

International law and third-party countermeasures in the age of global instant communication

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1. Introduction

I have been invited to join the debate around the admissibility of third-party countermeasures (TPCs) that has been inspired by Martin Dawidowicz's article in this issue of QIL.¹ I take this opportunity to make a few comments on his article, while trying to avoid repeating the thoughts that I have already put down in previous writings.²

Dawidowicz's thesis is that 'practice [relating to TPCs] appears to be sufficiently widespread, representative and consistent to form the basis of a rule of customary international law'.³ He thus refers specifically to *customary* international law, not to *general* international law, which may include other rules of general scope. His approach is to show that 'sufficient' practice and *opinio juris* exist. In particular, in his view *opinio juris* is to be understood as inclusive of 'political considerations': even

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¹ M Dawidowicz, 'Third-party countermeasures: a progressive development of international law?' (2016) 29 QIL-Questions of Intl L 3-15 <www.qil-qdi.org>.

² See C Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (OUP 2012) 466-479; Id, 'Responsibility to Protect in the Global System', in P Hilpold (ed), *Responsibility to Protect (R2P): A New Paradigm of International Law?* (Brill/Nijhoff 2015) 417-438; Id, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 Eur J Intl L 125-171; Id, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 J Conflict & Security L 191-213. In Italian, see C Focarelli, *Trattato di diritto internazionale* (Utet giuridica 2015) paras 283.12-21; Id, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 293-299; Id, 'Le contromisure pacifiche collettive e la nozione di obblighi *erga omnes*' (1993) Rivista di diritto internazionale 52-72.

³ Dawidowicz (n 1) 11.



assuming that TPCs are ‘enmeshed with policy’ and that *opinio* is very difficult to ascertain, the latter is still (although rarely) ascertainable in legal terms as far as TPCs are concerned. It follows that, to his eyes, the absence of *opinio* invoked by TPCs critics appears unconvincing. Interestingly, though citing Article 48 ARSIWA, Dawidowicz does not refer to obligations *erga omnes*, nor to any other purely or predominantly theoretical ground, as others do, to maintain that TPCs are admissible in customary international law. He states that ‘[t]here is increasingly strong support for th[e] conclusion’ that TPCs are to be seen as ‘a legitimate form of progressive development of international law’.⁴

2. Methodology

First, the identification of *lawful or per se unlawful* acts, either suffered or carried out in response, is very often open to question. As a result, what appears to TPCs advocates as a ‘countermeasure’, ie a per se unlawful act carried out in response to an unlawful act, may well appear to TPCs critics as either a retortion or simply an unlawful act. Dawidowicz avoids focusing on the issue, apart from a couple of examples.⁵ His conclusions are drawn from ‘practice’. Yet, practice can be plausibly viewed as supporting very different conclusions depending on whether each relevant act is per se unlawful. This holds true for the ‘quantity’ of practice in favour of TPCs, and all the more so in respect of its ‘quality’. The very notions of ‘quantity’ and ‘quality’ of practice as proof of customary international law can be viewed, and have been viewed, very differently.⁶ Is it sufficient to take note that many states have agreed with sanctions?⁷ As to ‘quantity’, for Dawidowicz the practice (which seems to be his decisive criterion of identification of international law) ‘is neither limited nor embryonic’,⁸ nor was it so even in 2001.⁹ He is probably right if one accepts a broad conception of general (customary) international law. Nonetheless, should we embrace such a

⁴ *ibid* 15.

⁵ *ibid* 7-8, 10.

⁶ Focarelli (*Trattato di diritto internazionale*) (n 2) para 37.16.

⁷ Dawidowicz (n 1) 5.

⁸ *ibid* 11.

⁹ *ibid* 4.



conception? Should we embrace it only in this area of international law or as a general standard even when its outcomes are unwelcome? The question may be answered affirmatively in terms of treaty law as between the parties, but this says little as to general international law as between all states and other relevant actors.

Second, as is well known, the notion of 'third party' is very problematic ('not injured', 'not directly injured', etc) and also in this regard different conclusions can be plausibly reached, depending on the notion accepted.

Third, different solutions might be accepted, depending on the context, rather than one 'general' conclusion. For instance, collective self-defence may be seen as a form of 'countermeasure' (at least in the ICJ's terminology)¹⁰ that is undoubtedly permitted by current international law, providing that certain conditions are met. The same conclusion may not apply to other contexts, such as 'peaceful' countermeasures. On this premise, practice could be 'dissected' so as to draw different conclusions (either positive or negative, or implying certain conditions rather than others) depending on the context. It may well be that states and other relevant actors support TPCs in certain contexts (ie reactions to an 'armed attack') while not in others (all other reactions), just as, ie, they support forceful reactions only to armed attacks (Article 51 UN Charter) and not to other internationally wrongful acts.

