

**JURISDICTIONAL COUNTERMEASURES:  
THE USE OF JURISDICTION AND IMMUNITY  
FOR THE IMPLEMENTATION OF  
INTERNATIONAL RESPONSIBILITY**

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# ABSTRACT

## JURISDICTIONAL COUNTERMEASURES:

### THE USE OF JURISDICTION AND IMMUNITY FOR THE IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY

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This thesis examines whether breaches of the rules of jurisdiction and immunity can be justified as lawful means for the implementation of international responsibility in the form of countermeasures. Countermeasures are circumstances precluding the wrongfulness of conduct that seeks to induce compliance with the obligations of cessation, reparation, and non-repetition stemming from the commission of internationally wrongful acts. First, the thesis surveys state practice in four subject areas: prescriptive jurisdiction, adjudicative jurisdiction, state immunity, and immunity of state officials. For each area, it determines the general rules of customary international law and identifies state practice that is *prima facie* inconsistent with these rules. It shows that, while much of this practice is potentially in breach of the rules of jurisdiction and immunity, it frequently occurred in response to prior wrongful acts of other states with a view to inducing them to comply with their international obligations. For this reason, this practice presents the structure of potential countermeasures. These countermeasures, which affect the rules of jurisdiction and immunity, are collectively referred to as ‘jurisdictional countermeasures’. Next, the thesis examines the function that the countermeasures framework serves with respect to the customary rules of jurisdiction and immunity. It demonstrates that jurisdictional countermeasures may act as a safety valve allowing for temporary suspension of these rules in exceptional circumstances, and as a second line of defence when states seek to bring about a change in customary international law. Then, the thesis examines the legality of jurisdictional countermeasures by testing them against the customary requirements of countermeasures as codified in the ILC Articles on State Responsibility. It shows that several measures affecting jurisdiction and immunity are capable of meeting these requirements. Finally, the thesis assesses some normative implications of recognising jurisdictional countermeasures.

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Concepción Escobar Hernández, ‘Fifth report on the immunity of State officials from foreign criminal jurisdiction’, UN Doc A/CN.4/701 (14 June 2016).....	216, 237
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ILC, Report on the Work of Its Forty-First Session [1989] 2(2) YBILC 111 .....	149
ILC, ‘Report on the work of Its Forty-Fourth session’ (1992) UN Doc A/47/10 .....	12
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ILC, ‘Report on the Work of Its Forty-Eight Session’ (1996) UN Doc A/51/10.....	129, 267
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ILC, ‘Report on the work of Its Fifty-Second session’ (2000) UN Doc A/CN.4/513 .....	298
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ILC, ‘Report on the Work of Its Fifty-Eight Session, Annexes’ (2006) UN Doc A/61/10 .....	27
ILC, Report on the Work of its Sixty-Ninth Session (2017) UN Doc A/72/10 .....	216, 237
ILC, Report on the Work of Its Seventieth Session (2018) UN Doc A/73/10 .....	143
ILC Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum, UN Doc A/CN.4/596 (2008).....	198, 199, 200, 201, 202, 209, 212, 213, 214
James Crawford, Third Report on State Responsibility (2000) II(1)YBILC 3 ..	267, 269, 271, 276, 288, 290, 293, 295, 298, 299
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Roman Kolodkin, ‘Second report on immunity of State officials from foreign criminal jurisdiction’, UN doc A/CN.4/631 (10 June 2010).....	213, 215, 216, 237
Roman Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, UN doc A/CN.4/601 (29 May 2008).....	198, 213
Sompong Suchartikul, Fifth Report on Jurisdictional Immunities of States and Their Property, [1983] 2(1) YBILC 41 .....	148
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Working Group on Arbitrary Detention, Deliberation No 9 (24 December 2012) UN Doc A/HRC/22/44230	

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IBA, Report of the Task Force on Extraterritorial Jurisdiction (2009) .....	81
IDI, Régime des représailles en temps de paix, Résolution (1934) 38 AIDI 708 .....	13
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# 1. INTRODUCTION

This Chapter introduces the research project. Section 1.1 illustrates the background and significance of the research, by situating the thesis in the existing literature and identifying the research objectives. Section 1.2 describes the adopted research framework. Section 1.3 clarifies some methodological choices and Section 1.4 defines the scope of the research and the structure of the thesis.

## 1.1. Background, significance, and objectives of the research

Among the corollaries of state sovereignty—the ‘basic constitutional doctrine of the law of nations’<sup>1</sup>—the principles of jurisdiction and immunity are some of the most elusive. Both are expressions of sovereign independence and equality, which they realise by allocating competences among states.<sup>2</sup> Yet, the boundaries of such allocation of competences are difficult to define and considerable uncertainty continues to surround the content of these rules.

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<sup>1</sup> James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 431. See generally Hans Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1943) 53 YLJ 207; Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 RdC 1, 48; Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 297; Martti Koskenniemi, ‘The Future of Statehood’ (1991) 32 HarvILJ 397; Christoph Schreuer, ‘The Warning of the Sovereign State: Towards a New Paradigm for International Law’ (1993) 4 EJIL 447; Samantha Besson, ‘Sovereignty’, *MPEPIL* (2011).

<sup>2</sup> See Rosalyn Higgins, *Problems and Process* (OUP 1995) 56; Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 65; Crawford, *Principles* (n 1) 432.

Jurisdiction is the power of the state to regulate the conduct of natural and legal persons.<sup>3</sup> While international law treats the state as a single unit,<sup>4</sup> jurisdiction is frequently analysed in its three components: (i) the power to make laws (prescriptive jurisdiction); the power to subject individuals and entities to the authority of judicial bodies (adjudicative jurisdiction); and (iii) the power to implement laws through coercive means (enforcement jurisdiction).<sup>5</sup> The presumption common to all three is that jurisdiction is primarily territorial and cannot be exercised outside the territory of the state without a specific basis under international law.<sup>6</sup> That said, prescriptive and adjudicative jurisdiction have undergone significant expansion over the years. Territory as the basis of prescriptive jurisdiction is increasingly unsuited for the regulation of global phenomena such as international trade, migration, environment, cyber-activities, and so forth.<sup>7</sup> States have

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<sup>3</sup> See generally Frederick A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 RdC 1; Michael Akehurst, 'Jurisdiction in International Law' [1972] BYIL 145; Derek Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1983) 53 BYIL 1; Frederick Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 RdC 9; Bernard Oxman, 'Jurisdiction of States', *MPEPIL* (2007); Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 187, 192; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 5; Crawford, *Principles* (n 1) 440. cf *Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Rep Series A/B No 53, 43.

<sup>4</sup> See Roger O'Keefe, 'The Doctrine of Incorporation Revisited' (2009) 79 BYIL 7, 56; Crawford, *Principles* (n 1) 440.

<sup>5</sup> See Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 292–293. Restatement (Third) of US Foreign Relations Law § 401(a). Jurisdiction to adjudicate is at times absorbed in the other two components; see, eg, Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICJ 735, 735; Crawford, *Principles* (n 1) 456. See further Section 3.1.

<sup>6</sup> See Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (n 3) 20; Alex Mills, *The Confluence of Public and Private International Law* (CUP 2009) 236; Ryngaert (n 3) 36; Crawford, *Principles* (n 1) 440.

<sup>7</sup> See Dan Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft' (2015) 109 AJIL Unbound 69; Stephen Allen and others, 'Defining State Jurisdiction and Jurisdiction in International Law' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019); Paul Schiff Berman, 'Jurisdictional Pluralism' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019). For a critique, see Uta Kohl, 'Territoriality and Globalization' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019).

sought to assert their jurisdiction on the basis of ever weaker connections, to the point that the study of ‘extraterritorial jurisdiction’ came to identify a discrete area of enquiry in international law.<sup>8</sup> Similarly, developments in human rights law (particularly the right of access to justice<sup>9</sup>) and international criminal law prompted domestic courts to exercise their adjudicative jurisdiction in the absence of any connection between the forum state and the relevant conduct. This type of ‘universal’ jurisdiction remains one of the most controversial topics of contemporary international law.<sup>10</sup>

The rules of immunity complement those of jurisdiction by exempting the state and its representatives from the exercise of adjudicative and enforcement jurisdiction by the courts of other states.<sup>11</sup> As far as state immunity is concerned, most states adopt a theory of restrictive immunity which distinguishes between (immune) acts performed in the exercise of sovereign authority and other (non-immune) transactions that are not unique to

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<sup>8</sup> See Vaughan Lowe, *Extraterritorial Jurisdiction* (Grotius 1983); Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996); Anthony J Colangelo, ‘What Is Extraterritorial Jurisdiction?’ (2013) 99 Cornell L Rev 1303; Cedric Ryngaert, ‘Whither Territoriality? The European Union’s Use of Territoriality to Set Norms with Universal Effects’ in Cedric Ryngaert, Erik Molenaar and Sarah Nouwen (eds), *What’s Wrong with International Law?* (Brill 2015) 436. See further Section 2.1.

<sup>9</sup> See Devika Hovell, ‘The Authority of Universal Jurisdiction’ (2018) 29 EJIL 427, 449.

<sup>10</sup> See Luc Reydam, ‘The Rise and Fall of Universal Jurisdiction’ in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 337; Sienho Yee, ‘Universal Jurisdiction: Concept, Logic and Reality’ (2011) 10 CJIL 503; Wolfgang Kaleck and Patrick Kroker, ‘Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?’ (2018) 16 JICJ 165; Maximo Langer and Mackenzie Eason, ‘The Quiet Expansion of Universal Jurisdiction’ (2019) 30 EJIL 779.

<sup>11</sup> See generally Gerald Fitzmaurice, ‘State Immunity from Proceedings in Foreign Courts’ (1933) 14 BYIL 101; Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 BYIL 220; Ian Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 167 RdC 113; Christoph Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988); Gerhard Hafner, Marcelo Kohen and Susan Carolyn Breau, *State Practice Regarding State Immunities* (Martinus Nijhoff 2006); Xiaodong Yang, *State Immunity in International Law* (CUP 2012); Hazel Fox and Philippa Webb, *The Law of State Immunity* (rev&upd 3rd edn, OUP 2015); Crawford, *Principles* (n 1) 470.

the state.<sup>12</sup> With respect to the immunity of state officials, a distinction is drawn between personal immunity (which extends to all acts performed by a restricted number of high-ranking representatives of the state) and functional immunity (which covers ‘official acts’ performed by all individuals acting on behalf of the state).<sup>13</sup> Not unlike the rules of jurisdiction, the rules of both state immunity and the immunity of state officials have faced significant challenges in recent years. Demands for accountability for serious violations of international humanitarian law have driven courts in a number of states to lift the immunity of states and state officials regardless of the ‘sovereign’ or ‘official’ nature of the acts at the basis of the claims.<sup>14</sup> In turn, these events triggered protests from other states and inter-state litigation which continues to this date.<sup>15</sup>

All these developments have generated much academic commentary. Most contributions dedicated to these topics focus on assessing the extent to which new instances of state practice challenged existing rules of jurisdiction and immunity. Nevertheless, little attention has been devoted to one element that is common to many of these departures from

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<sup>12</sup> See Pierre-Hugues Verdier and Erik Voeten, ‘How Does Customary International Law Change? The Case of State Immunity’ (2015) 59 *International Studies Quarterly* 209; Crawford, *Principles* (n 1) 471. See further Section 4.1.

<sup>13</sup> See Micaela Frulli, *Immunità e crimini internazionali* (Giappichelli 2007); Van Alebeek (n 2) 8; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2015) 2. See further Section 5.1.

<sup>14</sup> See, eg, Richard Garnett, ‘The Defence of State Immunity for Acts of Torture’ (1997) 18 *AustYBIL* 97; Lee Caplan, ‘State Immunity, Human Rights, and Jus Cogens’ (2003) 97 *AJIL* 741; Kate Parlett, ‘Immunity in Civil Proceedings for Torture: The Emerging Exception’ [2006] *EHRLR* 49; Alexander Orakhelashvili, ‘State Immunity and Hierarchy of Norms’ (2007) 18 *EJIL* 955; Lorna McGregor, ‘Torture and State Immunity’ (2007) 18 *EJIL* 903; Van Alebeek (n 2); Mizushima Tomonori, ‘Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means’ (2008) 71 *MLR* 734; Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 *EJIL* 815.

<sup>15</sup> At the time of writing, two cases dealing with immunity are under deliberation by the ICJ: *Immunities and Criminal Proceedings (Equatorial Guinea v France)* <[www.icj-cij.org/en/case/163](http://www.icj-cij.org/en/case/163)>; and *Certain Iranian Assets (Iran v USA)* <[www.icj-cij.org/en/case/164](http://www.icj-cij.org/en/case/164)>.

established rules of jurisdiction and immunity. Many of these measures were taken with the declared goal of *reacting to prior internationally wrongful acts of other states*. No research to date has sought to capture the extent and significance of the exercise of jurisdiction and denial of immunity as ‘responses’ to international wrongs. This gap is striking and the importance of addressing it should be clear once these unilateral responses are contextualised.

The language of ‘responses’ or ‘reactions’ to wrongful acts of other states belongs to the law of international responsibility, and particularly to the rules governing the implementation of state responsibility.<sup>16</sup> This concerns the actualisation of the secondary obligations (cessation, reparation, non-repetition) that stem from the commission of internationally wrongful acts.<sup>17</sup> The decentralised nature of international law means that the implementation of international responsibility is achieved primarily through the actions of individual states.<sup>18</sup> In principle, this can be accomplished through unfriendly but lawful acts (retorsions), or through measures consisting of temporary (justified) breaches of certain international obligations (countermeasures).<sup>19</sup> The latter proved to be the ‘most sensitive topic’ during the second reading of the Draft Articles on State Responsibility prepared by the International Law Commission (ILC Articles or ARSIWA).<sup>20</sup> These

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<sup>16</sup> See Linos-Alexandre Sicilianos, *Les réactions décentralisées à l’illicite* (LGDJ 1990) 6.

<sup>17</sup> See Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in ILC, Rep on the Work of Its Fifty-third Session (2018) UN Doc A/56/10 [hereinafter ARSIWA and Commentary] 116.

<sup>18</sup> See Section 1.2.

<sup>19</sup> See Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Brill Nijhoff 1988) 4.

<sup>20</sup> James Crawford, ‘Overview of Part Three of the Articles on State Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 936.

difficulties are reflected in academic scholarship where, despite various studies dedicated to the subject of countermeasures,<sup>21</sup> opinions are still divided on a number of crucial issues.

When the exercise of jurisdiction and denial of state immunity occur in response to international wrongs of another state, it may be wondered whether these acts are in essence means to implement international responsibility. If so, then the question is no longer (or not exclusively) whether they are compatible with the customary rules of jurisdiction and immunity or whether new rules have emerged to accommodate novel exceptions. If these measures are incompatible with existing rules of jurisdiction and immunity, they might still qualify as (lawful) countermeasures pursuant to the law of state responsibility.

The intersection between the laws of jurisdiction, immunity, and state responsibility reveals two shortcomings of the current academic debate. First, despite studies identifying a great variety of countermeasures,<sup>22</sup> there is no clarity as to whether these can consist of breaches of the rules of jurisdiction and immunity. In 2005, the Chairperson of the UN Committee against Torture suggested that ‘as 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.’<sup>23</sup> While endorsed by some authors,<sup>24</sup>

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<sup>21</sup> See, eg, Charles Leben, ‘Les contre-mesures inter-étatiques et les réactions à l’illicite dans la société internationale’ (1982) 28 AFDI 9; Zoller (n 19); Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988); Sicilianos (n 16); Denis Alland, ‘The Definition of Countermeasures’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Lori Damrosch, ‘Enforcing International Law Through Non-Forcible Measures’ (1998) 1997 RdC 9; Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011).

<sup>22</sup> See, eg, Zoller (n 19) 81; Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 13–146; Tzanakopoulos (n 21) 154.

<sup>23</sup> Committee Against Torture, ‘Summary Record of the Second Part (Public) of the 646th Meeting’ (6 May 2005) CAT/C/SR.646/Add.1, [67].

<sup>24</sup> Craig Forcese, ‘De-Immunizing Torture: Reconciling Human Rights and State Immunity’ (2007) 52 McGillLJ 127; Patricia Tarre Moser, ‘Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations’ (2012) 4 GoJIL 809; Simone Vezzani, ‘Sul diniego delle

this proposition has remained somewhat isolated.<sup>25</sup> Recognition of countermeasures affecting the rules of jurisdiction is even more unique.<sup>26</sup> Second, there is little clarity as to the extent to which domestic courts can participate in the taking of countermeasures—an indispensable premise for countermeasures in the form of exercise of jurisdiction and denial of immunity. Nollkaemper noted that the extent to which domestic courts engage in the implementation of international responsibility is ‘largely unexplored territory’.<sup>27</sup> While their role as agents for the implementation of responsibility of the forum state has gradually been acknowledged,<sup>28</sup> the contribution of domestic courts to the implementation of responsibility of foreign states is believed to be limited precisely because of constraints stemming from the rules of jurisdiction and immunity.<sup>29</sup>

This thesis is the first comprehensive study of the role that the exercise of jurisdiction and denial of immunity have in the implementation of international responsibility of other states. The main question it seeks to answer is: can the rules of

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immunità dalla giurisdizione di cognizione ed esecutiva a titolo di contromisura’ (2014) 97 RivDirInt 36; Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Impunity’ (2007) 18 EJIL 903; Andrea Atteritano, ‘Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years’ (2010) 19 ItYBIL 33; Kimberley Trapp and Alex Mills, ‘Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of Germany v Italy’ (2012) 1 CJIntl&CompL 153.

<sup>25</sup> For a critique, see Tom Ruys, ‘Immunity, Inviolability and Countermeasures’ in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 704–708.

<sup>26</sup> A rare example is Kimberley Trapp, ‘Jurisdiction and State Responsibility’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 363.

<sup>27</sup> André Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’ (2007) 101 AJIL 760, 763.

<sup>28</sup> See André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 166.

<sup>29</sup> See Simon Olleson, ‘Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility’ (2013) 26 LJIL 615, 624; Stephan Wittich, ‘Domestic Courts and the Content and Implementation of State Responsibility’ (2013) 26 LJIL 643, 644.

jurisdiction and immunity be breached by means of countermeasures in order to implement the international responsibility of other states?

In answering this question, this study makes four main contributions to existing scholarship. First, it advances an original framework to assess state practice that to date has been analysed mainly in terms of compliance/breach of the rules of jurisdiction and immunity. Examining state practice through the lens of implementation of international responsibility adds granularity to the study of jurisdiction and immunity and introduces a new possibility—that some of these instances may be breaches of international law justifiable as countermeasures. Second, this study adds to the knowledge of countermeasures by showing not only that it is possible for countermeasures to consist of breaches of the rules of jurisdiction and immunity, but that states already make extensive use of such measures. To be sure, the goal of this study is not to show that *all* the cases analysed herein are countermeasures, but that the legal *framework* of countermeasures may provide a justification for what would otherwise be breaches of international law, as long as states comply with the relevant requirements. Third, this study demonstrates that domestic courts can and do engage in the implementation of international responsibility of foreign states—in fact, they can even take countermeasures so long as certain conditions are met. Fourth, because the rules of jurisdiction and immunity are almost entirely based on customary international law,<sup>30</sup> the study of countermeasures in this area also sheds light on the role that countermeasures have with respect to the development of customary international law. This study shows that countermeasures may act as: either (a) a ‘safety

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<sup>30</sup> The exceptions being treaty-based exercise of universal jurisdiction and diplomatic and consular immunities: see Sections 3.2.1 and 5.3.2.

valve’ to ensure that states faced with flagrant breaches of international law have a way to react to these wrongs without compromising the integrity of the rules of jurisdiction and immunity; and/or (b) as a ‘second line of defence’ for states that wish to promote a change in customary international but are faced with the possibility of this change not materialising due to the opposition of other states. All these concepts will be explored throughout the thesis and particularly in Chapter 6.

## **1.2. Research framework: unilateral non-forcible measures for the implementation of state responsibility under international law**

International law has relied on the unilateral action of individual states for its enforcement since its early days.<sup>31</sup> Traditionally, the instruments through which states would seek redress for violations of their rights were reprisals. Oppenheim defined them as:

the injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.<sup>32</sup>

Reprisals were widely accepted in classic international law scholarship and in the early practice of international arbitral tribunals.<sup>33</sup> According to Kelsen, reprisals provided the

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<sup>31</sup> See Mary O’Connell, *The Power and Purpose of International Law* (OUP 2008) 19.

<sup>32</sup> Lassa Oppenheim, *International Law: A Treatise, Vol II: War and Neutrality* (3rd edn, Longmans, Green 1921) 44 [33].

<sup>33</sup> See Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (Archibald Colin Campbell tr, MW Dunne 1901) 311; Emer de Vattel, *The Law of Nations* (Joseph Chitty tr, T & JW Johnson 1852) 283 [342]; Karl Strupp, *Eléments du droit international public universel, européen et américain* (Rousseau 1927) 229–231; Alfred Verdross, ‘Règles générales du droit international de la paix’ (1929) 30 RdC 271, 491–493; Roberto Ago, ‘Le Délit International’ (1939) 68 RdC 419, 536–537. See also *Responsabilité de l’Allemagne à raison des dommages*

coercive element necessary to regard international law as a system of law.<sup>34</sup> Due to its being a ‘primitive legal system’, international law did not offer a centralised mechanism of determination of legal situations and imposition of sanctions; these were left to the self-help of individual states.<sup>35</sup> Each state determined for itself whether its rights had been violated and could resort to limited, but justified breaches of international law in the form of reprisals as ‘sanctions’ for failing to comply with the law.<sup>36</sup> In so doing, the injured state acted as an organ of the international community suppressing wrongful behaviour of non-compliant states.<sup>37</sup>

Despite its evolution over the last century, international law has remained at its heart a decentralised system of law.<sup>38</sup> While in some areas—such as trade and human rights—a partial centralisation has occurred (and, as a consequence, recourse to unilateral measures has been severely restricted),<sup>39</sup> general international law has yet to provide a compulsory, centralised mechanism of law determination and law enforcement (and may never do so).<sup>40</sup> In the absence of ‘vertical’ enforcement by the international community,

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*causés dans les colonies portugaises du sud de l’Afrique (Portugal/Allemagne)* (1928) II RIAA 1011, 1026 [Naulilaa].

<sup>34</sup> In his view, any legal system to be regarded as such must provide sanctions for failing to comply with its norms: Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1992) 108.

<sup>35</sup> *ibid* 108–109.

<sup>36</sup> *ibid* 109.

<sup>37</sup> Hans Kelsen, ‘Théorie générale du droit international public’ (1932) 42 RdC 117, 126. See also Josef Kunz, ‘The Theory of International Law’ (1938) 32 ASIL Proc 23, 31; Ago (n 33) 424–31.

<sup>38</sup> Higgins (n 2) 247; Denis Alland, ‘Countermeasures of General Interest’ (2002) 13 EJIL 1221, 1223; Tzanakopoulos (n 21) 114.

<sup>39</sup> For example, in the WTO resort to unilateral measures is pre-approved and monitored by the Dispute Settlement Body (DSB); see Chapter 2 n 38.

<sup>40</sup> UN institutions are plainly not vested with such competence: see Tzanakopoulos (n 21) 115.

self-help remains the default instrument to ensure compliance with the law.<sup>41</sup> Thus, reprisals continue to exist in contemporary international law, though the term—long associated with measures involving the use of force—has acquired a ‘pejorative connotation’<sup>42</sup> and is exclusively used for measures taken during armed conflicts.<sup>43</sup>

The role once occupied by reprisals is now played by ‘countermeasures’.<sup>44</sup> Their function is at times described in terms of ‘sword’ and ‘shield’.<sup>45</sup> As a ‘sword’, countermeasures are coercive instruments for the implementation of international responsibility. The ILC design of the system of international responsibility is built on the notion that, upon the commission of an internationally wrongful act—regardless of the content of the *primary* obligations breached—‘a new legal relationship’ is established between the wrongdoing state and the injured state.<sup>46</sup> The wrongdoing state comes under a novel set of *secondary* obligations to cease the wrongful conduct and to make full

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<sup>41</sup> See Hersch Lauterpacht, ‘La théorie des différends non justiciables en droit international’ (1930) 34 RdC 494, 526–528; Zoller (n 19) 68; David Bederman, ‘Counterintuiting Countermeasures’ (2002) 96 AJIL 817, 818; Linos-Alexander Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 EJIL 1127, 1138; Antonios Tzanakopoulos, ‘The Right to Be Free from Economic Coercion’ (2015) 4 CJICL 616.

<sup>42</sup> See (1979) I YILC 59 [6] (Francis).

<sup>43</sup> ARSIWA Commentary 75 [3].

<sup>44</sup> Ibid. See *Air Service Agreement of 27 March 1946 between the United States of America and France (USA/France)* (1978) 18 RIAA 417 [81]-[82]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) (1997) ICJ Rep 56 [87]. See also Leben (n 21) 18–19; Zoller (n 19) 36; Focarelli (n 22) 2–3; Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 4–7; Federica Paddeu, *Justification and Excuse in International Law* (CUP 2018) 228–236; Crawford, *Principles* (n 1) 572–573. The theoretical framework on which countermeasures rest, is disputed. It has been argued that the power to take countermeasures is a ‘liberty’ or a ‘faculty’ of the injured state because the wrongdoing state, by engaging in wrongful conduct, has forfeited the legal protection of its rights: Paddeu 274.

<sup>45</sup> See Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) 79 BYIL 264, 267; Federica Paddeu, ‘Countermeasures’, *MPEPIL* (2015) [11]. See also ARSIWA Commentary 128 [1-2].

<sup>46</sup> ARSIWA Commentary 86.

reparation for the injury caused.<sup>47</sup> Countermeasures are directed towards the fulfilment of these obligations.<sup>48</sup> In this sense, they moved away from the traditional role of reprisals as ‘sanctions’, or actions ‘the object of which is to inflict punishment’ for past wrongdoings.<sup>49</sup> During the ILC discussion of the Draft Articles, the punitive element was deemed ‘a matter of concern’ since it could be exploited by the injured state to ‘satisfy political and economic interests’ unrelated to the breach.<sup>50</sup> For this reason, subsequent iterations of the ILC Articles and contemporary scholarship stress that countermeasures cannot have punitive goals;<sup>51</sup> the lawful aim of countermeasures is inducement of the responsible state to comply with the law.<sup>52</sup> They exert pressure on the wrongdoing state to direct its future behaviour towards the fulfilment of its secondary obligations.<sup>53</sup>

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<sup>47</sup> See ARSIWA Commentary 87 [2]. On the distinction between primary and secondary rules, see James Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 AJIL 874, 876.

<sup>48</sup> See ARSIWA Commentary, art 49(2). See also *Application of Interim Accord (FYROM v Greece)* [2011] ICJ Rep 644, 691-692 [164].

<sup>49</sup> Roberto Ago, Eighth report on State responsibility, UN Doc A/CN.4/318 [79]. See Sicilianos (n 16) 32–33; Paddeu (n 44) 269.

<sup>50</sup> See ‘Summary Record of the 14th Meeting of the 6th Committee’ (2000) UN Doc A/C.6/55/SR.14, 9 [46] (Tanzania).

<sup>51</sup> See Zoller (n 19) 59; Sicilianos (n 16) 50–56; Alessandra Gianelli, *Adempimenti preventivi all’adozione di contromisure internazionali* (Giuffrè 1997) 615–616; Jansen Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’ [2009] VandJTransnatlL 1393, 1420. Similar views were expressed in previous studies: eg Dionisio Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi 1902) 95 (with regard to measures taken by non-injured states).

<sup>52</sup> To the extent that countermeasures react to previous wrongs some punitive elements cannot be fully eliminated: ILC, ‘Report on the work of its forty-fourth session’ (1992) UN Doc A/47/10, 24 [154]; Sicilianos (n 16) 56–57. Still, punishment relates exclusively to the past, while coercion is forward looking; see Zoller (n 19) 58.

<sup>53</sup> Zoller (n 19) 51; Sicilianos (n 16) 57.

Cessation of the wrongful act is often the main aim.<sup>54</sup> In seeking to bring wrongful behaviour to an end, countermeasures reaffirm the validity of the primary rule and of the rule of law in general.<sup>55</sup> At the same time, if the wrongful act has ceased, the only objectives that a state can lawfully pursue are assurances and guarantees of non-repetition,<sup>56</sup> and reparation.<sup>57</sup> The oft-quoted standard governing reparation is that it ‘must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’<sup>58</sup> This can take three forms: ‘restitution, compensation and satisfaction, either singly or in combination’.<sup>59</sup> The choice between different forms of reparation depends on the circumstances of each case, bearing in mind that the injured state remains free to elect its preferred option, or combination of options.<sup>60</sup>

As a ‘shield’, countermeasures preclude the wrongfulness of acts that are, in essence, breaches (‘non-performance for the time being’<sup>61</sup>) of international obligations of the state taking them. This preclusive effect operates strictly at the level of secondary

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<sup>54</sup> See Sicilianos (n 16) 61; Gianelli (n 51) 551; Olivier Corten, ‘The Obligation of Cessation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 545; Dawidowicz (n 44) 298.

<sup>55</sup> ARSIWA Commentary 89 [5].

<sup>56</sup> See *LaGrand (Germany/USA)* (Judgment) [2001] ICJ Rep 466 [46]-[48].

<sup>57</sup> See Sicilianos (n 16) 59; Dawidowicz (n 44) 300.

<sup>58</sup> *Factory at Chorzów* (Merits) [1928] PCIJ Ser A No 13, 47. See generally Brigitte Stern, ‘The Obligation to Make Reparation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 563.

<sup>59</sup> ARSIWA Commentary, art 34.

<sup>60</sup> ARSIWA Commentary 120 [6]. In practice, states do not often make claims for reparation: Sicilianos (n 16) 60.

