

Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?

Christian Tomuschat *

It is a challenging task for the International Law Commission (ILC) to frame an adequate regime of unilateral responses to unlawful State conduct. Traditionally, the sovereign State has been free to defend its rights as it saw fit. Self-help was a widely accepted concept of international law before the emergence of the new world order brought about by the UN Charter. Under Article 2(4) of the UN Charter, since 1945 a general ban on the use of force applies, which has additionally acquired the quality of customary international law.¹ Thus, no State can enforce a claim by resorting to forcible means, however legitimate and well-founded that claim may be. In dealing with counter-measures, the ILC is called upon to shape rules for other retaliatory actions which, although not reaching the level of force, would constitute a breach of an international obligation if they were not being made in response to an initial breach of international law by the protagonizing State. It is obvious that justifying an act considered *per se* unlawful by reference to another injustice can easily lead to a chain reaction causing damage far greater than the advantages a counter-measure is intended to secure. Thus, discussing the pros and cons of any suggested regime is not only a technical exercise, but rather a legislative project intimately tied to the particularities of the present-day international order.

I. General Considerations

A. Codification and Progressive Development of International Law

The ILC has a twofold mandate; namely to both codify and progressively develop international law. The current legal position concerning counter-measures, in the

* Professor of Public Law, Director of the Institute of International Law, University of Bonn; Member of the International Law Commission.

¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports (1986) 14, para. 188 (hereafter referred to as the Nicaragua case).

past termed 'reprisals', still reflects to a large extent the international law of yesterday, where the sovereign State was the main actor in international relations. A State that resorts to counter-measures takes justice into its own hands. In the slow process of building statehood in Central and Western Europe from the Middle Ages to the eighteenth century, the abolition of the right of feud was one of the major challenges and, eventually, achievements of monarchic rulers. The rule of law was guaranteed, at least in principle, only after judicial systems had been established that were exclusively competent for adjudicating legal claims. Likewise, the international community would make a great step forward if it succeeded in bringing unilateral responses by States to encroachments upon their rights under stricter discipline. In other words, there is every reason for the ILC not to confine its efforts to reproducing the law as it stands, but to search for better, forward-looking solutions that are fully adapted to an interdependent world that has much to lose by allowing anarchy to rule bilateral relationships.

B. Counter-measures – A Tool of Powerful and Rich States?

During the discussions in the ILC, time and again concern was voiced that counter-measures were essentially an instrument for powerful States to enforce their interests, with small and weak States never able to use counter-measures to protect themselves. One can easily agree with the proposition that the availability of a legal weapon which solely serves the interests of one group of States – namely the industrialized States of the North – raises serious issues under the principle of equality of States. Yet no speaker made a substantiated effort to prove that indeed such fears were well founded. When haunting spectres of the past are recalled, it is often overlooked that the most serious cause for concern has disappeared. Use of force is unreservedly forbidden under international law, except for purposes of self-defence against armed attack. Consequently, permissible counter-measures do not reach a degree of intensity that puts the existence of a State in jeopardy. Normally, a conflict which commences with an initial act of an allegedly wrong-doing State, and which prompts a response to that act, termed a counter-measure, remains within the area of clashes and frictions that can be settled by diplomatic means. The fourth report of the Special Rapporteur refers to many instances where assets were frozen by way of retaliatory action.² Indeed, temporary sequestration of foreign property seems to be the most currently used device in case of a major conflict. Unpleasant as such occurrences may be, they do not place new States in a position of inferiority. On the contrary, one may note that foreign investment is mostly located in developing countries, while these countries have few, if any assets in industrialized States.

In any event, in order to understand correctly the actual importance of counter-measures as a fact of life, it would be extremely helpful to undertake an empirical

² UN Doc. A/CN.4/444 (1992), paras. 37, 38.

Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?

study of the issue. In particular, the trade sector might furnish useful examples. Although the Special Rapporteur made considerable efforts to review the available data, he focused mainly – and understandably – on the most prominent cases. However, some important fields of international life have been totally left aside, in particular the law of armed conflict, the operation of which could provide many useful and even indispensable insights.