Fourth, the legal meaning of the ARSIWA is questionable. Some would see it as 'quasi-legal'. In my view, the ARSIWA are basically a doctrinal product, hence they are nothing 'legal' at all. Commentators who spend much of their time analysing the (actual or allegedly missing) words, if not commas, in the ARSIWA appear simply willing to show their mastery of legal speculation.

Fifth, there is a problem of terminology concerning different kinds of measures. Are collective 'sanctions' by international organizations (IOs) to be considered 'countermeasures'? More specifically, beyond nominalism, do they fall under the same legal regime?¹¹ Dawidowicz seems to think so when he refers to the action by the League of the Ar-

¹⁰ ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, paras 249, 252.

¹¹ See my review of the book by Mary Ellen O'Connell, *The Power and Purpose of International Law* (OUP 2008) 408 (2009) 20 Eur J Intl L 957-961; a larger version is found at <www.globallawbooks.org/home.asp>.



ab States against Libya and the action by the European Union against Syria. However, the term 'collective' may have very different meanings. A 'sanction' by an IO may be permitted within the organization and prove that similar sanctions may be taken by other IOs in similar circumstances, but this is inconclusive as to the question of whether countermeasures by individual states are permitted under general international law. That certain sanctions adopted by an IO are in breach of other treaty rules that are binding on its member states is a different question: (a) it concerns the relationship between rules of different treaties; and (b) it does not affect, nor prove in itself the lawfulness of the countermeasures themselves. The same applies to sanctions adopted by the UN Security Council. One can of course assert that there clearly is a 'tendency' collectively to punish certain transgressions of international law. This may well be true, but it is not a 'proof'. It is one thing to take note of acts carried out by (more or less organized) coalitions against an (alleged) individual transgressor, but quite another thing to establish the rules governing the reaction by individual states against a (real) transgressor. The former aspect has always *happened* in fact, whatever the law may say: it is the elementary idea that law is a product of the members of a society *uti universi* against the members *uti singuli*; and it is precisely states *uti universi* that *make* the law applicable to each one of them, rather than their being 'under' the law.¹²

Sixth, the limits of countermeasures and the conditions relating to resort thereto under Articles 49-54 ARSIWA and customary international law often remain obscure. For instance, how the condition of proportionality (Article 51 ARSIWA) is to be understood and how it is supposed to work in the context of TPCs (by way of some reasonable coordination among the reacting states in order for the response *as a whole* to be 'commensurate with the injury suffered') has rarely, if ever, been adequately examined.

Seventh, there is another crucial question: is existing state practice, or lack thereof, supposed to prove the lawfulness or the unlawfulness of TPCs? Does the performance of a presumably per se unlawful act, or 'without a clear basis for doing so',¹³ militate in favour of TPCs, as Dawidowicz seems to suggest? Or does it rather signal that there is no

¹²Focarelli (*International Law as Social Construct*) (n 2) 9-86.

¹³Dawidowicz (n 1) 8.



certainty, hence (in the absence of explicit practice) ‘the rule’ being that TPCs are not permitted? On what basis should one decide what alternative is to be preferred in these circumstances? Has mere rhetoric a certain role to play here? And what about the ‘inner’ subjective, even subconscious, expectations of each author? How does this personal sense of ‘justice’ duly enter the debate? Has Dawidowicz expanded on this basic precondition of his particular conclusions on TPCs? Are not these, his own ‘enmeshed policy considerations’ substantially similar in kind, although opposed in results, to those on which TPCs critics rely?

Finally, when speaking of ‘a legitimate form of progressive development of international law’, Dawidowicz sounds ambiguous: ‘progressive development’ means that in the area under discussion the law is not yet formed; on the contrary, ‘a legitimate form’ means that the law is formed and that TPCs are ‘legitimate’ (lawful?) on this basis. Similarly, when concluding that TPCs are permitted by customary international law, Dawidowicz stresses that TPCs are ‘legitimate’, while they may also contribute to the *further* development of international law. One wonders whether this approach masks the fact that the law is dubious and practice is only in favour of (future) ‘progressive’ development.

3. ‘Communitarian norms’

There is a tendency to argue in favour of TPCs on the basis of ‘communitarian’ values and/or norms. Dawidowicz himself connects TPCs to ‘communitarian norms’ at the very beginning of his paper¹⁴ and, thereafter, to reinforce his conclusions.¹⁵ He speaks of TPCs as ‘a frequent tool of communitarian law enforcement used in full conformity with international law’. He seems to believe in this communitarian dimension of international law. The underlying idea is manifold, but essentially based on a (public or quasi-constitutional) conception of current international law and on the belief that certain ‘common’ values are

¹⁴ Dawidowicz (n 1) 3.