<sup>61</sup> ARSIWA Commentary, art 49(2) 129-130. Early studies referred to this as the ‘derogative nature’ of countermeasures: IDI, *Régime des représailles en temps de paix, Résolution, art 1* (1934) 38 AIDI 708. See also *Naulilaa* (n 33) 1026 (speaking of ‘suspensive effect’); Zoller (n 19) 41-42.

norms; countermeasures do not alter the content of a state's obligations, but provide an exemption from responsibility for non-performance so long as the conditions justifying them persist.<sup>62</sup> This aspect also serves to distinguish countermeasures from retorsions, which are unfriendly acts not involving breaches of primary obligations.<sup>63</sup> Since there is no general obligation to maintain friendly relations,<sup>64</sup> retorsions can be used at any time and for whatever reason.<sup>65</sup> As such, retorsions can also be responses to prior wrongful acts of other states. When this occurs, it may be difficult to distinguish retorsions from countermeasures, particularly if both measures are taken at the same time.<sup>66</sup>

From this overview, it results that a measure taken by a state presents the *structure of a countermeasure* when it involves three elements: (i) the measure consists of an act (or omission) inconsistent with international law (breach); (ii) the measure responds to a prior wrongful act by another state (prior wrong); (iii) the measure is taken to induce the wrongdoing state to comply with its secondary obligations (instrumental character). When these conditions are met, the measure does not automatically amount to a *lawful countermeasure* but can be characterised as a *potential countermeasure*. As a safeguard against abuse, countermeasures are subject to a number of substantive and procedural

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<sup>62</sup> In order to describe these effects, countermeasures have been classified as 'justifications': Paddeu (n 44) 227. The ILC used the more neutral term 'circumstances precluding wrongfulness': ARSIWA Commentary 72. The nature of these circumstances is disputed; see Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 405.

<sup>63</sup> ARSIWA Commentary 128 [3]. See Sicilianos (n 16) 7; Dawidowicz (n 44) 27–28.

<sup>64</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 16 [273]; Zoller (n 19) 12–13; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 310.

<sup>65</sup> For this reason, in Kelsen's view retorsion is not a sanction: Hans Kelsen, *Principles of International Law* (Rinehart 1952) 25. See Tzanakopoulos (n 41) 148.

<sup>66</sup> Dawidowicz (n 44) 29.

requirements. These depend on the specific circumstances of each case and, for this reason, they are the subject of separate consideration in Chapter 6.

### 1.3. Methodological issues

The first obstacle to countermeasures as potential justifications for breaches of the law of jurisdiction and immunity is that states rarely, if ever, *expressly* rely on this mechanism to justify their conduct with respect to these rules.<sup>67</sup> However, jurisdiction and immunity are by no means the only instances where it is difficult to discern whether a state is resorting to countermeasures. While states frequently adopt countermeasures in the conduct of international relations, they rarely do so in explicit terms.<sup>68</sup> States avoid labelling their acts as ‘sanctions,’ ‘reprisals,’ and even the more neutral ‘countermeasures’ due to the negative connotations these terms carry.<sup>69</sup> Moreover, some reluctance towards admitting a breach of international obligations should be expected from states, regardless of how convincing their judgement on the justified nature of the breach may be. This is the reason why the place *par excellence* where countermeasures are pleaded is before international courts and tribunals; in these settings, countermeasures can be advanced as an alternative argument failing the first line of defence according to which the conduct under scrutiny has not breached international law.<sup>70</sup> As a result, identifying potential countermeasures requires a

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<sup>67</sup> See Moser (n 24) 827; Ruys (n 25) 707. Iran passed laws labelled as ‘countermeasures’ that also contain provision on denial of immunity; see Section 4.4. Italy came very close to rely on countermeasures in its oral pleadings before the ICJ: *Jurisdictional Immunities*, Public sitting held on Tuesday 13 September 2011 (CR 2011/18) 47-50.

<sup>68</sup> See Gianelli (n 51) 131; Tzanakopoulos (n 21) 188; Dawidowicz (n 44) 14.

<sup>69</sup> See Tzanakopoulos (n 21) 188.

<sup>70</sup> See Section 6.1.2.

degree of interpretation. What matters, for the purpose of this analysis, is not whether states externalised their ‘belief’ that they were taking countermeasures, but whether the *substance* of their measures presents the *distinctive features* of countermeasures. In other words, the identification of countermeasures requires an objective standard, not a subjective one.

The selection of state practice that meets these requirements is the result of three methodological choices. First, in order to isolate potential *breaches* of the rules of jurisdiction and immunity, the thesis engages at some length with the identification of the relevant rules of customary international law by examining evidence of state practice and *opinio juris* in the form of domestic court judgments, official statements, resolutions of international organisations, and so forth.<sup>71</sup> Weight is also attached to decisions of international courts and tribunals, and academic writings as subsidiary sources for the determination of rules of international law.<sup>72</sup> At the same time, this study does not aim to conclusively establish the content of the rules of jurisdiction and immunity. If the selected instances of state practice lack the first feature of countermeasures (breach), but present the other two (response to prior wrong and instrumental character), the relevant measures still qualify as means to implement international responsibility in the form of retorsion.<sup>73</sup> As retortions are subject to no constraints under general international law, the relevant measures remain lawful.

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<sup>71</sup> See Michael Wood, Second report on identification of customary international law (22 May 2014) UN Doc A/CN.4/672, 42ff; Michael Wood, Third report on identification of customary international law (27 March 2015) UN Doc A/CN.4/682, 9ff.

<sup>72</sup> See Third Report Wood (n 71) 41-46. See generally Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 35-40.

<sup>73</sup> See text at n 63 above.

Second, in order to determine that *prima facie* breaches of international law may qualify as countermeasures the thesis establishes that they occurred in response to *prior wrongful acts*. As a rule, the assertion of a state concerning the existence of an internationally wrongful act is not sufficient for the preclusive effect of countermeasures to operate; the prior wrong must have actually occurred.<sup>74</sup> This aspect, however, must be weighed against the absence of a compulsory, centralised system of determination of international responsibility. The result is that each state takes countermeasures on the basis of its own autonomous interpretation of the legal situation and it does so at its own risk.<sup>75</sup> If the state misjudged the situation which in its view legitimised the measure, its conduct will be unlawful. From a methodological standpoint, this means that it is not necessary to conclusively ascertain the existence of the prior wrongful act. The claim of a state that an internationally wrongful act occurred can be taken at face value so long as the reasons advanced to support it are at least ‘plausible’.<sup>76</sup> This is sufficient to establish that the state is invoking the countermeasures framework, regardless of whether its conditions are actually met.

Third, in order to demonstrate their *instrumental character*, the thesis shows that these breaches of international law are directed at inducing the wrongdoing state into

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<sup>74</sup> See Section 6.2.2.

<sup>75</sup> *ibid.*

<sup>76</sup> A standard of plausibility seems appropriate for circumstances that must be unilaterally assessed by states. For example, a WTO panel found that a measure taken under Article XXI(b)(iii) GATT must ‘meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.’: *Russia: Measures Concerning Traffic in Transit—Panel Report* (5 April 2019) WT/DS512/R [7.138]. See also Wesley Cann, Jr, ‘Creating Standards and Accountability for the Use of the WTO Security Exception’ (2001) 26 YJIL 413; Roger Alford, ‘The Self-Judging WTO Security Exception’ [2011] *UtahLRev* 697.

complying with its secondary obligations. At the same time, this need not be the *only* aim.<sup>77</sup> More often than not, countermeasures will serve a multitude of purposes.<sup>78</sup> In this regard, a state's motives and the legal justification for its action must be kept separated.<sup>79</sup> So long as the measure is clearly directed at inducing the target state to comply with its secondary obligations, it qualifies as a potential countermeasure.<sup>80</sup> When assessing state practice, the coercive goal of a measure is rarely made explicit by the state taking it; more often than not, it is deduced from the circumstances of the case. If a measure is taken 'in response to' an ongoing wrongful act, there is a presumption that the measure is directed at bringing that wrongful act to an end.<sup>81</sup> In certain cases, it is the context in which the measure is taken that reveals its instrumental character. For example, denial of state immunity occurs in tort proceedings against foreign states that are, by definition, geared towards obtaining reparation (often in the form of monetary compensation) from the state.<sup>82</sup> Finally, certain measures may themselves realise the primary obligations that the wrongdoing state failed to fulfil, thus bringing the wrongful omission to an end.<sup>83</sup> All these elements are the subject of detailed analysis in the upcoming chapters.

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<sup>77</sup> See Dawidowicz (n 44) 294.

<sup>78</sup> See I YILC (2000) 301 [90] (Brownlie).

<sup>79</sup> See *Nicaragua* (n 64) 70-71 [127]; Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 RdC 16, 59; Vaughan Lowe, *International Law* (OUP 2007) 57.

<sup>80</sup> Only measures where the punitive or ulterior aims totally eclipse the instrumental aims must be deemed unlawful; see Dawidowicz (n 44) 295. See also *Interim Accord* (n 48) sep op Simma 696 [3] (speaking of countermeasures as 'juridical fig leaves' in these cases).

<sup>81</sup> See Focarelli (n 22) 124 (arguing that a wrongful reaction to a wrongful act qualifies, for this reason alone, as a countermeasure).

<sup>82</sup> See Chapter 4.

<sup>83</sup> See Section 6.2.4.

The selection of domestic legislation, case law, and other instances of state practice analysed in this study has been made through the use of law reports, law reviews, and other databases primarily in English, French, and Italian. The thesis does not seek to cover all instances of state practice concerning jurisdiction and immunity, but to provide a framework to explain and potentially justify some of this practice. This notwithstanding, this study attempts to be as exhaustive as possible in the treatment of the topic within the boundaries set out below.

#### **1.4. Scope of the research and structure of the thesis**

In order to provide a comprehensive and coherent account, some choices have been made concerning the scope of the doctoral research. The study draws a line between prescriptive and adjudicative jurisdiction, on the one hand, and enforcement jurisdiction, on the other, and it deals exclusively with the former. This is because, despite the developments illustrated above, enforcement jurisdiction continues to be strictly territorial in the first instance.<sup>84</sup> There are few indications that countermeasures may provide a justification for breaches of the rules of enforcement jurisdiction.<sup>85</sup> Moreover, enforcement in the territory of another state may trigger the prohibition on the use of force which is explicitly excluded from countermeasures.<sup>86</sup>

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<sup>84</sup> See *SS 'Lotus' (France/Turkey)* (1927) PCIJ Rep Ser A no 10, 18–19; Crawford, *Principles* (n 1) 462.

<sup>85</sup> For Trapp, countermeasures in the context of enforcement jurisdiction are either unavailable or unnecessary: (n 26) 375–376.

<sup>86</sup> See Section 6.2.6.

Within these boundaries, the study deals both with aspects pertaining to the exercise of jurisdiction *and* denial of immunity.<sup>87</sup> This is because the two sets of rules are complementary; they are the expression of the same principles of sovereign equality and independence, and they are both concerned with the allocation of competences among states.<sup>88</sup> Jurisdiction determines the remit within which a state asserts its sovereign authority.<sup>89</sup> Immunity ensures that when states find themselves within the jurisdictional remit of other states, their sovereign functions are not subject to the scrutiny of other states. In this sense, jurisdiction and immunity are synergic; the consequence of a denial of immunity is the exercise of jurisdiction, as immunity itself is a bar to the exercise of jurisdiction. It is unlikely that countermeasures that apply to one do not apply to the other.

As far as immunity is concerned, the scope of this study does not extend to the rules governing immunity from execution. Execution against sovereign assets of a state triggers a different set of rules in international law.<sup>90</sup> If a judgment is obtained in breach of the rules on jurisdictional immunity, its execution does not necessarily import further elements of illegality. For example, when a judgment is satisfied against state property that is

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<sup>87</sup> The joint study of jurisdiction and immunity is not uncommon; see, eg, Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015).

<sup>88</sup> See text at n 2 above.

<sup>89</sup> Since international law allows the exercise of competing state jurisdictions, the goal of the rules of jurisdiction is to minimise, not to eliminate, clashes between states; see Ryngaert (n 3) 146–147.

<sup>90</sup> See 28 USC §§ 1609-1611 (2018). A codification of the relevant rules of customary international law can arguably be found in UN Convention on Jurisdictional Immunities of States and Their Property, arts 18–19 (2 December 2004) (not yet in force). See Chester Brown and Roger O’Keefe, ‘State Immunity from Measures of Constraint in Connection with Proceedings Before a Court’ in Roger O’Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 292.

exclusively used for commercial purposes, its execution is lawful.<sup>91</sup> While some states adopted measures that challenge the rules governing immunity from execution,<sup>92</sup> a more detailed analysis of these issues is reserved for further studies.

Finally, the study of jurisdiction considers separately jurisdiction to prescribe and jurisdiction to adjudicate. Some commentators question whether adjudicative jurisdiction is a discrete type of jurisdiction or merely a combination of prescription and enforcement.<sup>93</sup> The thesis does not take a position on this debate; the choice to separate prescriptive and adjudicative jurisdiction is dictated by pragmatic considerations. As explained in Chapter 3, the instrumental character of certain exercises of jurisdiction becomes more evident when courts assert their authority over specific cases. The way in which the study conveys this distinction is by using the term ‘assertion’ of (prescriptive) jurisdiction when referring exclusively to the former, and ‘exercise’ of (adjudicative) jurisdiction when including the latter.

The thesis proceeds as follows. The next four chapters assess state practice in four areas: prescriptive jurisdiction (Chapter 2); adjudicative jurisdiction (Chapter 3); state immunity (Chapter 4); immunity of state officials (Chapter 5). Each chapter starts with a short but comprehensive account of how international law governs the relevant subject. It then identifies instances of state practice that depart from the general rules and explains how these instances are more likely breaches of international law than permitted

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<sup>91</sup> See August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ (2006) 17 EJIL 803, 821; Brown and O’Keefe (n 90) 323.

<sup>92</sup> eg Terrorism Risk Insurance Act 28 USC § 1610 (2018) (removing restraints from attachment of frozen state assets with regard to terrorism-related disputes). See Allison Taylor, ‘Another Front in the War on Terrorism?’ (2003) 45 ArizLRev 533, 542.

<sup>93</sup> See text at n 5 above.

exceptions. At the same time, each chapter shows that these measures are often taken in response to perceived wrongful acts of other states as a way to induce them to comply with their obligations of cessation and reparation. Therefore, the conclusion of each chapter is that these instances of state practice present the distinctive features of countermeasures. Subsequently, Chapter 6 elaborates the concept of ‘jurisdictional countermeasures’, that is, countermeasures in the form of exercise of jurisdiction and denial of immunity. First, it illustrates the functions that countermeasures have with respect to the development of customary rules of jurisdiction and immunity, thus providing an explanation for the use of countermeasures in this context. Next, it assesses the extent to which breaches of the rules of jurisdiction and immunity may qualify as *lawful* countermeasures by testing them against the rules of customary international law governing substantive and procedural requirements of countermeasures. Finally, the thesis addresses some potential objections to the use of jurisdictional countermeasures.

## 2. ASSERTION OF PRESCRIPTIVE JURISDICTION

This Chapter examines whether the assertion of exorbitant prescriptive jurisdiction can be justified pursuant to the structure of countermeasures. Section 2.1 identifies assertions of prescriptive jurisdiction that are likely to be exorbitant, i.e. not based on internationally accepted bases of jurisdiction. Section 2.2 surveys examples of exorbitant jurisdictional assertions that lacked one of the features of countermeasures and shows that reactions to these measures were largely negative, calling into question their legality. Section 2.3 analyses examples where the countermeasures framework could provide a justification for exorbitant assertions of jurisdiction and illustrates that these cases have encountered little to no opposition in the practice of states.

### 2.1. Identifying exorbitant assertions of prescriptive jurisdiction

The principles governing the assertion of prescriptive jurisdiction—particularly in the criminal context<sup>1</sup>—have been the subject of the earliest debate concerning the regulation of state jurisdiction in international law.<sup>2</sup> This was prompted by the ICJ decision in the

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<sup>1</sup> The extent to which international law regulates the exercise of civil jurisdiction is still disputed; see Frederick Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 RdC 1, 73; Michael Akehurst, ‘Jurisdiction in International Law’ [1972] BYIL 145, 170; Uta Kohl, ‘Jurisdiction in Cyberspace’ in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015) 32; James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 455. See further Section 3.3.

<sup>2</sup> ‘Harvard Research Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29 AJIL Supp 439; Bernard Oxman, ‘Jurisdiction of States’, *MPEPIL* (2007) [10]; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 29; Crawford (n 1) 441.

*Lotus* case.<sup>3</sup> To date, this decision is quoted mainly to take distance from the ‘much maligned dictum’<sup>4</sup> according to which ‘[r]estrictions upon the independence of States cannot ... be presumed’ and thus, absent a prohibitive rule to the contrary, states enjoy the widest discretion to assert jurisdiction.<sup>5</sup> The criticism levelled at this passage is well known.<sup>6</sup> Following the judgment, state practice moved in the opposite direction and rules of jurisdiction developed through a ‘permissive rule’ approach. According to this approach, states asserting jurisdiction are required to invoke the existence of certain ‘connecting factors’ (or ‘heads of jurisdiction’) with the situation over which jurisdiction is asserted in order for their claims to be lawful.<sup>7</sup> The guiding principle is that, in order to minimise conflicts of sovereignty, states should not be allowed to assert jurisdiction if they do not have a legally sanctioned interest to do so.<sup>8</sup>

States have put forward a number of connecting factors to justify their assertion of jurisdiction. As Akehurst stated, ‘[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests.’<sup>9</sup> Following this test, territory and nationality—being two basic attributions of statehood—are virtually uncontested heads of

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<sup>3</sup> *SS ‘Lotus’ (France v Turkey)* (1927) PCIJ Rep Ser A no 10.

<sup>4</sup> Douglas Guilfoyle, ‘SS Lotus (France v Turkey) (1927)’ in Cameron Miles and Eirik Bjorge (eds), *Landmark Cases in Public International Law* (Bloomsbury 2017) 90.

<sup>5</sup> *Lotus* (n 3) 18–19.

<sup>6</sup> See James Brierly, ‘The “Lotus” Case’ (1928) 44 LQR 154; Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 RdC 1, 56–57; Rosalyn Higgins, *Problems and Process* (OUP 1995) 76–77; Ryngaert (n 2) 33–38; An Hertogen, ‘Letting Lotus Bloom’ (2015) 26 EJIL 901; Guilfoyle (n 4) 101.

<sup>7</sup> Oxman (n 2) [10]; Ryngaert (n 2) 29–48; Crawford (n 1) 442.

<sup>8</sup> See Higgins (n 6) 56; Ryngaert (n 2) 38–39.

<sup>9</sup> Akehurst (n 1) 176. See also Ryngaert (n 2) 40–41.

jurisdiction, though the latter is used more sparingly by some states.<sup>10</sup> Views differ as to whether the principle of territoriality can be stretched so as to include jurisdiction over acts that merely display certain ‘effects’ in the territory of the asserting state.<sup>11</sup> Early assertions by the United States on the basis of this doctrine in anti-trust matters were opposed by other states,<sup>12</sup> but today the doctrine is used—with some caveats—by the EU as well.<sup>13</sup> Alongside these, nearly all states assert jurisdiction over acts that threaten vital interests of the state (the so-called ‘protective principle’), though there is precious little consensus on what these vital interests may be.<sup>14</sup>

Other heads of jurisdiction are more controversial. When nationals of a state are harmed by the conduct of foreign nationals abroad (‘passive personality’ principle), it is not completely clear whether the state of nationality can assert its jurisdiction.<sup>15</sup> This would

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<sup>10</sup> Frederick Mann, ‘The Doctrine of International Jurisdiction Revisited After Twenty Years’ (1984) 186 RdC 9, 20; Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 BYIL 187, 196; Ryngaert (n 2) 49, 104; Christopher Staker, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 320; Crawford (n 1) 442–444.

<sup>11</sup> See Akehurst (n 1) 153; Jason Coppel, ‘A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law Student Contributions’ (1993) 6 LJIL 73; Austen Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’ (2008) 61 VandLRev 1455; Stephen Coughlan and others, *Law Beyond Borders* (Irwin 2014) 83; Crawford (n 1) 447.

<sup>12</sup> *US v Aluminum Corp of America*, 148 F2d 416, 443 (1945). The doctrine has since been refined according to a standard of ‘reasonableness’: *Timberlane Lumber Corp v Bank of America*, 549 F2d 597 (1976); *Mannington Mills v Congoleum Corp*, 595 F2d 1287 (1979).

<sup>13</sup> Agreement between the European Communities and the Government of the United States on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (4 June 1998) OJ L173/28. See further Ryngaert (n 2) 82–83; Crawford (n 1) 447.

<sup>14</sup> See Monika Krizek, ‘The Protective Principle of Extraterritorial Jurisdiction’ (1988) 6 BUIntlLJ 337; Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth 1994); Ryngaert (n 2) 114; Crawford (n 1) 446. Currency, immigration, and economic offences are frequently punished through this head of jurisdiction, though this doctrine may also have sinister consequences. For example, Nazi Germany used it to prosecute foreign Jews abroad; see Philip C Jessup, *Transnational Law* (Yale UP 1956) 50.

<sup>15</sup> Several judges in *Lotus* rejected this head of jurisdiction; see *Lotus* (n 3) diss op Loder 36, diss op Finlay 55–8, diss op Nyholm 62, and diss op Moore 91–3. According to Mann, it should be treated ‘as an excess of jurisdiction’; Mann (n 1) 92. See further Akehurst (n 1) 163; Geoffrey Watson, ‘The Passive Personality Principle’ (1993) 28 TexasIntlLJ 1; Higgins (n 6) 65; Ryngaert (n 2) 110–113.

expose potential perpetrators to the laws of an undetermined number of states.<sup>16</sup> Yet, some practice seems to provide support for the legality of this principle with respect to certain offences, often identified as being ‘terrorist’ in character.<sup>17</sup> Finally, states are able to assert their jurisdiction over a limited number of offences even in the absence of any other generally recognised head of jurisdiction pursuant to the principle of universality.<sup>18</sup> The principle itself is uncontroversial, but the exercise of this type of jurisdiction by the courts of some states—particularly when occurring without the presence of the accused—has generated much debate.<sup>19</sup> Because of this, universal jurisdiction is addressed separately in the next Chapter.

From this overview, it should be evident that the most problematic cases arise when jurisdiction is asserted outside the territory of the state. Extraterritorial prescriptive jurisdiction *per se* is not contrary to international law; however, the weaker the connection to the asserting state, the more likely the assertion will trigger protests and be ‘exorbitant’ (i.e. unlawful).<sup>20</sup> The ‘problem of extraterritorial jurisdiction’<sup>21</sup> has grown to such a degree that, in 2006, the ILC Secretariat recommended it for inclusion in the long-term programme

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<sup>16</sup> See *Lotus* (n 3) diss op Moore 92; Ryngaert (n 2) 110–111.

<sup>17</sup> *United States v Yunis*, 681 F Supp 896 (DDC 1988); Restatement (Third) of US Foreign Relations Law (1987) § 402. See also John McCarthy, ‘The Passive Personality Principle and Its Use in Combatting International Terrorism’ [1989] *FordhamIntLJ* 298; Higgins (n 6) 66.

<sup>18</sup> Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *JICJ* 735, 740.

<sup>19</sup> See Section 3.1.

<sup>20</sup> Oscar Schachter, ‘International Law in Theory and Practice: General Course in Public International Law’ (1982) 178 *RdC* 16, 246.

<sup>21</sup> Vaughan Lowe, ‘The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution’ (1985) 34 *ICLQ* 724. See also Vaughan Lowe, *Extraterritorial Jurisdiction* (Grotius 1983); Cecil Olmstead, ‘Jurisdiction’ (1989) 14 *YJIL* 468; Brigitte Stern, ‘L’extra-territorialité «revisitée»: où il est question des affaires Alvarez-Machain, Pâte de Bois et de quelques autres’ (1992) 38 *AFDI* 239; Higgins (n 6) 74; Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996).

of work of the Commission.<sup>22</sup> The question of the legality of extraterritorial jurisdiction has emerged in different fields. The ‘most important’<sup>23</sup> and most well-developed in terms of state practice and doctrinal analysis is the area of competition law.<sup>24</sup> Early attempts by the United States to assert jurisdiction over foreign companies for acts performed abroad that had restrictive effects on US competition sparked intense debate and had an important role in shaping the debate on extraterritoriality.<sup>25</sup> In this context, for example, the United States first sought to expand the notion of nationality of companies in order to justify exorbitant jurisdictional assertions that were vigorously objected by other states.<sup>26</sup> These measures present some features of countermeasures, in that they amount to potential breaches of international law taken with a coercive aim on foreign entities. However, the instrumental character of these measures lies primarily in the protection of economic interests of the asserting state. It is difficult to identify a prior internationally wrongful act to which these measures respond and, thus, claims of implementation of international responsibility in this context are rather weak.<sup>27</sup>

An area where extraterritorial jurisdiction may be more easily directed at implementing international responsibility is that of unilateral trade control measures. These

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<sup>22</sup> ILC, ‘Report on the Work of Its Fifty-Eight Session, Annexes’ (2006) UN Doc A/61/10, 229.

<sup>23</sup> Lowe, *Extraterritorial Jurisdiction* (n 21) xv.

<sup>24</sup> See Karl Meessen, ‘Antitrust Jurisdiction under Customary International Law’ (1984) 78 AJIL 783.

<sup>25</sup> Text at n 12 above.

<sup>26</sup> See Aidan Robertson and Marie Demetriou, “‘But That Was in Another Country...’: The Extraterritorial Application of US Antitrust Laws in the US Supreme Court’ (1994) 43 ICLQ 417, 418; Ryngaert (n 2) 108. Responses include: Protection of Trading Interests Act 1980, c 11 (United Kingdom); Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Australia). See Vaughan Lowe, ‘Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980’ (1981) 75 AJIL 257.

<sup>27</sup> See Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Brill Nijhoff 1988) 97–98.

range from measures affecting specific exports and imports between two states, to restrictions on commercial and financial activities of private entities, to flat-out embargos and seizure of assets.<sup>28</sup> Unilateral trade control measures have been an instrument of foreign policy, if not flat out warfare, for centuries.<sup>29</sup> In the common parlance, they are often equated to ‘economic sanctions’,<sup>30</sup> though the term ‘sanctions’ can be misleading.<sup>31</sup> These are instruments used by states to shape their economic policies and take a stance vis-à-vis other states with which they share economic interests. While their effectiveness is often criticised,<sup>32</sup> they remain a fundamental part of international relations.<sup>33</sup>

As a matter of principle, states enjoy considerable latitude in taking these measures. Since states are (legally) free to shape their internal and external economic policies,<sup>34</sup> they

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<sup>28</sup> Armand De Mestral and T Gruchalla-Wesierski, *Extraterritorial Application of Laws of Export Control Legislation: Canada and the USA* (Martinus Nijhoff 1990); Andrea Bianchi, ‘Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony Between European and US Approaches’ (1992) 35 GYIL 366; Karl Meessen, *International Law of Export Control: Jurisdictional Issues* (Graham & Trotman 1992); Andrea Bianchi, *L’applicazione extraterritoriale dei controlli all’esportazione* (CEDAM 1995); Cedric Ryngaert, ‘Extraterritorial Export Controls (Secondary Boycotts)’ (2008) 7 CJIL 625.

<sup>29</sup> See Donald Dekieffer, ‘Foreign Policy Trade Controls and the GATT’ (1988) 22 JWT 73; Andreas Lowenfeld, ‘Trade Controls for Political Ends: Four Perspectives’ (2003) 4 CJIL 355. See also J Dapray Muir, ‘The Boycott in International Law’ [1974] JIntL&Econ 187.

<sup>30</sup> Economic sanctions can also include measures of a non-commercial character, such as the withdrawal of foreign assistance; see Barry Carter, ‘Economic Sanctions’, *MPEPIL* (2011) [6].

<sup>31</sup> The term ‘sanctions’ is generally reserved for coercive measures under Art 41 of the UN Charter; Alain Pellet and Alina Miron, ‘Sanctions’, *MPEPIL* (2013) [4].

<sup>32</sup> eg Lowenfeld, ‘Trade Controls’ (n 29) 355. See further Section 6.3.1.

<sup>33</sup> See Muir (n 29) 192. See generally Barry Carter, *International Economic Sanctions: Improving the Haphazard US Legal Regime* (CUP 1988); Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004); Andreas Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 847; Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Bloomsbury 2016).

<sup>34</sup> See *Nicaragua* [1986] ICJ Rep 14, 108, [205]; Laura Picchio Forlati, ‘The Legal Core of International Economic Sanctions’ in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004) 101.

may refrain from having economic relationships with other states for any reason. As early as 1933, Lauterpacht argued that:

[i]n the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory.<sup>35</sup>

While this remains true today, the number of international norms concerning trade between states has multiplied over the years. As a result, the opportunities to use trade control as a tool of foreign policy without engaging international law have reduced. First, according to the principle of non-intervention, states must refrain from adopting measures ‘bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely’.<sup>36</sup> Second, the General Agreement on Tariffs and Trade (GATT) and the legal framework of the World Trade Organisation (WTO), together with other trade agreements, contain various provisions that limit the extent to which states can impose new burdens on imports and exports and/or limit foreign investments.<sup>37</sup> The WTO also contains a special regime for reactions to illegality that severely limits the scope for decentralised unilateral implementation of international responsibility.<sup>38</sup>

Alongside these limitations, various types of trade control measures are likely to be unlawful on a plain application of the principles of jurisdiction. This is best illustrated through an example. If state X implements a measure restricting trade with state Y, state X

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<sup>35</sup> Hersch Lauterpacht, ‘Boycott in International Relations’ [1933] BYIL 125, 130.

<sup>36</sup> *Nicaragua* (n 34) 106. Yet, there is no ‘core’ of sovereign prerogatives: see Carter (n 30) [30]; Antonios Tzanakopoulos, ‘The Right to Be Free from Economic Coercion’ (2015) 4 CJICL 616, 623.

<sup>37</sup> See generally Lowenfeld, *International Economic Law* (n 33) 28.

<sup>38</sup> Resort to countermeasures must be approved and monitored by the DSB; see Joost Pauwelyn, ‘Enforcement and Countermeasures in the WTO’ (2000) 94 AJIL 335; Petros Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ (2000) 11 EJIL 763.

issues a command (i.e. asserts its jurisdiction) so that individuals and entities must refrain from trading in state Y. Imagine two scenarios. In the first scenario, state X orders its nationals and/or those within its territory to suspend trade with state Y. In the second scenario, state X orders nationals of state Z within the territory of state Z to interrupt their trade relationships with state Y. In the first scenario, the assertion of jurisdiction is lawful—save for other international obligations—because grounded upon nationality and territoriality, two uncontroversial heads of jurisdiction. However, unilateral trade control measures are only effective if they ensure enough participation to exert pressure on the target state. In other words, the more the sanctioning states, the more successful the sanction. The state adopting the measure would thus have strong incentives to bring third states within the sanctions thread.<sup>39</sup> Thus, state X may be willing to extend its jurisdiction according to the model illustrated in the second scenario. This can lead to a clash between the jurisdictional authority of the sanctioning state and the sovereignty of other states. In the absence of a connection between state X and the addressees of the measure, the assertion of jurisdiction contained therein is unlawful.