C. An Across-the-Board Regime

Perhaps the greatest difficulty the ILC has to face is the necessity to elaborate rules that are suitable for any kind of counter-measure in any conceivable situation. No field of international law will be exempted *ratione materiae* from the future Draft Articles. Classical rules governing specific inter-State relationships in such areas as title to territory or sea boundaries will be covered in the same way as modern branches of the law, for instance human rights law or law of the environment. Moreover, counter-measures may arise out of trivial disputes, but they can also serve as defences against attacks on a nation's legally protected vital interests. With respect to the origins of international responsibility, the great variety of the possible factual configurations hardly matters. With regard to counter-measures, however, one cannot afford to ignore the substantive background. In particular, the overall expenditure for a procedure prescribed as a condition for the taking of counter-measures should certainly not be out of proportion with the importance of the subject matter in issue. Procedures that appear fully legitimate when a counter-measure affects essential legal positions may be regarded as excessively burdensome when only minor interests are at stake. The ILC cannot evade this conundrum. One of the basic premises of the ILC's work which was originally suggested by Roberto Ago (and later approved by the ILC as a whole) was that it should establish a uniform regime for all kinds of internationally wrongful acts, subject only to some possible modifications for international crimes.

It would be unwise, however, to totally disregard international crimes in drawing up the requisite regime of counter-measures. In the first place, the boundary between international crimes and 'ordinary' international delicts is very fluid. Second, one can easily identify quite a number of internationally wrongful acts which, although not being mentioned in Article 19 of Part I of the Draft Articles on State responsibility, nonetheless constitute extremely serious breaches of international law. Consequently, it would be shortsighted to conclude that the ILC is presently engaged in drawing up nothing else but rules for 'minor' international delicts. Hence, there is no escaping the necessity to devise a regime that provides suitable legal guidance for counter-measures in response to both grave and less disturbing breaches of international law.

D. The Time Factor

Additionally, the time factor must be taken into consideration. While in a trade dispute an aggrieved party often escapes serious harm if any retaliatory action is postponed until a third party determination has come about, in armed conflict, for instance, counter-measures will normally be effective only if taken immediately. To be sure, counter-measures have been ruled out to a large extent by modern developments. Additional Protocol I to the Geneva Conventions, in particular, contains a considerable number of prohibitions on reprisals (Articles 20, 51, (6) etc.). But there is still enough room for counter-measures that do not affect the core substance of the legal regime for the protection of victims of warfare. Many rules on the treatment of prisoners of war set a relatively high standard,³ and it would not be unlawful to mete out actual treatment (slightly) below such standards as a response to a violation of its duties by a hostile power.⁴ In such situations, no lengthy proceedings would be appropriate. Restoration of compliance with the law can only be obtained through a swift answer.

E. Fear of Counter-measures – An Incentive for Compliance with the Law

Quite rightly, in the debates of the ILC most speakers highlighted the dangers of unbridled resort to counter-measures. However, counter-measures also have a positive aspect. They are among the few enforcement elements available in the international legal order. According to Hans Kelsen, notwithstanding the large absence of executive and judicial machinery in the international arena, international law may be correctly classified as 'law' precisely because it authorizes a victim of an unlawful act to take justice into its own hands.⁵ In fact, if nations in their mutual relationships had to rely solely or essentially on the *bona fides* of their counterparts, the effectiveness of international law would be seriously affected. Fear of being exposed to counter-measures may act as a powerful inducement to abide by commitments undertaken by States. With respect to the law of armed conflict, in particular, many authors have argued that its artful edifice of rules and principles is totally based on reciprocity.⁶ If the parties to an armed conflict knew that they could violate the rules which restrain their actions without consequence, a general breakdown of the minimum standards of humanity would be expected. Fear of swift counter-measures can have a law supporting effect. An aggrieved party might be

3 Take, for instance, Article 74(1) of the Convention Relative to the Treatment of Prisoners of War (Convention III), according to which 'all relief shipments for prisoners of war shall be exempt from import customs and other dues'.

4 Article 13(3) of Convention III applies only to reprisals 'sur les personnes', see J. de Preux, *La Convention de Genève relative au traitement des prisonniers de guerre* (1958) 151; see also A. Rosas, *The Legal Status of Prisoners of War* (1976) 445-448.

5 *Reine Rechtslehre* (2nd ed., 1960) 321.

6 See, for instance, G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. I (1968) 452-453; J. Stone, *Legal Controls of International Conflict* (2nd ed., 1959) 354.

Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?

tempted to breach the law at an early stage of a dispute if they were obliged to go through a procedural quagmire before being entitled to respond to violations of the applicable rules on warfare. The only restraining device would then be purely factual considerations of military convenience, not legal arguments. Considerations of humanity, on the other hand, militate against making people the victims of such an approach. Here, the ambivalence of counter-measures reveals itself with its almost unsolvable harshness. Faced with the choice, the international community of today has opted for a far-reaching, though not total ban of counter-measures. However, as far as arms control and inspection of military sites is concerned, counter-measures have retained their full potential.

F. A Balanced Regime

Rules on permissible use of counter-measures must be well balanced. It would be a serious mistake to favour a wrong-doing State. In this connection, one has to acknowledge that any State can violate its obligations, be it a weak and poor or a rich and powerful State. On the other hand, the basic difficulty is that at the time when an injured State considers taking counter-measures, the legal position may still be unclear. Its government may be fully convinced that the act it is complaining of involves a breach of an international obligation. However, at that stage its view is no more than a partisan allegation that may or may not be true, unless the prevailing circumstances permit no serious doubt. Given this situation, the Special Rapporteur's wish to make the taking of counter-measures dependent on prior assessment by a third party has fully legitimate underpinnings.

G. Counter-measures Disguised as Measures of Retorsion

If the regime to be constructed should prove to be unfair to the victim State, that State would certainly feel tempted to simply refrain from terming the retaliatory action a counter-measure, in an attempt to evade requirements which it finds too time-consuming and burdensome. For example, in the economic sector, there is often no clear dividing line between unfriendly acts, which a State can put into operation in the exercise of its sovereignty, and measures which, viewed in isolation, would have to be characterized as unlawful. Only if fairness is ensured can one hope to channel the underlying conflict into a procedural framework facilitating speedy and effective resolution.

H. Trend Towards Formalized Dispute Settlement Procedures

The ILC must be clearly aware of the growing trend towards establishing formalized dispute settlement procedures. In many international treaties provision is made for unilateral resort by one of the parties to a dispute to a third-party body.

Examples are provided by the Vienna Convention on the Law of Treaties and the UN Law of the Sea Convention (Part XV). Yet, the lesson to be drawn from the relevant provisions of the instruments is ambivalent. Neither of them makes dispute settlement by a third party generally compulsory; rather, certain areas of particular concern to the participating States have been identified where such formalized procedures seem to be both necessary and suitable to promote law and justice. An important step was recently taken within the framework of the GATT Uruguay Round.⁷ Dispute settlement through panels whose reports⁸ set forth 'recommendations and rulings' of a binding nature has now become an institutionalized feature of the new GATT regime. Counter-measures in the form of suspension of concessions or other obligations may be taken only after the exhaustion of a carefully drafted step-by-step procedure, and only if the State infringing the relevant rules fails to bring its conduct into compliance with the panel's recommendations and rulings. However, here again, one is faced with a special sector of international relations, having a limited scope, where the rights and interests in issue can be clearly identified *ex ante*. Additionally, the framers of the new GATT panel system have been extremely diligent in setting a strict timetable for every stage of the complex procedure. Reliance on the GATT dispute settlement mechanism is therefore not tantamount to an adventure with a totally unpredictable outcome.

Generally, international practice reveals a close relationship between substance and procedure. International dispute settlement mechanisms have always been introduced in the light of given substantive issues judged as both requiring, and being suitable for, intervention by a third party. Nowhere does one find examples of comprehensive submission of international disputes to settlement, without any exception *ratione materiae*. Even in the European Communities, where the role of the Court of Justice is such a powerful one, matters pertaining specifically to the overarching structure of the European Union have been removed from the jurisdiction of the Court.

II. The Proposals of the Special Rapporteur

A. A Regime Focusing on Counter-measures

There is no real need to repeat the suggestions put forward by the Special Rapporteur. Yet, the relationship between his proposed Article 12⁸ and his proposals for Part III⁹ needs clarification. The Special Rapporteur focused his Draft Articles entirely on counter-measures. Article 12 deals with the pre-counter-measure stage, requiring a victim State to exhaust all available dispute settlement

7 See Doc. MTN/FA II-A2.

8 UN Doc. A/CN.4/444 (1992), para. 52.

9 UN Doc. A/CN.4/453/Add.1 (1993).

Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?

procedures beforehand, and Part III provides for a procedure that may be initiated by either party after counter-measures have been taken.

