The European Journal of International Law Vol. 32 no. 2
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State Immunity and Judicial Countermeasures

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Abstract

This article explores whether domestic courts can deny jurisdictional immunity of a state as a countermeasure. The article offers a survey of state practice that, according to some scholars, would support this argument, demonstrating that the corresponding practice is scarce, and that relevant domestic legislation denying jurisdictional immunity is not adopted as a countermeasure. Typically, countermeasures are adopted by political organs, which are responsible for the state's international relations and which can assess what is a lawful response to a violation of international law. Domestic courts are not entitled to adopt countermeasures without the involvement of the executive organs that are competent for the international relations of the state. This article demonstrates that a domestic court's denial of sovereign immunity as a countermeasure is unlawful without a prior determination of the government, and it is highly impractical when that determination is provided.

> C[ounter]M[easures] are a highly primitive and dangerous unilateral tool of pure private justice . . . an instrument neither of order nor of justice.[1]

1 Introduction

This article explores whether it is possible to consider judicial denial of sovereign immunity[2] as a permissible countermeasure under international law. In particular, the analysis focuses on the ongoing debate over the relationship between sovereign immunity and remedies for gross violations of international human rights law and

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1 R. Kolb, *The International Law of State Responsibility: An Introduction* (2017), at 177.

2 For practical reasons, the expressions 'jurisdictional immunities', 'state immunity' and 'sovereign immunity' are used as synonyms. Similarly, 'executive' and 'government' are used interchangeably.

international humanitarian law (some of which are *jus cogens* norms according to some scholars).[3] The article does not encompass the different topic of state immunity from execution.

The issue of sovereign immunity versus reparations for gross violations of international law is one of the most contentious topics of current international law. As it is known, the International Court of Justice (ICJ) addressed this subject in the 2012 *Jurisdictional Immunities* case, stating that there is no normative conflict between the procedural rule on immunity and the rules that are relevant for the merits of a case pending before a domestic court.[4] As a result, the Court has rejected the Italian argument that sovereign immunity can be disregarded in order to adjudicate reparations claims for international crimes.[5] Nonetheless, scholars have kept debating this relationship with significant vigour, demonstrating that the law on jurisdictional immunity and its alleged exceptions are topics far from settled.[6] Notably, the interplay between sovereign immunity and reparations for gross violations of individual rights could have been relevant for the pending *Certain Iranian Assets* case, if the ICJ had asserted its jurisdiction on the immunity issue.[7]

[3] For different views on the permissibility of denial of sovereign immunity in response to *jus cogens* violations, see J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997); Karagiannakis, 'State Immunity and Fundamental Human Rights', 11 *Leiden Journal of International Law* (*LJIL*) (1998) 9; De Vittor, 'Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali', 85 *Rivista di Diritto Internazionale* (*RDI*) (2002) 573; Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory', 97 *American Journal of International Law* (*AJIL*) (2003) 741; C. Espósito, *Inmunidad del Estado y derechos humanos* (2007); Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 19 *Europan Journal of International Law* (*EJIL*) (2009) 491; Cannizzaro and Bonafè, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights', in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 825.

[4] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 93.

[5] For different views on the absence of normative conflict, see Espósito, '*Jus Cogens* and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist', 21 *Italian Yearbook of International Law* (*IYIL*) (2012) 161; Pisillo Mazzeschi, 'Il rapporto fra norme di *ius cogens* e la regola sull'immunità degli Stati: Alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012', 6 *Diritti Umani e Diritto Internazionale* (*DUDI*) (2012) 310; Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished', 25 *LJIL* (2012) 979; Linderfalk, '*Jurisdictional Immunities of the State (Germany v. Italy)*: The Concept of a Normative Conflict Revisited', in P. Lindskoug, U. Maunsbach and G. Millqvist Juristförl (eds), *Essays in Honour of Michael Bogdan* (2013) 243.

[6] See e.g. H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. 2013); E. Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (2018), at 21–230. See also the essays collected in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015); A. Peters et al. (eds), *Immunities in the Age of Global Constitutionalism* (2015); T. Ruys and N. Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (2019).

[7] See *Certain Iranian Assets (Islamic Republic of Iran v. United States)*, Application Instituting Proceedings, ICJ, 14 June 2016, www.icj-cij.org/en/case/164/institution-proceedings. The Court dismissed the claims regarding jurisdictional immunity in *Certain Iranian Assets (Islamic Republic of Iran v. United States)* (Preliminary Objections), Judgment, ICJ, 13 February 2019, para. 80, available at https://www.icj-cij.org/en/case/164/preliminary-objections.

In the context of this debate, some authors have suggested that a domestic court can deny a foreign state's immunity as a countermeasure in cases of gross violations of *jus cogens* rules.[8] Some of these commentators have reached this conclusion on the basis of various domestic acts that authorize domestic courts to deny sovereign immunity to specific states.[9] Countermeasures are acts in violation of international law that are considered to be lawful since they are adopted in response to a prior wrongful act, with the aim to induce the author of the first wrong to cease the wrongful act and make reparation.[10] Some United Nations (UN) organs, some embryonic state practice in the field of the peaceful settlement of international disputes and some domestic legislation appear to suggest that sovereign immunity might be denied to a state as a countermeasure in response to *jus cogens* violations. Although this idea surfaces on many occasions, to this author's best knowledge states have never advanced this argument explicitly,[11] but rather, they have used a cautious approach that is mirrored by the absence of judicial precedents on this topic. This article explores the relevant state practice and scholarly arguments, taking into account cases of judicial denial of sovereign immunity pursuant the relevant domestic law as well as cases of judicial denial of sovereign immunity in the absence of any specific legal provision.

In order to tackle this subject, this article first analyses the ongoing debate on denial of state immunity as a countermeasure on the basis of the practice of quasi-judicial bodies, of states before the ICJ and of states through domestic legislation and case law (Section 2). The article goes on to assess whether this idea is correct under the law of state responsibility, focusing mainly on the theoretical possibility that a state may adopt judicial denial of sovereign immunity as a countermeasure (Section 3). After some preliminary considerations to set the stage for the debate (Section 3.A), the article addresses the irrelevance of rules on attribution and of the so-called *Lotus* principle (Section 3.B), the legal limits of domestic courts in relation to the assessment

[8] See, e.g., Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to *Jus Cogens* Violations: The Human Rights Answer to the ICJ Decision on the *Ferrini* Case', 4 *Gottingen Journal of International Law* (2012) 809.

[9] See, in particular, Vezzani, 'Sul diniego delle immunità dalla giurisdizione di cognizione ed esecutiva a titolo di contromisura', 97 *RDI* (2014) 36; Franchini, 'Suing Foreign States Before U.S. Courts: Non-Recognition of State Immunity as a Response to Internationally Wrongful Acts', 21 November 2017, available at https://ssrn.com/abstract=3073429.

[10] See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1 (Nov. 2001), repr. with commentaries, II-2 *Yearbook of the International Law Commission* (*Y.B. ILC*) (2008), Arts 22 and 49 (hereinafter 'ARSIWA'). Among many works on countermeasures, see E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984); A. De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (1985); O. Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988); L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (1990), at 247–290; D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (1994); C. Focarelli, *Le contromisure nel diritto internazionale* (1994); Lesaffre, 'Circumstances Precluding the Wrongfulness in the ILC Articles on State Responsibility: Countermeasures', in A. Pellet, J. Crawford and S. Olleson (eds), *The Law of International Responsibility* (2010) 469; Kolb, *supra* note 1, at 120–121, 173–184; F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 225–284.

[11] See Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions', in Ruys and Angelet (eds), *supra* note 6, at 670, 702.

of the commission of another state's prior wrongful act (Section 3.C) and the practical problems regarding domestic courts' suitability to make the political choices at the basis of the decision to adopt a countermeasure (Section 3.D). The article goes on to demonstrate that judicial countermeasures adopted without the involvement of the government are always unlawful (Section 3.E), and concludes that, even when the judicial denial of sovereign immunity is based on a determination by the government, this countermeasure would be unlawful in most of the cases for lack of compliance with the legal requirements set by the law on state responsibility (Section 3.F).

2 The Idea of Denying Sovereign Immunity as a Countermeasure

A *The Practice of Quasi-Judicial Bodies*

One of the first times that someone suggested that sovereign immunity could be denied by a domestic court as a countermeasure was in the framework of the mandate of the UN Committee Against Torture. The trigger of the debate was the Canadian decision in the case *Bouzari v. the Islamic Republic of Iran*, in which the Ontario Court of Appeal found that sovereign immunity was applicable to Iran, notwithstanding the peremptory character of the ban on torture under international law.[12] Following this decision, as a part of the UN Committee Against Torture's consideration of Canada's state party report, the Chairperson of the Committee affirmed that Canada could have exercised jurisdiction. According to him,

> [A]s a countermeasure permitted under international public law, a state could remove immunity from another state – a permitted action to respond to torture carried out by that state. There was no peremptory norm of general international law that prevented states from withdrawing immunity from foreign states in such cases to claim for liability for torture.[13]

The influence of the position of the Chairperson of the UN Committee Against Torture should not be underestimated, as demonstrated by the fact that a number of scholars have cited his view, endorsing the idea that sovereign immunity may be denied as a countermeasure against acts of torture.[14] Nonetheless, states have been reluctant to include the argument of the lawfulness of denial of sovereign immunity as a countermeasure in their pleadings before international courts.

B *Italian and German Views in the Context of the Jurisdictional Immunities Case*

The argument of judicial denial of sovereign immunity surfaced before the ICJ in relation to the *Jurisdictional Immunities* case between Germany and Italy. This dispute

[12] *Bouzari et al. v. Islamic Republic of Iran; Attorney General of Canada et al., Intervenors*, 71 OR (3d) 675 Ont. CA (2004), para. 67.