In the context of boycotts, the protective principle is often invoked to justify extraterritorial assertions of jurisdiction.<sup>40</sup> It is, however, highly questionable whether a general claim that exports carried out by foreign nationals abroad threaten the security of the nation is sufficient to ground such an assertion of jurisdiction.<sup>41</sup> Other principles have

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<sup>39</sup> See Charlotte Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016) 104–105.

<sup>40</sup> See Meessen, *International Law of Export Control* (n 28) 12. See text at n 14.

<sup>41</sup> See De Mestral and Gruchalla-Wesierski (n 28) 24; Stern (n 21) 7.

also been invoked to this end, including universality and the effects doctrine.<sup>42</sup> However, leaving aside the controversy surrounding these jurisdictional bases, it is unclear how they can find application in the case of boycotts. Indeed, some believe that secondary boycotts—that is, measures through which a state demands that nationals of other states refrain from trading or investing in a state that is subject to a primary boycott<sup>43</sup>—are necessarily unlawful because of the exorbitant nature of the associated assertion of jurisdiction.<sup>44</sup>

Against this backdrop, a narrow reading of unilateral trade control measures based exclusively on the rules governing jurisdiction fails to provide a satisfactory answer concerning the legality of these measures. Trade control measures can be taken for a variety of reasons. They can be used to express disagreement with policies of other states which are perfectly lawful but are contrary to the interests of the sanctioning state.<sup>45</sup> At the same time, trade control measures can be taken in response to perceived violations of international law by other states. When this occurs in order to coerce the wrongdoing state to cease the wrongful act and provide reparation, the measure presents the distinctive features of a countermeasure. Even if the measure is in breach of the rule of prescriptive jurisdiction, it may be justified pursuant to the secondary rules of state responsibility.

Using this test, it is possible to distinguish two groups of exorbitant trade control measures. Section 2.2 examines a first group of measures that lack one or more of the

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<sup>42</sup> European Communities, Comments on the US Regulations Concerning Trade with the USSR (1982) 21 ILM 891, 897; De Mestral and Gruchalla-Wesierski (n 28) 20–26; Stern (n 21) 7.

<sup>43</sup> Christopher Joyner, ‘Boycott’, *MPEPIL* (2009) [4]. See Brigitte Stern, ‘Can the United States Set Rules for the World? A French View’ (1997) 31 *JWT* 5; Ryngaert (n 28) 626.

<sup>44</sup> Stern (n 43) 7; Sarah Cleveland, ‘Norm Internalization and US Economic Sanctions’ (2001) 26 *YJIL* 1, 56.

<sup>45</sup> See Carter (n 30) [32].

features of countermeasures and are plainly unlawful: measures not reacting to internationally wrongful acts (Section 2.2.1); and measures reacting to internationally wrongful acts but targeting third states (Section 2.2.2). Section 2.3 analyses a second group of measures that present the structure of countermeasures and may therefore be justified breaches of prescriptive jurisdiction: measures exclusively targeting the wrongdoing state (Section 2.3.1); measures amounting to belligerent reprisals (Section 2.3.2); and peacetime measures implementing the responsibility of all targeted states (Section 2.3.3). Each category will be analysed in turn.

## **2.2. Measures lacking the features of countermeasures**

### **2.2.1. Measures not reacting to internationally wrongful acts**

Without a plausible claim that a trade control measure is responding to the prior wrongful act of another state, the assertion of jurisdiction contained therein is necessarily unlawful if not supported by a sufficiently established basis of jurisdiction. The most notorious incident involving exorbitant assertions of this kind is the ‘Siberian Pipeline’ dispute.<sup>46</sup> After martial law was imposed in Poland in 1981 with the alleged connivance of the Soviet Union, the United States put in place a number of measures forbidding the export of oil

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<sup>46</sup> Ann dePender Zeigler, ‘Siberian Pipeline Dispute and the Export Administration Act: What’s Left of Extraterritorial Limits and the Act of State Doctrine’ (1983) 6 *HoustonJIntlL* 63; Klaus Bockslaff, ‘The Pipeline Affairs of 1981/82: A Case History’ (1984) 27 *GermanYBIntlL* 28; Rusen Ergec, *La Compétence Extraterritoriale à La Lumière Du Contentieux Sur Le Gazoduc Euro-Sibérie* (Bruylant 1984); Pieter Jan Kuyper, ‘The European Community and the US Pipeline Embargo: Comments on Comments’ (1984) 27 *GermanYBIntlL* 72; Vaughan Lowe, ‘International Law Issues Arising in the Pipeline Dispute: The British Position’ (1984) 27 *GermanYBIntlL* 54; Karl Meessen, ‘Extraterritoriality of Export Control: A German Lawyer’s Analysis of the Pipeline Case’ (1984) 27 *GermanYBIntlL* 97; Detlev F Vagets, ‘The Pipeline Controversy: An American Viewpoint’ (1984) 27 *GermanYBIntlL* 38.

and gas machinery to the USSR.<sup>47</sup> While the situation in Poland raised concerns throughout Europe, it remained controversial whether the USSR participated in internationally wrongful acts. The lurking suspicion was that the United States took the opportunity to sabotage a pipeline project that Western European countries and the Soviet Union had been developing for a few years and which the US government opposed on policy grounds.<sup>48</sup> Indeed, the US measures contained far-reaching assertions of jurisdiction extending export controls to: (i) ‘persons subject to the jurisdiction of the United States’, which also included US-owned or controlled companies in foreign states;<sup>49</sup> (ii) machinery of US origin, wherever located; (iii) equipment produced abroad by foreign companies under licences issued by US companies.<sup>50</sup>

Unlike previous trade control measures adopted by the United States—which, as will be seen, raised only sporadic protests—these measures were met with vocal and overwhelming dissent by other states. The European Community and the United Kingdom submitted their protests to the US State Department, labelling the US measures ‘unacceptable’ for they ‘run counter to the two generally accepted bases of jurisdiction in international law; the territoriality and the nationality principles’.<sup>51</sup> The United Kingdom,

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<sup>47</sup> Controls on Exports of Petroleum Transmission and Refining Equipment to the USSR, 47 FedReg 141 (January 5, 1982). These measures were further given extraterritorial effects in June 1982: Statement of the President on Extension of US Sanctions, June 18, 1982, 18 WeeklyCompPres Docs 820 (June 21, 1982), implemented in 47 FedReg 27250 (June 24, 1982).

<sup>48</sup> See Lowenfeld, ‘Trade Controls’ (n 29) 361.

<sup>49</sup> On the ‘control theory’ of jurisdiction, see text at n 65.

<sup>50</sup> See Vaughan Lowe, ‘Public International Law and the Conflict of Laws: The European Response to the United States Export Administration Regulations’ (1984) 33 ICLQ 515, 517; Lowenfeld, ‘Trade Controls’ (n 29) 362.

<sup>51</sup> EC, ‘Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, presented to the United States Department of State on 12 August 1982’, 21 ILM (1982) 891, 893 (asserting that companies incorporated in foreign companies cannot be considered nationals of the

France, West Germany, and Italy all took steps to ensure that their companies would continue to carry out their contractual obligations notwithstanding the US regulations.<sup>52</sup> A district court of the Netherlands also examined the legality of the regulations and concluded that the jurisdictional claims of the United States were not supported by any of the ‘generally accepted rules of international law’.<sup>53</sup>

As a result of the outrage they caused and of the intense political pressure put on the United States by its European allies, these measures were withdrawn after a few months.<sup>54</sup> However, the Siberian Pipeline dispute has remained a milestone for the establishment of customary rules of jurisdiction.<sup>55</sup> For the purpose of the present analysis, the US failure to plausibly establish the international responsibility of the Soviet Union—and explain under which theory the European states should have borne the negative consequences<sup>56</sup>—reinforces the conclusion that these measures could not be justified as countermeasures.

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United States and that goods and technology can have no nationality). See also ‘Note no 177 presented by the British Government on 18 October 1982’, reprinted in Lowe (1983) 212.

<sup>52</sup> The United Kingdom, for example, invoked the provision of the Protection of Trading Interests Act. See Bianchi, ‘Extraterritoriality’ (n 28) 409–414; Lowenfeld, ‘Trade Controls’ (n 29) 363.

<sup>53</sup> *Compagnie Europeene des Petroles v Sensor Nederland* (1983) 22 ILM 66, 73.

<sup>54</sup> 47 FedReg 51858 (November 18, 1982).

<sup>55</sup> See Lowenfeld, ‘Trade Controls’ (n 29) 365.

<sup>56</sup> See Zoller (n 27) 100.

## 2.2.2. Measures reacting to internationally wrongful acts but targeting third states

A state willing to adopt trade control measures to implement the international responsibility of other states may find itself in a double bind. On the one hand, the effectiveness of the measure increases if multiple states are involved in exerting pressure on the wrongdoing state. On the other hand, the choice to react to a specific wrong through coercive means is often—albeit not always<sup>57</sup>—a faculty and not a duty of the state.<sup>58</sup> Other states generally have no duty to follow the sanctioning state in the adoption of countermeasures and may not even be able to do so without the appropriate legal standing.<sup>59</sup> Moreover, the concrete measures to be taken in response to a wrongful act are, within the limits imposed by international law,<sup>60</sup> a matter of free choice of the responding state.<sup>61</sup> The sanctioning state may attempt to capture the broadest range of addressees by advancing remote jurisdictional grounds or remaining ambiguous as to the jurisdictional basis that supports its measures.<sup>62</sup> However, this is problematic. If the sanctioning state directs its measures at foreign nationals for acts performed in the territory of third states, the breach of the rules of jurisdiction cannot be justified as a countermeasure. Countermeasures have a ‘relative preclusive effect’ in that they exempt states from international responsibility only to the

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<sup>57</sup> See Section 2.3.3.

<sup>58</sup> See Picchio Forlati (n 34) 117.

<sup>59</sup> See Section 6.2.3.

<sup>60</sup> See Articles 49-53 ARSIWA and Commentaries.

<sup>61</sup> Picchio Forlati (n 34) 171.

<sup>62</sup> On the meaning of this ambiguity, see Section 6.1.1.

extent that they target states responsible for prior wrongful acts.<sup>63</sup> Conversely, third states have a right *not to be targeted* by countermeasures.<sup>64</sup> If the state taking exorbitant trade control measures cannot plausibly explain why the obligations of the target states are engaged, its measures cannot be justified as countermeasures. The following examples from state practice confirm this tenet.

### ***US measures against Iran following the Tehran hostage crisis***

The United States has long implemented trade control measures that, at various stages, involved far-reaching assertions of jurisdiction. A substantial group of measures containing assertions of this kind followed the so-called ‘control theory’ of jurisdiction.<sup>65</sup> This mechanism was first introduced by the US Treasury in 1942, when the notion of ‘persons subject to the jurisdiction of the United States’ set out in the Trading With the Enemy Act of 1917 (TWEA)<sup>66</sup> was interpreted as including any organisation or corporation which is ‘owned or controlled’ by a US national or a person within US territory.<sup>67</sup> The control theory of jurisdiction is not based on a rule of international law and, in particular, it is inconsistent with the principle of nationality-based jurisdiction.<sup>68</sup> As it became clear in the Siberian Pipeline dispute,<sup>69</sup> companies incorporated in a state cannot be subject to the jurisdiction of a different state by virtue of the nationality of their shareholders. This principle was

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<sup>63</sup> Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 288–289.

<sup>64</sup> See Linos-Alexandre Sicilianos, *Les réactions décentralisées à l’illicite* (LGDJ 1990) 98–99; Tzanakopoulos (n 36) 625.

<sup>65</sup> Ryngaert (n 28) 627; Beaucillon (n 39) 113.

<sup>66</sup> Trading with the Enemy Act of 1917, 40 Stat 411 § 5(b).

<sup>67</sup> Public Circular No 18 (March 30, 1942), 7 FedReg 2495, 2503-2504.

<sup>68</sup> Ryngaert (n 2) 108; Andrea Bianchi, ‘Reply to Professor Maier’ in Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996) 94.

<sup>69</sup> See text at n 46.

recognised by the ICJ in *Barcelona Traction*, which affirmed that the ‘traditional rule’ is that the nationality of a corporation is that of the state where the latter is incorporated or has its registered office, though the state of the seat may also be relevant.<sup>70</sup> Since the assertion of jurisdiction based on the control theory is exorbitant, the cases relying on this theory shed further light on the interplay between jurisdiction and state responsibility.

In 1977, US Congress gave the President the power to regulate foreign economic transactions in case of peacetime emergencies through the International Emergency Economic Powers Act (IEEPA), which used the ‘persons subject to the jurisdiction of the United States’ formula.<sup>71</sup> The first set of measures taken under the IEEPA was the Iranian Assets Control Regulations,<sup>72</sup> which followed a series of executive orders proclaiming a national emergency after the 1979 hostage crisis.<sup>73</sup> These measures introduced an absolute ban on trade with Iran. As to their legality, the United States was clearly entitled to take countermeasures against Iran, considering that the ICJ had found that Iran was responsible for several violations of international law.<sup>74</sup> However, it is not clear on what basis it could impose restrictive measures on other states. In the event, the US measures did not elicit protest from third states potentially affected by the Regulations, many of which adopted

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<sup>70</sup> *Barcelona Traction, Light and Power Company (Belgium/Spain)* [1970] ICJ Rep 3 [70]. This is considered to be reflective of customary international law; see Stephan Wittich, ‘Barcelona Traction Case’, *MPEPIL* (2007) [19]. See also Giorgio Gaja, ‘Barcelona Traction, Light and Power Company (Belgium v Spain) (1970)’ in Cameron Miles and Eirik Bjorge (eds), *Landmark Cases in Public International Law* (Bloomsbury 2017) 317.

<sup>71</sup> 91 Stat 1626 § 203; 50 USC 1702; this was again interpreted as including US-owned or controlled companies in foreign states.

<sup>72</sup> 31 CFR 535.

<sup>73</sup> EO No 12170, 44 FedReg 65729 (1979); EO No 12205, 45 FedReg 24099 (1980).

<sup>74</sup> *United States Diplomatic and Consular Staff in Tehran (USA/Iran)* (Judgment) [1980] ICJ Rep 28, [95] [Tehran Hostages].

measures of their own against Iran.<sup>75</sup> The international condemnation of Iran for such blatant disregard of the rules of diplomatic law may have mitigated the clash between the United States and affected third states.<sup>76</sup> Thus, while in principle the effects of the measures on third states made them unlawful with respect to those states, affected states chose not to categorise them as such or at least not to invoke the responsibility of the United States for them. In this sense, this remains a rather exceptional case compared to those that followed.

### *US measures against Cuba*

Shortly after the Revolutionary Government took power in Cuba, the United States put in place some of the most longstanding trade control measures of the last decades.<sup>77</sup> While over time they became particularly controversial, at first these measures had a realistic claim to be responding to a series of purported international law violations.<sup>78</sup> One of the first acts adopted by the newly installed Cuban Government was the Agrarian Reform Act of 1959, pursuant to which large-scale expropriations were carried out against the payment of sums that the United States considered wholly inadequate.<sup>79</sup> The US Government made this point clear in a Note of Protest to its Cuban counterpart lamenting a ‘manifest

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<sup>75</sup> eg Iran (Temporary Powers) Act 1980, c 28 (United Kingdom); Iranian Economic Sanctions Act 1980 (Canada). On 22 April 1980, the foreign ministers of the EEC also agreed to implement unilateral sanctions: see Christopher Hill and Karen E Smith, *European Union Foreign Policy: Key Documents* (Routledge 2000) 317.

<sup>76</sup> cf Statement by Peter Blaker, Minister of State, Foreign and Commonwealth Office, HC Debs, vol 985, Written Answers, col 347 (22 May 1980) (‘Iran ... cannot expect to enjoy fruitful relations with the West while it continues to flout the basic principles of international law’).

<sup>77</sup> Nigel White, *The Cuban Embargo under International Law* (Routledge 2014) 142.

<sup>78</sup> See Stern (n 21) 20; White (n 77) 142.

<sup>79</sup> See Richard Allison, ‘Cuba’s Seizures of American Business’ (1961) 47 ABAJ 48, 49. See also James O’Connor, ‘Agrarian Reforms in Cuba, 1959-1963’ (1968) 32 Science & Society 169. This occurred at the height of newly-independent and developing states challenging the Hull Formula for compensation on which the US claims were based; see debate in Burns Weston, ‘The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth International Law of Expropriation’ (1981) 75 AJIL 437.

violation’ of international law.<sup>80</sup> In 1962, these protests were backed by the imposition of a total embargo on trade with Cuba.<sup>81</sup> The following year, the Cuban Assets Control Regulations (CACR) extended several trade restrictions to all ‘person[s] subject to the jurisdiction of the United States’ in the broad sense examined above.<sup>82</sup>

At this stage, the US measures provoked few negative reactions.<sup>83</sup> The plausible nature of the claim concerning the unlawfulness of the Cuban expropriations strengthened the US position. Moreover, the most severe consequences of the exorbitant jurisdictional assertions were alleviated by issuing special licences to US-owned or controlled companies in foreign states, which—although covered by the embargo—could demonstrate that local laws allowed trade with Cuba and no person in the United States was involved in the transactions.<sup>84</sup> The relaxation of the Cuban embargo came to an end with the Cuban Democracy Act (CDA) of 1992,<sup>85</sup> which forbade the issuance of special licences and restored the embargo in all its force.<sup>86</sup> The advent of the CDA is inexplicable in terms of international responsibility, as nothing had materially changed since the 1960s. The CDA mentions the Castro government’s ‘consistent disregard for internationally accepted

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<sup>80</sup> See Press Release No 397, Dept of State, July 16, 1960 in *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 463 (1964) (‘[T]he Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.’).

<sup>81</sup> ‘Proclamation 3447: Embargo on all trade with Cuba’ (February 3, 1962) 3 CFR 26-27.

<sup>82</sup> 31 CFR § 515.329.

<sup>83</sup> See Beaucillon (n 39) 114–115. Canada made representations before the US government against the CACR before amendments allowed for special licences; see De Mestral and Gruchalla-Wesierski (n 28) 166.

<sup>84</sup> 31 CFR § 515.559. From 1975, the policy of the US Treasury Department was to grant these licences ‘in appropriate cases’; see 40 FedReg 47, 108.

<sup>85</sup> Cuban Democracy Act, 106 Stat 2575 (codified at 22 USC 6001-6010).

<sup>86</sup> 22 USC 6005(a).

standards of human rights and for democratic values’ and ‘involvement in narcotics trafficking and support for the FMLN guerrillas in El Salvador.’<sup>87</sup> At the same time, it goes on to state that the ‘fall of communism in the former Soviet Union and Eastern Europe ... provides the United States ... with an unprecedented opportunity to promote a peaceful transition to democracy in Cuba’.<sup>88</sup> Less charitably, Ryngaert described it as the US attempt to ‘squeeze one of the last communist States in the world’.<sup>89</sup>

Measures pursuing a change of government in a foreign state cannot be justified as countermeasures, especially when affecting third states. For one, a right to democratic governance is far from clearly established in international law.<sup>90</sup> Even if it was, there is no clear connection between such a right and the obligations of other states. Indeed, the exorbitant jurisdictional assertions contained in the CDA elicited strong protests from other states. The EC Commission filed an official *démarche* to the US President stressing that:

[a]lthough the EC is fully supportive of a peaceful transition to democracy in Cuba, it cannot accept that the U.S. unilaterally determines and restricts EC economic and commercial relations with any foreign nation which has

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<sup>87</sup> 22 USC 6001.

<sup>88</sup> *ibid.*

<sup>89</sup> Ryngaert (n 28) 636.

<sup>90</sup> On the asserted emergence of a right to democratic governance, see Thomas Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46; James Crawford, ‘Democracy and International Law’ (1993) 64 BYIL 113. For a critical assessment, see Susan Marks, ‘What Has Become of the Emerging Right to Democratic Governance?’ (2011) 22 EJIL 507.

not been collectively determined by the U.N. Security Council as a threat to peace or order in the world of nations.<sup>91</sup>

Both the United Kingdom and Canada invoked the provisions of blocking statutes to curtail the extraterritorial effects of the CDA.<sup>92</sup> Mexico and other Latin American countries voiced similar discontent.<sup>93</sup> The UN General Assembly adopted a resolution titled ‘Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba’ by a vote of 59 to 3 with 71 abstentions.<sup>94</sup> The Resolution explicitly demanded that states refrain from implementing measures ‘whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction’.<sup>95</sup> The General Assembly has since adopted a new resolution each year condemning the extraterritorial measures of the United States against Cuba.<sup>96</sup> All these objections provide strong evidence against the legality of the US measures.

Despite the strong opposition encountered by the CDA, the United States enacted even stricter measures with the ‘Helms-Burton Act’ of 1996.<sup>97</sup> The Act contained a miscellany of allegations against Cuba, including: (i) the ‘continuing violations of fundamental human rights’ and use of torture; (ii) ‘illegal international narcotics trade’;

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<sup>91</sup> The EC Calls for Veto of the Cuban Democracy Act (8 October 1992) <[http://europa.eu/rapid/press-release\\_IP-92-800\\_en.htm](http://europa.eu/rapid/press-release_IP-92-800_en.htm)>.

<sup>92</sup> The Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, SI 1992/2449. See further Gabriel Wilner, ‘International Reaction to the Cuban Democracy Act’ (1993) 8 FlaJIL 401, 405–406.

<sup>93</sup> *ibid* 406.

<sup>94</sup> UNGA Res 19 (1992), UN Doc A/RES/47/19.

<sup>95</sup> *ibid*, preamble and [1].

<sup>96</sup> eg UNGA Res 72/4 of (2017) UN Doc A/RES/72/4.

<sup>97</sup> Cuban Liberty and Democratic Solidarity Act, 110 Stat 785, 22 USC 6021-6091. The events were precipitated by the shooting down of two planes of a US-based Cuban-American organisation by the Cuban Air Force: see Andreas Lowenfeld, ‘Congress and Cuba: The Helms-Burton Act’ (1996) 90 AJIL 419, 419.

and (iii) threats to ‘international peace and security by engaging in acts of armed subversion and terrorism’.<sup>98</sup> While the plausibility of these claims remains to be verified, the declared objective of the Act was regime change, as the restrictions contained in the Helms-Burton Act would last until the President certifies that a ‘democratically elected government’ is in power in Cuba.<sup>99</sup>

The new restrictions towards Cuba were draconian.<sup>100</sup> Yet, what struck most commentators was the aggressively exorbitant character of the jurisdictional claims contained in the Helms-Burton Act—a novelty even by US standards. The now infamous Titles III and IV of the Act establish that no person, wherever located and whatever their nationality, is permitted to ‘traffic’<sup>101</sup> in confiscated property that formerly belonged to US nationals or nationals of Cuba who later acquired US nationality.<sup>102</sup> These provisions—aimed at preventing dispersion of confiscated property at a moment where Cuba was opening up its market to foreign investors<sup>103</sup>—are exorbitant in two ways.

First, their geographical scope is virtually unlimited, since they apply to ‘any person or entity’ who traffics in confiscated property.<sup>104</sup> Congress justified this exorbitant

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<sup>98</sup> s 2, 110 Stat 786-788 (22 USC 6021).

<sup>99</sup> s 203, 110 Stat 809 (22 USC 6063). See also Stern (n 21) 9.

<sup>100</sup> See White (n 77) 105.

<sup>101</sup> As in ‘trade’ in the widest possible meaning, including ‘engag[ing] in a commercial activity using or otherwise benefiting from the confiscated property’; § 4(13), 110 Stat 790 (22 USC 6023). The use of a term with criminal connotations is deliberate; see Lowenfeld, ‘Trade Controls’ (n 29) 366.

<sup>102</sup> s 4(13), 110 Stat 790 (22 USC 6023).

<sup>103</sup> s 301, 110 Stat 814-815 (22 USC 6081) . See also Lowenfeld, ‘Congress and Cuba’ (n 97) 426.

<sup>104</sup> s 4(11), 110 Stat 790; (22 USC 6023) . Since ‘virtually all commercial enterprises in Cuba’ were taken over by the Castro government, anyone engaging with an enterprise established before 1959 is captured by the boycott: Lowenfeld, ‘Congress and Cuba’ (n 97) 428.

assertion on the basis of the ‘effects theory’,<sup>105</sup> which Lowe described as ‘no more than a play on words’.<sup>106</sup> Even if one accepts the effects doctrine,<sup>107</sup> no effects on the United States can realistically be discerned from the economic activities targeted by the Helms-Burton Act.<sup>108</sup> Second, the sanctions for violating the measures also present an abnormal character. Title IV is a classic territorial sanction excluding from the territory of the United States any non-US national who owns confiscated property or has ‘trafficked’ in it.<sup>109</sup> Title III, however, is markedly extraterritorial. It creates a right of action for US nationals to recover compensation from persons ‘trafficking’ in confiscated property in which the plaintiff has an interest.<sup>110</sup> These ‘clawback’ provisions give the Helms-Burton Act its uniquely extraterritorial character.<sup>111</sup>

The reactions to the Helms Burton Act were swift and uniformly negative. Mexico and Canada passed blocking statutes preventing their companies from complying with the Act;<sup>112</sup> the Council of the EU adopted measures including blocking statutes and clawback

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<sup>105</sup> s 301(9), 110 Stat 815 (22 USC 6081) .

<sup>106</sup> Lowenfeld, ‘Congress and Cuba’ (n 97) 431.

<sup>107</sup> *contra* Vaughan Lowe, ‘US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts’ (1997) 46 ICLQ 378.

<sup>108</sup> See, eg, Lowenfeld, ‘Congress and Cuba’ (n 97) 431; Stern (n 43) 14–15; Ryngaert (n 28) 643–644; Beaucillon (n 39) 123.

<sup>109</sup> s 401, 110 Stat 822 (22 USC 6091) . The measure targets both those directly responsible for the expropriation and those who simply benefitted from acquiring it.

<sup>110</sup> s 302, 110 Stat 815 (22 USC 6082) .

<sup>111</sup> See Lowe, ‘US Extraterritorial Jurisdiction’ (n 107) 384.

<sup>112</sup> Ley de Protección al Comercio y a la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, Nueva Ley DOF (23 October 1996) (Mexico); Foreign Extraterritorial Measures Act (as amended by Bill C-54 passed by the House of Commons on 9 October, 1996) (1997) 36 ILM 117 (Canada).

provisions to counter the effects of the Act.<sup>113</sup> Criticism was also voiced in international fora, including the OAS and the OECD.<sup>114</sup> The European Commission brought formal complaints before the WTO,<sup>115</sup> which were settled through an out-of-court agreement according to which the United States would suspend the measures against the EU indefinitely.<sup>116</sup> In a controversial move, the Trump Administration ceased the suspension of Title III in May 2019.<sup>117</sup> At the time of writing, the Helms Burton Act remains in place and domestic litigation based on the Act has resumed.<sup>118</sup>

Alongside being a ‘fundamentally misguided policy’, the Helms-Burton Act is widely regarded as unlawful due to its exorbitant assertion of jurisdiction.<sup>119</sup> Provided that what the United States calls ‘trafficking’ in confiscated property is not an internationally wrongful act,<sup>120</sup> the Act targets third states for what is a purely bilateral matter between the United States and Cuba, like other measures examined in this section. As a consequence,

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<sup>113</sup> Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L309/1.

<sup>114</sup> See Lowe, ‘US Extraterritorial Jurisdiction’ (n 107) 388.

<sup>115</sup> Request for the Establishment of a Panel by the European Communities, United States-The Cuban Liberty and Democratic Solidarity Act, WTO DOC No WT/DS38/2/Corr. 1 (14 October 1996).

<sup>116</sup> European Union-United States: Memorandum of Understanding Concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act [11 April 1997] (1997) 36 ILM 529.

<sup>117</sup> See Mengqi Sun, ‘Companies in Cuba Face Legal Risks as U.S. Changes Stance on Seized Property’ *Wall Street Journal* (2 May 2019) <[www.wsj.com/articles/companies-in-cuba-face-legal-risks-as-u-s-changes-stance-on-seized-property-11556789400](http://www.wsj.com/articles/companies-in-cuba-face-legal-risks-as-u-s-changes-stance-on-seized-property-11556789400)>.

<sup>118</sup> See Matthew Aho, Pedro Freyre and Augusto Maxwell, ‘Cuba Update: COVID-19, Economic Reforms, and Helms-Burton Title III Developments’ (*Lexology*, 30 July 2020) <[www.lexology.com/library/detail.aspx?g=21bd65b7-c989-4a62-a826-4e3566256a7a](http://www.lexology.com/library/detail.aspx?g=21bd65b7-c989-4a62-a826-4e3566256a7a)>.

<sup>119</sup> Lowe, ‘US Extraterritorial Jurisdiction’ (n 107) 385; Luisette Gierbolini, ‘The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum’ (1996) 6 *JTransnatlL&Poly* 289; Amanda Francis, ‘LIBERTAD or Liberty? Breaking the Law in the Name of Democracy’ (2019) 28 *TulJIntl&CompL* 55.

<sup>120</sup> Stern (n 43) 20.

the Act cannot be justified as a countermeasure because it is not deployed against states that have become responsible through the commission of internationally wrongful acts.

***US measures against Iran not covered by UNSC resolutions***

The United States increased its trade control measures against Iran after 1984, upon declaring the latter a ‘state sponsor of terrorism’.<sup>121</sup> It was not until 1995, however, that the United States began to expand the scope of such measures so as to include activities carried out by foreign nationals in third states.<sup>122</sup> In 1996, the Iran and Libya Sanctions Act (ILSA) required the President to impose penalties on persons investing in the oil and gas industry in Iran and Libya, and to prevent the exchange of certain goods, services, and technology with Libya.<sup>123</sup> Strikingly, there was ‘no attempt to show even the semblance’<sup>124</sup> of a jurisdictional basis under which jurisdiction could be extended beyond the territory/nationals of the United States. The Act applied to all persons, wherever located, entering into business of this nature with these two states. While the sanctions for failing to comply with these measures remained territorial,<sup>125</sup> the jurisdictional claims were plainly exorbitant.

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<sup>121</sup> Quinton Cannon Farrar, ‘US Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction’ (2011) 79 *FordhamLR* 2347, 2355. On ‘states sponsor of terrorism’, see Section 4.3.1.