This duplication does not seem to be the most felicitous approach to the problem to be tackled. There are two issues which should be separated. In the first place, the question arises whether counter-measures should be enmeshed in a specific procedural straightjacket because of the dangers inherent in them for maintaining an orderly state of affairs in international relations. If the response is in the affirmative, then one has to elucidate the further problem of whether procedural requirements should apply *before* the taking of counter-measures (as was suggested by the Special Rapporteur), or whether procedural mechanisms should be activated *concomitantly with or after* resort to counter-measures. The expenditure both in terms of time and money for a combination of an *ex ante* with an *ex post* procedure would simply appear to be excessive.

It is a totally different question whether the Draft Articles should be supplemented by a general dispute settlement mechanism under which any legal issue arising in connection with State responsibility could be brought before a third party body. Although the Special Rapporteur has stated that indeed his envisaged post-counter-measure procedure is designed to deal with all aspects of a legal controversy related to State responsibility, it is by no means clear why the actual taking of counter-measures should be the only triggering mechanism. In any event, the present writer would tend to adopt a cautious position. It is obvious that the introduction of a comprehensive scheme of dispute settlement by a third party with regard to State responsibility would mean a fundamental transformation of the international society. It is easy to simply design a blueprint for a perfect world. The true piece of art required, however, is a draft that strikes a fair balance between the principle of sovereign equality of States, and the need for a stricter discipline to protect the general interests of the international community.

B. Comparison with the Vienna Convention on the Law of Treaties

It may be useful to compare the procedural regime suggested by the Special Rapporteur with the corresponding provisions contained in the Vienna Convention on the Law of Treaties. Under the Convention, a specific arrangement is provided for with regard to disputes concerning the invalidity of a treaty as a result of its inconsistency with a peremptory norm of international law (Article 66(a)). Each party to such a dispute has a right to unilaterally seize the ICJ. It is the threat posed by *ius cogens* to the stability of treaties that has prompted opening the way to the ICJ in this particular situation. Second, if a State invokes the nullity or invalidity of a treaty on other grounds, or if it claims to be entitled to terminate a treaty, withdraw from it or suspend its operation, it is required to bring the issue before the Conciliation Commission established under Article 66(b) of the Convention and the Annex attached to it. Here again, the danger of treaties being undermined by

spurious allegations of possible defects constitutes the *raison d'être* of the procedural mechanism. Apart from these two very peculiar instances, however, the Convention has refrained from setting up a general procedural framework for disputes over the interpretation and application of treaties. Additionally, it should be noted that there is not a single known case where the two special procedures have been actually put into practice. The reasons for their lack of operative success are not yet evident, but in any event the practical failure of the Vienna mechanisms should caution against placing too many hopes on an analogous system for counter-measures.

However, dispute settlement in respect of counter-measures has many features similar to the two proceedings under the Vienna Convention on the Law of Treaties, since the taking of counter-measures may impair the rule of law in international relations. On the other hand, to devise a general regime of compulsory dispute settlement for all disputes in the field of State responsibility would subject the international community to the same kind of challenge which, in the field of treaty law, it has declined to take up.

III. A Critical Assessment of the Special Rapporteur's Proposed Regime

A. Imbalance to the Detriment of the Victim State

If an injured State is duty bound to exhaust all available dispute settlement procedures before it can put any counter-measures into operation, it is placed at a disadvantage with regard to the wrong-doing State. It has to wait for the outcome of the proceedings initiated, which may take a long time during which the wrong-doing State may enjoy benefits from its unlawful action. The rule under Article 12(1)(a) may be suitable for instances where the illegality of the original act cannot be clearly established. However, in situations where the occurrence of unlawful conduct cannot be seriously doubted, the injured State will hardly agree that it should refrain from retaliating in an adequate fashion to protect its interests.