[13] Committee Against Torture Summary Record of the Second Part (Public) of the 646th Meeting, 6 May 2005, CAT/C/SR.646/Add 1, para. 67.

[14] See, e.g., Forcese, 'De-Immunizing Torture: Reconciling Human Rights and State Immunity', 52 *McGill Law Journal* (2007) 127; Moser, *supra* note 8, at 810–812.

was triggered by a number of decisions of the Italian judiciary which affirmed that Germany is not entitled to immunity in circumstances in which the act complained of constitutes an international crime and a violation of *jus cogens*.[15] In its counterclaim, Italy alluded to the concept of countermeasures, briefly mentioning that Germany has violated its duty to provide for reparations for the Nazi violations of international humanitarian law that occurred in the occupied portion of Northern Italy during World War II. According to Italy,

> [L]ifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims. Such a measure [. . .] was the only possible means to ensure respect for and implementation of the imperative reparation regime established for serious violations of I[nternational] H[umanitarian] L[aw].[16]

After having dismissed the counterclaim as inadmissible,[17] the Court noted that Italy could have advanced the argument of a German violation of international law as a 'defence'.[18] This allusion may be seen as a reference to countermeasures which,[19] from the standpoint of the law of state responsibility, are defences.[20] Nevertheless, Italy did not invoke the argument of countermeasures, even though it stressed the relationship between a violation of international law by Germany and the denial of sovereign immunity in order to try to demonstrate the existence of a normative conflict.[21]

Germany, seeming to acknowledge that this allusion could be read as a reference to countermeasures, cursorily addressed the argument in the merits phase. According to the German position,

15 On this case law, see Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years', 19 *IYIL* (2009) 33; Marongiu Buonaiuti, 'Azioni risarcitorie per la commissione di crimini internazionali ed immunità degli Stati dalla giurisdizione: La controversia tra la Germania e l'Italia innanzi alla Corte internazionale di giustizia', 5 *DUDI* (2011) 232; Sciso, 'Italian Judges' Point of View on Foreign States' Immunity', 44 *Vanderbilt Journal of Transnational Law* (2011) 1201.
The most relevant of these decisions is the *Ferrini* judgment, adopted on 11 March 2004 by the Italian Court of Cassation (Corte di Cassazione), *Ferrini v. Federal Republic of Germany*, decision No. 5044/2004, 87 *RDI* (2004) 539, translation at 128 ILR 658). On this decision, see, among many others, Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza *Ferrini*', 87 *RDI* (2004) 643; De Sena and De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', 16 *EJIL* (2005) 89; Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: The *Ferrini* Decision', 54 *International & Comparative Law Quarterly* (2005) 951.

16 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Counter-Memorial of Italy, 22 December 2009, https://www.icj-cij.org/public/files/case-related/143/16017.pdf, para. 6.39.

17 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Counter-Claim, Order, 6 July 2010, ICJ Reports (2010) 310, at para. 35.

18 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 47.

19 See Trapp and Mills, 'Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of *Germany v. Italy*', 1 *Cambridge Journal of International and Comparative Law* (2012) 153, at 164.

20 See ARSIWA, *supra* note 10, Art. 22 and commentary. See also Paddeu, *supra* note 10, at 225.

21 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 13 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110913-ORA-01-00-BI.pdf, paras 23–31, 27–28.

> [I]t would be outright absurd to argue that the jurisdiction of the Italian courts may be justified as a countermeasure responding to Germany's failure to fulfil its duty of reparation. . . . Italy never made any representation to Germany in that sense. Lastly, Italy has never contended that the assumption of jurisdiction by the *Corte di Cassazione* was legally justified as a countermeasure.[22]

Germany went on and affirmed that there was

> no need to discuss the very strange new theory of countermeasures advocated by [the Italian Counsel]. Their contention is that, because Germany was in breach of its obligation to make reparation, the Italian courts are entitled to rule on the controversial issues, acquiring jurisdiction by a magic stroke, in total departure from the rules elaborated by the International Law Commission. They are visibly on an erroneous course.[23]

This passage is the most direct and articulated expression of a state's position on the possibility of denying sovereign immunity as a countermeasure. It would have been interesting to read the ICJ's opinion on it, but since Italy did not advance the countermeasure argument at the merits stage,[24] the Court did not need to address this issue.[25] Anyway, to this day, the ICJ has never ruled out explicitly the possibility that denial of sovereign immunity can be justified as a countermeasure.[26]

At the time of the writing of this article, Italy is *not* complying with the ICJ's decision. Although one author has suggested that Italy might have done so as a countermeasure against the failure of Germany to find extra-judicial ways to make reparations to the victims of Nazi crimes,[27] Italy has not yet advanced the argument based on countermeasure not to comply with the ICJ's judgment.[28] The Italian position on non-implementation is based on the decision of the Italian Constitutional Court no. 238 of 2014, which has ordered the Italian government and judges not to implement the ICJ's

[22] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 12 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110912-ORA-01-00-BI.pdf, para. 14.

[23] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 14 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110914-ORA-01-00-BI.pdf, para. 27.

[24] On possible explanations behind the Italian strategy, see Trapp and Mills, *supra* note 19, at 166–168.

[25] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 48. In agreement, see Ferrer Lloret, 'La insoportable levedad del Derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia: El caso de las inmunidades jurisdiccionales del Estado', 24 *Revista electrónica de estudios internacionales* (2012) 1, at 24. When, in the past, the Court had analysed the existence of a defence based on countermeasures *proprio motu*, this was due to the fact that the involved state was not participating in the proceedings. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 201.

[26] Vezzani, *supra* note 9, at 38.

[27] Cataldi, 'Jurisdictional Immunities of the State case in the Italian Domestic Order: What Balance Should Be Made between Fundamental Human Rights and International Obligations?', 2 *European Society of International Law Reflections* (2013) 1, at 6. See also Bonafè, 'Et si l'Allemagne saisissait à nouveau la Cour internationale de Justice?', 1 *Ordine internazionale e diritti umani* (2014) 1049, at 1053–1054.

[28] Rather, Germany could adopt countermeasures against Italy's non-compliance with the ICJ's judgment. See Ronzitti, 'La Cour constitutionnelle italienne et l'immunité juridictionnelle des États', 60 *Annuaire Français de Droit International* (*AFDI*) (2014) 3, at 10.

decision because the recognition of sovereign immunity would prevent the exercise of the domestically constitutionally protected right to access to justice.[29] Accordingly, even the Italian domestic follow-up of the *Jurisdictional Immunities* case does not offer any significant insight in relation to the countermeasure argument.[30]

C *Domestic Legislation and Case Law on Denial of Sovereign Immunity for Violations of International Law*

The idea that judicial denial of sovereign immunity can be considered a form of countermeasure has been suggested by some authors who have taken into consideration some domestic acts that allow domestic courts to deny other states' sovereign immunity in response to the alleged violations of international law. This view mainly considers some US and Canadian legislation,[31] though relevant Cuban, Iranian and Russian acts are sometimes analysed through the prism of countermeasures.[32] All this legislation and the consequent case law are relevant to the customary regulation of sovereign immunity since both domestic legislation and judicial decisions are elements of state practice.[33] In particular, since the ICJ has not settled the issue of denial of sovereign immunity as countermeasure in the *Jurisdictional Immunities* case, this argument might resurface in future litigation concerning the legality of these domestic acts.[34] This section offers only an overview of the different acts that is strictly functional to the purposes of this article, though far from complete.

[29] Corte Costituzionale, 22 October 2014, n. 238, 96 *RDI* (2015) 237, translated in https://itdpp.files.wordpress.com/2014/11/judgment-238-eng-alessio-gracisnr.pdf. For some remarks, see, e.g., Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014', 96 *RDI* (2015) 126; Tanzi, 'Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale', 70 *La Comunità Internazionale* (2015) 13; Iovane, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the "Constitutionalization" of International Law', 14 *Journal of International Criminal Justice* (2016) 595; Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) 193. For this author's view, see Longobardo, 'The Italian Constitutional Court's Ruling against State Immunity when International Crimes Occur: Thoughts on Decision no 238 of 2014', 16 *Melbourne Journal of International Law* (2015) 255.

[30] On the implementation of decision no. 238 of 2014 by subsequent Italian judges, see the judgments analysed by Forlati, 'Immunities', 25 *IYIL* (2015) 497.

[31] See, in particular, Vezzani, *supra* note 9; Franchini, *supra* note 9.

[32] See, e.g., Ruys, *supra* note 11, at 707.

[33] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 55; International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law with Commentaries (A/73/10), II-2 *Y.B. ILC* (2018) 122, at 133, Conclusion 6.2 (hereinafter 'ILC Draft Conclusions').

[34] For example, as mentioned, in the pending *Certain Iranian Assets* case, the issue might have played a certain role at the merits stage, since Iran has asked the Court to declare the entitlement of Iran and Iranian state-owned companies to immunity (see *Certain Iranian Assets (Islamic Republic of Iran v. United States), Application Instituting Proceedings*, ICJ, 14 June 2016, www.icj-cij.org/en/case/164/institution-proceedings, para. 33(d)).