<sup>122</sup> EO No 12959 (1995) 60 *FedReg* 24757 (banning all trade with Iran, including by foreign subsidiaries of US companies, and ‘the reexportation to Iran ... of any goods or technology ... exported from the United States’).

<sup>123</sup> 110 Stat 1541, 1543 (50 USC 1701).

<sup>124</sup> Lowe, ‘US Extraterritorial Jurisdiction’ (n 107) 385.

<sup>125</sup> They are ‘frontier’ measures, such as denial of export licences, of export assistance, of the right to import, and so on; see *ibid* 386.

The Act contained different justifications for its provisions against Iran and Libya. In the case of Iran, its objectives were: (i) preventing Iran from acquiring weapons of mass destruction; and (ii) thwarting Iran's alleged support for acts of international terrorism.<sup>126</sup> Both allegations have a potential foothold in international law. However, the United States never substantiated how the development of the energy industry in Iran would constitute an internationally wrongful act.<sup>127</sup> Nor did it advance any theory according to which third states would be bound to follow the US measures. On the contrary, at the time ILSA was adopted the EU strategy towards Iran was one of economic incentives and dialogue.<sup>128</sup> As a result, ILSA was strongly criticised. In particular, the European Union included ILSA among the foreign extraterritorial measures barred by the blocking legislation adopted in 1996.<sup>129</sup>

The case of Libya is unlike other US measures analysed so far. The stated objective of the Act was 'compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations'.<sup>130</sup> In other words, that the conduct of the Libyan government ('failure ... to demonstrate ... its renunciation of terrorism and ... failure to respond fully and effectively to the requests [of prior resolutions]'<sup>131</sup>) represented a 'threat to international peace and security' was not a unilateral determination of the

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<sup>126</sup> § 2(a), 110 Stat 1541.

<sup>127</sup> According to Joyner, Iran has not at any time violated the 1968 Nuclear Nonproliferation Treaty; see Daniel Joyner, *Iran's Nuclear Program and International Law: From Confrontation to Accord* (OUP 2016) 94.

<sup>128</sup> See Sascha Lohmann, 'The Convergence of Transatlantic Sanction Policy Against Iran' (2016) 29 *Cambridge Rev Int Aff* 930.

<sup>129</sup> Council Regulation (EC) No 2271/96.

<sup>130</sup> § 2(b), 110 Stat 1542.

<sup>131</sup> UNSC Res 748 of 31 March 1992, UN Doc S/RES/748 (1992) 1.

United States, but it was based on multiple UNSC resolutions.<sup>132</sup> These resolutions also imposed a number of mandatory measures on UN Member States, including an embargo on the provision of certain goods and services to Libya.<sup>133</sup> To the extent that ILSA banned the export of goods, services, and technology prohibited under the relevant UNSC resolutions,<sup>134</sup> the US measures were implementing obligations under the UN Charter and their exorbitant assertions of jurisdiction may be justified pursuant to the mechanism analysed in Section 2.3.3 below.<sup>135</sup> However, the same Act contained a general prohibition on foreign investments in Libya that did not derive from the UNSC resolutions.<sup>136</sup> To the extent that such prohibition targeted third states, it could not be justified as a countermeasure.

That measures based on UNSC resolutions may have a stronger claim to be justified as means to implement international responsibility is best demonstrated by the markedly different response received by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). The climate in which this new set of US measures was approved had changed since 1996. As of 2006, the UN Security Council had adopted multiple resolutions following concerns by the International Atomic Energy Agency (IAEA) regarding Iran's undeclared nuclear material and activities. These instruments

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<sup>132</sup> *ibid*; UNSC Res 731 of 21 January 1992, UN Doc S/RES/731 (1992); UNSC Res 883 of 11 November 1993, UN Doc S/RES/883 (1993).

<sup>133</sup> See UNSC Res 748 of 31 March 1992, UN Doc S/RES/748 (1992) [4(b), 5]; UNSC Res 883 of 11 November 1993, UN Doc S/RES/883 (1993) [5-6].

<sup>134</sup> s 5(b)(1), 110 Stat 1543.

<sup>135</sup> cf Lowe, 'US Extraterritorial Jurisdiction' (n 107) 388 (arguing that ILSA is the expression of a more widely espoused policy of reinforcing UNSC resolutions 'to which the EU would in principle subscribe').

<sup>136</sup> s 5(b)(2), 110 Stat 1543.

mandated multiple sanctions, including prohibiting the supply of nuclear materials and technology, and imposing an arms embargo.<sup>137</sup> The apex of the Obama Administration's efforts to gather international support for action towards Iran was the approval of UNSC Resolution 1929, which, among other things, tightened the arms embargo and severely limited the provision of financial services to Iran.<sup>138</sup> When CISADA was passed, not only was the United States unopposed, but some of these measures were made mandatory by the Security Council. In stark contrast with the universal condemnation of ILSA (and despite the fact that CISADA contained numerous exorbitant assertions<sup>139</sup>), the new US measures encountered no opposition—in fact, other states adopted measures of their own.<sup>140</sup>

To be sure, the US measures still went beyond what was strictly required by the UNSC resolutions. Even though the United States was unable to obtain a complete financial embargo on Iran at the Security Council,<sup>141</sup> some of the exorbitant measures included in CISADA (and the subsequent Iran Freedom and Counter-Proliferation Act of 2012<sup>142</sup>) sought to accomplish that by restricting activities of foreign financial institutions trading in US dollars.<sup>143</sup> The use of the 'dollar weapon' as a tool to assert jurisdiction over

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<sup>137</sup> See UNSC Res of 23 December 2006, UN Doc S/RES/1737 (2006); UNSC Res 1747 of 24 March 2007, UN Doc S/RES/1747 (2007).

<sup>138</sup> UNSC Res 1929 of 09 June 2010, UN Doc S/RES/1929 (2010). Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' [2009] *VandJTransnatL* 1393, 1396–1397.

<sup>139</sup> See Meredith Rathbone, Peter Jeydel and Amy Lentz, 'Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws' (2012) 44 *GeoJIL* 1055, 1112–1119.

<sup>140</sup> Council Regulation (EU) No 961/2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L281/1. Japan, Canada, South Korea, and Australia enacted similar measures; see Cannon Farrar (n 121) 2371.

<sup>141</sup> *ibid.*

<sup>142</sup> Contained in the National Defense Authorization Act for Fiscal Year 2013, 126 Stat 1634.

<sup>143</sup> See Rathbone, Jeydel and Lentz (n 139) 1113.

transactions outside the United States is not a unique feature of the measures against Iran and its increased use in recent years has become particularly problematic.<sup>144</sup> In 2014, the French BNP Paribas reached a USD 8.9 billion settlement with the US Department of Justice (DOJ) and pleaded guilty to having processed multiple transactions on behalf of Sudanese, Iranian, and Cuban entities targeted by US sanctions.<sup>145</sup> But BNP was just the most visible of a series of cases involving financial institutions operating outside the United States which were caught in the US sanctions net due to their trading in US dollars.<sup>146</sup> This is not without controversy. The US dollar being the dominant currency in the world, the implication is that virtually every financial institution operating internationally is exposed to the jurisdiction of the United States.<sup>147</sup> Some have questioned whether the simple fact that US dollar transactions are cleared by corresponding banks in the United States is sufficient to trigger territorial jurisdiction.<sup>148</sup> Recent trends in the imposition of sanctions on foreign entities are even more far-reaching.<sup>149</sup> Responses by states whose nationals were

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<sup>144</sup> The use of dollar-based jurisdiction has received more attention due to the US self-declared global 'war' against the financing of terrorism; see Michael Gurson, 'The US Jurisdiction over Transfers of US Dollars Between Foreigners and over Ownership of US Dollar Accounts in Foreign Banks' [2004] *ColumBusLRev* 721, 722.

<sup>145</sup> US DOJ, BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (30 June 2014) <[www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial](http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial)>.

<sup>146</sup> See Refinitiv, 'Fines for Banks That Breached US Sanctions' <[www.refinitiv.com/en/resources/infographics/fines-banks-breached-us-sanctions](http://www.refinitiv.com/en/resources/infographics/fines-banks-breached-us-sanctions)>.

<sup>147</sup> See David Restrepo Amariles, 'The Global Enforcement of U.S. Law and Its Implication for European Corporate Governance' (*HEC Paris*, 21 September 2016) <[www.hec.edu/en/knowledge/articles/global-enforcement-us-law-and-its-implication-european-corporate-governance](http://www.hec.edu/en/knowledge/articles/global-enforcement-us-law-and-its-implication-european-corporate-governance)>.

<sup>148</sup> See Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 *ArizJIntl&CompL* 631, 655. See also Mathias Audit, 'Sanctions contre BNP Paribas: L'extraterritorialité du droit américain est-elle conforme au droit international?' (*Les Echos*, 25 June 2014) <[http://archives.lesechos.fr/archives/cercle/2014/06/25/cercle\\_101744.htm](http://archives.lesechos.fr/archives/cercle/2014/06/25/cercle_101744.htm)>.

<sup>149</sup> In 2017 two Singapore-based companies settled charges concerning violations of Iran sanctions with respect to dollar transactions that occurred in Singapore without clearance in the United States; Robert Clifton Burns, 'Touch a US Dollar Anywhere, Go Directly to US Jail' (*Lexology*, 2 August

targeted by these measures show increasing discontent towards US unilateral action. France, for example, complained of ‘disproportionate’ treatment in the aftermath of the BNP case.<sup>150</sup> A spokesperson for China’s Foreign Ministry complained about the United states having ‘seriously violated norms governing international relations’.<sup>151</sup>

This is all the more relevant considering that, after the negotiation of the Joint Comprehensive Plan of Action (JCPOA or the ‘Iran nuclear deal’), most of the UN-mandated sanctions have been suspended.<sup>152</sup> In May 2018, the United States announced its withdrawal from the JCPOA and reimposed expansive trade control measures.<sup>153</sup> This sparked protests by the European Union and Russia, both of whom adopted blocking statutes.<sup>154</sup> Later that year, the arrest by Canadian authorities of Huawei CFO Meng Wanzhou for alleged violations of US sanctions against Iran led to a row between China, Canada, and the United States that has strained relations between these states.<sup>155</sup> As long as the United States is unable to advance any plausible justification for its expansive

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2017) <[www.lexology.com/library/detail.aspx?g=9c7fc8c1-8e12-4a56-9a72-00fb3d1c0b66](http://www.lexology.com/library/detail.aspx?g=9c7fc8c1-8e12-4a56-9a72-00fb3d1c0b66)>. On the expansion of US sanctions, see Victoria Anglin, ‘Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks’ (2015) 104 *GeoLJ* 693, 705.

<sup>150</sup> ‘France Seeks Germany’s Support on BNP Paribas Case’ (*FT*, 23 June 2014) <[www.ft.com/content/609dbabe-faf3-11e3-a9cd-00144feab7de](http://www.ft.com/content/609dbabe-faf3-11e3-a9cd-00144feab7de)>.

<sup>151</sup> Foreign Ministry Spokesperson Qin Gang's Remarks on US Sanctions against Bank of Kunlun (1 August 2012) <<http://bd.china-embassy.org/eng/fyrth/t957592.htm>>. See further Cameron Rotblat, ‘Weaponizing the Plumbing: Dollar Diplomacy, Yuan Internationalization, and the Future of Financial Sanctions’ (2017) 21 *UCLAJILForeignAff* 311.

<sup>152</sup> See UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231. See Joyner (n 127) 221.

<sup>153</sup> See ‘Trump Pulls US out of Iran Deal’ (*BBC News*, 9 May 2018) <[www.bbc.com/news/world-us-canada-44045957](http://www.bbc.com/news/world-us-canada-44045957)>.

<sup>154</sup> Daniel Franchini, ‘“With Friends Like That, Who Needs Enemies?”: Extraterritorial Sanctions Following the United States’ Withdrawal from the Iran Nuclear Agreement’ (*EJIL: Talk!*, 29 May 2018) <[www.ejiltalk.org/with-friends-like-that-who-needs-enemies-extraterritorial-sanctions-following-the-united-states-withdrawal-from-the-iran-nuclear-agreement](http://www.ejiltalk.org/with-friends-like-that-who-needs-enemies-extraterritorial-sanctions-following-the-united-states-withdrawal-from-the-iran-nuclear-agreement)>.

<sup>155</sup> David Ljunggren, ‘Canada Approves Huawei Extradition Proceedings, China Seethes’ (*Reuters*, 1 March 2019) <[www.reuters.com/article/us-usa-china-huawei-tech-idUSKCN1QI3MI](http://www.reuters.com/article/us-usa-china-huawei-tech-idUSKCN1QI3MI)>.

jurisdictional assertions, the effects of its measures against Iran on third parties cannot be justified as countermeasures and will continue to generate further disputes.<sup>156</sup>

### ***Recent US measures, especially against Syria, Iran, Russia, and North Korea***

As of August 2020, the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers 34 sanctions programmes.<sup>157</sup> Alongside these, further programmes are overseen by the US Department of State.<sup>158</sup> The content of these programmes is extremely varied and too complex to be analysed in great detail here. Nevertheless, a recurring feature of these programmes is their extremely broad jurisdictional reach.<sup>159</sup> Among the most recent measures, the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) is particularly emblematic.<sup>160</sup> The Act mandates the President to impose a number of sanctions against Iran, Russia, and North Korea. For the most part, it codifies pre-existing measures introduced by Executive Order; however, some provisions introduce new restrictions. With regard to Russia, the United States has had measures in place since the Ukraine crisis of 2014.<sup>161</sup> Other states have

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<sup>156</sup> 'Recent Extraterritorial US Sanctions and EU Reactions' (*Blomstein*, 6 November 2017) <<http://blomstein.com/en/news.php?n=recent-extraterritorial-us-sanctions>>.

<sup>157</sup> Some of these are country-specific, others are targeted on certain activities (eg trafficking in narcotics); their legal authority also varies, with some programs being exclusively set up by Executive Orders and others mandated by Congress. See US Department of the Treasury, *Sanctions Programs and Country Information*, <[www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx)>.

<sup>158</sup> eg US Department of State, *Nonproliferation Sanctions*, <[www.state.gov/t/isn/c15231.htm](http://www.state.gov/t/isn/c15231.htm)>.

<sup>159</sup> The extent to which these measures target entities with little or no connection to the United States is often unclear; cf Emmenegger (n 148).

<sup>160</sup> HR 3364, Pub L 115–44.

<sup>161</sup> See especially EO 13660 (2014) 79 FedReg 13493; EO 13685 (2014).

enacted similar measures, including Canada,<sup>162</sup> Australia,<sup>163</sup> and the European Union.<sup>164</sup> Compared to these, the US measures stand out in that they continue to present exorbitant jurisdictional claims. Under CAATSA, the President is required to target foreign persons who have knowingly engaged in a ‘significant transaction’ with a person that is subject to US sanctions<sup>165</sup> and ‘any person’ that makes investments that ‘directly and significantly’ contribute to the ‘enhancement’ of Russia’s ability to construct energy export pipelines.<sup>166</sup> The latest set of measures, particularly reminiscent of the 1980s Siberian Pipeline dispute, raised serious concerns amongst third States. Germany and Austria reacted with a joint statement protesting the ‘threat of illegal extraterritorial sanctions against European companies’;<sup>167</sup> Germany also called for countermeasures against the United States.<sup>168</sup> Similarly, the European Commission discussed potential countermeasures to protect the EU’s energy security interests should the United States push ahead with its exorbitant measures.<sup>169</sup>

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<sup>162</sup> Special Economic Measures Act: Special Economic Measures (Russia) Regulations (2014) *Canada Gazette Part II*, 148(8).

<sup>163</sup> See Minister for Foreign Affairs, Further sanctions to support Ukraine (21 May 2014) <[https://foreignminister.gov.au/releases/Pages/2014/jb\\_mr\\_140521.aspx?ministerid=4](https://foreignminister.gov.au/releases/Pages/2014/jb_mr_140521.aspx?ministerid=4)>.

<sup>164</sup> See Council Decision (EU) No 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229/13.

<sup>165</sup> No definition of a ‘significant transaction’ is provided; see § 228 CAATSA, HR 3364—26.

<sup>166</sup> s 232 CAATSA, HR 3364—32. See further Brian Egan and Peter Jeydel, ‘Back to the Future on “Extraterritorial” Sanctions on Russian Pipelines?’ (*Steptoe*, 26 June 2017) <[www.steptoeinternationalcomplianceblog.com/2017/06/back-to-the-future-on-extraterritorial-sanctions-on-russian-pipelines](http://www.steptoeinternationalcomplianceblog.com/2017/06/back-to-the-future-on-extraterritorial-sanctions-on-russian-pipelines)>.

<sup>167</sup> Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the imposition of Russia sanctions by the US Senate (15 June 2017) <[www.auswaertiges-amt.de/en/Newsroom/170615-kern-russland/290666](http://www.auswaertiges-amt.de/en/Newsroom/170615-kern-russland/290666)>.

<sup>168</sup> ‘Germany urges EU countermeasures against U.S. over Russia sanctions’ (*Reuters*, 31 July 2017) <[www.reuters.com/article/us-usa-trump-russia-germany/germany-urges-eu-countermeasures-against-u-s-over-russia-sanctions-idUSKBN1AG0SJ](http://www.reuters.com/article/us-usa-trump-russia-germany/germany-urges-eu-countermeasures-against-u-s-over-russia-sanctions-idUSKBN1AG0SJ)>

<sup>169</sup> US draft bill on Russia sanctions: European Commission ready to act to protect European interests (26 July 2017) <[http://europa.eu/rapid/press-release\\_MEX-17-2168\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-2168_en.htm)>.

A significant difference can be observed with regard to the US measures against North Korea. The counterproliferation sanctions adopted by the United States since 2008 have become increasingly more far-reaching; the latest round of measures includes provisions targeting ‘any person’ that has operated in a laundry list of industry sectors in North Korea or ‘engaged in at least one significant importation from or exportation to North Korea’.<sup>170</sup> The combined effect is an almost total embargo forcing non-US businesses to cease their dealings with North Korea.<sup>171</sup> Yet, the only negative reactions so far came from China, one of the very few states still doing business with North Korea.<sup>172</sup> This is because North Korea is currently subject to stringent sanctions imposed by the UN Security Council, including extensive bans on the export of various products.<sup>173</sup> To be sure, China is correct in stating that, as long as China duly implements its obligations under the relevant UNSC resolutions, US interference with China’s trade with North Korea is unwarranted. However, the existence of obligations on trade mandated by the Security Council can fundamentally change the position of states asserting their jurisdiction exorbitantly, as will be seen in Section 2.3.3 below.

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<sup>170</sup> Sec 1, EO 13810 (2017) 82 FedReg 184.

<sup>171</sup> ‘US President Issues Executive Order Imposing Additional Sanctions on North Korea’ (*Morgan Lewis*, 25 September 2017) <[www.morganlewis.com/pubs/us-president-issues-executive-order-imposing-additional-sanctions-on-north-korea](http://www.morganlewis.com/pubs/us-president-issues-executive-order-imposing-additional-sanctions-on-north-korea)>.

<sup>172</sup> See Foreign Ministry Spokesperson Geng Shuang's Remarks (24 February 2018) <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1537359.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1537359.shtml)>.

<sup>173</sup> eg UNSC Res 2375 of 11 September 2017, UN Doc S/RES/2375 (2017).

## 2.3. Measures potentially justifiable as countermeasures

### 2.3.1. Measures exclusively targeting the wrongdoing state

Most assertions of jurisdiction analysed in the previous sections are problematic. Despite being contained in measures potentially reacting to international wrongs, they infringe upon the rights of third states without a theory justifying why these states should bear the negative consequences of unlawful acts of others. From this principle it follows that measures that do not engage rights and obligations of third states because they *exclusively* target the wrongdoing state may more easily satisfy the requirements for resorting to countermeasures. A recurrent scenario of this kind is that of states asserting their jurisdiction exorbitantly in response to prior exorbitant jurisdictional claims of other states. As seen above, states have frequently resorted to such measures to counteract exorbitant assertions by the United States. The United Kingdom, for example, adopted a series of measures of this kind in 1980 in order to protect its trade interests from US incursions, particularly in the field of antitrust law.<sup>174</sup> ‘Blocking statutes’ of this sort generally include territorial measures that prohibit compliance with the exorbitant claims advanced by other states and impose non-enforcement of foreign judgments issued pursuant to exorbitant laws.<sup>175</sup> Because they are limited to the territory of the state, these measures are not exorbitant. However, some of these blocking statutes also include provisions establishing a cause of action before domestic courts in order to recover, in whole or in part, sums paid in compliance with damages awards given by the courts of the state asserting exorbitant

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<sup>174</sup> Protection of Trading Interests Act 1980, c 11. See further Lowe, ‘Blocking’ (n 26).

<sup>175</sup> eg ss 1, 2, and 5 Protection of Trading Interests Act 1980.

jurisdiction. The relevant UK legislation, for example, provides that certain ‘qualifying defendants’ (British nationals and persons carrying out trade in the United Kingdom) are ‘entitled to recover from the party in whose favour the judgment was given so much of the amount ... as exceeds the part attributable to compensation ...’<sup>176</sup> (i.e. the ‘penal’ element of punitive damages awards).<sup>177</sup> These ‘clawback provisions’ are in essence assertions of jurisdiction over acts performed by foreign entities (foreign plaintiffs and foreign courts awarding punitive damages) outside the United Kingdom grounded exclusively on the fact that British individuals were injured by exorbitant jurisdictional claims of other states. This is at best a form of passive personality jurisdiction that, even if accepted under international law, does not cover trade matters.<sup>178</sup>

At the same time, such measures need not be grounded on an accepted head of jurisdiction to be lawful. These assertions of jurisdiction are the perfect example of tit-for-tat reciprocity; they are (potentially) wrongful acts in response to wrongful acts of other states which aim at cancelling the effects of the latter and obtaining compensation for the injury caused. The United Kingdom made this logic clear:

[T]he U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations.... Her Majesty’s Government have reluctantly reached the conclusion that a limited countervailing remedy

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<sup>176</sup> s 6(2) Protection of Trading Interests Act 1980.

<sup>177</sup> Lowe, ‘Blocking’ (n 26) 273.

<sup>178</sup> See text at nn 15–17.

should be provided to persons in the U.K. who have, while engaged in international trade, been penalised under laws of this kind.<sup>179</sup>

‘Remedial’ assertions of this kind have been made by several states who found themselves at the receiving end of exorbitant assertions of jurisdiction, including Canada,<sup>180</sup> the European Union,<sup>181</sup> and the United States itself.<sup>182</sup> Not only are these assertions of jurisdiction justifiable as countermeasures, but they are almost certainly proportionate ones.<sup>183</sup>

### 2.3.2. Measures amounting to belligerent reprisals

Blockades and other unilateral trade control measures are commonplace during war.<sup>184</sup> While these measures have been relatively infrequent in recent years—if anything, due the scarcity of fully-fledged inter-state conflicts—it is worth paying attention to them separately, as exorbitant assertions of jurisdiction contained in such measures may be more easily justified than equivalent measures taken in peacetime. In particular, the existence of an armed conflict provides two potential grounds to support exorbitant jurisdictional claims.

First, the presence of an ongoing armed conflict strengthens the argument that trade control measures are a response to an ‘objective threat’ to the security of the nation. Far-

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<sup>179</sup> Diplomatic Note No 225 (27 November 1979), reprinted in Lowe, ‘Blocking’ (n 26) 278–279.

<sup>180</sup> s 9, Foreign Extraterritorial Measures Act, RSC 1985, c F-29.

<sup>181</sup> Art 6, Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L 309/1.

<sup>182</sup> See text at n 214.

<sup>183</sup> See Section 6.2.7.

<sup>184</sup> For examples from World War II, see Henry Chalmers, *World Trade Policies: The Changing Panorama, 1920-1953* (UCal Press 1953) 205–206.

reaching jurisdictional assertions have a realistic claim to be supported by the protective principle of jurisdiction.<sup>185</sup> At the same time, it is not at all clear whether this basis is sufficient when the claim is expressed in general terms—that is, without pointing to a specific threat that the measure seeks to avert.<sup>186</sup> Even more so, this argument may be less convincing when jurisdiction is asserted towards nationals of states not parties to the conflict whose only ‘contribution’ to the threat is engaging in commercial transactions with one of the warring states.

For these reasons, a second ground may supply an alternative justification for such exorbitant assertions of jurisdiction. In the context of an armed conflict, trade control measures may qualify as belligerent reprisals. In contemporary parlance, reprisals are wartime measures taken to coerce the opposing party to a conflict to abide by international law.<sup>187</sup> Structurally, they are identical to countermeasures and, in the pre-UN-Charter system, there was no meaningful distinction between the two.<sup>188</sup> Like countermeasures, they are premised on a prior wrongful act of the target state and consist in breaches of certain international law obligations whose wrongfulness is precluded.<sup>189</sup> Compared to peacetime measures, reprisals offer additional grounds to support the legality of exorbitant assertions of jurisdiction because the obligations of third states are more easily engaged in

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<sup>185</sup> cf Ryngaert (n 28) 629.

<sup>186</sup> *ibid.*

<sup>187</sup> Matthias Ruffert, ‘Reprisals’, *MPEPIL* (2015) [7].

<sup>188</sup> *ibid* [1]. See Section 1.2.

<sup>189</sup> Like countermeasures, reprisals must follow attempts to obtain redress through other means and must be limited to the necessities of the case and proportionate to the wrong; see Derek Bowett, ‘Economic Coercion and Reprisals by States’ (1972) 13 *VaJIL* 1, 9–10. The only difference is that, according to some, reprisals could involve the use of armed force; eg Shane Darcy, ‘Retaliation and Reprisal’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 879.

the context of an armed conflict. Two examples may help clarify this point: the Arab League boycott of Israel and certain US measures adopted during the 1950s Korean War.

### *The Arab League Boycott of Israel*

Discussions over unilateral trade control measures frequently centre around the practice of the United States. Given the multitude and pervasiveness of US initiatives in this area, it is easy to overlook that one of the first measures in the post-UN-Charter era imposing economic restrictions on foreign nationals to pursue foreign policy objectives was the League of Arab States' (LAS) boycott of Israel.<sup>190</sup> Although Arab states implemented some forms of boycott before the creation of the state of Israel,<sup>191</sup> its full implementation came about with the LAS Council's Resolution of 11 December 1954.<sup>192</sup> In this form, the Arab boycott of Israel has three components. At its core, it is a primary boycott, which aims at preventing all persons within LAS states from engaging in economic transactions with Israel.<sup>193</sup> Alongside this, it includes a secondary boycott which prevents foreign companies doing business with Israel, wherever located, from trading in LAS states.<sup>194</sup> A tertiary boycott was subsequently added to include in the ban non-blacklisted companies dealing with blacklisted companies.<sup>195</sup> The sanctions envisaged by the primary boycott are

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<sup>190</sup> At the time when the Arab boycott was imposed, other boycotts were in place, including: by the United Kingdom against Iran in 1951; by the USSR's and other Eastern European states against Yugoslavia in 1948, and against Albania in 1961; by the United States against Cuba in 1961. See further Muir (n 29) 189–190.

<sup>191</sup> Joyner (n 43) [3].

<sup>192</sup> 'The Unified Boycott of Israel Law as approved by the Council of the League of Arab States in its Twenty-Second session dated 11 December 1954' reprinted in (1987-1988) 4 PalYBIntlL 359.

<sup>193</sup> Art I(1) of the Unified Boycott of Israel Law.

<sup>194</sup> Art I(2) of the Unified Boycott of Israel Law; Art 1 of the Arab Boycott Regulations, reprinted in (1986) 3 PalYBIntlL 189, 195. A blacklist of foreign companies in breach of the boycott is maintained by the Central Boycott Office (CBO) in Damascus.

<sup>195</sup> Arab Boycott Regulations (n 194) art 6.

essentially territorial, in that they prevent persons within LAS states from dealing with those who ran afoul of the ban. At the same time, the secondary and tertiary components of the boycott are markedly extraterritorial.<sup>196</sup>

Assessing the legality of the boycott presents some challenges. First, LAS states themselves have been inconsistent in the enforcement of the boycott and over the years it has acquired an essentially symbolic, rather than practical, meaning.<sup>197</sup> To this, it should be added that various states either formally withdrew from the boycott or ceased to implement it.<sup>198</sup> The evolution of the Arab boycott suggests that its objectives changed over time. As a consequence, establishing the legal justification of the boycott and its exorbitant jurisdictional claims is chasing a moving target.

One of the main goals of the Arab boycott has consistently been to isolate Israel and somehow curtail its territorial expansion.<sup>199</sup> The secondary boycott contributes to this objective by targeting those ‘supporting the economy of Israel’.<sup>200</sup> This would be consistent with the idea that the very existence of the state of Israel represents an illegality—a difficult

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<sup>196</sup> cf Bianchi, *L'applicazione extraterritoriale* (n 28) 301. On the legality of secondary and tertiary boycotts, see text at n 44.

<sup>197</sup> Preston Greene, ‘The Arab Economic Boycott of Israel: The International Law Perspective’ [1978] *VandJTransnatlL* 77, 78.

<sup>198</sup> Art 3(3) Treaty of Peace between the Arab Republic of Egypt and the State of Israel (26 March 1979) [1979] 1136 UNTS 116; Declaration of Principles on Interim Self-Government Arrangements (13 September 1993) [1993] 32 ILM 1525; Art 7(2)(a) Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (26 October 1994) 2042 UNTS 351. See also Roger Alford, ‘The Death of the Secondary Boycott Against Israel’ (*Kluwer Arbitration Blog*, 25 May 2010) <<http://arbitrationblog.kluwerarbitration.com/2010/05/25/the-death-of-the-secondary-boycott-against-israel>>. In 1994, Member States of the Cooperation Council for the Arab States of the Gulf (GCC) also declared they would only implement the primary boycott; see Norman Kempster, Arabs Ease Boycott Linked to Israel (*LA Times*, 1 October 1994) <[http://articles.latimes.com/1994-10-01/news/mn-45020\\_1\\_arab-states](http://articles.latimes.com/1994-10-01/news/mn-45020_1_arab-states)>.

<sup>199</sup> Greene (n 197) 79.