¹⁵ *ibid* 13.



so crucial that their breach must be discouraged as far as possible, a result that the admissibility of TPCs has the potential to bring about.¹⁶

To my eyes, this optimistic and ecumenical view of the ‘public good’ of the entire ‘international community’ is a hope much more than a reality, and conceptually highly ambiguous.¹⁷ Many of us still see a fierce daily competition for survival between states, non-state actors, groups of every kind and individuals. In this scenario, behind the collective reaction there may be just a few hegemon, who decide to act only when and where there is a gain in sight. In other words, in terms of policy considerations, the medicine may be worse than the disease. Furthermore, we jurists tend to see law as quite benevolent, but law is a reflection of the stronger in any society, much more so in the international community, and may be the instrument of abuse (ie ‘immoral law’), rather than an instrument of justice. Finally, experience shows that states are anything but inclined to intervene (particularly by resorting to manifestly unlawful acts) to protect others, unless of course it is in *their* particular interest to do so.

The term ‘communitarian’ has numerous different meanings and consequences. Its generic use is hardly to be recommended. For example, it refers to the doctrine of the ‘mystic body’ as a theological doctrine.¹⁸ It refers also, historically, to the power of intervention by other princes within the Christian-European ‘family of nations’ at the beginning of the modern age.¹⁹ One has always to bear in mind the fact that modern international law was born as a reaction to a ‘universal’ (potentially totalitarian) power exerted at the time by the Pope and the Emperor. It was based on the premise that no political entity should be ‘superior’ to any other. This ‘structure’ was later ‘accepted’ by other peoples and states, and it became ‘universal’. Indiscriminately permitted TPCs presuppose a ‘unified’ world conceived of as a secular ‘mystic

¹⁶ On global constitutionalism see Focarelli (*International Law as Social Construct*) (n 2) 122-127; Id, review of the book by J Klabbers, A Peters, G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) (2010) 104 AJIL 557-564; Id (*Trattato di diritto internazionale*) (n 2) para 43.8-15.

¹⁷ Focarelli (*International Law as Social Construct*) (n 2) 147-150; Id (*Trattato di diritto internazionale*) (n 2) para 29.

¹⁸ Focarelli (*International Law as Social Construct*) (n 2) 97, 99, 147, 151, 360, 467; Id (*Trattato di diritto internazionale*) (n 2) paras 29, 283.17.

¹⁹ Th Meron ‘Common Rights of Mankind in Gentili, Grotius and Suarez’ (1991) 85 AJIL 110-116.



body'. This body is assumed to punish collectively individual transgressors as a general rule for particularly serious breaches. In doing so, the TPCs doctrine underestimates the need for diversity and the fact that the distinction between 'diversity' and 'transgression', however vital, is much more blurred in international law, compared to domestic law. While the latter is supported by some political legitimacy, the former is not.

4. *Social construction*

What is then the meaning of the trend in favour of TPCs, including Dawidowicz's? It is in my view that of a 'self-fulfilling prophecy': the more we say that TPCs are lawful, the more it becomes likely that TPCs will be lawful, because every relevant actor will think that this is what everybody 'objectively' support. To resist such efforts by way of other considerations is of course an attempted social construction as well. This appears to me the only sufficient certainty about law and international law, and it does not escape from being socially constructed *itself!* The rest is a struggle among different individuals and groups with different interests and values, including doctrinal and ethical views. Nobody can say whether the winning party every day is also the 'right' winner.

In the age of global instant communication and interaction international law needs to be rethought as a whole, whatever answer is given to details such as the admissibility of TPCs. A radical change in communication entails an equally radical change in the substance. International law is still basically studied as it was at the time when what was known of it was very scarce and slow to be made publicly available, a few (above all Western) scholars dominated the scene, judgments by the ICJ (let alone those of other courts and tribunals) were known months after their issuance, sound 'criteria' for evaluating writings were stably shared by few leading scholars, who also had control of the articles submitted and published in reviews, ideas and books in circulation were relatively few and relatively manageable, judges worked with little or no pressure at all by the media and all those concerned long before the delivery of a judgment, etc. This epoch is past but we still 'work' on the discipline as if it were the same, ie as if 'custom' were the same as in the past, dis-

cussing whether the ‘two elements’ are necessary, what counts as ‘practice’, etc. In a word, we are attracted to the technical details that we need in order to justify our profession, and we miss the ‘full picture’. By full picture I mean the social underpinnings of law in general and of international law in particular. Today the battle for what should count as ‘law’ begins every morning (if not every hour) involving many different peoples engaged in many different contexts. This entire picture would tell us that we struggle *moment by moment* for the ‘right’ answer, while both ‘right’ and ‘wrong’ are being redefined by the ‘new world’ we face.