1 The Alleged US Practice

The most relevant pieces of domestic legislation are the 'expropriation exception' in the US Foreign Sovereign Immunity Act (FSIA),[35] the 1996 US Antiterrorism and Effective Death Penalty Act (AEDPA)[36] and the 2016 US Justice Against Sponsors of Terrorism Act (JASTA).[37] Although the attention of this section focuses mainly on these pieces of legislation, some hesitant references to denial of sovereign immunity as a proper response to violations of international law has been read into some previous US decisions.[38]

Foreign states do not enjoy sovereign immunity before US courts in any case involving property taken in violation of international law. According to the 'expropriation exception' in the US FSIA, US courts must deny to a foreign state its sovereign immunity in any case pertaining to 'property taken in violation of international law', if that property: (i) is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (ii) is owned or operated by an agency or instrumentality of the foreign state which engages in a commercial activity in the United States.[39] In the case of FSIA, the countermeasure argument could be based on the fact that sovereign immunity is denied in relation to 'property taken in violation of international law' only.[40]

More significant, even in relation to the increasing case law, is the terrorism exception introduced by the AEDPA. The AEDPA has introduced an amendment to the FSIA, section 1605(a)(7) (now 1605A), according to which US citizens may claim compensation against a foreign state that is responsible for an 'act of torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support or resources' as long as such conduct is undertaken 'by an official employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency'.[41] The determination of which state is considered responsible for sponsoring terrorism is left to the government. The AEDPA specifies that a claim cannot be heard if 'the foreign state was not designated as a state sponsor of terrorism' by the Executive.[42] In this case, the countermeasure argument could be built on the fact that sovereign immunity is lifted as a consequence of the commission of an alleged international wrongful act such as personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, or a conduct sponsoring terrorism.[43]

[35] Pub. L. No. 94–583, 90 Stat. 2891 (1976).

[36] Pub. L. No. 104–132, § 221, 110 Stat. 1214 (24 April 1996).

[37] Pub. L. No. 114–222, 130 Stat. 852 (2016).

[38] See the decisions analysed by Focarelli, *supra* note 10, at 123–129.

[39] Now in 28 USC § 1605(a)(3).

[40] See the critical discussion in Vezzani, *supra* note 9, at 79–81 and Franchini, *supra* note 9, at 14–21.

[41] Pub. L. No. 104–132, § 221 (introducing 28 USC § 1605(a)(7), now 1605(A)).

[42] *Ibid.*

[43] See the analysis in Vezzani, *supra* note 9, at 72–77 and Franchini, *supra* note 9, at 6–14. The Italian judiciary has considered this exception in line with its own case law on denial of sovereign immunity: see Corte di Cassazione, Sezioni Unite Civili, *Kazemi v. Iran*, 20 October 2015, decision No. 21946/2015, para. 5, 11 *Federalismi.it: Rivista di diritto publico italiano, comparato, europeo* (Nov. 2015), available at www.federalismi.it/nv14/articolo-documento.cfm?Artid=30684.

In 2016, the US Congress adopted the JASTA, introducing a new ground of denial for sovereign immunity that is based on terrorist activities. According to the new section 1605B of the US Code, a foreign state is not immune from the jurisdiction of US courts when compensation is sought for physical injury to person or property or death occurring in the United States due to '(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state' acting within the scope of their office, 'regardless where the tortious act or acts of the foreign state occurred'.[44] The JASTA limits the denial of sovereign immunity to claims by US nationals and in relation to cases where foreign states are not responsible for omissions or 'mere negligence'.[45] In relation to this provision, it is possible to argue that, again, the denial of sovereign immunity is a response to an international law violation, namely 'an act of international terrorism'.[46]

2 *The Alleged Canadian Practice*

In 2012, Canada adopted domestic legislation that expands the US position. According to the Canadian State Immunity Act, as amended by the 2012 Justice for Victims of Terrorism Act (JVTA),[47] victims of acts of terrorism can claim compensation before Canadian courts in relation to damage caused by any foreign state that is included in a list created by the government of Canada.[48] Some authors have considered that this legislation may be justified as a countermeasure in response to terrorist activities.[49]

3 *The Alleged Cuban Practice*

In response to FSIA, the 1996 Law Reaffirming Cuba's Dignity and Sovereignty authorizes the lifting of US sovereign immunity in relation to civil claims regarding deaths, personal injury and economic damages caused by the Batista's regime, with the support or help of the US government.[50] Article 1 of this act specifies that it is adopted as a response to the allegedly unlawful US legislation on sanctions against Cuba,[51] and thus, in principle, it could be considered to be a countermeasure. On the basis of this legislation, the Cuban judiciary has adopted a number of decisions against the US, denying the latter sovereign immunity.[52]

[44] 28 USC § 1605B(b).

[45] *Ibid.*, §§ 1605B(b), 1605B(c).

[46] See Franchini, *supra* note 9, at 35–42.

[47] Justice for Victims of Terrorism Act, SC 2012, c 1, s. 2.

[48] SC 2012, c 1, s. 2(4).

[49] See Vezzani, *supra* note 9, at 77–79.

[50] See Ley de reafirmación de la Dignidad y la Soberanía, No. 80 of 24 December 1996, Art. 12, 48 *Gaceta Oficial* (27 December 1996), translation at 36 ILM 472 (1996). For a rare commentary on this law, see Atuahene, 'The Effectiveness of International Legislative Responses to the Helms-Burton Act', 69 *Revista Jurídica Universidad de Puerto Rico* (2000) 809, at 822–829.

[51] Ley de reafirmación de la Dignidad y la Soberanía, *supra* note 50, Art. 1.

[52] For an overview, see US Library Congress, Laws Lifting Sovereign Immunity: Cuba (June 2016), available at www.loc.gov/law/help/sovereign-immunity/cuba.php.

4 The Alleged Iranian Practice

According to the US government, some laws adopted by Iran imply the denial of foreign sovereign immunity.[53] Particularly relevant for the purposes of this article is the 2012 Act on Jurisdiction of the Judiciary of the Islamic Republic of Iran to Try Civil Cases Against Foreign Governments, which allows actions for damages against foreign governments that have violated the sovereign immunity of Iran or its officials and that are included by the Ministry of Foreign Affairs in a specific list.[54]

In the course of the pending litigation before the ICJ, the United States claimed that 'the parliamentary debates surrounding legislation enacted by Iran to strip the United States of immunity in Iranian courts [do not] refer to those measures as a response to perceived violations of the [1955] Treaty' of Amity, Economic Relations and Consular Rights between the United States and Iran.[55] Contrary to this view, Iran affirmed that 'these debates suggest that the Iranian legislation was intended as a counter-measure in response to the U.S. violations, which indeed it was'.[56] This conclusion appears correct.[57]

5 The Alleged Russian Practice

Equally interesting is the case of some recent Russian legislation denying foreign states sovereign immunity as a response to limitations on Russian immunity. The 2015 Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property provides that Russian courts may deny foreign states' sovereign immunity *on the basis of the principle of reciprocity*, so that the immunity of a foreign state can be limited in Russia if that foreign state limits Russian jurisdictional immunity.[58] The law tasks the Russian Ministry of Foreign Affairs with providing recommendations concerning the extent of jurisdictional immunity that Russia enjoys in a foreign state.[59]

The reciprocity argument at the basis of this legislation, which has been allegedly adopted in response to some domestic claims against Russia in various Western

[53] See US Library Congress, Laws Lifting Sovereign Immunity: Iran (June 2016), available at www.loc.gov/law/help/sovereign-immunity/iran.php (hereinafter 'Laws Shifting Sovereign Immunity: Iran') (including a brief overview of the judicial application of the relevant legislation).

[54] *Ibid.*

[55] *Certain Iranian Assets (Islamic Republic of Iran v. United States)*, Preliminary Objections Submitted by the United States, 1 May 2017, https://www.icj-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf, para. 8.17.

[56] *Certain Iranian Assets (Islamic Republic of Iran v. United States)*, Observations and Submissions of Iran on the Preliminary Objections of the United States, 1 September 2017, https://www.icj-cij.org/public/files/case-related/164/164-20170901-WRI-01-00-EN.pdf, para. 5.19.

[57] Even the United States, in Laws Lifting Sovereign Immunity: Iran, *supra* note 53, labels this measure as a 'countermeasure', even though this document does not express the official position of the state. According to one author, assuming that Iran believes that the US legislation denying Iran immunity for support of terrorism is an unlawful measure, the Iranian law would be a reciprocal countermeasure, i.e. a countermeasure against an unlawful countermeasure: see Vezzani, *supra* note 9, at 72 n.130.

[58] See US Library Congress, Laws Lifting Sovereign Immunity: Russia (June 2016), available at www.loc.gov/law/help/sovereign-immunity/russia.php.

[59] *Ibid.*

states,[60] is questionable: reciprocity presupposes that a certain conduct is due by state *A* only as long as state *B* adopts the same course of conduct, so that if state *B* does not act in this way, there is no correspondent obligation upon state *A*. However, sovereign immunity is not applied on the basis of reciprocity.[61] Consequently, a Russian domestic court that decides to deny a foreign state immunity on the basis of reciprocity may violate international law if, in that specific case, the foreign state was entitled to sovereign immunity under customary international law, irrespective of any consideration of reciprocity. In this case, one could wonder whether this apparent wrongful act should be considered as a countermeasure adopted in response to a previous wrongful act.

3 The Admissibility of Countermeasures Taken by Domestic Courts

A *Preliminary Remarks*

To discuss whether a domestic court can deny sovereign immunity as a countermeasure, it is necessary to consider that two different scenarios may occur. Denial of sovereign immunity can be seen as both a countermeasure in response to *the very violation at the centre of the domestic proceeding* for which the immunity is lifted, and as a countermeasure against *another violation of international law*. In the first scenario, the countermeasure argument would consist in a domestic court of state *A* deliberately violating the immunity of state *B* in response to the same *B*'s conduct that is the centre of a proceeding before that court (as in the view of those who would deny sovereign immunity as a countermeasure against *jus cogens* violations that are the object of the same specific proceeding).[62] In the second scenario, denial of sovereign immunity may be seen as a countermeasure against any other unlawful conduct of state *B* (as in the allusion during the ICJ proceeding in *Jurisdictional Immunities* case, where the violation of the duty to make reparation rather than the violation of the primary relevant international humanitarian law rules was noted).[63]

[60] See *ibid.*; Ruys, *supra* note 11, at 707; see *contra* Rogozina, 'New Rules on Jurisdictional Immunities of States in Russian Courts', *CIS Arbitration Forum* (13 November 2015), available at www.cisarbitration.com/2015/11/13/new-rules-on-jurisdictional-immunities-of-states-in-russian-courts/ (excluding any retaliatory intent). The official report accompanying the draft legislation only mentions that the reciprocity clause is established in order to balance the jurisdictional immunity granted to a foreign state in accordance with the legislation of Russia and the jurisdictional immunity granted to Russia in that foreign state: Пояснительной записки к проекту федерального закона "О юрисдикционном иммунитете иностранного государства и имущества иностранного государства в Российской Федерации", 25 November 2015, available at https://perma.cc/4DGL-7VY7.