<sup>200</sup> Arab Boycott Regulations (n 194) Part One.

argument to make in the absence of allegations concerning specific international law violations.<sup>201</sup> However, the claims of the Arab League may have more purchase in the subsequent developments of the troubled relationship between the League and Israel. After 1948, various LAS states have been at war with Israel and the boycott became an instrument of that confrontation.<sup>202</sup> In this sense, the Arab boycott—or at least part of it—turned into a belligerent reprisal. This idea has been advanced since the early days of the boycott.<sup>203</sup> Even with all the doubts regarding the obligations allegedly breached by the target states, the structure of a reprisal is the most persuasive basis to justify the boycott.

The framework of reprisals is of particular interest when considering the exorbitant secondary and tertiary aspects of the boycott. To the extent that it targets states other than Israel, the boycott would be unlawful even as a reprisal if it cannot be demonstrated that third states have an obligation owed to LAS states with regard to Israel. A potential explanation of the claims of the Arab League in this regard can be distilled from the controversy that took place at the height of the oil crisis in 1973, when the Organization of Arab Petroleum Exporting Countries (OAPEC) imposed an oil embargo on a number of states supportive of Israel.<sup>204</sup> The embargo was conceived in the context of the 1973 Arab–

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<sup>201</sup> The LAS Council remained vague as to what international obligations were deemed violated; see ‘LAS Council Resolution No 16 of 2 December 1945’ in Muhammad Khalil, *The Arab States and the Arab League: A Documentary Record* (Khayats 1962) 161. According to Slomanson, the principal reason for the Arab boycott is contained in the 1968 Palestinian Charter: William Slomanson, *Fundamental Perspectives on International Law* (6th edn, Wadsworth 2010) 470. See Palestinian Charter, art 19 (‘The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal ... because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations; particularly the right to self-determination.’).

<sup>202</sup> Marwan Iskander, *The Arab Boycott of Israel* (PLO Research Center 1966) 14; Greene (n 197) 79–80. This is consistent with the fact that Egypt, the Palestinian Authority, and Jordan discontinued the boycott as a result of peace agreements.

<sup>203</sup> Iskander (n 202) 20; Greene (n 197) 93.

<sup>204</sup> 16 MEES No 51 (12 October 1973) 4.

Israeli War and, as stated in a resolution of the OAPEC Oil Ministers, its goal was the ‘liberation of the Arab territories occupied in the June 1967 war and the recovery of the legitimate rights of the Palestinian people in accordance with the United Nations resolutions’.<sup>205</sup> The resolution contains an explicit reference to the alleged responsibility of third states:

*Recalling* that the big industrial nations help, in one way or another, to perpetuate the status quo, though they bear a common responsibility for implementing the United Nations resolutions.<sup>206</sup>

This was read as an indication that the Arab States considered third states supporting Israel to be in violation of international law. The argument was best made by Shihata:

[N]eutral states (such as the United States and the Netherlands supposedly were during the Arab-Israeli hostilities of October 1973) are under the obligation of acting towards belligerents in accordance with their attitude of impartiality. This means, in particular, abstention from ‘the supply in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition or war material of any kind whatever.’ It means also that a neutral power should not allow a belligerent to transport war materials or supplies over its territory.... A breach of such obligations of neutrality entitles affected belligerents to take retaliatory action in the nature of reprisals.<sup>207</sup>

To be sure, this argument is not uncontroversial.<sup>208</sup> Moreover, the justification of the oil embargo of 1973 is not necessarily the same as that underpinning the Arab boycott as a whole. The oil embargo did, however, come about as one of the multiple measures of trade

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<sup>205</sup> 17 MEES No 4 (16 November 1973) iii.

<sup>206</sup> *ibid.*

<sup>207</sup> Ibrahim Shihata, ‘Destination Embargo of Arab Oil: Its Legality Under International Law’ (1974) 68 AJIL 591, 614. On the law of neutrality, see *SS Wimbledon (UK v Germany)* [1923] PCIJ Ser A No 1, 25.

<sup>208</sup> See Jordan Paust and Albert Blaustein, ‘The Arab Oil Weapon: A Reply and Reaffirmation of Illegality’ (1976) 15 ColumJTransnatlL 57.

control taken by the Arab states against Israel and its ‘supporters’. While it is unclear whether third states effectively breached their obligations, the logic of the oil embargo reinforces the argument that such measures can respond to perceived violations of international law by third states and thus fit the framework of countermeasures.<sup>209</sup>

With the exception of the United States, the reaction of other states has been particularly contained. For example, the EEC took only very limited steps against the Arab boycott and the focus has been mainly on preventing discrimination based on racial, religious, or ethnic grounds.<sup>210</sup> European states have passed no legislation on the issue and continued to engage in business with the Arab states.<sup>211</sup> Only Canada adopted a number of (non-mandatory) guidelines, the role of which was to exclude official government support for the boycott.<sup>212</sup>

The United States, for its part, did not acknowledge the Arab boycott for more than 20 years.<sup>213</sup> In 1977, US Congress amended the Export Administration Act (EAA) and introduced a number of anti-boycott measures that, although formulated in general terms, were clearly directed at the Arab boycott.<sup>214</sup> The new measures were, in turn, characterised

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<sup>209</sup> See Sicilianos (n 64) 88 n39.

<sup>210</sup> See Nancy Turck, ‘A Comparative Study of Non-United States Responses to the Arab Boycott’ (1978) 8 *GaJIntl&CompL* 711, 712.

<sup>211</sup> *ibid* 739.

<sup>212</sup> The Canadian position focuses on discriminatory aspects, rather than on the boycott as a whole; see Hon Donald Jamieson, Secretary of State for External Affairs, ‘Statement of policy on international boycotts’ (21 October 1976), in House of Commons Debates, 30th Parliament, 2nd Session: Vol 1, 302-303.

<sup>213</sup> Andreas Lowenfeld, ‘Sauce for the Gander: The Arab Boycott and United States Political Trade Controls’ (1977) 12 *TexasIntlLJ* 25, 34.

<sup>214</sup> Export Administration Amendments of 1977, Pub L No 95-52 § 201, 91 Stat 235 (1977) (amending the Export Administration Act of 1969).

by exorbitant jurisdictional assertions.<sup>215</sup> The amended EAA prevented all US persons from refusing to do business with anyone pursuant to a request of a boycotting country; the term ‘US persons’, similar to previous US legislation,<sup>216</sup> included foreign subsidiaries ‘controlled in fact’ by their US parent company.<sup>217</sup> The US response fits precisely the structure of a reciprocal countermeasure of the type analysed in the previous section.<sup>218</sup> As such, the Arab boycott of Israel and its responses reinforce the argument that breaches of the rules of jurisdiction can be justified as means for the implementation of international responsibility.

### *US measures against China and North Korea during the Korean War*

Despite its criticism of the Arab boycott, the United States made use of similar trade-restrictive measures in the context of armed conflicts. Most measures taken under the authority of the Trading With the Enemy Act of 1917 (TWEA) can be qualified as belligerent reprisals.<sup>219</sup> During the 1950–53 Korean War, the US Treasury Department issued a number of Foreign Assets Control Regulations to impose restrictions on the China and North Korea.<sup>220</sup> These measures went unchallenged for the entire duration of the armed

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<sup>215</sup> See Stanley Marcuss and Eric Richard, ‘Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory’ (1981) 20 ColumJTransnatlL 439, 449; Robert Wayne, ‘Extraterritorial Application of the Export Administration Amendments of 1977’ (1978) 8 GaJIntl&CompL 741.

<sup>216</sup> See text at n 67.

<sup>217</sup> 50 USC app § 2415(2) (Supp III 1979). The 1977 Amendments contained some limitations to this principle in order to accommodate the Senate Committee’s intent to ‘respect the sovereignty of boycotting nations’; see further Marcuss and Richard (n 215) 454.

<sup>218</sup> cf Brice Clagett, ‘A Reply to Professor Lowenfeld’ (1996) 90 AJIL 641, 642.

<sup>219</sup> See Act concerning the Powers of the President in Time of War § 202(a), 50 USC 1701.

<sup>220</sup> 31 CFR Part 500 (1950-72). See further Lowenfeld, ‘Sauce’ (n 213) 28.

conflict despite containing particularly exorbitant jurisdictional assertions.<sup>221</sup> At the end of the armed conflict, however, it became less clear on what legal basis these measures could be maintained other than a generic fear of the ‘communist threat’.<sup>222</sup> No claim was advanced linking the embargo to specific breaches of international law by China. Indeed, when the US Treasury Department attempted to enforce the embargo vis-à-vis nationals of third states, its efforts were thwarted. In *Fruehauf v Massardy*,<sup>223</sup> the French subsidiary of an American corporation was ordered to suspend a contract with another French company to sell a number of vans for delivery to China. The Court of Appeal of Paris ordered that the contract should proceed regardless of the American request,<sup>224</sup> indirectly upholding the illegality of the US jurisdictional assertion.<sup>225</sup> The Supreme Court of Hong Kong reached a similar verdict in another case.<sup>226</sup> In 1958, the Canadian Prime Minister brought complaints directly before the US President and obtained assurances that Canadian companies would be exempted by these measures.<sup>227</sup> All these reactions prove that, once

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<sup>221</sup> The UN Security Council had approved a resolution ‘call[ing] upon all Member States ... to refrain from giving assistance to the North Korean authorities’: UNSC Res 82 of 25 June 1950, UN Doc S/RES/82 (1950) [III].

<sup>222</sup> Shu Guang Zhang, *Economic Cold War: America’s Embargo against China and the Sino-Soviet Alliance, 1949-1963* (StanUP 2001) 113.

<sup>223</sup> *Soci t  Fruehauf Corp v Massardy*, 1968 DS Jur 147, 1965, 5 ILM 476 (1966).

<sup>224</sup> The Court did not enquire on the legality of the assertion of jurisdiction by the United States; however, it balanced the ‘interests of the company’ against the interests of the shareholders, in what seems to be an assessment of proportionality; see Ryngaert (n 28) 630. See also William Laurence Craig, ‘Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massardy*’ (1970) 83 HLR 579.

<sup>225</sup> Bianchi, ‘Extraterritoriality’ (n 28) 411.

<sup>226</sup> *The China Mutual Trading Co Ltd v The American President Lines Ltd* (1953) 38 HKLR 111 (holding that, once the goods were ‘discharged’, they were no longer subject to the jurisdiction of the United States, otherwise there ‘would be ... an incursion into the sovereign rights of Hong Kong’). See also Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 155.

<sup>227</sup> Address by President Eisenhower (9 July 1958) 39 US Dept of State Bull 204. See James Irvine Whitcomb Corcoran, ‘The Trading with the Enemy Act and the Controlled Canadian Corporation’ (1968) 14 McGillLJ 174, 197.

the circumstances justifying reprisals have ceased, exorbitant jurisdictional assertions can no longer be justified pursuant to this framework.

### 2.3.3. Peacetime measures implementing the responsibility of all targeted states

Exorbitant jurisdictional claims that affect states other than the wrongdoing state may be justified as countermeasures when these states are, in turn, bearers of certain international obligations in connection with the wrongful act. In such scenarios, the assertion of jurisdiction is justifiable because it does not merely seek to implement the responsibility of the (original) wrongdoing state, but also the responsibility of other states.

The first set of circumstances in which this may occur is when the third state targeted with the measures has aided or assisted the wrongdoing state in the commission of the internationally wrongful act.<sup>228</sup> In order to satisfy the customary standard of ‘complicity’,<sup>229</sup> the provision of aid or assistance must qualify as a separate (albeit derivative) wrongful act.<sup>230</sup> For example, a state could not be targeted with exorbitant

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<sup>228</sup> Art 16 ARSIWA and Commentary 65-67. See also Miles Jackson, *Complicity in International Law* (OUP 2015) 147ff. Similar considerations may apply to states directing and controlling the commission of an international wrong and coercing other states to commit a wrongful act; arts 17–18 ARSIWA).

<sup>229</sup> There is some debate as to whether art 16 ARSIWA was codification of progressive development of custom; see Christian Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 286. The ICJ referred to it as a ‘reflecting a customary rule’: *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [420] [Bosnian Genocide].

<sup>230</sup> ARSIWA Commentary 65 [7]; Jackson (n 228) 150.

jurisdictional assertions for the simple reason that it is trading with the wrongdoing state. The ILC identified three conditions that aid or assistance must meet in order to be wrongful: (i) the assisting state must be aware of the circumstances making the conduct of the assisted state internationally wrongful; (ii) aid or assistance must be given with a view to facilitating the wrongful act and must actually do so; and (iii) the assisting state must have aided or assisted in the breach of an obligation by which it itself is bound.<sup>231</sup> In these circumstances, the exorbitant measures will seek to implement the international responsibility of the assisting state alongside that of the assisted state.<sup>232</sup>

Alongside cases of complicity in general, exorbitant jurisdictional assertions targeting third states may be justified under two sets of circumstances: (i) when the UN Security Council has adopted resolutions requiring that all states adopt certain measures; and (ii) when a state responds to a serious breach of a peremptory norm of international law.

### *Measures mandated by UN Security Council resolutions*

That the UN Security Council holds a ‘normative’,<sup>233</sup> if not outright ‘legislative’,<sup>234</sup> function is something that can hardly be contested. While not technically creating ‘new law’,<sup>235</sup> when acting under Article 39 and 41 of the UN Charter the Security Council can

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<sup>231</sup> ARSIWA Commentary 66 [4]–[6].

<sup>232</sup> On the content of this responsibility, see Jackson (n 228) 168.

<sup>233</sup> Tarcisio Gazzini, ‘The Normative Element Inherent in Economic Collective Enforcement Measures: United Nations and European Union Practice’ in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004) 286.

<sup>234</sup> As in, the power to create ‘legislative or generic resolutions’: Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 175, 176.

<sup>235</sup> These resolutions are ‘secondary treaty law’ legally based on the UN Charter itself; *ibid* 179.

impose obligations on UN Member States to the effect that they are bound to pass certain legislation or enact specific measures.<sup>236</sup> When so doing, the Security Council can even vest UN Member States with jurisdiction that they would not otherwise possess.<sup>237</sup> In Resolution 2240 (2015), dedicated to the fighting of migrant smuggling off the coast of Libya, the Security Council granted Member States extensive powers of inspection and seizure on the high seas of foreign-flagged vessels when there are ‘reasonable grounds to suspect [they] are being used for migrant smuggling and human trafficking from Libya’.<sup>238</sup> Provided that consent of the flag state must be sought, but not necessarily obtained, the Security Council granted—in fact, made mandatory—the exercise of not only prescriptive, but even enforcement jurisdiction in a manner that goes beyond the limits set by customary international law.<sup>239</sup> In such cases, the flag state of a vessel intercepted by another state would not be able to complain of being injured by the inspection of one of its vessels. Its sovereign rights had been limited by the Security Council itself—or, from a different perspective, the rights of the enforcing state had been expanded.

At the same time, there is another, more elusive way in which measures mandated by the Security Council may have an impact on the assertion of jurisdiction by UN Member

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<sup>236</sup> See Gazzini (n 233) 290.

<sup>237</sup> According to art 103 UN Charter, the obligations under the Charter prevail over other obligations of member states. Hence, UNSC resolutions would ‘trump’ any jurisdictional limitations stemming from customary international law: Kimberley Trapp, ‘Jurisdiction and State Responsibility’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 361.

<sup>238</sup> UNSC Res 2240 of 9 October 2015, UN Doc S/RES/2240 (2015) [7]–[8].

<sup>239</sup> See Marco Gestri, ‘EUNAVFOR MED: Fighting Migrant Smuggling Under UN Security Council Resolution 2240 (2015)’ (2016) 25 *ItalYrbkIntL* 19, 35. See also Marta Bo, ‘Fighting Transnational Crimes at Sea under UNSC’s Mandate: Piracy, Human Trafficking and Migrant Smuggling’ (*EJIL:Talk!* 30 October 2015) <[www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling](http://www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling)>.

States. Very frequently, when the Security Council decides on the imposition of restrictive measures vis-à-vis states, individuals, or entities, it confines these measures to what is within the jurisdiction of each Member State.<sup>240</sup> For example, Resolution 2399 (2018) renewing the arms embargo established in 2013 against the Central African Republic (CAR) is phrased in the following terms:

[A]ll Member States shall continue to take the necessary measures to prevent the direct or indirect supply, sale or transfer to the CAR, *from or through their territories or by their nationals, or using their flag vessels or aircraft*, of arms and related materiel of all types ....<sup>241</sup>

Other UN-mandated arms embargoes have used similar language.<sup>242</sup> Under such provisions, UN Member States have an obligation to enact measures restricting the supply of weapons only to the extent that the two most uncontroversial heads of jurisdiction are engaged: territory and nationality. However, when it comes to the implementation of these resolutions by Member States, domestic provisions may differ. The measures taken by the European Union, for example, reproduce almost verbatim the language of the UNSC resolutions:

The sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned to the Central African Republic ('CAR') *by nationals of Member States or from*

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<sup>240</sup> See Stern (n 43) 22.

<sup>241</sup> UNSC Res 2399 of 30 January 2018, UN Doc S/RES/2399 (2018) [1] (emphasis added). See also UNSC Res 2339 of 27 January 2017, UN Doc S/RES/2339 (2017) [1]; UNSC Res 2127 of 5 December 2013, UN Doc S/RES/2127 (2013) [54].

<sup>242</sup> eg UNSC Res 2216 of 14 April 2015, UN Doc S/RES/2216 (2015) [14] (Yemen); UNSC Res 1970 of 26 February 2011, UN Doc S/RES/1970 (2011) [9] (Libya); UNSC Res 1718 of 14 October 2006, UN Doc S/RES/1718 (2006) [8] (North Korea).

*the territories of Member States or using their flag vessels or aircraft shall be prohibited whether originating or not in their territories.*<sup>243</sup>

Conversely, the United States has gone beyond the UNSC requests. The tool through which the United States gives effect to relevant UNSC resolutions<sup>244</sup> is the Arms Export Control Act of 1976 (AECA), as amended in 1996, which prescribes that ‘every person’ who engages in ‘brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article’ is subject to restrictions determined by the State Department.<sup>245</sup> The International Traffic in Arms Regulations (ITAR), which implement the AECA, specify that ‘every person’ includes ‘[a]ny foreign person located outside the United States where the foreign person is owned or controlled by a US person’.<sup>246</sup> For the reasons mentioned above, provisions based on the control theory of jurisdiction are exorbitant.<sup>247</sup>

The United States has not made extensive use of these far-reaching provisions;<sup>248</sup> nevertheless, should it assert its jurisdiction towards foreign companies on the basis of the control theory under the AECA and ITAR authority, would its conduct be unlawful? The answer depends on the circumstances of each case. When the state where these companies are incorporated has put in place its own system of domestic measures implementing the relevant UNSC resolutions, this state has a well-founded reason to resist the US exorbitant

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<sup>243</sup> Art 1, Council Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic [2013] OJ L 352/51 (emphasis added).

<sup>244</sup> In the case of CAR, see Department of State, ‘Amendment to the International Traffic in Arms Regulations: Central African Republic’ (17 April 2014) 79 FedReg 21616.

<sup>245</sup> s 151, 110 Stat 1437 (codified at 22 USC 2778(b)(1)(A)).

<sup>246</sup> 22 CFR 129.2.

<sup>247</sup> See text at n 68.

<sup>248</sup> See Elise Keppler, ‘Preventing Human Rights Abuses by Regulating Arms Brokering’ (2001) 19 BerkeleyJIntlL 381, 383.

jurisdiction.<sup>249</sup> But if this state has no measures executing the relevant UNSC resolutions and shows no intention of carrying out the UN-imposed measures, the exorbitant assertion of jurisdiction by the United States has a reasonable claim of being a measure remedying the (wrongful) inaction of the target state. In other words, the exorbitant assertion of jurisdiction is a countermeasure implementing the international responsibility of that state for failing to implement the relevant UNSC resolutions.<sup>250</sup>

The same reasoning applies to all measures that are mandated by the UN Security Council, whether or not the relevant resolutions limit the scope of the obligation to the jurisdiction of the Member States. Indeed, in these cases, all Member States are under the same obligations stemming from the UN Charter.<sup>251</sup> As seen above, US measures seeking to realise the prescriptions of UNSC resolutions encountered significantly less opposition than those that were blatantly based on unilateral US policies.<sup>252</sup> This reasoning was also followed by the European Court of Justice (ECJ) with regard to exorbitant claims of EU Member States in the implementation of UNSC resolutions. In the *Ebony Maritime* case,<sup>253</sup> a Liberian-flagged ship was intercepted in 1994 by NATO forces on the high seas and brought to Italy, where Italian authorities impounded the cargo on grounds that the vessel had attempted to enter the territorial waters of the Federal Republic of Yugoslavia in breach

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<sup>249</sup> This is the reason behind China's opposition to the US sanctions against North Korea; see text at n 172.

<sup>250</sup> On the entitlement of states other than the injured state to take countermeasures, see Section 6.2.3.

<sup>251</sup> See Picchio Forlati (n 34) 118.

<sup>252</sup> Compare the reaction to the measures against Iran contained in CISADA (2010) with those contained in the ILSA (1996); text at nn 129 and 140. See also reactions to US sanctions against North Korea; text at n 170.

<sup>253</sup> *Ebony Maritime SA v Prefetto della Provincia di Brindisi* (Case C-177-95) [1997] 117 ILR 304.

of the embargo imposed by UNSC Resolution 820 (1993).<sup>254</sup> The defendant opposed the impounding contesting the jurisdiction of Italian authorities, provided that the cargo was registered in Liberia and was captured on the high seas. The ECJ, however, relied directly on the ‘wording and purpose of Resolution 820 (1993)’<sup>255</sup> to hold that

[i]n order to guarantee that those sanctions would be effective, it was deemed vital to prevent all commercial traffic in Yugoslav territorial waters. ... Effective prevention of all commercial traffic in Yugoslav territorial waters implies that the prohibition set out in [the EU Regulation implementing the UNSC Resolution] should apply not only to actual entries, but also to attempted entries into those territorial waters by vessels in international waters. Any other interpretation would risk rendering the prohibition ineffective.<sup>256</sup>

In other words, an ‘effective’ realisation of the UNSC resolutions justified pushing the jurisdiction of the EU Member States to the point where no connection existed. Such assertion of jurisdiction, even if exorbitant, is not unjustified considering that all states, including Liberia, were bound by the same obligations under the relevant UNSC resolutions.<sup>257</sup> Italy was implementing such obligations in a scenario where Liberia failed to do so.

### ***Measures in response to serious breaches of peremptory norms***

While internationally wrongful acts ordinarily trigger secondary obligations only for the wrongdoing state, there is one notable exception. Under customary international law, all states are bound to fulfil certain secondary obligations when ‘serious breaches of

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<sup>254</sup> Implemented by Council Regulation (EEC) 990/933 and Decision 93/235/ECSC.

<sup>255</sup> *Ebony Maritime* (n 253) [20].

<sup>256</sup> *ibid* [24]–[25].

<sup>257</sup> UN Charter, art 25. See generally Rosalyn Higgins, ‘The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?’ (1972) 21 ICLQ 270.

peremptory norms of international law' occur.<sup>258</sup> Specifically, Article 41 ARSIWA identifies three obligations: (i) the duty not to 'recognize as lawful' a situation created by the serious breach; (ii) the duty not to render aid or assistance in the maintenance of the situation; (iii) the duty to cooperate with other states in order to bring to an end 'through lawful means' the serious breach.<sup>259</sup> The difficulty with these obligations is that their content is fundamentally vague and state practice is not sufficiently developed so as to conclusively determine what they entail.<sup>260</sup> As to the duty of non-recognition, in order for the unlawful situation flowing from the breach not to be 'recognised as lawful', the unlawful situation should amount to some legal claim that other states are in a position to deny.<sup>261</sup> This works well with territorial claims based, for example, on unlawful use of force, but less well with situations created by acts of genocide, torture, or crimes against humanity, where it is not clear what there is to be denied.<sup>262</sup> The duty not to render aid or assistance, for its part, clearly prevents states from supporting the commission of the crime itself and may entail a duty to take action in order to counteract those effects.<sup>263</sup> However, the extent to which this means that states should sever their relationships with the

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<sup>258</sup> Chapter III, ARSIWA and Commentary, 110-116. See also Commentary to Draft Art 53(2) (1996) II(2) YILC 114.

<sup>259</sup> Art 42 ARSIWA and Commentary 113-114.

<sup>260</sup> Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes* (Martinus Nijhoff 2006) 105; Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 679; Nina Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 688.

<sup>261</sup> See Dawidowicz, 'The Obligation' (n 260) 683.

<sup>262</sup> See Talmon (n 260) 120.

<sup>263</sup> See Jørgensen (n 260) 690.

wrongdoing state is in question; in fact, many agree that states are *not* required to completely isolate the wrongdoing state<sup>264</sup> and state practice is also oriented in this direction.<sup>265</sup> The duty to cooperate does not lead much further, considering the fundamental ambiguity of the notion of ‘cooperation’ and the fact that this is limited to ‘lawful means’.<sup>266</sup>

Despite these uncertainties, some state practice supports the idea that exorbitant assertions of jurisdiction may find a justification under international law when they respond to serious breaches of peremptory norms. An obvious candidate in this sense is the action that the United States took against Uganda in 1978 in response to the allegation of genocide on the part of the government of Idi Amin. US Congress, in particular, imposed a ban on exports of all products except for grains and food products to Uganda for all ‘persons subject to the jurisdiction of the United States’.<sup>267</sup> As seen above, this was understood as including persons not linked by territory and nationality to the United States.<sup>268</sup> Congress made explicit the link between these measures and the human rights violations in Uganda:

The Congress finds that ... the Government of Uganda, under the regime of General Idi Amin, has committed genocide against Ugandans; .... It is the sense of the Congress that the Government of the United States should take

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<sup>264</sup> ibid 691. States manifested concerns about an excessively broad and unrealistic duty of non-recognition: Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (1968) UN Doc A/7326 [75].

<sup>265</sup> After the ICJ Advisory Opinion on the *Wall*, for example, states maintained their usual business with Israel; see Talmon (n 260) 106.

<sup>266</sup> Whether these means include countermeasures as ‘lawful measures’ under art 54 ARSIWA (let alone, the precise content of these measures) is unclear. See generally Dawidowicz, *Third-Party* (n 63).

<sup>267</sup> s 5, PL 95-435 (1978) 92 Stat 1053.

<sup>268</sup> See text at n 71.

steps to disassociate itself from any foreign government which engages in the international crime of genocide.<sup>269</sup>

While the measure was short-lived<sup>270</sup> and it is unclear whether the United States ever sought to enforce it against third states, it is striking for two reasons. First, it is frequently referred to as one of the most clear-cut examples of collective countermeasures,<sup>271</sup> that is, measures taken by ‘states other than an injured state’ to implement responsibility for breaches of *erga omnes* obligations.<sup>272</sup> Second, and in stark contrast with exorbitant jurisdictional claims made by the United States at the time, these measures encountered no protests from other states;<sup>273</sup> on the contrary, many states adopted measures against Uganda of their own.<sup>274</sup>

To be sure, this does not conclusively prove that such exorbitant jurisdictional claims are justified in their targeting of third states. The problem connected to the vagueness of the obligations stemming from serious breaches of peremptory norms is that, while states may agree that such a breach has occurred and that measures must be taken

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<sup>269</sup> s 5, PL 95-435 (1978) 92 Stat 1053.

<sup>270</sup> After a few months, the US President certified that Uganda was ‘no longer committing a consistent pattern of gross violations of human rights’; see Termination of the Embargo on Export Trade with Uganda (30 May 1979) 44 FedReg 31010.

<sup>271</sup> Sicilianos (n 64) 64; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 210; Martin Dawidowicz, ‘Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council’ (2007) 77 BYIL 333, 356.

<sup>272</sup> See Articles 48 and 54 ARSIWA and Commentaries 126, 137. See further Section 6.2.3.

<sup>273</sup> Bianchi, ‘Extraterritoriality’ (n 28) 398 (linking the lack of protests to the ‘universally accepted condemnation of genocide’).

<sup>274</sup> See Tams (n 271) 210; Dawidowicz, ‘Public Law’ (n 271) 358.

against the wrongdoing state, they may still hold different views as to the best course of action required to ‘bring [the breach] to an end through lawful means’.<sup>275</sup>

An indication as to how to break the impasse is provided by the ICJ. In the *Namibia* Advisory Opinion, upon establishing that UN Member States were under a duty to recognise the illegality of the continued presence of South Africa in Namibia, the ICJ added that:

[t]he precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.<sup>276</sup>

Similarly, in the *Wall* Advisory Opinion the Court held that:

the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated *régime*, taking due account of the present Advisory Opinion.<sup>277</sup>

According to the Court, the political organs of the United Nations could remedy the inherent vagueness of the provisions concerning the duties to deny recognition and bring the breach to an end by specifying which action is required in the specific case. In these scenarios, a binding resolution of the Security Council is not necessary because the obligations themselves stem directly from customary international law.<sup>278</sup> The role of the

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<sup>275</sup> See Jørgensen (n 260) 697 (‘Even if the action is clearly unlawful, some States may refuse to cooperate because they feel it is an inappropriate response to the particular wrongful act’).

<sup>276</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 55 [120].

<sup>277</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 200 [160].

<sup>278</sup> Some treaty law also supports this: eg Article VIII, Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 (‘Genocide Convention’) (requiring

General Assembly and the Security Council is ‘one of coordination, rather than creation, of the obligation, as uncoordinated acts of non-recognition by individual States will not usually be very effective’.<sup>279</sup>

Reactions to the apartheid regime in South Africa in the 1980s provide a fitting example of this role. In response to serious breaches concerning the prohibition on racial discrimination by the Government of South Africa, multiple UN Security Council resolutions demanded increasingly restrictive measures against South Africa.<sup>280</sup> Resolution 418 (1977) applied a mandatory arms embargo and Resolution 569 (1985) imposed severe restrictions on investments in South Africa.<sup>281</sup> These measures, however, stopped short of imposing a full embargo on South Africa and, in particular, never touched the oil industry. Conversely, the UN General Assembly had urged all states to refrain from supplying petroleum to South Africa since 1963<sup>282</sup> and repeated UNGA resolutions urged ‘all States which have not yet done so to take effective legislative and other measures to ensure the effective implementation of an oil embargo against South Africa.’<sup>283</sup>

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state parties to ‘call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide’). According to Bruno Simma, ‘[i]n the face of genocide, the right of States, or collectivities of States, to counter breaches of human rights most likely becomes an obligation’; see ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1, 2.

<sup>279</sup> Talmon (n 260) 113.

