations *vis-à-vis* the offending subject. In fact, however, this freedom is limited by three

factors: reasons of legal logic; consideration for the rights of third parties and respect for normative values.

10. While art. 50 of the ILC Draft on State Responsibility goes too far by allowing the injured State any conduct which does not derogate from *basic* human rights, it is too restrictive in its exclusion of any use of force in taking reprisals. The absolute prohibition of forcible reprisals is only acceptable if the right to self-defense is interpreted in a broader sense than accepted today by the prevailing view.
11. It follows from the goal of reprisals of compelling the offending State to comply with its legal obligations under public international law that the target State must be or be made aware of the injured State's claim. The countermeasure itself, however, need not be notified. The injured State must suspend reprisals when the offending State has resumed compliance with its international legal obligations. Non-compliance with legal obligations as a form of reprisal may only be of temporary nature. Problems may arise if reprisals are first taken many years after the internationally wrongful act to which they are intended to be a response has occurred.
12. Although there are good reasons for resorting to negotiations – with or without the involvement of third parties – regarding the carrying out of reprisals, a corresponding obligation to negotiate prior to taking countermeasures would grant the offending State an unjust advantage. This does not mean, however, that the injured State could ignore procedures which had already been agreed upon for dealing with the breach in question. Art. 48 paras. 3 and 4 of the ILC Draft succeed in balancing the opposing interests.
13. In spite of many difficulties in its application, the principle of proportionality plays an indispensable role in the legal regime of reprisals: they must not be disproportionate. The relationship between the internationally wrongful act and the act of reprisal will be assessed according to this principle and in doing so the aim of the countermeasures taken into account. In determining the proportionality of the aim of the reprisal measure in question and the means chosen to achieve this aim the seriousness of the breach in question will also be taken into account.
14. There is no obligation to take reprisals, even where peremptory norms of public international law have been violated or international crimes (art. 19 ILC Draft) have been committed. It is possible to interpret art. 53 (d) ILC Draft as imposing an obligation to support reprisals taken by third parties against a particular State which has been accused of committing international crimes. However, such an interpretation goes too far and should therefore be rejected.
15. The UN Security Council can, to a certain degree, extend or restrict the limits of the legal regime of reprisals. In so doing, however, it is still bound by the powers conferred on it by the UN Charter and by fundamental rules that constitute the legal community of States. Depriving States of their right of reprisal would be in any case inadmissible if they were thereby left un-

protected against the wrongful conduct of other States and the Security Council did not grant protection under its own measures.

16. It is true that a State's ability to effectively make use of reprisals is closely connected with how powerful it is. This is not sufficient reason however to cast doubt on this countermeasure as a legal institution.