[61] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ICJ Reports (2008) 177, para. 119. See, in relation to immunity, Cannizzaro, 'Reciprocità e interessi statali nella disciplina dell'immunità di Stati stranieri dalla giurisdizione esecutiva e cautelare', 28 *Rivista di diritto internazionale privato e processuale* (1992) 875, at 876–877.

[62] This is the scenario analysed by Moser, *supra* note 8.

[63] See *supra* Section 2.B.

The majority of scholars so far have been quite sceptical of the possibility of denying sovereign immunity under the law of countermeasures for a number of reasons. Above all, as already mentioned, states have never articulated this argument clearly, but rather, even when the argument was alluded to, as in the *Jurisdictional Immunities* case, Italy decided not to rely on it, demonstrating scant confidence in the merits of this argument. Moreover, the North American legislation that may support the countermeasure argument was dismissed in 2012 as isolated by the ICJ,[64] even though some criticized the Court for its approach to US case law and legislation.[65] Arguably, the very attempts of some states to affirm the existence of some 'exceptions' or 'limitations' to the rule on sovereign immunity are illustrative of the fact that they do not have confidence in the countermeasure argument.

Although the lack of support of state practice and *opinio juris* is significant, it is not decisive. As detailed below, the matter does not regard the existence of a customary law exception to the rule of sovereign immunity – which should be sustained by uniform state practice and *opinio juris*[66] and was the object of the ICJ's scrutiny in 2012 – but rather, the possibility that a state may invoke an institution of general international law – namely, countermeasure – to justify the non-performance of its obligations under the rule of sovereign immunity. From this perspective, the lack of support in state practice does not prevent one from reaching the conclusion that such a defence would be lawful; it simply suggests that states are not very confident that this may be the case.

This section presents a slightly different approach to this issue compared to that of other scholars. Some authors so far have rejected the possibility of violating sovereign immunity in countermeasure without any detailed elaboration.[67] Others have

64 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 88 (this legislation 'has no counterpart in the legislation of other states. None of the states which has enacted legislation on the subject of state immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged').

65 See Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State', 21 *IYIL* (2011) 143.

66 This is very well established in the ICJ case law (see, e.g., *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, para. 77; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, para. 27; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 55) and ILC practice (ILC Draft Conclusions, *supra* note 33, at 124, Conclusion 2).

67 See Cebrián Salvat, 'Daños causados por un Estado en la comisión de crímenes de guerra fuera de su territorio inmunidad de jurisdicción, competencia judicial internacional y tutela judicial efectiva', 5 *Cuadernos de Derecho Transnacional* (*CDT*) (2013) 265, at 273; Fox and Webb, *supra* note 6, at 16; Papa, 'Il ruolo della Corte costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo: Osservazioni critiche a margine della sentenza n. 238/2014', 6 *Rivista AIC* (2014) 1, at 12 n.29; C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2017), at 152; Gutiérrez Espada, 'Sobre la inmunidad de jurisdicción de los estados extranjeros en España, a la luz de la Ley Orgánica 16/2015, de 27 de octubre', 8 *CDT* (2016) 5, at 31. See also the position of Germany in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 14 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110914-ORA-01-01-BI.pdf, para. 27.

questioned the concrete possibility that such a countermeasure would be able to comply with the substantive and procedural requirements for countermeasures codified by the International Law Commission (ILC).[68] Similarly, those who support the idea that sovereign immunity can be denied as a countermeasure have so far tried to confine the decisions of domestic courts that violate sovereign immunity into the boundaries of the same requirements set by the ILC.[69]

Taking into account these approaches, this section focuses mainly on the often-overlooked preliminary theoretical question of whether it is possible for a domestic court to adopt a countermeasure.[70] Accordingly, other important questions, such as the possibility that such a countermeasure could comply with the substantive and procedural requirements established by the law of state responsibility, will be only mentioned after a close examination of this preliminary issue.

B *The Irrelevance of Rules on Attribution and of the So-Called* Lotus *Principle*

Countermeasures adopted by domestic courts are sometimes labelled 'judicial countermeasures'.[71] Since the national organ that denies sovereign immunity is usually a domestic court tasked with the hearing of a claim, it is necessary to ascertain whether international law allows domestic courts to adopt countermeasures.

The departing point of this analysis is that the ILC never specified which state organs are entitled to take countermeasures, but rather, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) mentions only that the state can adopt a countermeasure.[72] The supporters of the admissibility of judicial countermeasures point out that, under Article 4 of the ARSIWA, the conduct of *every* organ of the state, including the judiciary, is attributable to the state in its entirety;[73] accordingly, for these authors, the law of state responsibility would make no distinction between the action of different domestic organs, and this would be relevant also for the entitlement to take countermeasures.[74] Two authors have also argued that the ICJ's

[68] See, e.g., Giegerich, 'Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?', in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (2005), at 203, 232–235; R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), at 343–345; Ruys, *supra* note 11, at 702–704.

[69] See, e.g., Moser, *supra* note 8; Vezzani, *supra* note 9; Franchini, *supra* note 9.

[70] This question was specifically – albeit briefly – addressed by S.V. Glotova and O.N. Evdokimova, 'Практика ограничения иммунитета государства контрмерами в современном международном праве' 4 *Московский журнал международного права* (2017) 70, at 77–78; C. Focarelli, *International Law* (2019), at 376–377.

[71] See, e.g., Franchini, *supra* note 9, at 45–46. The possibility that domestic courts adopt countermeasures has been particularly advocated by A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011).

[72] ARSIWA, *supra* note 10, Art. 22. The reports of the Special Rapporteurs are silent on this point as well. Moser considers the absence of any indication as to which organ can adopt countermeasures to be evidence of the fact that any organ can adopt countermeasures. Moser, *supra* note 8, at 834–835.

[73] See ARSIWA, *supra* note 10, Article 4, commentary, para. 5.

[74] See, in particular, Glotova and Evdokimova, *supra* note 70, at 78.

consideration that sovereign immunity is a procedural rule[75] supports the idea that domestic courts, tasked with the application of that rule, are entitled to take countermeasures affecting sovereign immunity.[76]

Contrary to this view, the reliance on Article 4 of the ARSIWA appears to be incorrect since this provision does not pertain to the entitlement to adopt countermeasures or any defence. As clearly stated by its title, Chapter II of the ARSIWA, where Article 4 is located, refers to the rules on attribution of conduct to the state. There is nothing in Article 4 referring to justifications and, thus, this provision is not decisive for the issue under analysis here, as admitted by one of the very strongest supporters of the lawfulness of judicial countermeasures.[77] As suggested by yet another author, 'the capacity of the [domestic] courts to engage the international responsibility of their state is one thing, their deliberate adoption of a countermeasure is quite another thing'.[78] Accordingly, considering Article 4 of the ARSIWA as the key provision to ground the legality of judicial countermeasures is incorrect.

Some observers have also claimed that the absence of any explicit limitations on which organs can adopt countermeasures means that every organ can adopt countermeasures, as an application of the principle that everything that is not explicitly prohibited in international law should be considered permitted.[79] Without entering the debate regarding the ongoing validity of this principle – often referred to as the *Lotus* principle[80] – it is necessary to reject this view since it blurs the distinction between what a state can lawfully do with the way in which some international law concepts (in this case, countermeasures) work.

Accordingly, the rules on attribution and the *Lotus* principle are irrelevant to determine the legality of judicial countermeasures under international law.

C *The Problem of a Domestic Court's Assessment of the Commission of Another State's Prior Wrongful Act*

It is questionable whether domestic courts are able to assess *directly* another state's violation of international law,[81] which is the *condicio sine qua non* of the adoption of

75 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 93.

76 Glotova and Evdokimova, *supra* note 70, at 78.

77 See Tzanakopoulos, *supra* note 71, at 196.

78 Focarelli, *supra* note 70, at 377.

79 See Glotova and Evdokimova, *supra* note 70, at 78.

80 This idea is called the '*Lotus* principle' since it was affirmed by the Permanent Court of International Justice in *The Case of SS Lotus (France v. Turkey)*, 7 September 1927, PCIJ Series A, No. 10, at 18.

81 It has been argued that, under customary international law, domestic judges might be called to determine *incidentally* whether a breach of a treaty occurred in order to decide whether it is still binding a state, for example, in the case of the ascertainment of the existence of a material breach under the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 60 (hereinafter 'VCLT'). See Conforti and Labella, 'Invalidity and Termination of Treaties: The Role of National Courts', 1 *EJIL* (1990) 44; see also Institut de Droit international, Milan session, Res. (7 September 1993), Art. 7(3); D. Amoroso, *Insindacabilità del potere estero e diritto internazionale* (2012), at 119–120. This view is far from uncontroversial (see Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on the Activities of National Courts and the International Relations of their State', 5 *EJIL* (1994) 423, at 432) and is not explicitly supported by Article 67(2) of the VCLT, according to which:

countermeasures. This section argues that states have deliberately prevented domestic courts from performing this assessment because of the very rule of sovereign immunity, which strips domestic courts from the possibility of undertaking countermeasures if that assessment is not performed by another organ.