<sup>280</sup> The UN Security Council had deplored the apartheid policy and demanded that the South African government abandon it since 1960; UNSC Res 134 (1960), UN Doc S/RES/134 (1960).

<sup>281</sup> UNSC Res 418 of 4 November 1977, UN Doc S/RES/418 [2]; UNSC Res 569 of 26 July 1985, UN Doc S/RES/569 (1985) [6].

<sup>282</sup> UNGA Res 1899 (XVIII) (1963), UN Doc A/RES/1899(XVIII) [7].

<sup>283</sup> UNGA Res 35/206 D (1980) UN Doc A/RES/35/206D; UNGA Res 36/172 G (1981) UN Doc A/RES/36/172G; UNGA Res 37/69 J (1982) A/RES/37/69J. These recommendations continued after the US Anti-Apartheid Act; eg UNGA Res 42/23 F (1987) UN Doc A/RES/42/23F.

Despite several UNGA requests that the Security Council ‘impose a mandatory embargo on the supply and shipping of oil and petroleum products to South Africa’,<sup>284</sup> a resolution in this sense was never adopted because of the joint vetoes of the United States and the United Kingdom.<sup>285</sup> Ironically, US Congress in those same years pushed the Reagan Administration into a much tougher stance against South Africa.<sup>286</sup> The Comprehensive Anti-Apartheid Act of 1986 is a complex statute which includes multiple restrictions on imports and exports from the United States to South Africa.<sup>287</sup> These are generally limited to US nationals;<sup>288</sup> however, section 321 of the Act forbids the exports of crude oil and petroleum products by any ‘person[s] subject to the jurisdiction of the United States’.<sup>289</sup> In the light of the dominant interpretation at the time, this should be read as an assertion of jurisdiction over all US-owned companies with virtually unlimited territorial reach. Despite these exorbitant assertions, no protest was recorded—other states followed suit and adopted measures of their own.<sup>290</sup>

No UNSC resolutions justified the exorbitant jurisdictional assertions of the United States. Strictly speaking, the US measures even went beyond what was required by the General Assembly, considering that the Assembly never asked states to implement exorbitant measures. At the same time, assuming that all states were bound not to recognise

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<sup>284</sup> UNGA Res 42/23 F (1987) UN Doc A/RES/42/23F [2].

<sup>285</sup> ‘US and Britain Veto UN Move to Impose Penalties on Pretoria’ (*The New York Times*, 9 March 1988) 12.

<sup>286</sup> See Winston Nagan, ‘An Appraisal of the Comprehensive Anti-Apartheid Act of 1986’ (1987) 5 *JL&Relig* 327.

<sup>287</sup> 100 Stat 1086 (22 USC 5001-5116).

<sup>288</sup> eg § 301 (22 USC 5051); § 303 (22 USC 5053); § 305 (22 USC 5055).

<sup>289</sup> 100 Stat 1105 (22 USC 5071) .

<sup>290</sup> Various OPEC states had autonomously implemented an oil embargo against South Africa since 1973; see Philip Levy, ‘Sanctions on South Africa: What Did They Do?’ (1999) 89 *AmEcRev* 415.

the legality of the South African Government's policy of apartheid and to cooperate to bring it to an end, the United States had a realistic claim that, in asserting exorbitant jurisdiction, it was implementing the secondary obligations owed by all states in response to South Africa's serious breaches of peremptory norms. Multiple UNGA resolutions had authoritatively interpreted the content of these obligations, in the specific circumstances of the case, as including an oil embargo. Considering the favourable responses that such claims encountered, the framework of countermeasures provides a strong justification for these exorbitant assertions of jurisdiction.

#### **2.4. Interim conclusion**

This Chapter has shown that state practice supports the assertion of exorbitant prescriptive jurisdiction as a potentially justified countermeasure. This is particularly evident in the context of unilateral trade control measures. The problem of exorbitant trade control measures is that, even if taken in response to the prior wrongful act of another state, they often target third states that bear no obligations in relation to the original wrongful act. Such measures lack the instrumental character required to justify them as countermeasures. When this occurs, state practice is largely oriented against the legality of such measures. Conversely, state practice is supportive of the legality of exorbitant assertions of jurisdiction that present all the features of countermeasures. These features are found when a state asserts its jurisdiction exorbitantly to counteract the effects of exorbitant assertions by another state (that is, when the measure exclusively targets the wrongdoing state). These features are also present when the obligations of all targeted states are engaged. In the context of armed conflicts, these obligations may derive from the breach of the law of

neutrality. In peacetime, the obligations of third states may be engaged (i) because they aided or assisted the wrongdoing state in the commission of the wrongful act, (ii) following breaches of UNSC-mandated measures, or (iii) in response to the commission of a serious breach of peremptory norms.

Given the importance of these norms for the protection of interests of the international community, the use of jurisdictional countermeasures in this area has advantages that may outweigh the infringement on sovereign equality and independence following the breach of the rules of jurisdiction. The normative implications of the use of these countermeasures are further explored in Chapter 6.

### 3. EXERCISE OF ADJUDICATIVE JURISDICTION

This Chapter investigates whether the countermeasures framework may provide a justification for otherwise unlawful exercise of adjudicative jurisdiction. Section 3.1 explains the choice of focussing on the ‘adjudicative’ component of jurisdiction and illustrates that the features of countermeasures are likely to emerge when jurisdiction is exercised in the absence of any internationally accepted jurisdictional link (universal jurisdiction). Section 3.2 surveys examples of exercises of universal jurisdiction in the criminal law context and identifies cases in which the countermeasures framework may provide an alternative justification for the exercise of jurisdiction. Section 3.3. explores whether the countermeasures framework may justify the exercise of universal jurisdiction in the civil law context.

#### 3.1. Identifying potentially unlawful exercise of adjudicative jurisdiction

Adjudicative jurisdiction is the state’s power ‘to subject persons or things to the process of its courts or administrative tribunals’.<sup>1</sup> Of the three types of jurisdiction,<sup>2</sup> it is the most controversial. For some, isolating this type of jurisdiction is nonsense; adjudication is the

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<sup>1</sup> § 401 (b) Restatement (Third) of US Foreign Relations Law. See also Oscar Schachter, ‘International Law in Theory and Practice: General Course in Public International Law’ (1982) 178 RdC 16, 246; Bernard Oxman, ‘Jurisdiction of States’, *MPEPIL* (2007) [3]; Anthony Colangelo, ‘Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction’ (2013) 28 Md JIL 65.

<sup>2</sup> See Chapter 1 text at n 5.

‘actualisation of the prescription’<sup>3</sup>—as such, it contains elements of both prescriptive and enforcement jurisdiction.<sup>4</sup> This is certainly true in all cases in which courts apply their own domestic laws, such as most criminal law cases and non-criminal law cases dealing with ‘public law’ or ‘regulatory’ matters (e.g. taxation, securities, and anti-trust).<sup>5</sup> However, the conclusion may be different when domestic courts hear a case without applying the law of the forum state, for example as a result of the operation of rules of private international law in civil matters.<sup>6</sup> Similarly, the courts of state X may hear a case about a war crime committed in state Y and apply directly international law rather than the law of state X.<sup>7</sup> To compound this difficulty, the extent to which international law regulates the exercise of (purely) adjudicative jurisdiction remains unclear. The most recent Restatement (Fourth) of the Foreign Relations Law of the United States states—controversially<sup>8</sup>—that ‘[w]ith the significant exception of various forms of immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate.’<sup>9</sup>

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<sup>3</sup> Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 JICJ 735, 737.

<sup>4</sup> See Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 BYIL 187, 195; Stephen Coughlan and others, *Law Beyond Borders* (Irwin 2014) 42.

<sup>5</sup> See Michael Akehurst, ‘Jurisdiction in International Law’ [1972] BYIL 145, 179; Schachter (n 1) 248; Derek Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1983) 53 BYIL 1, 2; Mills (n 4) 195.

<sup>6</sup> See Section 3.3.

<sup>7</sup> See text at n 24. See also IBA, Report of the Task Force on Extraterritorial Jurisdiction (2009) 10 <<http://tinyurl.com/taskforce-etj-pdf>>; ILC, Report on the work of its fifty-eighth session, Annexes (2006) UN Doc A/61/10, 230 (‘[T]he notion of extraterritorial jurisdiction may be understood as referring to the exercise of jurisdiction by a State with respect to its national law in its own national interest rather than the application of *foreign law* or *international law*.’).

<sup>8</sup> Austen Parrish, ‘Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law’ (*OpinioJuris*, 06 September 2018) <<http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law>>.

<sup>9</sup> William Dodge, Anthea Roberts, and Paul Stephan, ‘Jurisdiction to Adjudicate Under Customary International Law’ (*OpinioJuris*, 11 September 2018) <<http://opiniojuris.org/2018/09/11/33646>>.

Diplomatic protests remain the litmus test to discriminate between lawful and unlawful exercises of adjudicative jurisdiction.<sup>10</sup> Yet, when domestic courts exercise adjudicative jurisdiction, it is difficult to assess this aspect in isolation from prescriptive jurisdiction. If domestic courts assert application of the laws of the forum to specific cases, reactions of other states contribute to developing customary international law with regard to both prescriptive and adjudicative jurisdiction. At the same time, at least one type of jurisdiction has come specifically under attack in its adjudicative component and looking at this practice may offer some guidance concerning the legality of the exercise of adjudicative jurisdiction as such. This is universal jurisdiction, or jurisdiction exercised in the absence of any internationally accepted connecting link.<sup>11</sup>

The existence of the principle of universality in the assertion of prescriptive jurisdiction is uncontroversial; accordingly, states can assert their jurisdiction over a number of offences regardless of the existence of connecting factors.<sup>12</sup> However, the exercise of universal jurisdiction remains fraught with uncertainties. State representatives in the Sixth Committee of the UN General Assembly have been debating this topic annually

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<sup>10</sup> See Akehurst (n 5) 176; Schachter (n 1) 247.

<sup>11</sup> O’Keefe, ‘Universal Jurisdiction’ (n 3) 740. See generally Rosalyn Higgins, *Problems and Process* (OUP 1995) 56; Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *VaJIL* 81; Antonio Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 *JICJ* 589; George Fletcher, ‘Against Universal Jurisdiction’ (2003) 1 *JICJ* 580; Luc Reydam, *Universal Jurisdiction* (OUP 2003); Christian Tomuschat, ‘Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes’ (2005) 71 *AIDI* 213; Jean d’Aspremont, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’ (2010) 43 *ILR* 301; Maximo Langer, ‘The Diplomacy of Universal Jurisdiction’ (2011) 105 *AJIL* 1; Roger O’Keefe, *International Criminal Law* (OUP 2015) 371; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 120; Sienho Yee, ‘Universal Jurisdiction: Concept, Logic and Reality’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015); Devika Hovell, ‘The Authority of Universal Jurisdiction’ (2018) 29 *EJIL* 427; James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 451.

<sup>12</sup> See Reydam, *Universal Jurisdiction* (n 11) 28.

since 2009<sup>13</sup> and, while ‘important progress has been made’,<sup>14</sup> there remain considerable differences between their views.<sup>15</sup> First, states disagree as to the scope of the principle of universality and, particularly, the crimes to which it applies.<sup>16</sup> Second, states hold opposing views concerning the ‘parameters for [its] application’, including:

criteria for the exercise of such jurisdiction; procedural and practical aspects, including whether the presence of a suspect in the territory is required before investigations or other measures may be taken against him; role of national judicial systems; ... whether the territorial State should have priority to act as against other States with different connections to the alleged prohibited conduct; ... its interaction with the usually treaty-based duty to extradite or prosecute (*aut dedere aut judicare*) in relation to certain crimes and the relationship of universality with the principle of complementarity, which for States Parties to the Rome Statute, gives primacy to *national* prosecutions of core crimes in relation to the jurisdiction of the permanent ICC.<sup>17</sup>

The nature of these divergences relates not so much to the assertion of prescriptive jurisdiction, but to the way in which it is exercised—that is, to adjudicative and enforcement jurisdiction. This reflects concerns—expressed in particular by the African Union—that the exercise of universal jurisdiction should be subject to additional limitations compared to other forms of jurisdiction in order to prevent potential ‘abuse’

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<sup>13</sup> UNGA Res 64/117 (15 January 2010); UNGA Res 65/33 (10 January 2011) UN Doc A/RES/65/33; UNGA Res 66/103 (13 January 2012) UN Doc A/RES/66/103; UNGA Res 67/98 (14 January 2013) UN Doc A/RES/67/98; UNGA Res 68/117 (18 December 2013) UN Doc A/RES/68/117; UNGA Res 69/124 (18 December 2014) UN Doc A/RES/69/124; UNGA Res 70/119 (18 December 2015) UN Doc A/RES/70/119; UNGA Res 71/149 (20 December 2016) UN Doc A/RES/71/149; UNGA Res 72/120 (18 December 2017) UN Doc A/RES/72/120.

<sup>14</sup> Charles Jalloh, ‘Universal criminal jurisdiction’ in ILC, Report on the Work of its Seventieth Session, Annex A (2018) UN Doc A/73/10, [12] [Jalloh Report].

<sup>15</sup> In January 2018, the Assembly of the African Union requested the African Group and the Commission to ‘make recommendations ... on how to move this discussion forward, *in view of the apparent impasse in the Sixth Committee*’; AU Assembly, Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII) (2018) Assembly/AU/Dec.665-689(XXX), [5(v)] (emphasis added).

<sup>16</sup> See Jalloh Report (n 14) [8].

<sup>17</sup> *ibid.*

deriving from its selective use to target heads of state and other high-ranking officials of a limited number of states.<sup>18</sup> Doctrinal debate on the topic mirrors states' concerns.<sup>19</sup>

That the exercise of universal jurisdiction may present difficulties that are specifically connected with the adjudicative (rather than prescriptive) component is better demonstrated by some trials for crimes committed during World War II (WWII) such as the trial of Adolf Eichmann in Israel<sup>20</sup> and others before Australian<sup>21</sup> and English<sup>22</sup> courts. These trials were carried out pursuant to the principle of universality and convictions were reached by means of retroactive application of domestic laws (which were adopted after WWII). However, this was not in conflict with the principle of legality (*nullum crimen sine lege*) because—the courts found—the acts were already criminalised under customary

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<sup>18</sup> AU Assembly, 'Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/731(XXI)' (2012) Assembly/AU/Dec.420(XIX); see further Jalloh Report (n 14) [9-10]. See also Sixth Committee, 'Summary record of the 13th meeting' (2017) UN Doc A/C.6/72/SR.13, [8] (Iran, on behalf of the Non-Aligned Countries), [12] (Algeria, on behalf of the African Group), [18] (Trinidad and Tobago, on behalf of the Caribbean Community).

<sup>19</sup> Some scholars distinguish two 'categories' of universal jurisdiction: 'absolute' universal jurisdiction (which can be exercised *in absentia*) as an 'extreme' and unlawful form of universal jurisdiction; and 'conditional' universal jurisdiction (which requires the presence of the accused in the prosecuting state) as the only lawful form of universal jurisdiction. See Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (n 11) 592–593; Reydams, *Universal Jurisdiction* (n 11) 32ff; Anthony Colangelo, 'The New Universal Jurisdiction' (2004) 36 *GeoJIL* 537; Ryan Rabinovitch, 'Universal Jurisdiction in Absentia' (2004) 28 *FordhamIntLJ* 500; Alexander Poels, 'Universal Jurisdiction in Absentia' (2005) 23 *NQHR* 65; Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 *JICJ* 561, 579. This distinction made its way into the separate opinions in *Arrest Warrant of 11 April 2000 (DRC/Belgium)* (Merits) [2002] ICJ Rep 3, sep op Guillaume [16] ('Universal jurisdiction *in absentia* is unknown to international law'); sep op Rezek [6] (presence of the accused is required); sep op Higgins, Kooijmans, and Buergenthal [59-61] (no definitive answer as to legality of 'universal jurisdiction *in absentia*'); sep op Van den Wyngaert [58] (universal jurisdiction *in absentia* is permitted because it is not prohibited). For a critical analysis, see O'Keefe, 'Universal Jurisdiction' (n 3) 741–750.

<sup>20</sup> *Attorney-General v Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem); *Attorney-General v Eichmann* (1968) 36 ILR 277 (Supreme Court of Israel).

<sup>21</sup> *Polyukhovich v Commonwealth of Australia* (1991) 91 ILR 1; ILDC 2726 (AU 1991) (Australia, High Court).

<sup>22</sup> *R v Sawoniuk (Anthony)* [2000] CrimLR 506.

international law at the time they were committed.<sup>23</sup> In other words, while applying their own domestic statutes, these courts were enforcing prescriptions already contained in international law.

According to some, when national courts enforce prescriptions that derive from international law—whether or not incorporated in their domestic legislation—they are not limited by the ordinary principles of jurisdiction, as there is no extraterritorial exercise of *domestic* jurisdiction—‘State courts act as instruments of the decentralized enforcement of international law.’<sup>24</sup> At the same time, unless one accepts that the criminalisation of an offence under international law always entails a permissive rule allowing the exercise of universal jurisdiction—a conclusion that is not supported by state practice<sup>25</sup>—there must be a way to distinguish between lawful and unlawful exercises of universal jurisdiction. The applicable rules are not necessarily those of prescriptive jurisdiction. On the one hand, it is correct to affirm that ‘a state’s criminal courts have no greater authority under international law to adjudge conduct by reference to that state’s criminal law than has the legislature of the state to prohibit the conduct in the first place’.<sup>26</sup> On the other hand, the judicial organs of a state may very well be vested with a *lesser* authority than their legislative counterpart. In other words, states are free to agree on rules of custom according

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<sup>23</sup> *Polyukhovich* (n 21) (Toohey J). See generally Antonio Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law’ (2006) 4 JICJ 410; O’Keefe, *International Criminal Law* (n 11) 366. On the principle of legality, see Section 6.2.5.

<sup>24</sup> Rüdiger Wolfrum, ‘The Decentralized Prosecution of International Offences through National Courts’ in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996) 236. See also Daniel Bodansky, ‘Human Rights and Universal Jurisdiction’ in Mark Gibney (ed), *World Justice? U.S. Courts and International Human Rights* (Westview 1991) 3–11; Anthony Colangelo, ‘The Legal Limits of Universal Jurisdiction’ (2006) 47 VaJIL 149, 161.

<sup>25</sup> See Section 3.2.2.

<sup>26</sup> O’Keefe, ‘Universal Jurisdiction’ (n 3) 737 (footnote omitted).

to which prescriptive jurisdiction can be asserted over a crime without any connection to the state, but in order for domestic courts to hear the relevant cases additional conditions must be fulfilled.<sup>27</sup>

Focussing specifically on the exercise of (adjudicative) universal jurisdiction offers two clear advantages in the present study. First, by looking at the exercise of universal jurisdiction by domestic courts it is possible to identify instances of state practice potentially breaching customary international law. If a domestic court exercises universal jurisdiction in the absence of a permissive rule of custom, the breach may very well lie (also) in the prescription—still, the exercise of adjudicative jurisdiction is clearly a breach of international law.<sup>28</sup> Second, the exercise of universal jurisdiction by domestic courts turns any dispute concerning the legality of such jurisdiction into a bilateral dispute. Unlike domestic statutes (which are formulated in general terms), court proceedings always project the sovereignty of one state (the forum state) against that of another state (the state of nationality of the accused and/or the state where the conduct occurred).<sup>29</sup> This means that the exercise of (adjudicative) universal jurisdiction can be *instrumentalised* and used as a response to wrongful acts of specific states. In other words, the exercise of adjudicative universal jurisdiction may more easily offer the features of countermeasures compared to its prescriptive counterpart. Even if the breach lied in the prescription, countermeasures might still preclude the wrongfulness of the ‘actualisation of the prescription’.

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<sup>27</sup> See Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 EJIL 815, 848, n 155.

<sup>28</sup> See Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 271.

<sup>29</sup> Trapp suggests that actualisation constitutes the injury, a necessary element of the wrongfulness of the prescription: Kimberley Trapp, ‘Jurisdiction and State Responsibility’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 360–361.

The next sections explore the applicability of the countermeasures framework to the exercise of universal jurisdiction. First, the focus is on criminal matters, where state practice is more developed. Then, the countermeasures framework is considered with respect to the exercise of universal civil jurisdiction.

### **3.2. Exercise of universal jurisdiction in criminal proceedings**

The legal basis for the exercise of universal jurisdiction can be found in international treaties or customary international law. While some treaties unequivocally authorise the exercise of universal jurisdiction over certain criminal offences, the identification of a legal basis for the exercise of universal jurisdiction under customary international law has proved more complicated. As evidenced by the abovementioned UNGA discussions,<sup>30</sup> there is debate as to the extent to which custom authorises the exercise of universal jurisdiction and the crimes over which this type of jurisdiction can be vested in domestic courts. The following sections demonstrate that the countermeasures framework may play an important role in justifying potentially wrongful exercise of adjudicative jurisdiction.

Section 3.2.1 examines the practice of domestic courts exercising universal jurisdiction pursuant to treaties. It shows that treaty-based exercise of universal jurisdiction is ‘primary’ or ‘unconditional’ and courts have largely held that no preliminary requirement—other than (potentially) the presence of the accused—should be met before exercising jurisdiction on this basis. Section 3.2.2 compares this practice with the exercise of universal jurisdiction in the absence of a treaty basis. It illustrates that courts exercising

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<sup>30</sup> Text at n 13.

universal jurisdiction in these cases have frequently found that jurisdiction could be established only ‘subsidiarily’—that is, if the states with territorial and nationality links with the case were unable or unwilling to exercise their jurisdiction. Section 3.2.3 argues that the principle of subsidiarity qualifies the exercise of universal criminal jurisdiction as an instrumental response to the failure of the national and/or territorial state(s) to fulfil their obligations to criminalise and prosecute international crimes. In these circumstances, the framework of countermeasures provides an additional or alternative legal basis for the exercise of universal jurisdiction.<sup>31</sup> This framework is then tested against the exercise of universal jurisdiction over the crime of aggression.

### 3.2.1. Treaty-based exercise of universal jurisdiction

Treaty provisions concerning the exercise of universal jurisdiction are contained in a class of treaties known as ‘suppression conventions’.<sup>32</sup> As the name suggests, the object and purpose of these conventions is to ‘suppress’ (that is, criminalise and prosecute) certain conduct of individuals. While states have resorted to suppression conventions for centuries,<sup>33</sup> early examples of these instruments did not engage with issues of jurisdiction. Older treaties acknowledged that states held different views with regard to the assertion of jurisdiction beyond their territory and left the issue of extraterritorial jurisdiction to the

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<sup>31</sup> On the function of countermeasures, see Section 6.1.2.

<sup>32</sup> O’Keefe, *International Criminal Law* (n 11) 311.

<sup>33</sup> Provisions outlawing piracy can be found in the Jay Treaty: see Article 20 of the Treaty of Amity, Commerce and Navigation between Great Britain and the United States (19 November 1794) 52 Consolidated Treaty Series 243. See also Roger Clark, ‘Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus’ (2011) 22 *CrimLF* 519, 523.

determination of individual states.<sup>34</sup> This trend changed with the 1949 Geneva Conventions, which contain the first treaty formulation of unconditional universal jurisdiction.<sup>35</sup> The suppression conventions adopted after 1949 do not use the same language; yet, with very few exceptions, they all impose similar obligations. First, all these conventions provide for the obligation to *criminalise* the relevant conduct within the state's municipal system,<sup>36</sup> often coupled with the closely connected obligation to provide for appropriate penalties.<sup>37</sup> Second, several conventions contain an obligation to *prosecute* conduct inconsistent with the prohibition. This is frequently formulated in these terms:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever

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<sup>34</sup> eg Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (26 June 1936), art 3 ('The High Contracting Parties who possess extra-territorial jurisdiction in the territory of another High Contracting Party undertake to enact the necessary legislative provisions for punishing such of their nationals as are guilty within that territory of any offence specified in Article 2 at least as severely as if the offence had been committed in their own territory').

<sup>35</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, art 50; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 146. See Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 JICJ 811.

<sup>36</sup> eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('Torture Convention'), art 4(1); Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ('Illicit Traffic Convention'), art 3(1); International Convention for the Suppression of Terrorist Bombings 1997 ('Terrorist Bombings Convention'), art 4(a).

<sup>37</sup> eg Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970) 860 UNTS 105 ('Hague Convention'), art 2; International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 ('Apartheid Convention'), art IV; International Convention against the Taking of Hostages 1979 ('Hostages Convention'), art 2.

and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.<sup>38</sup>

This provision, which leaves the state where the accused is found with a choice between submission of the case to its own prosecuting authorities or extradition to a state willing to prosecute, is known as the obligation to prosecute or extradite (or *aut dedere aut judicare*).

As the ICJ clarified:

[this choice] does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.<sup>39</sup>

It follows that, under the conventions that use this language, states are first and foremost under a general duty to prosecute;<sup>40</sup> this duty arises directly from the presence of the accused in the territory of the state and is not subject to any other condition.<sup>41</sup>

This is reinforced by a third obligation: the duty to ‘take such measures as may be necessary to *establish jurisdiction* over the offence’ on a number of pre-determined bases.<sup>42</sup>

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<sup>38</sup> eg Hague Convention, art 7 (continuing ‘[t]hose authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State). This is known as ‘The Hague model’; see Kreß (n 19) 567.

<sup>39</sup> *Obligation to Prosecute or Extradite (Belgium/Senegal)* (Judgment) [2012] ICJ Rep 422, 456 [95].

<sup>40</sup> See Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (OUP 2018) 179.

<sup>41</sup> See O’Keefe, *International Criminal Law* (n 11) 332. These conventions must be distinguished from a small number of treaties where the duty to prosecute arises when a request for extradition from another state has been received and denied; see *Obligation to Prosecute or Extradite* (n 39), sep op Yusuf, 567-9 [18-22]; Kittichaisaree (n 40) 169. This is more common in older conventions: eg International Convention for the Suppression of Counterfeiting Currency 1929, art 9(2); Convention for the Suppression of the Illicit Traffic in Dangerous Drugs 1936, art 8. In other treaties, this duty arises only when extradition is refused on the ground that the accused is a national of the custodial state: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (‘Children Protocol’), art 5(5); United Nations Convention against Transnational Organized Crime 2000 (‘Organized Crime Convention’), art 16(10); United Nations Convention against Corruption 2003 (‘Corruption Convention’), art 44(11).

<sup>42</sup> eg Hague Convention, art 4(1) (emphasis added).

The number and type of jurisdictional bases vary depending on the convention.<sup>43</sup> A great number of these conventions make the exercise of universal jurisdiction an obligation; others expressly permit it.<sup>44</sup> The obligation to establish universal jurisdiction is formulated along these lines:

Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him [to another Contracting State].<sup>45</sup>

This is first and foremost a duty to exercise (adjudicative) universal jurisdiction when the accused is present in the territory of the contracting state and the latter decides not to extradite. Since no link is required between the accused and the contracting state when the relevant conduct takes place, this is also a duty to assert (prescriptive) universal jurisdiction.<sup>46</sup> Moreover, it has been argued that the exercise of universal jurisdiction in the absence of the accused, while not mandatory, would nonetheless be permissible under such provisions—though the issue remains contested.<sup>47</sup>

Putting all of this together, these conventions establish that the exercise of universal jurisdiction by the courts of state parties—at least (but not necessarily only) when the

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<sup>43</sup> All conventions oblige states to establish jurisdiction on their territory. Most conventions mandate the establishment of extraterritorial jurisdiction over nationals of the state: eg Hague Convention, art 4(1)(e); Hostages Convention, art 5(1)(b); Torture Convention, art 5(1)(b). The exceptions where this jurisdictional basis is purely mandatory are: Illicit Traffic Convention, art 4(2)(a)(ii); Children Protocol, art 4(2)(a); Organized Crime Convention, art 15(2)(b); Corruption Convention, art 42(2)(b).

<sup>44</sup> Apartheid Convention, art V; Illicit Traffic Convention, art 4(2)(b); Organized Crime Convention, art 15(4); Corruption Convention, art 42(4). See O’Keefe, *International Criminal Law* (n 11) 324.

<sup>45</sup> eg Hague Convention, art 4(2).

<sup>46</sup> O’Keefe, *International Criminal Law* (n 11) 325.

<sup>47</sup> Compare Reydam, *Universal Jurisdiction* (n 11) 188 (‘The [Torture] Convention does not provide a third country’s right to punish’) with O’Keefe, ‘Universal Jurisdiction’ (n 3) 750.

accused is present—is: (i) mandatory; (ii) unconditional; and (iii) primary (as opposed to subsidiary).<sup>48</sup> In other words, domestic courts are under no conventional obligation to enquire about the possibility of bringing these cases before the courts of a state with jurisdictional connections; on the contrary, these conventions are premised on the idea of concurring jurisdiction.<sup>49</sup> The case law arising from these conventions confirms this finding, as there is no evidence of domestic courts enquiring into the possibility of prosecution in other states before exercising universal jurisdiction. Some examples of state practice concerning universal jurisdiction over major treaty crimes further elucidate this point.

### ***War crimes under the ‘grave breaches’ system***

The four Geneva Conventions had a fundamental role in ‘acclimatis[ing] states to the idea of treaty-based, mandatory universal criminal jurisdiction’.<sup>50</sup> In line with what is discussed above, domestic courts have exercised universal jurisdiction over grave breaches of the Geneva Conventions without questioning whether prosecution in other legal systems was ongoing or even feasible. Aside from trials for WWII crimes,<sup>51</sup> the first conviction of this kind came from Denmark and dealt with a case of assault in a Croatian POW camp during the Bosnian War.<sup>52</sup> Since universal jurisdiction in Denmark was established with a

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<sup>48</sup> cf O’Keefe, ‘Grave Breaches’ (n 35) 821.

<sup>49</sup> See O’Keefe, *International Criminal Law* (n 11) 321.

<sup>50</sup> O’Keefe, ‘Grave Breaches’ (n 35) 825–6.

<sup>51</sup> See text at nn 20–22.