B. Available Settlement Procedures

One wonders what exhaustion of all 'available' settlement procedures may mean. There are procedures which a party can set in motion unilaterally. The most relevant might be recourse to the ICJ if both sides have made a declaration under Article 36(2) of the ICJ Statute. The one possibility always open to States which are members of the United Nations is to bring their qualms before the General Assembly or the Security Council. It is clear, however, that these two bodies are not interested in purely 'technical' matters. Some procedures may even lie between the two extremes. In principle, negotiation is always available in the sense that one

Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?

party may request the other to settle an actual dispute in that way. On the other hand, the addressee of such a request may consider negotiation to be the wrong mechanism for the controversy concerned. It can be inferred from Draft Article 12(2)(a) that the Special Rapporteur views as 'available' any one of the procedures listed in Article 33 of the UN Charter, regardless of whether unilateral institution of proceedings is possible. Indeed, he stresses that prior exhaustion of settlement procedures may be dispensed with if the wrong-doing State does not cooperate in good faith in the 'choice' of these procedures. This extensive understanding of availability makes the situation very burdensome for the aggrieved State. In each and every instance where unilateral recourse cannot be had to a settlement procedure, during the first stage and before the commencement of the settlement procedure proper negotiations would have to be conducted with a view to reaching agreement on the choice of that procedure.

On the whole, the notion of exhaustion of available settlement procedures seems to have been transplanted from the law of diplomatic protection or the law of human rights complaints ('exhaustion of local remedies'). However it makes much less sense in the field of inter-State disputes. In a domestic legal system predicated on the rule of law, normally there exist judicial mechanisms which an individual can resort to in order to vindicate his or her rights. International dispute settlement mechanisms, however, rest generally on the free choice principle, which is tantamount to saying that the parties must agree on a specific method.

C. Exhaustion of 'All' Procedures

Article 12(1)(a) provides that an injured State must exhaust 'all' available dispute settlement mechanisms. Here a drafting error may have crept into the text. At the most, the injured State can be duty-bound to exhaust in good faith one available procedure. To request it to exhaust several procedures step-by-step would obviously subject them to an unduly onerous burden.

D. Matters of Minor Importance

In trivial matters, a tit-for-tat exchange may settle the litigious issue swiftly and definitively. To require the injured State to mobilize a complex and costly dispute settlement mechanism when the economic stakes are low would not pass a reasonable test. On the other hand, it would not be a sound proposition to affirm that any State must tolerate minor injuries without having the right to seek redress. In such matters, no third party assistance is needed.

E. The Lesson of Article 51 of the UN Charter

Self-defence is not the direct object of the Draft Articles on counter-measures. Still, as a response to an unlawful act it may serve as a signpost. By Article 51 the drafters of the UN Charter recognized that a State which is a victim of a serious onslaught has the right to react swiftly without requiring any authorization by the international community acting through the Security Council. The general idea underlying Article 51 also demands that account be taken of situations of similar gravity. States cannot be expected, and should not be required by law, to stand idly by while their legal rights are being massively violated. In such instances, the only viable solution is to provide for an *ex post facto* settlement procedure.

F. Counter-measures and Treaty Reciprocity

Strangely enough, the relationship between a regime of counter-measures and the rules under Article 60 of the Vienna Convention on the Law of Treaties is by no means clear.¹⁰ To suspend the operation of a treaty or terminate it following a grave breach by another party also falls under the broad definition of Article 11. Here, in any event, the procedural provisions of the Vienna Convention on the Law of Treaties take precedence as *leges speciales*. However, it is hard to explain why, for example, infringements of the rules on diplomatic intercourse between two States should be governed by two different regimes according to whether the States concerned are parties to the Vienna Convention on Diplomatic Relations, or whether the general rules of customary law apply.

G. Interim Measures of Protection

The provisions suggested by the Special Rapporteur under Article 12(2) of his draft proposals do not remedy the shortcomings highlighted above.

a) Sub-paragraph (a) of Article 12(2) provides no real relief for the injured State. International procedures cannot be as expeditious as those of a *juge de paix*. It may take weeks and even months before a determination on an application for an injunction under Article 41 of its Statute can be made by the ICJ. In special areas, it may be possible to set rigid time-limits. But in the international arena, the basic unit is not the day, the week or the month, but the year.

b) Sub-paragraph (b) is not coordinated with sub-paragraph (a) of paragraph one. It allows the injured State to take 'interim measures of protection' only if a dispute settlement body has been seized which would be mandated to look into the lawfulness of such measures. This provision does not take account of negotiations

¹⁰ This holds true notwithstanding the ground-breaking article by Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law', 20 *Österreichische Zeitschrift für öffentliches Recht* (1970) 5.