Under the law of countermeasures, a state has to assess whether it is injured in relation to another state's conduct since, as affirmed by the ICJ, a countermeasure 'must be taken in response to a previous international wrongful act of another state and must be directed against that state'.[82] In the case of denial of sovereign immunity, this assessment cannot be lawfully conducted by a domestic court since the procedural rule on immunity specifically prevents that court from doing so. The determination of whether a previous wrongful act occurred is barred to domestic courts by the rule on sovereign immunity itself, which would be ineffective if its main addressees, the domestic courts, could disregard it as a countermeasure.[83] It is true that, in practice, domestic courts sometimes assess incidentally the legality of foreign states' conduct, and it is also true that doctrines preventing domestic courts from doing so, such as the Act of State doctrine, are grounded in domestic law rather than in international law.[84] Nevertheless, domestic courts may assess the unlawfulness of foreign states' conduct in relation to a domestic claim directly involving the responsibility of that state only if that state has waived its immunity or if the act is not covered by immunity because it is not a manifestation of state sovereignty.[85]

For the sake of completeness, this argument must be distinguished from that according to which sovereign immunity cannot be denied as a countermeasure since this norm should be included in the list of rules that cannot be affected by countermeasure,[86] now codified by Article 50 of the ARSIWA. Without debating the merit of this view,[87] this author considers that the rule of sovereign immunity entirely prevents

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Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty . . . shall be carried out through an instrument communicated to the other parties. *If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers*. (Emphasis added.)

82 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, para. 82. This requirement is codified by ARSIWA, *supra* note 10, Art. 49(1).

83 See Bröhmer, *supra* note 3, at 193; Ruys, *supra* note 11, at 706.

84 See the remarks by Tzanakopoulos, *supra* note 71, at 126–129. More in general, see the detailed analysis of Amoroso, *supra* note 81.

85 This is the case of the acts that a state undertakes in its private capacity (*jure gestionis*) under the so-called restrictive doctrine of state immunity (see, generally, Fox and Webb, *supra* note 6, at 130–164).

86 See E. Cannizzaro, *Diritto internazionale* (4th ed. 2018), at 356.

87 Sovereign immunity is not listed by ARSIWA, *supra* note 10, Art. 50 as a rule that cannot be violated in countermeasure – which only mentions diplomatic and consular immunities – and, although Article 50 prohibits countermeasures in violation of *jus cogens*, the rule on sovereign immunity has no peremptory nature (see Sciso, *supra* note 15, at 1230; Bonafè, *supra* note 27, at 1053). Accordingly, it would be necessary to demonstrate that such an exception is based on uniform state practice and *opinio juris* that was overlooked by the ILC. Additionally, the exception in relation to diplomatic immunity is justified on functional ground to allow states to settle their disputes (ARSIWA, *supra* note 10, Art. 50, commentary, paras. 14–15), whereas state immunity is based on a different rationale, linked to the principle of sovereign equality (Ruys, *supra* note 11, at 705).

the domestic court's assessment of the commission of another state's wrongful act, which is the preliminary requisite for the adoption of countermeasures. In contrast, the impossibility of violating sovereign immunity as a countermeasure because of its inclusion in a 'protected list' is based on considerations regarding which rule can be violated as a countermeasure, when the assessment of the illegality of the prior conduct has already been performed.[88]

Incidentally, it is worthwhile noting that domestic courts are the organs least apt to assess the unlawfulness of a prior act of another state, in order to trigger a response in countermeasure, when that act is the object of the very litigation for which immunity is denied. Let us assume, for the sake of argument, that domestic courts are entitled to adopt judicial countermeasures. A court of state *A* receives a claim by a private individual against state *B* regarding an alleged act of torture; in order to assess whether sovereign immunity can be denied in countermeasure, the court of state *A* must preliminarily determine whether that act of torture occurred in violation of international law. Now, ignoring for a moment the fact that this runs contrary to the aforementioned dictum of the ICJ on the distinction between procedural and substantial rules,[89] such a conduct might lead to the ascertainment of violation of international law by the very state *A* since once the domestic court decides to open the proceedings against state *B*, state *B*'s immunity is as such violated.[90] If the domestic court of state *A*, at the end of the proceeding, concludes that state *B* is not responsible for torture, thus rejecting the private claim, the court of state *A* would contradict its first assumption that a prior unlawful act was performed by state *B* in order to react with a countermeasure.[91] Clearly, there is a dangerous circularity, which may lead to unintended consequences on the plane of the international responsibility of the state allegedly acting in countermeasure.[92]

Accordingly, the very rule on sovereign immunity prevents domestic courts from assessing *directly* the commission of a wrongful act that affects their own state, which is

[88] According to the ILC, the exclusions listed in ARSIWA, *supra* note 10, Art. 50, entail that '[a]n injured state is required to continue to respect these obligations in its relations with the responsible state, and may not rely on a breach by the responsible state of its obligations . . . to preclude the wrongfulness of any non-compliance with these obligations' (*id.* Art. 50, commentary, para. 1).

[89] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 93.

[90] *Ibid.*, para. 82. See, on this point, Trapp and Mills, *supra* note 19, at 166. Accordingly, the author of this article disagrees with the idea that a determination of the legality of the targeted state's action at the merit stage would be the proper way to defend that state's interests (see Franchini, *supra* note 9, at 54), since, once the proceeding is held, its immunity is breached irrespective of the outcome of the merits stage.

[91] Bröhmer, *supra* note 3, at 193.

[92] It should be recalled that:

> A state taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A state which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.

ARSIWA, *supra* note 10, Art. 49, commentary, para. 2.

the *conditio sine qua non* of the adoption of every countermeasure. As a consequence, domestic courts cannot adopt countermeasures without the cooperation of other state organs.

D *The Adoption of Countermeasures as a Political Choice*

Domestic courts are unable to undertake countermeasures since the adoption of countermeasures requires some political evaluations which domestic courts are not fit to take under international law. These evaluations include (i) whether a state is an injured state in relation to an international wrongful act – which has already been examined in the previous subsection; (ii) whether it is convenient to adopt a countermeasure in response to that wrongful act; and (iii) the conditions the countermeasure must comply with in order to be lawful.

Even after having assessed that a state has been injured by another state, the organs of the former had to decide whether or not to respond with a countermeasure. This is a highly discretionary choice, which involves an analysis of the opportunity to violate international law in order to induce the other state to comply with the previously breached obligations.[93] The discretion is so broad at this stage that a state, after having assessed that an injury occurred, may decide not to take any countermeasure,[94] or to adopt retorsions, that is, inherently lawful but unfriendly actions against the alleged state responsible for the violation of international law.[95] Clearly, the state's decision on how to respond to a wrongful act implies political evaluations that are usually performed by those organs that are responsible for international relations.

The political determination is particularly delicate in relation to claims that are not commenced by citizens of the state of the domestic court that is involved in the denial of immunity. Indeed, as mentioned above, under Article 49(1) of the ARSIWA, only the injured state may adopt countermeasures in relation to a wrongful act. It is well known that, in relation to individual claims, the injured state is (i) the state of nationality of the individual who seeks reparation for the conduct of another state; or (ii) the sending state of an organ who is entitled to functional immunity under international law.[96] However, when the breached rule is an obligation *erga omnes*, i.e., an obligation owed towards the international community as a whole,[97] every state in the

[93] See Vezzani, *supra* note 9, at 53.

[94] See Giegerich, *supra* note 68, at 234–235. This circumstance is emphasized also by some members of the British branch of the International Law Association (ILA) who support the possibility of undertaking judicial countermeasures. See Human Rights Committee of the British branch of the ILA, 'Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad', *European Human Rights Law Review* (2001) 129, at 151.

[95] On the difference between retorsions and countermeasures, see ARSIWA, *supra* note 10, Chapter II: Countermeasures, commentary, para. 3.

[96] Vezzani, *supra* note 9, at 44.

[97] *Barcelona Traction, Light and Power Company, Limited*, Second Phase Judgment, 5 February 1970, ICJ Reports (1970) 3, para. 33. On obligations *erga omnes* and *erga omnes partes*, see, generally, M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997); C.J. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005); Gaja, 'The Protection of General Interests in the International Community', 364 *Recueil des Cours de l'Académie de Droit International de La Haye* (*RCADI*) (2012) 9; P. Picone, *Comunità internazionale e obblighi* erga omnes (3rd ed. 2013).

international community is indirectly injured by the violation of that rule.[98] Similarly, if the concerned obligation is an obligation *erga omnes partes*, that is, an obligation owed towards a group of states that are parties to the same treaties,[99] there will be a specially injured state (generally the state of nationality of the claimant or the sending state of an organ) and other indirectly injured states. In both cases, at least when the scenario involves serious violations, there is the need to coordinate the reactions of both the specially injured states and the indirectly injured ones, giving priority to the reactions of the former, which have a stronger interest in compliance with a specific rule that has been breached.[100] Finally, in some cases, there is no specially injured state by a violation of an obligation *erga omnes* / *erga omnes partes*, such as in the case of a genocide committed by a government against some of its own citizens.[101] In this case, the specially injured state would be the same responsible for the violation; thus, the only relevant position is held by all the states of the international community / parties to the specific relevant treaty, which are indirectly injured states.[102]

Now, this complex normative framework is relevant for the purposes of this article because it is necessary to assess whether countermeasures for violations of obligations *erga omnes* / *erga omnes partes* may be undertaken by indirectly injured states. Although the ARSIWA does not reach a final word on this issue, leaving it open to future developments,[103] most authors, on the basis of state practice, concur that indirectly injured states may adopt countermeasures under Article 54 of the ARSIWA.[104] In this case, the decision to adopt a countermeasure by an indirectly injured state has an additional layer of political character since it involves the deliberate violation of international law to respond to a wrongful act with a less stringent link with that state, as well as, in some cases, the need to coordinate the reaction with the directly

[98] The expression 'indirectly injured states' is used instead of 'non-injured states' when referring to obligations *erga omnes* and obligations *erga omnes partes* because, under their very definitions, every state in the international community or every state party to certain treaties is injured in case of violations of these kinds of obligations. See, e.g., P.-M. Dupuy, '2000–2020: Twenty Years Later, Where Are We in Terms of the Unity of International Law?', 9 *Cambridge International Law Journal* (2020) 6, at 15.