<sup>52</sup> *Government Prosecution Service v T* (Appeal judgment) (15 August 1995) U 1995 838H; ILDC 568 (DK 1995) (Denmark, Supreme Court). See Rafaëlle Maison, ‘Les premiers cas d’application des dispositions pénales des Conventions de Genève par les juridictions internes’ (1995) 6 EJIL 260.

legislative *renvoi* to Denmark's treaty obligations,<sup>53</sup> Danish courts promptly exercised jurisdiction upon identifying the case as falling under the grave breaches provisions of the Third and Fourth Geneva Conventions.<sup>54</sup> A year earlier, a French judge similarly held that French courts were competent to hear a case originating from the Bosnian War under the grave breaches provisions. Though the order was later quashed by the Court of Appeal due to the absence of the accused from French territory,<sup>55</sup> neither judgment discussed whether jurisdiction had or could be exercised elsewhere. In 1997, a Swiss court exercised jurisdiction over a Bosnian national for crimes committed in a POW camp in Bosnia; the only preliminary enquiry concerned whether the conflict had an international character.<sup>56</sup> In a similar vein, the Federal Court of Justice upheld the jurisdiction of German courts over a Serbian national for various offences committed in the former Yugoslavia.<sup>57</sup> Despite labelling the offences as 'genocide' and 'torture', the Court established jurisdiction under the grave breaches provision of the Fourth Geneva Convention.<sup>58</sup> The latter case is relevant because it precedes the entry into force of the 2002 German Code of Crimes against International Law;<sup>59</sup> before that year, German courts' jurisdiction over these crimes was

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<sup>53</sup> Denmark Criminal Code, Act No 127 of 1930, Consolidated Act No 871 of 2014, General Part, Ch 2 s 8.

<sup>54</sup> *Government Prosecution Service v T* (n 52) [46].

<sup>55</sup> *Javor and Others* (24 November 1994) 127 ILR 126 (Court of Appeal of Paris); confirmed by *Javor and Others* (26 March 1996) 127 ILR 132 (Court of Cassation).

<sup>56</sup> *In re G* (18 April 1997) (Military Tribunal of Lausanne); see case note by Ziegler in (1998) 92 AJIL 78.

<sup>57</sup> *Sokolović (Maksim)* (Revision judgment) (21 February 2001) 3 StR 372/00; ILDC 564 (DE 2001) (Germany, Federal Court of Justice).

<sup>58</sup> *ibid* [4].

<sup>59</sup> See BGBl (2002) I S 2254.

grounded in Germany's conventional obligations.<sup>60</sup> Recent decisions by German<sup>61</sup> and Spanish courts<sup>62</sup> confirm that universal jurisdiction for war crimes under the grave breaches system remains uncontroversial and not subject to any condition.

### *Torture*

Among the suppression conventions providing for mandatory universal jurisdiction, the 1984 Convention against Torture ('Torture Convention') recurrently appears in domestic judgments. One of the reasons for its widespread use is the fact that 'torture', alongside being a self-standing crime, can be an element of other crimes under international law.<sup>63</sup> Because of its 'versatile' nature, the Torture Convention is often the 'hook' with which domestic courts establish universal jurisdiction over international crimes.<sup>64</sup> As with other suppression conventions, the issue of whether the presence of the accused is necessary remains unclear; yet, besides this, there is no further condition attached to the exercise of universal jurisdiction.<sup>65</sup>

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<sup>60</sup> See Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 JICJ 381.

<sup>61</sup> *Ignace Murwanashyaka and Straton Musoni* (Judgment) (28 September 2015) 5-3 StE 6/10 (Higher Regional Court of Stuttgart).

<sup>62</sup> *Jiménez Sánchez v Gibson*, (Appeal Judgment) (11 December 2006) Case No 1240/2006; ILDC 993 (ES 2006) (Supreme Court of Spain) (basing the jurisdiction on the Fourth Geneva Convention); *Vallmajo I Sala v Kabareb* (Formal Indictment) (6 February 2008) Order No 3/2008; ILDC 1198 (ES 2008) (relying on a combination of domestic provisions and international instruments, including the Fourth Geneva Convention). Unlike other Spanish cases, no examination was carried out as to whether the crimes could be prosecuted elsewhere.

<sup>63</sup> See William Schabas, 'The Crime of Torture and the International Criminal Tribunals' (2005) 37 CaseWResJIntIL 349.

<sup>64</sup> See eg *Vallmajo I Sala* (n 62).

<sup>65</sup> See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 316–318.

The most frequently cited case of universal prosecution for torture are the *Pinochet* proceedings, which involved a number of European jurisdictions, including Spain, Denmark, and the United Kingdom.<sup>66</sup> Despite this, the *Pinochet* cases are not particularly relevant as precedents for the exercise of jurisdiction under the Torture Convention considering that the Convention entered into force only after most of the crimes were committed.<sup>67</sup> None of the courts that dealt with these claims addressed the issue of whether universal jurisdiction was established pursuant to customary international law or through a retroactive application of the Torture Convention.<sup>68</sup>

This attitude can be contrasted with the approach followed by the District Court of Amsterdam in the *Bouterse* case, which concerned crimes committed during the military ruling of Suriname in the 1980s.<sup>69</sup> The Court found that torture was a crime under customary international law as early as in 1982,<sup>70</sup> but this finding did not solve the issue as to what legal basis could be advanced to justify the exercise of universal jurisdiction.<sup>71</sup> To address this, the District Court added a consideration that is common in cases where

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<sup>66</sup> See, eg, Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237, 237; Madeleine Davis, 'The Pinochet Case' [2000] ISA Research Papers; Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2000) 35 NewEngLRev 311.

<sup>67</sup> The Torture Convention entered into force on 26 June 1987; the various states involved ratified it on: 27 May 1987 (Denmark); 21 October 1987 (Spain); 30 September 1988 (Chile); 8 December 1988 (United Kingdom).

<sup>68</sup> *In re Pinochet* (4 November 1998) Case 19/97; (5 November 1998) Case 1/98 (National Court of Spain); *Proceedings in re Pinochet* (29 January 1999) (Decision by the Danish Minister of Justice) in (2000) 3 YIHL 469; *Regina v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) [40-41]. For a critique, see Reydams, *Universal Jurisdiction* (n 11) 128, 186-7, 207.

<sup>69</sup> See Liesbeth Zegveld, 'The Bouterse Case' (2001) 32 NYIL 97.

<sup>70</sup> *Desi Bouterse* (Judgment) (20 November 2000) (Court of Appeal of Amsterdam) in (2000) 3 YIHL 677, 688. The Supreme Court later dismissed the case on the basis of *inter alia* the absence of the accused: *Bouterse (Desire)* (Appeal Judgment) (18 September 2001) Case No HR 00749/01 CW 2323; ILDC 80 (NL 2001) (Supreme Court of the Netherlands).

<sup>71</sup> As of August 2020, Suriname is not a party to the Torture Convention.

jurisdiction cannot be established pursuant to a treaty. Prosecution in the Netherlands was necessary due to Suriname's inaction in prosecuting its former head of state.<sup>72</sup>

Aside from this case, domestic courts have generally exercised jurisdiction over torture without questioning whether other states failed to prosecute. In the Netherlands, the District Court of Rotterdam exercised jurisdiction over a Congolese national for offences committed abroad on the basis of a plain reading of the Torture Convention Implementation Act.<sup>73</sup> A more recent case testifies that the only preliminary issue that Dutch courts investigate is whether a foreign national has remained in the territory of the Netherlands for a sufficiently long time in order to satisfy the requirement of 'presence' under Article 5(2) of the Torture Convention.<sup>74</sup>

French courts exercised jurisdiction over a Mauritanian army lieutenant for acts of torture committed by the Mauritanian Government in the 1990s.<sup>75</sup> Notably, the Investigative Magistrate of Montpellier made a point of stressing that jurisdiction could be asserted no matter the state of progress toward prosecution in Mauritania.<sup>76</sup>

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<sup>72</sup> *Bouterse* (n 70) 682 ('[I]nvestigation of criminal offences committed in Surinam and that constitute violations of human rights is in principle incumbent on the Republic of Surinam by virtue of the International Covenant of Civil and Political Rights, to which it became a party in 1977. We accept, however, the position of plaintiffs that it cannot be expected that Bouterse will be brought to justice any time soon, in Surinam or elsewhere, for the conduct complained of.')

<sup>73</sup> *Public Prosecutor v SN* (Judgment) (7 April 2004) LJN: AO7178; ILDC 145 (NL 2004) (District Court of Rotterdam) [17].

<sup>74</sup> *Al Shami v Ayalon* (Appeal Judgment) (26 October 2009) No K08/0386; ILDC 673 (NL 2009) (Court of Appeal of The Hague).

<sup>75</sup> *Ely Ould Dah* (Ordonnance de mise en accusation) (25 May 2001) No 4/99/48 (Court of Assize of Montpellier) 3. See Jeanne Sulzer, 'Implementing the Principle of Universal Jurisdiction in France' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 126.

<sup>76</sup> Prosecution in Mauritania was in any case inhibited by an amnesty law; see *Ely Ould Dah* (Ordonnance) (n 75) 4. See also *Ely Ould Dah* (Judgment) (23 October 2002) App No 02-85379 (Court of Cassation). Mauritania was not a party to the Torture Convention until 2004. Despite this, the ECtHR found that prosecution in France was not contrary to the principle of legality; see *Ould*

In the United Kingdom, the Old Bailey Criminal Court in London found an Afghan national responsible for acts of torture and hostage taking committed in Afghanistan between 1991 and 1996; jurisdiction was established upon determining that the UK and Afghanistan were parties to the Torture Convention and to the 1979 Hostage Taking Convention (which contains similar jurisdictional provisions).<sup>77</sup> Similarly, the Bow Street Magistrates Court was ready to accept (at least in principle<sup>78</sup>) that jurisdiction could be exercised over a Chinese Minister for acts of torture committed in China in 1999 on the basis of Article 5(2) of the Torture Convention.<sup>79</sup> The *Lama* case confirms that UK courts consider that the jurisdictional authority provided by the Torture Convention (via the implementing provisions contained in section 134 of the Criminal Justice Act 1988) can be exercised in spite of the viability of prosecution elsewhere.<sup>80</sup>

In Spain, the Torture Convention has been invoked repeatedly in ongoing litigation against US officials for their alleged role in torture of detainees at Guantanamo and other

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*Dah v France* (Admissibility) App No 13113/03 (17 March 2009). See also note by Gavouneli in (2009) 48 ILM 869.

<sup>77</sup> *R v Zardad (Faryadi Sarwar)* (18 July 2005) (unreported). The relevant information is taken from Crown Prosecution Service, Press Release of 18 July 2005 <<http://archive.li/ZNSHJ#selection-549.116-549.172>>. See Nowak and McArthur (n 65) 305–308. See also *R v Zardad (Faryadi Sarwar)* [2007] EWCA Crim 279 (CA).

<sup>78</sup> Jurisdiction was ultimately declined on grounds of immunity.

<sup>79</sup> *Bo Xilai* (8 November 2005) 128 ILR 713; ILDC 429 (UK 2005) (Bow Street Magistrates Court) [2].

<sup>80</sup> Nepal protested the exercise of jurisdiction over a Nepalese Colonel for acts committed in Nepal in 2006; yet, the main discussion before the English courts concerned immunity—universal jurisdiction as such was uncontroversial. See *R v Lama (Kumar)* [2014] EWCA Crim 1729. See also Hovell, The ‘Mistrial’ of Kumar Lama: Problematizing Universal Jurisdiction (*EJIL:Talk!*, 6 April 2017) <[www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction](http://www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction)>; Hovell (n 11) 428.

sites.<sup>81</sup> In one of these rulings, a Spanish judge held that jurisdiction could be exercised without showing ‘that in another competent country or within an international court no procedure involving an investigation and effective prosecution of such punishable acts has been initiated’.<sup>82</sup> These remarks are particularly important because they depart from a long-standing Spanish approach making ‘subsidiarity’ a fundamental pre-requisite for the exercise of universal jurisdiction.<sup>83</sup>

Finally, even in Italy, a state that lacked legislation implementing the Torture Convention for decades,<sup>84</sup> the Court of Assize of Milan exercised universal jurisdiction over a Somali national accused of acts of torture perpetrated against Somali citizens in several African states.<sup>85</sup> Not only was universal jurisdiction established without any preliminary enquiry by the Court, but it also received the approval of the Ministry of Justice.<sup>86</sup>

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<sup>81</sup> For a comprehensive account and the text of all the relevant decisions, see CCR, ‘Accountability for U.S. Torture: Spain’ at <<https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain>>.

<sup>82</sup> *US Torture Program* (Order of 14 January 2012) (Preliminary Court for Criminal Proceedings, National Court) 14-15.

<sup>83</sup> Compare text at n 166. The case was ultimately dismissed due to the absence of the accused: *US Torture Program* (Judgment) (17 July 2015) (Preliminary Court for Criminal Proceedings, National Court).

<sup>84</sup> See *Cestaro v Italy* (Judgment) App No 6884/11 (7 April 2015). In 2017, the Italian Parliament criminalized torture, though with some controversy: Francavilla, ‘Italy’s New Law on Torture Fails to Meet International Standards’ (HRW, 11 July 2017) at <[www.hrw.org/news/2017/07/11/italys-new-law-torture-fails-meet-international-standards](http://www.hrw.org/news/2017/07/11/italys-new-law-torture-fails-meet-international-standards)>.

<sup>85</sup> *Matammud* (Judgment) (10 ottobre 2017) (Court of Assize of Milan); see Silvia Bernardi, ‘Una condanna della Corte d’assise di Milano svela gli orrori dei “centri di raccolta e transito” dei migranti in Libia’ (*Diritto Penale Contemporaneo*, 16 April 2018) <[www.penalecontemporaneo.it/d/5976-una-condanna-della-corte-d-assise-di-milano-svela-gli-orrori-dei-centri-di-raccolta-e-transito-dei](http://www.penalecontemporaneo.it/d/5976-una-condanna-della-corte-d-assise-di-milano-svela-gli-orrori-dei-centri-di-raccolta-e-transito-dei)>.

<sup>86</sup> Pursuant to Article 10 of the Italian Criminal Code, a request by the Ministry of Justice is required to prosecute foreigners for crimes committed abroad; see *Matammud* (n 85) 2.

### *Piracy outside the customary definition*

The exercise of jurisdiction over acts of piracy that have no connection to the forum is, historically, the oldest form of universal jurisdiction and the least controversial.<sup>87</sup> In the light of this, it is significant that, when exercising universal jurisdiction over offences that lie at the edges of the notion of piracy under customary international law, domestic courts rely extensively on treaty-based universal jurisdiction. This is the case with regard to ‘internal seizures’, acts committed by persons already on board the victim vessel as passengers or crew.<sup>88</sup> Such internal seizures are not covered by the definition of piracy codified in the UN Law of the Sea Convention (UNCLOS) (largely reflective of custom).<sup>89</sup> However, they do fall within the scope of the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).<sup>90</sup> A court in China, for example, exercised jurisdiction over a Thai oil tanker which had been seized by Indonesian nationals in the territorial waters of Malaysia by relying on the SUA Convention.<sup>91</sup> A

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<sup>87</sup> See *Arrest Warrant* (n 19) sep op Guillaume [12]; Ivan Shearer, ‘Piracy’, *MPEPIL* (2010) [2]. However, recent data shows that universal jurisdiction is not used very frequently in this context: Eugene Kontorovich and Steven Art, ‘An Empirical Examination of Universal Jurisdiction for Piracy’ (2010) 104 *AJIL* 436.

<sup>88</sup> Shearer (n 87) [15].

<sup>89</sup> UNCLOS defines piracy as requiring, among other things, the involvement of two vessels on the high seas; see UN Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3 (‘UNCLOS’), art 101. This definition is ‘regarded as having great authority’: Robert Jennings, *Oppenheim’s International Law* (9th ed Longman Harlow 1992) 747. There is debate as to whether it exhausts the definition of piracy under customary international law; see George Constantinople, ‘Towards a New Definition of Piracy: The Achille Lauro Incident’ (1985) 26 *VaJIL* 723; Arron Honniball, ‘Private Political Activists and the International Law Definition of Piracy’ (2015) 36 *AdelLRev* 279.

<sup>90</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (10 March 1988) 1678 UNTS 201 (‘SUA Convention’) art 3.

<sup>91</sup> *Shantou Municipal People’s Prosecutor v Naim (Atan) and ors* (15 January 2003) No 22; ILDC 1161 (CN 2003) (Shantou Intermediate People’s Court).

similar decision relying mostly on the SUA Convention for jurisdictional purposes is reported in the United States.<sup>92</sup>

Some US courts relied on these conventions to support both the assertion of prescriptive universal jurisdiction and the exercise of adjudicative jurisdiction. In cases dealing with Somali nationals charged with ‘aiding and abetting piracy under the law of nations’<sup>93</sup> (although accused of taking part in the crimes only within Somalia), US courts relied on UNCLOS, the SUA Convention, and the Hostage Taking Convention to justify their jurisdiction.<sup>94</sup> The Court of Appeals for the DC Circuit stressed that it was the very existence of the Hostage Taking Convention that had provided the accused with sufficient notice of the fact that he could be subjected to the jurisdiction of the United States as one of the parties to the Convention.<sup>95</sup>

### ***Other crimes with treaty-based jurisdictional rules***

Several other treaties define offences and provide for the exercise of universal jurisdiction. These offences are sometimes referred to as ‘transnational crimes’ to mark the difference between them and crimes for which individual responsibility arises directly under

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<sup>92</sup> United States v Lei Shi, 525 F3d 709 (9th Cir 2008); ILDC 1396 (US 2008).

<sup>93</sup> 18 USC § 1651 (‘Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.’).

<sup>94</sup> United States v Ali, 718 F3d 929 (DC Cir 2013); ILDC 2265 (US 2013); United States v Shibin (Mohammad Saaili) 722 F 3d 233 (4th Cir 2013); ILDC 2160 (US 2013).

<sup>95</sup> See *Ali* (n 94) 944 [citing *Shi* (n 92) 717–24].

international law.<sup>96</sup> This distinction—provided it is even possible to draw<sup>97</sup>—is superfluous for the purpose of the present analysis. When universal jurisdiction is established pursuant to a treaty, there is no fundamental difference between ‘transnational crimes’ and ‘international crimes’; in both cases, states are obliged to exercise universal jurisdiction without any precondition other than (potentially) the presence of the accused.

The practice under these conventions is abundant and testifies to the fact that domestic courts find it unproblematic to exercise unconditional universal jurisdiction when a treaty authorises them to do so. US courts relied on The Hague Hijacking Convention<sup>98</sup> to establish universal jurisdiction in *Yunis*<sup>99</sup> and *Rezaq*.<sup>100</sup> South Korea used The Hague Convention as early as in 1984 in a case involving the hijacking of a Chinese plane by Chinese nationals.<sup>101</sup>

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<sup>96</sup> Neil Boister, ‘Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law’ in Harmen Van Der Wilt (ed), *Legal Responses to Transnational and International Crimes* (Edward Elgar 2017) 27. See Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012); Alejandro Chehtman, ‘Terrorism and the Conceptual Divide Between International and Transnational Criminal Law’ in Harmen Van Der Wilt (ed), *Legal Responses to Transnational and International Crimes* (Edward Elgar 2017) 107; Kreß (n 19) 568; Kittichaisaree (n 40) 36.

<sup>97</sup> See O’Keefe, *International Criminal Law* (n 11) 66 (‘[T]he label is problematic and undesirable for several reasons.’). See also Kevin Jon Heller, ‘What Is an International Crime?’ (2017) 58 *HarvILJ* 353, 407.

<sup>98</sup> Hague Convention.

<sup>99</sup> *United States v Yunis*, 681 F Supp 896 (DDC 1988). See also *United States v Yunis*, 924 F2d 1086 (DC Cir 1991); 88 ILR 176. See further Abraham Abramovsky, ‘Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in *United States v. Yunis*’ (1990) 15 *YJIL* 121; Mason Drake, ‘United States v. Yunis: The DC Circuit’s Dubious Approval of US Long-Arm Jurisdiction Over Extraterritorial Crimes’ (1992) 87 *NwULRev* 697.

<sup>100</sup> *United States v Rezaq*, 134 F3d 1121 (DC Cir 1998); ILDC 1391 (US 1998).

<sup>101</sup> UNSG Report (2010) UN Doc A/65/181 [64].

As far as other ‘terrorism conventions’ are concerned,<sup>102</sup> a court in the Netherlands exercised jurisdiction on the basis of the Terrorist Bombings Convention<sup>103</sup> over an individual connected with the 2005 attacks in Madrid even after having determined that Spanish courts (which had a ‘stronger connection’) were examining the case.<sup>104</sup> A Finnish court found four individuals responsible for financing al-Shabaab in Somalia and Kenya according to the obligations of the Financing of Terrorism Convention.<sup>105</sup> A recent decision of an Austrian court relied on several terrorism conventions to establish jurisdiction over crimes committed in the Syrian War.<sup>106</sup> Other conventions, especially the Convention on Illicit Traffic in Narcotic Drugs,<sup>107</sup> have been used to establish universal jurisdiction by the courts of various states ranging from Greece<sup>108</sup> to Azerbaijan.<sup>109</sup> In none of these cases there is any record of domestic courts subjecting their jurisdiction to the lack of prosecution elsewhere.

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<sup>102</sup> See Reuven Young, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’ (2006) 29 *BCIntl&CompLRev* 23, 25. French courts also resorted to one of these conventions when establishing jurisdiction over six Libyan nationals for the bombing of an airplane in Chad; *Gaddafi* case (Judgment) (20 October 2000) 125 *ILR* 490 (Court of Cassation) 496.

<sup>103</sup> Terrorist Bombings Convention.

<sup>104</sup> *Anonymous v Public Prosecutor* (8 February 2005) Case no 10/000218-04; *ILDC* 853 (NL 2005) (Rotterdam District Court).

<sup>105</sup> International Convention for the Suppression of the Financing of Terrorism (10 January 2000) 2178 *UNTS* 197. The conviction was later reversed on the basis that the offence was not criminalised in Finland at the time it was committed; UNSG Report (2016) UN Doc A/71/111 [18]; ‘Court acquits four in Finland’s first terror case’ (*YLE* 23 March 2016) <[https://yle.fi/uutiset/osasto/news/court\\_acquits\\_four\\_in\\_finlands\\_first\\_terror\\_case/8762843](https://yle.fi/uutiset/osasto/news/court_acquits_four_in_finlands_first_terror_case/8762843)>.

<sup>106</sup> ‘Austria convicts asylum seeker of Syria war crimes’ (*BBC* 11 May 2017) <[www.bbc.com/news/world-europe-39879305](http://www.bbc.com/news/world-europe-39879305)>. See TRIAL International, ‘Make way for Justice #4’ (2018) at <<https://trialinternational.org/latest-post/make-way-for-justice-4-momentum-towards-accountability>> 14.

<sup>107</sup> Illicit Traffic Convention.

<sup>108</sup> UNSG Report (2015) UN Doc A/70/125 [40].

<sup>109</sup> UNSG Report (2011) UN Doc A/66/93 [51].

### 3.2.2. Non-treaty-based exercise of universal jurisdiction

Without treaty provisions authorising the exercise of universal jurisdiction, the latter can only be lawfully exercised pursuant to customary international law. In this regard, it is possible to distinguish four types of cases. First, a rule of customary international law establishing universal jurisdiction is necessary for the exercise of such jurisdiction when a treaty criminalises certain conduct but provides for the exercise of jurisdiction only within the territory and over nationals of a state party. The most notable example of this kind is the Genocide Convention,<sup>110</sup> but other suppression conventions also fall into this category.<sup>111</sup>

Second, a customary basis is required when the criminalisation of the offence is not grounded on a treaty but on a rule of customary international law. The identification of this category is complicated by the fact that there is no agreement as to what conduct constitutes a crime for which customary international law establishes direct individual responsibility.<sup>112</sup> Most authorities converge on genocide, crimes against humanity, and war crimes.<sup>113</sup> At times, aggression is also added to the list.<sup>114</sup> Alongside these ‘core crimes’,

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<sup>110</sup> Genocide Convention.

<sup>111</sup> eg Single Convention on Narcotic Drugs 1954, as amended in 1975 (8 August 1975) 976 UNTS 105.

<sup>112</sup> See O’Keefe, *International Criminal Law* (n 11) 120; Marko Milanović, ‘Is the Rome Statute Binding on Individuals?’ (2011) 9 JICJ 25, 28; Bruno Simma and Andreas Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 AJIL 302, 308.

<sup>113</sup> See ‘AU–EU Expert Report on the Principle of Universal Jurisdiction’ (2009) EU Doc 8672/1/09 Rev 1, 7. See, also for further references, Heller (n 97) 407.

<sup>114</sup> See Bruce Broomhall, *International Justice and the International Criminal Court* (OUP 2003) 19; Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP 2019) 57.

some consider torture a crime under customary international law;<sup>115</sup> others also include hijacking, terrorism, apartheid, and slavery.<sup>116</sup>

Third, a customary basis is necessary when one of the suppression conventions does not apply because of limitations *ratione temporis* (because the case precedes the entry into force of the treaty) or *ratione personae* (because jurisdiction is exercised over nationals of states not parties to the treaty or over acts committed outside the territory of state parties).<sup>117</sup>

Fourth, the only crime for which customary international law authorises all states to exercise jurisdiction on the basis of universality but does not provide directly for its criminalisation is piracy.<sup>118</sup> As stated above, this is the least contentious crime of universal jurisdiction because pirates operate on the high seas, that is, outside the territorial jurisdiction of any state.<sup>119</sup> In these instances, conflicts of sovereignty are minimised and

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<sup>115</sup> John Dugard, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 LJIL 1001; Langer (n 11) 1.

<sup>116</sup> See Kenneth Randall, 'Universal Jurisdiction Under International Law' (1987) 66 TexLRev 785; Bassiouni (n 11) 81.

<sup>117</sup> See Trapp (n 29) 359. According to Scharf, it is possible to assert jurisdiction for treaty crimes over nationals of non-party states by relying on the (discredited) 'prohibitive rule' approach; see Michael Scharf, 'Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States' (2000) 35 NewEngLRev 363, 374.

<sup>118</sup> See Antonio Cassese and others, *International Criminal Law: Cases and Commentary* (OUP 2011) 312; Boister, *Introduction* (n 96) 32; O'Keefe, *International Criminal Law* (n 11) 50. See also Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 HarvILJ 183. But see *Re Piracy Jure Gentium* [1934] AC 586 (implying the existence of a separate crime of piracy under international law different from that under domestic law).

<sup>119</sup> See *Lotus* (1927) PCIJ Rep Ser A no 10, sep op Moore 70 ('[Piracy] is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.').

the exercise of jurisdiction by the court of one state will not infringe upon the rights of other states.<sup>120</sup>

With the exception of piracy, the lack of a treaty basis authorising the exercise of universal jurisdiction for all other crimes has generated doubts and inconsistencies in the practice of states. For some of these crimes, it is not clear whether customary international law provides a basis for the exercise of universal jurisdiction. Even crimes for which today universal jurisdiction is exercised without objections had been, for a long time, surrounded by uncertainty with respect to their legal basis under international law. In these cases, the potential wrongfulness of the exercise of universal jurisdiction may have been precluded by the framework of countermeasures. Indeed, a common thread that emerges comparing this case law with that analysed in the previous section is that many cases without a treaty basis supporting the exercise of universal jurisdiction present a markedly *instrumental* character. Universal jurisdiction in these cases was exercised ‘subsidiarily’, that is, in response to the failure of other states to criminalise and/or prosecute the relevant conduct. In these cases, exercise of universal jurisdiction is a potentially wrongful reaction (breach) aimed at bringing to an end (instrumental character) a potentially wrongful omission (prior wrong). It thus presents the *structure* of a countermeasure. The following analysis of case law highlights how subsidiary universal jurisdiction came about and how it may play an

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<sup>120</sup> See d’Aspremont (n 11) 327. See also *Seychelles v Osman* (2011) 152 ILR 513 (Supreme Court of the Seychelles); UNSG Report (2014) UN Doc A/69/174 [35]-[39]. But see Malcolm Evans and Sofia Galani, ‘Piracy and the Development of International Law’ in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea* (Bloomsbury 2014) 348 (‘Unless there is some very pressing reason to do so, even as regards piracy, states seem reluctant to prosecute without a jurisdictional nexus’).

instrumental role in the implementation of international responsibility with respect to the obligations to criminalise and prosecute international crimes.

### ***War crimes in non-international armed conflicts***

The notion of ‘war crimes’ is wider than that of the grave breaches of the Geneva Conventions; it encompasses ‘any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law’.<sup>121</sup> As a consequence, exercising universal jurisdiction over some war crimes requires reliance on customary international law. This is especially the case for war crimes committed in non-international armed conflicts (NIACs), which are outside the scope of the ‘grave breaches’ provisions of the Geneva Conventions.<sup>122</sup>

The development of universal jurisdiction over war crimes in NIACs partly overlaps with the development of these crimes. The turning point was the *Tadić* decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), which held that various customary rules traditionally reserved for international conflicts are also applicable to NIACs.<sup>123</sup> These findings—innovative at the time<sup>124</sup>—hold truer today. The Rome Statute of the International Criminal Court (ICC) significantly expanded the list of crimes

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<sup>121</sup> Alexander Schwarz, ‘War Crimes’, *MPEPIL* (2014) [1]. See also Georges Abi-Saab, ‘The Concept of “War Crimes”’ in Wang Tieya and Sienho Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 112.

<sup>122</sup> See Schwarz (n 121) [12].

<sup>123</sup> *Prosecutor v Tadić* (Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [134].

<sup>124</sup> See Mia Swart, ‘Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 70 *ZaöRV* 459, 466; O’Keefe, *International Criminal Law* (n 11) 126.

that can be committed in internal conflicts<sup>125</sup> and various states, in adopting legislation incorporating these provisions, have provided for the criminalisation of these offences and the exercise of universal jurisdiction.<sup>126</sup> This practice may have created a permissive rule of customary international law according to which ‘States have the right to vest universal jurisdiction in their national courts over war crimes ... committed in both international and non-international armed conflicts’, as argued by the International Committee of the Red Cross in its 2005 study.<sup>127</sup> Yet, several decisions exercising universal jurisdiction over these crimes reveal uncertainty regarding the legal basis under customary international law and the occasional search for supplementary grounds to support the exercise of jurisdiction.

A common approach, exemplified in a 2008 decision of the Supreme Court of the Netherlands,<sup>128</sup> is to avoid the question of customary international law. The accused, an Afghani national charged with offences committed in the Soviet-Afghan War, objected that the Geneva Conventions did not support universal jurisdiction for crimes in NIACs. The Supreme Court responded with a strictly dualist reasoning; since Dutch law provided extraterritorial jurisdiction for ‘war crimes’ and breaches of Common Article 3 constituted war crimes, it was not possible for the Court to test whether there was a discrepancy between national law and customary international law on the point of jurisdiction.<sup>129</sup>

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<sup>125</sup> Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 (‘ICC Statute’), art 8(2)(e).

