

## ZOOM IN

### *The question:*

### *Questioning the development of international law with regard to third-party countermeasures: Lessons from Libya, Syria, Ukraine and beyond*

*Introduced by Enrico Milano and Paolo Palchetti*

One of the most significant innovations in the 2001 ILC Articles on State Responsibility was the insertion of several provisions concerning the legal interests of the international community in enforcing international legality. And yet the possibility of non-injured States reacting to a violation of *erga omnes* obligations through the adoption of collective countermeasures proved utterly controversial within the Commission. The ILC finally drafted and approved a non-prejudice clause, that of Article 54, recognising the right of any State entitled to invoke the responsibility of another State for violations of *erga omnes* obligations to also ‘take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached’. The commentary to Article 54 made clear that the practice of adopting countermeasures to react to violations of *erga omnes* obligations was ‘limited and rather embryonic’, hence not justifying a codification of the right of third party non-injured States to adopt countermeasures. However, according to the ILC, the expression chosen, namely ‘lawful measures’, ‘reserves the position and leaves the resolution of the matter to the further development of international law’.

We have asked two distinguished international law scholars for an analysis as to the ‘further development of international law’ fifteen years after the adoption of the ILC articles, especially in light of recent practice in cases such as Libya, Syria and Ukraine. Martin Dawidowicz has written extensively on the topic of third-party countermeasures, includ-

ing in a forthcoming monograph with Cambridge University Press. Carlo Focarelli is the author of a monograph dedicated to the topic of countermeasures (*Le contromisure nel diritto internazionale*, Giuffrè 1994). The main question we have asked them to address is whether the relevant practice can be still qualified as ‘limited and rather embryonic’ confirming the conclusion reached by the ILC in 2001 or whether the collective dimension of international law has now reached a stage of development in which third States may also react through countermeasures. Ancillary to the main question – but nevertheless important and, we believe, worth investigating – are questions such as the ‘type’ of proportionality involved in the reaction of third States, given that the latter States are not materially injured by the illegal conduct; the consent of the injured State in authorising the adoption of countermeasures by other States; and the coordination requirements between individual countermeasures and collective reactions organised within the framework of the UN system of collective security.