[99] ARSIWA, *supra* note 10, Art. 42(b).

[100] See ILC, Eighth Report of the Special Rapporteur Ago, 2(1) *Yearbook of the ILC* (1979) 3, at 43–44; Seventh Report of the Special Rapporteur Arangio-Ruiz, 2(1) *Yearbook of the ILC* (1995) 4, paras 70–120. See, generally, Picone, 'Il ruolo dello stato leso nelle reazioni collettive alle violazioni degli obblighi *erga omnes*', 95 *RDI* (2012) 957.

[101] These scenarios are analysed by Picone, 'Le reazioni collettive ad un illecito *erga omnes* in assenza di uno stato individualmente leso', 96 *RDI* (2013) 5.

[102] *Ibid.* at 7.

[103] See ARSIWA, *supra* note 10, Art. 54 and commentary.

[104] See Dupuy, 'Observations sur la pratique récente des "sanctions" de l'illicite', 87 *Revue Générale de Droit International Public* (1983) 505; Sicilianos, *supra* note 10, at 155–174; Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *RCADI* (1994-IV) 345, at 405–422; Tams, *supra* note 97, at 207–249; E.K. Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2009), at 90–209; M. Dawidowicz, *Third-Party Countermeasures in International Law* (2017). See also Institut de Droit International, Krakow session, Res. (27 August 2005), Art. 5(c). See *contra* Focarelli, 'International Law and Third-Party Countermeasures in the Age of Global Instant Communication', 29 *Questions of International Law, Zoom-In* (2016) 17.

injured state.[105] Clearly, a domestic court is not fit to navigate this (legal and) political maze, which implies a complete knowledge of the web of interests of a state in its foreign relations.

In a recent work, Carlo Focarelli provides the clearest articulation of the argument as to why judicial organs should not be involved in the adoption of countermeasures. As affirmed by this author, 'it appears inappropriate that the courts may adopt true "countermeasures". Countermeasures are discretionary acts that are appropriate for the Executive, which may or not adopt them in light of various reasons, including political convenience at a certain moment in relations with another state'.[106] Apparently, here Focarelli considers that judicial denial of sovereign immunity is not a countermeasure if it is not accompanied by a decision of the executive.

The following subsection explains why the domestic courts' inability to perform the political choices that are at the basis of the adoption of countermeasures does not make purely judicial countermeasures merely undesirable. Rather, this inability is crucial to the argument that purely judicial countermeasures are impermissible.

E *The Necessary Involvement of the Government*

The political discretion in the entire process of adopting a countermeasure is linked to the fact that, under international law, the government represents the state in the conduct of foreign relations. Government, through its different branches, is the organ that typically expresses the political will of a state,[107] and this element is decisive in relation to the process of adopting countermeasures. In this section, it is argued that uncodified customary rules on the necessary involvement of the government in the reactions to wrongful acts exist under the law of state responsibility. These rules are similar to those codified in relation to the law of the treaties, which, however, is not applied here by analogy.

As observed afore, the fact that under Article 4 of the ARSIWA the conduct of every organ, including the judiciary, is attributable to the state does not mean that every organ is responsible for the conduct of foreign relations. Rather, international law clearly recognizes that some organs are, for their functions, more entitled to act in their international arena. As lucidly noted by Morelli, it is necessary to distinguish between: (i) some organs of the state that are tasked with the *external activity of the state* in relation to presenting the will of the state and exercising its rights under international law (heads of state, ministries of foreign affairs, diplomats) and to undertaking actions in times of armed conflict (military commanders and combatants); and

[105] This topic is explored by M. Gavouneli, *State Immunity and the Rule of Law* (2001), at 115–118, and Vezzani, *supra* note 9, at 44–48. For the position that indirectly injured states may adopt judicial countermeasures, see Glotova and Evdokimova, *supra* note 70, at 78; see *contra* Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?', 24 *LJIL* (2011) 173, at 180.

[106] Focarelli, *supra* note 70, at 376–377.

[107] Sometimes this is labelled 'political direction' ('indirizzo politico') in Italian constitutional law theory. For its impact on this author's reflections, see Martines, 'Indirizzo politico', in Francesco Santoro-Passarelli (ed.), *Enciclopedia del diritto* (1971) vol. 21, 134.

(ii) organs that are tasked with the *internal activity of the state*, which can undertake conduct that is relevant under international law (e.g. committing a fact that is contrary to international law), without being able to convey the will of the state or to exercise a right under international law.[108] The ICJ supported this view, affirming that 'in international law and practice, it is the Executive of the state that represents the state in its international relations and speaks for it at the international level'.[109] The possibility that domestic law identifies other organs with the task to conduct foreign relations is left open since, in principle, international law does not dictate how a state should be organized. However, the presumption established by international law in favour of the government as the branch responsible for foreign affairs protects the certainty of international relations, so that derogations under domestic law should be notified by the government itself to other international actors.[110]

This is particularly clear in relation to the law of treaties, which bestows the power to conclude a treaty to few political organs, allowing other organs to act in the international arena only upon specific authorization. Indeed, even though the capacity to conclude a treaty is attributed to the state in its entirety,[111] under Article 7 of the 1969 Vienna Convention of the Law of the Treaties (VCLT) some specific organs enjoy a central role in the adoption of treaties: Heads of State, Heads of Government, Ministers for Foreign Affairs, heads of diplomatic missions (only in relation to treaties between the accrediting state and the state to which they are accredited) and representatives accredited by states to an international conference or to an international organization or one of its organs (in relation to treaties to be adopted in that conference, organization or organ) are considered as representing a state in relation to the adoption of a treaty without the need to present evidence of this (full powers). As this provision clarifies, these organs have this power 'in virtue of their function', whereas other organs have to show full powers in order to negotiate and conclude a treaty.[112]

[108] See Morelli, 'Cours général de droit international public', 89 *RCADI* (1956) 437, at 547; G. Morelli, *Nozioni di diritto internazionale* (7th ed. 1967), at 184–185; see also Capotorti, 'Cours général de droit international public', 248 *RCADI* (1994) 9, at 62. Morelli goes on to address the position of heads of states, ministries of foreign affairs, diplomats and military organs under the label of 'External Organs of Every State' (Morelli, *Nozioni di diritto internazionale*, *supra*, at 194–212). Similarly, Lauterpacht and Oppenheim analyse the position of heads of states, monarchs, presidents of republics, foreign offices, diplomatic envoys, consuls and military organs in Lauterpacht and Oppenheim, 'Organs of the States for their International Relations', in H. Lauterpacht (ed.), *L. Oppenheim's International Law: A Treatise* (8th ed. 1955) 755, at 757–863). See also Deák, 'Organs of the States in their External Relations: Immunities and Privileges of State Organs and of the State', in M. Sørensen (ed.), *Manual of Public International Law* (1968) 381, at 383–384.

[109] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections), Judgment, 1 April 2011, ICJ Reports (2011) 70, para. 37. This statement is quoted also in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Preliminary Objections), Judgment, 17 March 2017, ICJ Reports (2016) 3, para. 96.

[110] See the discussion on the 'foreign powers' of organs in F. Salerno, *Diritto internazionale: Principi e norme* (4th ed. 2017), at 92–93.

[111] VCLT, *supra* note 81, Art. 8.

[112] Even regarding the aforementioned assessment of violations of international law by domestic judges for the ascertainment of a material breach under VCLT, *supra* note 81, Art. 60 (see *supra* Section 3.C), it is recognized that the domestic judge's assessment is *incidental* (Conforti and Labella, *supra* note 81, at 50). Accordingly, the effects of the domestic judge's assessment are limited to that specific case, whereas the government, under VCLT, *supra* note 81, Art. 67(2), is free to act at the international level to terminate,

The same rationale is implicit in relation to the consequences of a wrongful act under the law of state responsibility. As affirmed by the ICJ, Article 7 of the VCLT is a concrete specification of the power of some organs to act on behalf of the state in its international relations.[113] Accordingly, it is possible to suggest that only some organs, 'in virtue of their function', are entitled to act in the international arena on behalf of the state *even outside the scope of the law of treaties*. The rules of procedure of the UN Security Council support this assumption, since they require that '[t]he credentials of a representative on the Security Council ... shall be issued either by the Head of the State or of the Government concerned or by its Minister of Foreign Affairs. The Head of Government or Minister of Foreign Affairs of each member of the Security Council shall be entitled to sit on the Security Council without submitting credentials'.[114] In relation to the law of state responsibility, only political organs – mainly the executive – may adopt the discretionary and political determinations that are necessary to invoke the violation of an international law rule, ask for cessation, seek reparation *and adopt countermeasures*.[115] This is a consequence of the traditional tendency of international law to consider that the state acts mainly through its government,[116] which is explicit in the law of treaties and implicit in the law of state responsibility.

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suspend or invalidate the treaty once and for all (*ibid.*). Moreover, even following this view, the domestic judge's assessment of facts and their legal characterizations in relation to issues in which the government has full discretion should be approached with more caution by domestic judges (Conforti, 'Preliminary Report on the Activities of national judges and the international relations of their State', 65(1) *Yearbook of the Institute of International Law* (1993) 371, at 404–405; for a more active role of domestic judges even on these issues, see Amoroso, *supra* note 81, at 119–120).

