

Omer Yousif Elagab

The Legality of Non-Forcible Counter-Measures in International Law

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Omer Yousif Elagab's Oxford thesis - supervised by Jan Brownlie - aims at determining under which circumstances non-forcible counter measures are lawful. After describing the evolution of the doctrine of reprisals until 1945 (p. 6-36), the author suggests that after 1945 the unlawfulness of forcible reprisals under the UN Charter, without a corresponding and effective alternative system of redress, has increased the importance of non-forcible counter measures (p. 37). Elagab identifies three conditions for the lawfulness of such measures: prior breach of international law, prior demand for redress, and a proportional response.

In the course of his analysis of the requirements of a prior breach of international law (p. 42-62), the author examines the implications of a bona fide but mistaken belief by a State that it has fallen a victim to such a breach. This disputed question is based on the conflicting views of Lori F. Damrosch¹ and Wilhelm Wengler² regarding the *Air Services Agreement Dispute*³. While Mrs. Damrosch adopts a ruling allowing a State to implement counter-measures without risk of a later liability when it acts upon a good faith belief that it is the victim of a breach, the latter takes an objective view. Elagab suggests a half-way compromise by conceding the State in question a "margin of appreciation" in assessing the breach as a precipitating factor (p. 50). Further, he regards anticipatory counter-measures as unlawful - basing his view on the definition that an actual breach has to have occurred (p. 54).

Elagab then examines the second condition: Lawful counter-measures have to be preceded by an unfulfilled demand for an effective remedy. He comes to the conclusion that there is no hard and fast rule respecting the content of this demand or the time which has to elapse between the demand and the resort to counter-measures (p. 77-78).

Furthermore, the author analyses the purposes of counter-measures in the context of both prior breach and a proportional response, suggesting that the criteria for determining proportionality will vary according to the purpose served. In this context he identifies three legally acceptable motives: self-protection, reciprocity and the inducement of a settlement of disputes (p. 44-46). In the case of self-protection a wide range of action should be permissible, whereas in the case of reciprocity that notion itself necessarily restricts the scope of action to be taken; in the case in which the motive is inducement to settle a dispute, the action taken can go beyond the limits of reciprocity.

1 *Lori F. Damrosch*, Retaliation or Arbitration or Both? The 1978 United States - France Aviation Dispute, *AJIL* 74 [1980], p. 793-96.

2 *Wilhelm Wengler*, Public International Law. Paradoxes of a Legal Order, *RdC* 158 (5), p. 16.

3 Case Concerning the Air Services Agreement of 27 March 1946, *ILR* 54 [1979], p. 304.

He accepts the view expressed in the *Air Services Award* that the effects of the breach, and not just the breach itself, may be relevant in assessing proportionality, thus implying that counter-measures may be designed to have deterrent effect (p. 91-92). Besides that he regards the factor of dependence or reliance (in the Arab oil boycott) as one of the criteria for assessing proportionality (p. 92-93).

An analysis of the collateral constraints of the legality of counter-measures imposed on States follows (p. 96-135). The reviewer is of the opinion that the author's categories of collateral constraints - in other words: rules of international law which cannot be broken by way of reprisal - can be summarized in meanly three: Firstly, obligations imposed by the rules of *jus cogens* (p. 96-99), and rules similar to *jus cogens* like material human rights norms (p. 99-104 and 104-111), secondly, the infringement of third State rights, and thirdly, self-contained regimes, like diplomatic law (p. 116-122) and, by analogy, the law on innocent passage through territorial seas or through straits (p. 113-116). The reviewer was puzzled by the exclusion of the part on 'the relationship between extraterritorial exercise of jurisdiction and the category of counter measures' (p. 125-135) from third State rights to which it is only a sub category. Unfortunately, Elagab does not discuss in depth the concept of self-contained regimes in general.

Counter-measures are then examined in the context of the law of treaties, especially the relationship between the concept of material breach (art. 60 Vienna Convention on the Law of Treaties) and the general law on reprisals (p. 136-163).

After that the author demonstrates the relationship between counter-measures and obligations in respect of peaceful settlement of disputes (p. 965-988). Elagab suggests in this part that, unless the obligation is "trenchant" or supported by an effective enforcement system, the victim should still be able to have recourse to counter measures; in this context the author submits a right of EEC-Member States to obtain redress by "reprisal" after exhausting the judicial machinery (art. 169-171 EEC-Treaty).

The book concludes with a discussion of methodological problems relating to the legality of economic coercion in international law: If economic coercion is looked upon as *prima facie* unlawful, it will be difficult, in evidential terms, to establish the legality of counter-measures, because every counter-measure entails a degree of economic coercion (p. 221).

In conclusion, Elagab explores the issues with great clarity of both style and presentation; this work is to be welcomed as an outstanding analysis of an important area of international law and as a fundamental source for research.

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