Are Countermeasures Subject to Prior Recourse to Dispute Settlement Procedures?

as an available dispute settlement mechanism, and is not attuned to the characteristics of an application to the political organs of the United Nations. Neither the General Assembly nor the Security Council would specifically examine the justifiability of the controversial counter-measures in issue, but would attempt to deal with the dispute in its entirety, without acting in a judge-like manner.

H. General Evaluation

To sum up, one has to conclude that the rigidities engendered by the Special Rapporteur's Draft Articles go largely to the detriment of the injured State. Greater flexibility should therefore be brought into the system. A stringent requirement of *ex ante* recourse to third party settlement should not be sustained. Freedom to take counter-measures under the substantive conditions rightly delineated by the Special Rapporteur should in principle be acknowledged, and a procedural limitation should also be retained, but with a different emphasis. The alleged wrongdoer should be able to obtain withdrawal of the counter-measure if it discontinues its harmful activity and if, for the remainder of the issues arising therefrom (reparation, compensation, etc.) it accepts a third party settlement procedure whose outcome will be a decision binding on both parties.¹¹

This formula has several advantages. In cases where the wrongfulness of the original act or measure could not be seriously doubted, the author State will have to admit – at least to itself – that it has been rightly sanctioned. When the stakes are not particularly high, the parties will choose the least formalistic and cost-intensive procedure. In the remaining bracket, a fair and balanced solution prevails until the pronouncement of the body which has been seized. In this way neither side will be able to impose its viewpoint on the other. The alleged wrongdoer must desist from its intended course of action, but so must the victim, which will be prevented from taking any unfair advantages from the injury it claims to have suffered.

The formula suggested here differs from Article 12 as adopted by the Drafting Committee,¹² which constitutes a compromise solution that seeks to reconcile the position defended by the Special Rapporteur with the views held by many members of the ILC. It is submitted that it would be better to require the (alleged) wrongdoer to take the initiative in instituting dispute settlement procedures. It is the State author of the initial act that has stirred up the conflict. The burden should therefore be incumbent on its government to take steps to avert the negative effects of a counter-measure. The present arrangement seems particularly unbalanced in the case of gross violations of international law. However, the Drafting Committee's proposal is acceptable in as much as it does not pose a condition of prior exhaustion of available settlement procedures. Thus, the opportunities for the affected State to defend itself against any unlawful encroachments of its rights are fully ensured.

11 Suggestion first put forward by ILC member D. Bowett, UN Doc. A/CN.4/SR.2266 (1992) 16.

12 UN Doc. A/CN.4/L.480/Add.1 (1993).

IV. States Not Having Suffered Substantive or Physical Harm

Draft Article 12, both in the version of the Special Rapporteur and that adopted by the Drafting Committee, speaks in general terms of the injured State. But it is by no means sure that States having suffered only 'juridical' injury should enjoy the same rights as a State that has sustained actual physical damage. Again, Article 51 of the UN Charter may serve as a beacon. One of the main lessons of the *Nicaragua* case is that there exists a legal difference between a State against whose territory an armed attack was directed, and third States willing to assist it. According to the ICJ it is the State victim of the attack which decides on the admissibility of collective self-defence.¹³ In fact, it is highly artificial to place all States in the same category with regard to international crimes or to violations of a treaty for the protection of human rights.¹⁴ States may act for the defence and protection of their sovereign rights (e.g., the protection of territory, citizens and assets) or they may assume the role of guarantors of minimum world order standards. If they are in the second category, not being directly affected, they can more easily be expected to wait until the outcome of any relevant international dispute settlement procedure. If and to the extent that the international community is interested in obtaining redress, it should be incumbent upon its organs to set in motion adequate mechanisms to stop the wrongdoing. It would be helpful if the draft text on State responsibility showed that the ILC encourages international developments to that effect.¹⁵

13 *Supra* note 1, at para. 232.

14 See Focarelli, 'Le contromisure pacifiche collettive e la nozione di obblighi *erga omnes*', 76 *RDI* (1993) 52, at 65-71.

15 Special Rapporteur W. Riphagen had attempted to move in that direction, see his suggested Draft Article 11(2), ILC Yearbook (1985.II.1) 12.