[113] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Preliminary Objections), Judgment, 11 July 1996, ICJ Reports (1996) 595, para. 44 (in relation to heads of state); *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, para. 53 (in relation to a minister of foreign affairs).

[114] UN Security Council, Provisional Rules of Procedure (S/96/Rev.7), 21 December 1982, rule 13.

[115] An alternative justification may be based on the existence of a rule corresponding to that codified by VCLT, *supra* note 81, Art. 46, according to which

> A state may . . . invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent [if] that violation was manifest and concerned a rule of its internal law of fundamental importance.

However, at closer scrutiny, this rule is not applicable to an act of a domestic court since Article 46 applies only to the conduct of organs authorized under Article 7 of the VCLT. See Condorelli, 'L'imputation à l'état d'un fait internationalment illicite: Solutions classiques et nouvelles tendances', 189 *RCADI* (1984) 9, at 36; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 588; Bothe, 'Article 46 – Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) vol. 2, 1090, at 1093; M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M.D. Evans (ed.), *International Law* (5th ed. 2018) 138, at 145; Rensmann, 'Article 46', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed. 2018) 837, at 854.

[116] See, e.g., the analysis offered by T. Treves, *Diritto internazionale: problemi fondamentali* (2005), at 52–53.

The reaction to a wrongful act is, indeed, one of those activities falling within the concept of 'capacity to enter into relations with the other states',[117] which, rather than one component for statehood, is one typical function upon the government of a state under international law.[118] Indeed, there is no contestation in state practice and *opinio juris* regarding the entitlement of the government to adopt countermeasures, whereas when there was an allusion to the adoption of judicial countermeasures, the concerned state has vocally protested.[119]

The entitlement to adopt countermeasures follows the same rules that developed in state practice in relation to the entitlement to invoke any consequence of a wrongful act.[120] As the request of a domestic court towards another state to cease a wrongful act would be without consequence – because domestic courts do not play this role in international relations – similarly, the violation of international law by a domestic court as the response to an alleged wrongful act cannot be considered a countermeasure. Following the model of the law of treaties, the countermeasure would be 'without legal effect' – because domestic courts are not entitled to act for the state in relation to the adoption of countermeasures[121] – and the underlying denial of sovereign immunity would not be justified. In other words, as Germany has correctly affirmed, domestic courts' judicial countermeasures are based on a 'very strange new theory of countermeasures', and those who advocate this view 'are visibly on an erroneous course'.[122]

Article 52(1) of the ARSIWA supports the argument that only organs tasked with the international representation of a state can enact countermeasures. This provision reads: '[b]efore taking countermeasures, an injured state shall: (a) call upon the responsible state . . . to fulfil its obligations . . .; (b) notify the responsible state of any

[117] Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19, Art. 1(d).

[118] V. Lowe, *International* Law (2007), at 157.

[119] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 14 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110914-ORA-01-00-BI.pdf, para. 27.

[120] Uniform state practice demonstrates that only organs of the executive power, such as ministries of foreign affairs and diplomats, invoke the responsibility of another state for a wrongful act. See the documents collected in I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), at 89–119.

[121] The expression is borrowed by VCLT, *supra* note 10, Art. 8 in relation to acts performed without authorization. This author disagrees with the doctrinal position according to which such an act would be without effect because it would not be attributable to the state (see Hoffmeister, 'Article 8', in Dörr and Schmalenbach (eds), *supra* note 115, at 145, 148); rather, if performed by a state organ, the act is attributable to the state under ARSIWA, *supra* note 10, Art. 4, but is without any legal effect under the law of treaties – which is not concerned with issues of attribution – because it is performed by an organ with no competence (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Preliminary Objections), Dissenting Opinion of Judge Kreća, ICJ Reports (1996) 658, para. 39; Villiger, *supra* note 115, at 145, 151–152; Angelet and Leidgens, 'Article 8 – 1969 Vienna Convention', in Corten and Klein (eds), *supra* note 115, 155 at 159). For this reason, the International Tribunal for the Law of the Sea has rejected the idea that a document signed by an organ falling outside the scope of Article 7 of the VCLT was a treaty. See ITLOS Case No. 16, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, para. 96.

[122] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting, 14 September 2011, https://www.icj-cij.org/public/files/case-related/143/143-20110914-ORA-01-00-BI.pdf, para. 27.

decision to take countermeasures and offer to negotiate'.[123] Both these activities require an action of the organs tasked with the international representations of the state.[124] The view suggested by an author that, in principle, a court could notify the allegedly responsible state of a contestation of the unlawful act and call upon the responsible state to comply with its obligation, with the warning that it could lift the immunity in countermeasure,[125] is admissible only with a legal basis in the domestic law of that state; thus, the ultimate decision would rest with the parliament or the government – the organs that have adopted that piece of legislation, whereas the court would be just the material organ tasked with the delivery of the notice. Anyway, it is highly unlikely that states will allow domestic courts to issue such notices towards a foreign state, and rightly so, since courts are not ordinarily tasked with foreign relations.[126] It is also untenable the idea that judicial countermeasures fall under the scope of Article 52(2) of the ARSIWA, according to which 'the injured state may take such urgent countermeasures as are necessary to preserve its rights';[127] judicial countermeasures in relation to sovereign immunity are always triggered by a private claim, and this conflicts with the idea of an urgent measure, which should be started when the state decides to do so rather than upon the will of a private person.

The fact that there is the need for the involvement of the government means that (i) purely judicial countermeasures cannot exist; and (ii) countermeasures may consist of a conduct in which both political and judicial state organs play a role.[128] This is the correct reading of the US AEDPA and Canadian JVTA, which allow domestic courts to deny state immunity *after the executive has included some specific states in a designated list*, on the basis of legislative provisions.[129] Since the process of listing is linked to the governmental evaluation of the involvement of a state in acts contrary to international law, in these cases it is possible, in principle, to present the denial of immunity as a countermeasure adopted by the government and realized through domestic courts.[130] Correctly, Giegerich affirms that '[t]his is the only way to guarantee a well-reasoned political decision in the forum state on whether the management of

[123] For more on the actions that a state must undertake before adopting a countermeasure, see A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (1997).

[124] Tzanakopoulos, *supra* note 71, at 196.

[125] Moser, *supra* note 8, at 841–842. For some critical remarks, see Vezzani, *supra* note 9, at 52–55.

[126] Note that no notification is offered under the US legislation, either by the government or domestic courts. See Franchini, *supra* note 9, at 64.

[127] The argument of urgency is advanced by Tzanakopoulos, *supra* note 71, at 197. This view is also mentioned favourably, but not discussed, by Franchini, *supra* note 9, at 64.

[128] This might have been classified as a 'complex act' – a notion that was suggested to the ILC by Ago (ILC, Seventh Report of the Special Rapporteur Ago, 2(1) *Yearbook of the ILC* (1978) 49, para. 43). Due to the significant criticisms it received (see, e.g., Salmon, 'Le fait étatique complexe: Une notion contestable', 28 *AFDI* (1982) 709), this notion has not been included in the final ARSIWA, even if it is sometimes employed by scholars (see, e.g., G. Distefano, *Fundamentals of Public International Law* (2019), at 713–714).

[129] See *supra* Section 2.C.

[130] See Stephan, 'Sovereign Immunity and the International Court of Justice: The State System Triumphant', in J.N. Moore (ed.), *Foreign Affairs Litigation in United States Courts* (2013) 67, at 81; Vezzani, *supra* note 9, at 54.

the consequences of a *jus cogens* violation should be privatised and the diplomatic relations with the perpetrator state burdened with the commencement of civil court proceedings for damages'.[131]

The North American legislation allows, in principle, a political determination in relation to the decision of denying some states' sovereign immunity in response to alleged violations of international law since they are based on express legislative provisions and on political decisions of the government. For this reason, it is necessary to distinguish between judicial denial of sovereign immunity based on domestic legislation and executive involvement – as in the North American experience – and judicial denial of sovereign immunity decided by domestic courts without any political determination of the government.[132] As correctly noted by Gattini, 'the US experience, pointlessly invoked at length by the Italian Court of Cassation in the *Ferrini* decision, can only be understood when read in the light of countermeasures, since it is the executive that decides which countries are "unworthy" of immunity'.[133] Accordingly, the discretionary and political decision of the government, in relation both to the assessment of prior state conduct as unlawful and to the determination to react in countermeasure, characterizes denial of sovereign immunity as a countermeasure, irrespective of the fact that this denial is actually performed by a court; this conclusion squarely fits with the assumption that the government is the actor speaking on behalf of the state in the international arena.[134]

The suggested approach is particularly relevant to assess the conduct of those courts that deny state immunity *without* any basis in domestic legislation and political determinations of the executive. For instance, in an interview, the Italian Minister of Foreign Affairs at the time criticized the Italian case law, including the *Ferrini* decision, which denied German immunity, labelling it as 'dangerous';[135] moreover, the Italian government has acknowledged German immunity in a number of trials before Italian domestic courts.[136] The position of the Italian government is an element that, as such, prevents a conclusion that denial of sovereign immunity can be justified as a countermeasure: indeed, by definition, countermeasures, 'in contrast to some other circumstances precluding wrongfulness, [. . .] are constituted by a *deliberate* act contrary to international obligations, taken *knowingly* and *willingly* by a state'.[137] Following the

[131] Giegerich, *supra* note 68, at 234. The same author suggests that '[t]he procedural law of the forum state must thus make the admissibility of the damages claim conditional on the prior consent of its foreign policy-making organs' (*ibid.*).

[132] Vezzani, *supra* note 9, at 54.

[133] Gattini, *supra* note 105, at 183. See also Stephan, *supra* note 130, at 80 ('the U.S. approach, unlike Italy's, ensures that only states that an authoritative actor (the executive) has determined to have violated international law suffer a loss of immunity'). Similarly, Atteritano emphasizes that the adoption of judicial countermeasures 'is a problem for countries in which the denial of immunity is *usually decided by the courts rather than by governments*' (Atteritano, *supra* note 15, at 36 (emphasis added)).

[134] See E. Zoller, *Enforcing International Law Through U.S. Legislation* (1985), at 9.

[135] See Ronzitti, 'Visioni opposte tra Frattini e i giudici italiani?', *Affari Internazionali* (23 July 2008), available at www.affarinternazionali.it/2008/07/visioni-opposte-frattini-giudici-italiani/.

[136] See Bonafè, *supra* note 27, at 1053.

[137] Lesaffre, *supra* note 10, at 469 (emphases added).

suggestion that the relevant organ is the government, its position prevails over that of the domestic courts as a matter of the official position of the state in its international relations. This issue crosses the very delicate – and largely underexplored – topic of the assessment, from the standpoint of international law, of the conduct of a state when two or more of its organs adopt different positions, undermining the unitary principle that is often read in Article 4 of the ARSIWA.[138]

Finally, one could wonder whether a government could claim *ex post* the nature of countermeasure of a prior domestic decision on denial of sovereign immunity, which was not based on explicit domestic legislation or governmental determination at the time it was adopted. The ICJ could have provided an answer if Italy had decided to advance a defence based on countermeasure; but, likely, the opposition of the Italian government to the denial of German immunity before the Italian courts persuaded Italy not to try this strategy before the ICJ. In the absence of prior positions taken by the government, *prima facie*, it might appear admissible that a judicial denial of sovereign immunity could be adopted subsequently by the government as a countermeasure,[139] for instance pursuant a *domestic law* obligation upon the government to comply with the decision of a domestic court. The rationale behind this may be, again, the same as that behind the law of treaties and, in particular, that at the basis of Article 8 of the VCLT, which reads that '[a]n act relating to the conclusion of a treaty performed by a person who cannot be considered . . . as authorized to represent a state for that purpose is without legal effect *unless afterwards confirmed by that state*'.[140] However, the procedural requirements that a state must follow *before* adopting a countermeasure[141] appear to preclude this opportunistic invocation.[142] In the specific context of judicial denial of sovereign immunity, the absence of any state practice in this sense recommends a very cautious approach.[143]

F *A Very Unlikely Lawful Countermeasure*

As argued in the sections above, judicial denial of state immunity can be considered a countermeasure only if the relevant court decision is adopted with the involvement of

[138] To the best knowledge of this author, this question has been addressed only in the context of the formation of international customary law, in relation to the relevance, as state practice, of divergent courses of action among the organs of the same state. The ILC affirmed, very cautiously, that '[w]here the practice of a particular state varies, the weight to be given to that practice may, depending on the circumstances, be reduced': ILC Draft Conclusions, *supra* note 33, at 134, Conclusion 7.2.

[139] This seems the position of Focarelli who, after having denied that a domestic court can adopt autonomously a countermeasure, affirms that, nonetheless, denial of sovereign immunity by a domestic court may be justified as countermeasure. Focarelli, *supra* note 70, at 377–378.

[140] Emphasis added. It would be possible to mention here also ARSIWA, *supra* note 10, Art. 11, according to which a state may adopt as its own a conduct that in principle is not attributable to that state. However, *id.* Art. 11 is a rule on attribution, whereas a customary international law rule analogous to VCLT, *supra* note 81, Art. 8 would cover also the consequences of a wrongful act.

[141] See *supra* Section 3.F.

[142] See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports (2011) 644, at 710 (Bennouna, J.).

[143] In an entirely different scenario, Greece advanced *ex post* a defence based on countermeasures, which, however, was rejected by the ICJ on different grounds: *ibid.*, paras 120–122, 164.

the government or the government and the parliament.[144] Notwithstanding this conclusion, one should not be misled and consider that the adoption of denial of sovereign immunity as a countermeasure is an easy task when it is performed with the participation of the government. Rather, it presents many hazards both at international and national law levels, which are likely the reason why states are so reluctant to deny sovereign immunity even as countermeasure or to admit they have done so. Due to space constraints, these hazards are only briefly mentioned here.

In relation to international law aspects pertaining to the denial of immunity as a countermeasure, some problems are linked to the fact that the denial of immunity is not triggered directly by the injured state, but rather by private claimants. This means that some of these claims may regard nationals of the state that denies immunity and non-nationals alike. In the first case, as well as in relation to organs, the state can be considered the injured state of the previous wrongful act, at least when this act is the same for which the state wants to react in countermeasure and for which the private individual issues the claim; in these instances, the action of denial of sovereign immunity should occur only after the exhaustion of domestic remedies before the domestic courts of the responsible state since it would be a form of diplomatic protection.[145] If the claimant is neither a national nor an organ, some authors consider that the state exercising jurisdiction can deny sovereign immunity only as an indirectly affected state in relation to the violation of an obligations *erga omnes* or *erga omnes partes*, creating a number of problems of coordinating the reactions of different injured states.[146] This assumption is inaccurate when state *A* decides to violate the immunity of state *B* for a breach of an obligation that is different from the one that is the object of the private claim against state *B*; indeed, the status of injured state must be assessed taking into account the wrongful act against which the countermeasure is taken, rather than in relation to the violations of international law at the centre of the private claims between individuals and the foreign state. To navigate this maze, North American legislation usually limits the possibility to claim compensation against foreign states to nationals of, or to individuals with a close link to, the state that is exercising jurisdiction.[147]

Other minor issues support the unfeasibility of denying sovereign immunity as a countermeasure. First, it would be extremely difficult to assess the proportionality of the countermeasure:[148] it may be the case that the violation of sovereign immunity in relation to just one private claim is proportionate to the prior wrongful act, whereas

[144] Although the involvement of the parliament may be relevant under domestic law, from the perspective of international law the crucial element is the involvement of the government. See Zoller, *supra* note 134, at 9–10.

[145] This issue is explored in detail by Vezzani, *supra* note 9, at 44.

[146] *Ibid.*, at 44–48.

[147] See, for the United States, the restrictions in 28 USC § 1605A(a)(2)(A)(ii), and, for Canada, SC 2012, c. 1, s. 2, § 4(2).

[148] See ARSIWA, *supra* note 10, Art. 51. On this issue, see, generally, Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *EJIL* (2001) 889; Franck, 'On Proportionality of Countermeasures in International Law', 102 *AJIL* (2008) 715.

more actions would not be. However, the state deciding to lift immunity has no way of controlling how many private persons would issue claims, thus risking a violation of the criterion of proportionality.[149] Moreover, countermeasures must be aimed at inducing a responsible state to comply with its obligations of cessation and reparation of a wrongful act;[150] one could wonder whether the opening of some civil claims before foreign courts is a tool to induce a foreign state to comply with international law, especially taking into account the fact that, usually, the relevant domestic decisions against that state cannot be implemented.[151] Finally, it is worthwhile mentioning that countermeasure should be, 'as far as possible', reversible,[152] whereas it may be difficult to resume compliance with sovereign immunity when a domestic proceeding against the foreign state has been already opened.[153]

Other problems, which cannot be explored here, pertain to the domestic sphere. In particular, the necessity of an involvement of the government in the decision to deny foreign state immunity may result in a blurring of the principle of separation of powers, with a significant interference of the executive in the activity of the judiciary.[154] Additionally, the discretionary powers granted to the government in its determinations that are relevant for the adoption of the countermeasures may result in a frustration of individual interests', double standards and a lack of predictability and certainness of the law.

4 Conclusions

This article demonstrated that decisions taken autonomously by domestic courts to deny sovereign immunity in response to prior wrongful acts by another state cannot be justified as countermeasures. In principle, domestic courts may be involved in the adoption of a countermeasure decided by the government, which is the only organ entitled to take countermeasures under international law. Domestic courts are not able to make the highly political and discretionary decisions at the basis of the adoption of countermeasures and are not tasked with the representation of the state in its international affairs. Rather, only political organs have this ability, and only they are authorized to convey to other states the will of the forum state.

Even in the very few cases where denial of sovereign immunity may be considered, in principle, to be a countermeasure, a state would struggle to comply with the substantive and procedural requirements of countermeasures set forth by international

[149] See Stephan, *supra* note 130, at 80; Vezzani, *supra* note 9, at 74–75. See also Franchini, *supra* note 9, at 58–62, who, correctly, claims that it is impossible to assess *ex ante* the proportionality of such a countermeasure, but rather, it can only be ascertained *ex post*, case-by-case, taking into account, *in concreto*, how many claims have been issued.

[150] ARSIWA, *supra* note 10, Art. 49(1).

[151] For instance, the Cuban decisions against the US sanctions have not been implemented and proved ineffective to change the US attitude towards Cuba. See US Library Congress, Laws Lifting Sovereign Immunity: Cuba, *supra* note 52.

[152] ARSIWA, *supra* note 10, Art. 49(3).

[153] See the discussion in Vezzani, *supra* note 9, at 58.

[154] See Giegerich, *supra* note 68, at 234; Vezzani, *supra* note 9, at 55.

law. The reason for this difficulty lies in the consideration that the rules on countermeasures, as they have emerged in state practice and have been codified by the ILC, are based on the premise that countermeasures are taken only by the political organs of the state.

Accordingly, taking into account the absence of any claim of the forum state that its courts are acting in countermeasure, it is possible to conclude that the denial of sovereign immunity as a countermeasure is unlawful without a prior determination of the government, and very impractical even if based on such a determination.