<sup>126</sup> See O’Keefe, *International Criminal Law* (n 11) 127.

<sup>127</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law: Volume I, Rules* (CUP 2005) 604. This conclusion was criticised by the United States: John Bellinger and William Haynes, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 892007 IntlRevRedCross 443, 465–471.

<sup>128</sup> *H v Public Prosecutor* (8 July 2008) Case No 07/10063; ILDC 1071 (NL 2008) (Supreme Court of the Netherlands).

<sup>129</sup> *ibid* [6.4]–[6.5].

This dualist approach can be traced back to the first modern universal jurisdiction trial over these crimes. In the *Butare Four* case,<sup>130</sup> the defendants—Rwandan nationals accused of war crimes committed during the Rwandan civil war—did not challenge the jurisdiction of Belgian courts; as a consequence, the legality of universal jurisdiction beyond the grave breaches system was never discussed.<sup>131</sup>

This and other cases originating from the Rwandan civil war remain an oddity in this sense, which can be explained by the fact that the intervention of the UN Security Council had fundamentally altered the logic of jurisdiction over crimes committed during the war. UNSC Resolution 955 (1994) created an *ad hoc* international tribunal with primacy over domestic courts.<sup>132</sup> While never expressly authorising universal jurisdiction over offences committed in Rwanda, the Security Council urged states

‘to arrest and detain, in accordance with their national law and relevant standards of international law, *pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities*, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda’.<sup>133</sup>

It also bears reminding that, in the aftermath of the civil war, the Rwandan judicial system had all but collapsed.<sup>134</sup> Rwanda, far from opposing the exercise of jurisdiction by Belgian courts, cooperated with these courts and allowed Belgian investigators into its territory.<sup>135</sup>

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<sup>130</sup> *Butare Four*’ (8 June 2001) (Assize Court of Brussels).

<sup>131</sup> See Luc Reydams, ‘Belgium’s First Application of Universal Jurisdiction: The Butare Four Case’ (2003) 1 JICJ 428.

<sup>132</sup> See Bartram Brown, ‘Primacy or Complementarity’ (1998) 23 YJIL 383.

<sup>133</sup> UNSC Res 978 (27 February 1995) S/RES/978 [1] (emphasis added).

<sup>134</sup> See William Schabas, ‘Post-Genocide Justice in Rwanda: A Spectrum of Options’ in Phil Clark and Zachary Kaufman (eds), *After Genocide* (ColumbUP 2009) 207.

<sup>135</sup> See Reydams, ‘Belgium’ (n 131) 430.

Such consent may have precluded the wrongfulness of the potential breach of the rules of jurisdiction.<sup>136</sup>

All these factors explain why the courts of some states could exercise universal jurisdiction with little to no complaint from Rwanda. Nowhere is this shown better than in some Swiss cases. In *Niyonteze*, a case dealing with a Rwandan mayor accused of genocide, the Military Supreme Court of Switzerland established jurisdiction exclusively on the basis of the Swiss Military Criminal Code, without devoting any attention to international law considerations.<sup>137</sup> This approach is striking when compared with the more recent judgment in the case of *Khaled Nezzar*, in which the former Minister of Defence of Algeria was accused of crimes committed during the Algerian Civil War.<sup>138</sup> Having ascertained that the crime was one of those for which the Swiss Criminal Code provided for universal jurisdiction,<sup>139</sup> the Federal Criminal Court deemed it necessary to perform a further analysis before exercising jurisdiction. The Court examined whether there was a realistic possibility of prosecution in Algeria.<sup>140</sup> Even more surprising is the result of such analysis: despite the fact that the accused was no longer present in Switzerland—in fact, precisely because he had returned to Algeria and no prosecution was forthcoming—the Court

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<sup>136</sup> See Art 20 ARSIWA and Commentary 72. cf Trapp (n 29) 361–363.

<sup>137</sup> *Niyonteze et al v Military Appeals Tribunal 1A* (27 April 2001); ILDC 349 (CH 2001) (Switzerland, Military Supreme Court). Rwanda had given full support and allowed site visits by Swiss authorities: Luc Reydam, ‘Niyonteze v. Public Prosecutor’ (2002) 96 AJIL 231.

<sup>138</sup> *A v Swiss Federal Public Prosecutor and ors* (25 July 2012) No BB.2011.140; ILDC 1933 (CH 2012) (Switzerland, Federal Criminal Court) [Nezzar].

<sup>139</sup> *ibid* [3.3.1].

<sup>140</sup> *ibid* [3.4]. According to the Swiss Criminal Code, prosecution can be halted when a foreign authority is prosecuting the crime and the accused is extradited; see Swiss Criminal Code, art 264m(2)(a) (translation of the author). See Flavia Zorzi Giustiniani, ‘Giurisdizione penale universale e immunità degli organi statali: la decisione del Tribunale Federale svizzero nel caso Nezzar’ [2013] *DirUmDirInt* 159.

determined that jurisdiction could be exercised in Switzerland.<sup>141</sup> This is not an isolated case; subordinating the exercise of universal jurisdiction to the unavailability of prosecution in the territorial state is also a feature of other cases dealing with crimes without a treaty basis of jurisdiction.

Recently, a growing number of cases of universal jurisdiction has originated from the Syrian civil war.<sup>142</sup> Domestic courts in these trials do not always question the possibility of prosecution in Syria; yet, this should come as no surprise. When the regime that perpetrates the crimes is in power, the impossibility of prosecution in the territorial state is self-evident. Moreover, the more universal jurisdiction is exercised over a category of crimes, the more solid the rule of customary international authorising jurisdiction becomes. The framework of countermeasures plays a crucial role at times where custom changes and the need for this alternative legal basis decreases as the new rule becomes entrenched.<sup>143</sup>

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<sup>141</sup> *ibid* [3.4] .

<sup>142</sup> See UNSG Report (2017) UN Doc A/72/112 [23]-[26]; TRIAL International (n 106) 43-55, 57; *Aerial Drone Deployment (Targeted Killing in Pakistan Case)* (23 July 2013) Case No 3 BJs 7/12-4; 157 ILR 722 (Germany, Federal Prosecutor General); UNSG Report (2016) A/71/111 [18]; Stefan Talmon and Philip Wimmer, 'Officer of Afghan National Army convicted of war crimes for desecrating the corpse of a Taliban commander in front of civilians' (*GPIL*, 6 April 2020) <<https://gpil.jura.uni-bonn.de/2020/04/officer-of-afghan-national-army-convicted-of-war-crimes-for-desecrating-the-corpse-of-a-taliban-commander-in-front-of-civilians>>; Elisabeth Baier , 'A puzzle coming together' (*Völkerrechtsblog*, 23 April 2020) <<https://voelkerrechtsblog.org/a-puzzle-coming-together>>.

<sup>143</sup> See further Section 6.1.2.

## ***Genocide***

Despite establishing the criminalisation of the ‘crime of crimes’,<sup>144</sup> the Genocide Convention dedicates only one provision (Article VI) to issues of jurisdiction which reads as follows:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by *a competent tribunal of the State in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>145</sup>

Exclusive reference to the territorial state and to international courts is not a coincidence; states explicitly considered and rejected the idea of mandatory universal jurisdiction during the drafting of the Convention.<sup>146</sup> As a consequence, in order to establish universal jurisdiction over genocide a permissive rule of customary international law must be identified.

Case law in this area shows that the exercise of universal jurisdiction over genocide has been frequently conceived as a way of remedying the inaction of the territorial state when the latter is unable or unwilling to prosecute. Considerations of this nature can be found in one of the first judgments dealing with the Bosnian War,<sup>147</sup> in which the Supreme Court of Austria held that:

Article VI of the Genocide Convention ... is based on the fundamental assumption that there is a functioning criminal justice system in the *locus*

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<sup>144</sup> See William Schabas, *Genocide in International Law* (CUP 2000) 9; Payam Akhavan, *Reducing Genocide to Law*, vol 87 (CUP 2012) 56.

<sup>145</sup> Genocide Convention, art VI (emphasis added).

<sup>146</sup> See Schabas, *Genocide in International Law* (n 144) 56–57.

<sup>147</sup> *Public Prosecutor v Cvjetkovic* (13 July 1994) (Supreme Court of Austria). See also Axel Marschik, ‘The Politics of Prosecution’ in Timothy MacCormack and Gerry Simpson (eds), *The Law of War Crimes* (Martinus Nijhoff 1997) 79–81.

*delicti* (which would make the extradition of a suspect legally possible). Otherwise—since at the time of the adoption of the Genocide Convention there was no international criminal court—the outcome would be diametrically opposed to the intention of its drafters and a person suspected of genocide ... could not be prosecuted because the criminal justice in the *locus delicti* is not functioning and the international criminal court is not in place (or its jurisdiction has not been accepted by the State concerned).<sup>148</sup>

Several courts of other states have been faced for the first time with jurisdictional issues concerning genocide in cases originating from the conflicts in Bosnia and Rwanda. As illustrated above,<sup>149</sup> the creation by the UN Security Council of international tribunals with primacy over the jurisdiction of the territorial states has made the treatment of these cases inconsistent.

France adopted two laws implementing the relevant UNSC resolutions.<sup>150</sup> Despite not being required to do so by the Security Council, the French legislator vested national courts with universal jurisdiction for crimes falling under the Statutes of the Tribunals.<sup>151</sup> Even then, French courts found it difficult to reconcile these laws with the perceived absence of international norms authorising the exercise of universal jurisdiction for genocide. The Court of Appeal of Paris, unable to identify any jurisdictional provision in the Genocide Convention, concluded that jurisdiction over a Bosnian national for crimes committed during the Bosnian War could only be established under the Torture Convention and the Fourth Geneva Convention.<sup>152</sup> Similarly, the Court of Appeal of Nîmes held that a case dealing with the Rwandan genocide should be dismissed due to the absence of a

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<sup>148</sup> Reydams, *Universal Jurisdiction* (n 11) 100; Marschik (n 147) 80.

<sup>149</sup> See text at n 132.

<sup>150</sup> Law No 95-1 (2 January 1995); Law No 96-432 (22 May 1996).

<sup>151</sup> This only if the accused was found in France; *ibid* [2] (common to both laws).

<sup>152</sup> *Javor and Others* (24 November 1994) 127 ILR 126 (Court of Appeal of Paris) 127.

jurisdictional basis in the Genocide Convention.<sup>153</sup> The Court of Cassation reversed this decision relying primarily on the jurisdictional provisions of the Torture Convention and the national laws implementing the ICTY/ICTR statutes.<sup>154</sup> An interesting aspect of the Rwandan cases is that French courts never ignored considerations pertaining to prosecution in the territorial state. As time passed, it became increasingly harder to justify why these cases could not be tried by the (now functioning) Rwandan courts. In more recent litigation, justification for the exercise of universal jurisdiction over Rwandan nationals was found not in Rwanda's inability to try these suspects, but in the risk of potential human rights abuses in Rwanda.<sup>155</sup> Similar considerations have emerged in another Rwandan case tried by Finnish courts.<sup>156</sup>

In Germany, cases dealing with genocide mostly originated from the Bosnian War; the approach used by German courts to establish universal jurisdiction has alternated between attempts to engage with international law and retreat into domestic law reasoning. In the *Tadic* case—later transferred to the ICTY—universal jurisdiction over genocide was based exclusively on German law.<sup>157</sup> A few months later, the Bavarian Supreme Court exercised jurisdiction on a similar case relying exclusively on the grave breaches system of the Geneva Conventions.<sup>158</sup> The case where the compatibility of the German approach with international law was most thoroughly tested was *Jorgić*. The Federal Supreme Court

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<sup>153</sup> *Munyeshyaka* (6 January 1998) 127 ILR 134 (Court of Cassation) 136.

<sup>154</sup> *ibid* 134.

<sup>155</sup> See Helen Trouille, 'France, Universal Jurisdiction and Rwandan Génocidaires: The Simbikangwa Trial' (2016) 14 JICJ 195, 207.

<sup>156</sup> *Prosecutor v François Bazaramba* (11 June 2010) No R 09/404 (Finland, Porvoo District Court); see UNSG Report (2016) UN Doc A/71/111 [17].

<sup>157</sup> See Reydams, *Universal Jurisdiction* (n 11) 149; Rissing-van Saan (n 60) 382.

<sup>158</sup> Christoph Safferling, 'Public Prosecutor v. Djajic' (1998) 92 AJIL 528, 530.

having upheld his conviction for genocide,<sup>159</sup> the accused—a Bosnian Serb—brought his complaint before the Constitutional Court claiming that the exercise of universal jurisdiction outside Article VI Genocide Convention breached his constitutional right to a fair trial. According to the Constitutional Court, while Article VI of the Genocide Convention contains a duty for the territorial state to exercise jurisdiction, it does not prevent other states from exercising jurisdiction.<sup>160</sup> In fact, since the object and purpose of the Convention is the ‘effective criminal prosecution of genocide’, the more liberal interpretation allowing for universal jurisdiction should be preferred.<sup>161</sup>

The connection between the exercise of jurisdiction and the effective prosecution of genocide was confirmed by the ECtHR, which later reviewed the case:

[T]he Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide ... However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts’ reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).<sup>162</sup>

The link between the *erga omnes* character of the obligation to punish genocide and the establishment of universal jurisdiction is significant. It strengthens the argument that, when

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<sup>159</sup> Rissing-van Saan (n 60) 389.

<sup>160</sup> *Jorgić* (12 December 2000) 2 BvR 1290/99; ILDC 132 (DE 2000) (Germany, Constitutional Court) [40].

<sup>161</sup> *ibid.*

<sup>162</sup> *Jorgic v Germany* (12 July 2007) App No 74613/01 [68].

territorial states fail to fulfil this duty, it is ‘reasonable’ (i.e. justified) for the courts of other states to exercise jurisdiction and remedy this illegality.<sup>163</sup>

Spain offers perhaps the clearest examples of universal jurisdiction as a remedy against the territorial state’s failure to prosecute. In the *Pinochet* case, the Spanish National Court responded to the objection that jurisdiction fell outside Article VI Genocide Convention on grounds similar to those relied upon in the *Jorgić* case, but with an important caveat: ‘claims to jurisdiction by other states were *subsidiary* to those provided for in the Convention; thus if the accused were being tried for genocide before an international court or a court where the crime occurred, Spanish courts should defer to them.’<sup>164</sup> In fact, the Court continued, it was precisely because Chile had enacted amnesty laws which made prosecution impossible that Spanish courts could exercise jurisdiction over the case.<sup>165</sup>

The requirement of subsidiarity—which does not appear in the text of the Genocide Convention—is a significant feature of how Spanish courts have interpreted the customary rules permitting the exercise of universal jurisdiction. The concept was famously endorsed by the Spanish Supreme Court in the *Guatemala Genocide* case:

The [Genocide] Convention does not establish universal jurisdiction, nor does it exclude it. Nor does it exclude other criteria. If the possibility that more than one national jurisdiction may intervene is recognized, given the various criteria of jurisdiction, some sort of priority criteria will be necessary, directed at resolving the supposed effective and real concurrence of active jurisdiction, *in a manner that considers it natural that those courts in the place of commission of the act exclude jurisdiction of courts of*

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<sup>163</sup> In a similar vein, see Heller (n 97) 406 (speaking of ‘exercise of universal jurisdiction (on a subsidiary basis)’).

<sup>164</sup> *In re Pinochet*, case note by M Carrasco and J Fernández in (1999) 93 AJIL 690, 692-693 (emphasis added).

<sup>165</sup> *ibid* 694.

*another State*. In terms of the current laws in force in Guatemala, we do not find a legislative impediment or obstacle which prevents the prosecution of the acts alleged.<sup>166</sup>

The Supreme Court returned to this point in the *Peruvian Genocide* case, where it clarified how the test of subsidiarity works:

[T]he necessity of judicial intervention pursuant to the principle of universal jurisdiction remains excluded when [the jurisdiction in which the crimes were committed] is effectively prosecuting [them]. In this way one can speak about a *principle of necessity of jurisdiction*, which is derived from the very nature and from the finality of universal jurisdiction . . . In order for the complaint to be admissible, in this regard it is necessary that the acts constitute a universal crime. [There must be] serious and reasonable indication that the serious crimes denounced have not so far been prosecuted effectively by the territorial courts, whatever the reasons may be, without implying any prejudice as to the political, social or economic conditions that have de facto determined such impunity.<sup>167</sup>

The approach spearheaded by the Supreme Court has characterised Spain's attitude towards universal jurisdiction to date, even though for a number of years Spanish courts moved away from it. When plaintiffs in the *Guatemala Genocide* case complained that the interpretation of universal jurisdiction given by the Supreme Court breached their right of access to justice, the Spanish Constitutional Court upheld their claims and did away with subsidiarity—though it seems that the Court took issue not so much with the principle of subsidiarity, but with the degree of inactivity that must be ascertained before exercising universal jurisdiction.<sup>168</sup> Be that as it may, after this verdict several universal jurisdiction

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<sup>166</sup> *Guatemala Genocide Case* (25 February 2003) App No 803/2001; 42 ILM 686 (Spain, Supreme Court) [6] (emphasis added). See also Introductory Note by Luis Benavides in (2003) 42 ILM 683; Hervé Ascensio, 'Are Spanish Courts Backing down on Universality?' (2003) 1 JICJ 690.

<sup>167</sup> *Peruvian Genocide Case* (20 May 2003) Decision No 712/2003 (Spain, Supreme Court) 141 ILR 720, 725-6 (emphasis in the original).

<sup>168</sup> *Guatemala Genocide Case* (26 September 2005); Case No 237/2005; ILDC 137 (ES 2005) (Spain, Constitutional Court) [4].

cases were opened.<sup>169</sup> This momentum was short-lived, but it is interesting to note that, even when virtually unconstrained by their domestic legal framework, Spanish courts continued to investigate whether the territorial state had engaged in any attempt to prosecute.<sup>170</sup>

As political pressure from states affected by these decisions mounted, the Spanish legislator passed two legislative reforms to curb this expansive approach to universal jurisdiction.<sup>171</sup> In the new system, the principle of subsidiarity plays an essential role.<sup>172</sup> The reformed Article 23(5) of the LOPJ now states that Spanish courts will *not* exercise universal jurisdiction when proceedings have been initiated in the territorial state or state of nationality;<sup>173</sup> however, the same Article provides that

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<sup>169</sup> Mugambi Jouet, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond' (2006) 35 GaJIntl&CompL 495; Rosa Ana Alija Fernández, 'The 2014 Reform of Universal Jurisdiction in Spain: From All to Nothing' [2014] ZIS 717.

<sup>170</sup> eg *Fundación Casa del Tibet v Jiang (Zemin)* (Appeal Judgment on Admissibility) (10 January 2006) App No 196/05; ILDC 1002 (ES 2006) (Spain, National Court) (finding that jurisdiction could be established because the plaintiffs were unable to seek legal redress in China). See also Christine Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet' (2006) 4 JICJ 595, 599.

<sup>171</sup> Concepción Escobar Hernández, 'Universal Jurisdiction in Spain' [2013] SpanYrbkIntlL 255; Alija Fernández (n 169) 717. As a result of this reform, many cases were terminated: eg *Eutimio v Adriano*, Case no 297/2015 (8 May 2015); ILDC 2679 (ES 2015) (Spain, Supreme Court); *POLITEIA v Kabarebe*, STS 551/2015 (24 September 2015); ILDC 2623 (ES 2015) (Spain, Supreme Court).

<sup>172</sup> See Escobar Hernández (n 171) 260.

<sup>173</sup> Organic Law No 6/1985 on Judicial Power, art 23(5), as amended by Organic Law No 1/2014 (14 Mar 2014) 63 BOE 23026 at <[www.legislationline.org/documents/id/20381](http://www.legislationline.org/documents/id/20381)>.

[t]he stipulations of [the previous paragraph] will not apply where the State that exercises its jurisdiction *is unwilling or genuinely unable to carry out the investigation* . . .<sup>174</sup>

As a result of this reform, ‘subsidiary’ universal jurisdiction is now the norm. This means that for Spain universal jurisdiction can only be exercised as a remedy against the failure of other states to prosecute international crimes.

### ***Crimes against humanity***

Crimes against humanity have never been the subject of a comprehensive treaty;<sup>175</sup> with the exception of apartheid,<sup>176</sup> they are defined and criminalised exclusively under customary international law.<sup>177</sup> As to jurisdiction, the Apartheid Convention authorises (but does not oblige) all state parties to establish jurisdiction over the crime regardless of the place of commission.<sup>178</sup> But given the limited success of the Convention,<sup>179</sup> customary international law continues to play a fundamental role in enabling courts to exercise universal jurisdiction over crimes against humanity.

State practice on the exercise of universal jurisdiction over crimes against humanity is more limited and not always uniform. For example, in one of the various strands of the *Pinochet* affair a Belgian investigative magistrate held that Spanish courts had universal

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<sup>174</sup> *ibid* (emphasis added). The provision goes on to list various factors to take into account in making this determination.

<sup>175</sup> See Cherif Bassiouni, ‘Crimes Against Humanity: The Case for a Specialized Convention’ (2010) 9 WashUGlobalStudLRev 575.

<sup>176</sup> See Apartheid Convention.

<sup>177</sup> See Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’ (1999) 93 AJIL 43, 44.

<sup>178</sup> Apartheid Convention, art IV. See Hercules Booyen, ‘Convention on the Crime of Apartheid’ (1976) 2 SAfrYBIntlL 56, 64; O’Keefe, *International Criminal Law* (n 11) 22, n 93.

<sup>179</sup> As of August 2020, the Apartheid Convention has 109 parties, mostly non-Western states.

jurisdiction over crimes against humanity on the basis of a convoluted argument based on double criminality and an asserted ‘general principle of international law *aut dedere aut judicare*’.<sup>180</sup>

Spain, for its part, has maintained its subsidiarity-based approach when exercising universal jurisdiction over crimes against humanity. In the *Scilingo* case, the Spanish National Court held that the exercise of universal jurisdiction over the Argentine officer was possible because crimes committed during the military *junta* could not be prosecuted before Argentine courts.<sup>181</sup> In *Abuelas Plaza de Mayo*, the Supreme Court of Spain drew a parallel between the principle of subsidiarity and that of complementarity which governs the jurisdiction of the ICC.<sup>182</sup> Like the latter, in order to determine whether a state is unable or unwilling to prosecute, Spanish courts must verify the existence of a ‘total or substantial collapse or unavailability of its national judicial system.’<sup>183</sup>

Alongside these European cases, the South African Constitutional Court reached a strikingly similar conclusion when deciding whether South African authorities could investigate allegations of torture as a crime against humanity committed in Zimbabwe despite the absence of any connection with South Africa.<sup>184</sup> The Court, after extensively

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<sup>180</sup> *Aguilar Diaz v Pinochet* (Order) (6 November 1998) (Tribunal of First Instance of Brussels). See also case note by Reydams in (1999) 93 AJIL 700.

<sup>181</sup> *Public Prosecutor's Office v Manzorro* (19 April 2005) Case No 16/2005; ILDC 136 (ES 2005) (Spain, National Court) [6]. See also *Scilingo Manzorro v Spain* (1 October 2007) No 798; ILDC 1430 (ES 2007) (Spain, Supreme Court).

<sup>182</sup> *Abuelas Plaza de Mayo v X and Y* (1 July 2015); ILDC 2622 (ES 2015) (Spain, Supreme Court) [14].

<sup>183</sup> *ibid* [15].

<sup>184</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (30 October 2014) 12 BCLR 1428 (Constitutional Court of South Africa); see case note by James Gathii in (2016) 110 AJIL 333.

discussing the principles governing jurisdiction under international law,<sup>185</sup> found that a preliminary condition must be satisfied before investigation can begin:

Investigating international crimes committed abroad is permissible only if the country with jurisdiction *is unwilling or unable to prosecute* and only if the investigation is confined to the territory of the investigating state. Simply put, we may not investigate or prosecute international crimes in breach of *considerations of complementarity and subsidiarity*.<sup>186</sup>

The Court went on to find that this condition was satisfied since ‘it was very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high-profile personalities to be investigated.’<sup>187</sup> Even though the judgment centred upon the issue of investigation, it is particularly significant that the South African Court endorsed a subsidiary approach. If investigation can only begin subsidiarily, this is more so the case for the start of judicial proceedings pursuant to the principle of universality.

### 3.2.3. Making sense of ‘subsidiary’ universal jurisdiction

#### *Interpreting subsidiary universal jurisdiction*

As seen in the previous section, the principle of subsidiarity in the exercise of universal jurisdiction is very common when the existence of a rule of custom supporting the exercise of jurisdiction may be in question. But what does ‘subsidiarity’ mean? Some commentators use this term as a synonym for the outcome produced by the obligation to prosecute or

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<sup>185</sup> *ibid* [25]-[40].

<sup>186</sup> *ibid* [61].

<sup>187</sup> *ibid* [62].

extradite; jurisdiction in these cases would be exercised ‘subsidiarily’ because it occurs when the accused is not extradited to another state.<sup>188</sup> This understanding, however, does not correspond to the content of the *aut dedere, aut judicare* provisions. The ICJ clarified that there is no priority between the two alternatives established by these provisions; a state is under a duty to prosecute, but it can free itself of this obligation by extraditing the accused to a different state.<sup>189</sup> The correct understanding of subsidiarity is that domestic courts consider it permissible to exercise universal jurisdiction only when the state with stronger jurisdictional connections (territory or nationality) has failed to criminalise and/or prosecute the relevant crime.

This practice is open to multiple interpretations. First, it might mean that state practice supports a rule of customary international law on the exercise of universal jurisdiction that is partly different from that established under international treaties. Unlike the provisions of the suppression conventions that confer *primary* and *unconditional* universal jurisdiction, customary international law would only allow domestic courts to exercise universal jurisdiction *subject to the inaction* of the territorial/national state.<sup>190</sup> This is certainly possible, but it seems unlikely.<sup>191</sup> First, state practice is not uniform; courts of some states deemed it possible to exercise universal jurisdiction over international crimes

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<sup>188</sup> *Arrest Warrant* (n 19) sep op Guillaume [16]; IDI Resolution (n 11) Principle 3(c). See also Kreß (n 19) 579; Harmen Van Der Wilt, ‘Universal Jurisdiction Under Attack’ (2011) 9 JICJ 1043, 1050.

<sup>189</sup> *Obligation to Prosecute or Extradite* (n 39), 456 [95]. The accused need not be transferred to a state with jurisdictional connections; the only condition is that the state is willing to prosecute. See Kittichaisaree (n 40) 87–88.

<sup>190</sup> See Jo Stigen, ‘The Relationship Between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’ in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl 2010) 133.

<sup>191</sup> Some authors believe a rule in this sense may be developing; eg Anthony Colangelo, ‘Universal Jurisdiction as an International False Conflict of Laws’ (2009) 30 MichJIntL 881, 900; Stigen (n 190) 142.

without enquiring about the possibility of prosecution elsewhere even if not expressly authorised by a treaty. Second, there is no obvious reason why the customary rule mirroring the provisions of the suppression conventions on universal jurisdiction should be different from the latter. In other words, it is not self-evident why domestic courts would have primary jurisdiction over torture but only subsidiary jurisdiction over crimes against humanity.

A second, more straightforward interpretation has therefore gained some traction. According to this view, customary international law may very well have developed so as to *permit* domestic courts to exercise universal jurisdiction over genocide, crimes against humanity, and so forth, without any pre-condition other than, perhaps, the presence of the accused. However, there would be no *obligation* in this sense. This means that domestic courts would be perfectly capable of abstaining from exercising jurisdiction when reasons of judicial propriety warrant such abstention.<sup>192</sup> If the state where the crime has been committed initiated proceedings on the same matters, the contextual exercise of adjudicative jurisdiction by states with no jurisdictional connections would be *inappropriate*; a reasoning that echoes the doctrine of *forum non conveniens*.<sup>193</sup> This is what Cassese envisaged when advocating a ‘sensible’ notion of universal jurisdiction.<sup>194</sup> It also has the advantage of explaining why certain states appear to consider subsidiarity as a

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<sup>192</sup> See Van Der Wilt (n 188) 1051; O’Keefe, *International Criminal Law* (n 11) 375.

<sup>193</sup> See Princeton Principles on Universal Jurisdiction Principle, principle 8 <[www1.umn.edu/humanrts/instree/princeton.html](http://www1.umn.edu/humanrts/instree/princeton.html)>; Ascensio (n 166) 697.

<sup>194</sup> Cassese (n 11) 593. See also See *Arrest Warrant* (n 19) sep op Higgins, Kooijmans, and Buergenthal [59].

precondition to the exercise of universal jurisdiction in general, and not only with regard to customary crimes.<sup>195</sup>

Nevertheless, it is precisely because of its explanatory power that this interpretation may oversimplify the matter. It can be no coincidence that many of the applications of the subsidiarity principle examined above occurred with regard to crimes for which universal jurisdiction could only be established under customary international law and at a time where the existence of these rules was unclear. Subjecting jurisdiction to the lack of prosecution from other states provides an additional line of defence to the legality of the exercise of universal jurisdiction; it turns such exercise of jurisdiction into a means to implement international responsibility and thus potentially justifies it as a countermeasure.

### ***Subsidiary universal jurisdiction as a means to implement international responsibility***

An alternative, yet underexplored, explanation of this practice is that the exercise of universal jurisdiction may, under certain conditions, be a tool to induce other states into complying with their secondary obligations stemming from the commission of an internationally wrongful act. But what exactly is the prior wrongful act in these cases? The answer depends on the relevant circumstances existing at the time the measure is taken (i.e. jurisdiction is exercised). At the same time, it is possible to make some generalisations as universal jurisdiction is consistently exercised to respond to one specific omission: the territorial/national state's failure to criminalise and prosecute international crimes. Whether this omission always amounts to an internationally wrongful act depends on the

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<sup>195</sup> eg Spain after the 2014 law reform; text at n 173. Various states before the Sixth Committee have emphasised the primary responsibility of the territorial/national state in the prosecution of international crimes; eg UNSG Report (2010) UN Doc A/65/181 [6]; UNSG Report (23 August 2004) UN Doc S/2004/616 [48].

interpretation of the obligations deriving from the qualification of an offence as an ‘international crime’.<sup>196</sup> It is often assumed that international crimes are crimes over which every state can establish jurisdiction regardless of connections between the accused and the forum—that is, crimes of universal jurisdiction.<sup>197</sup> Yet, it is not clear why states would not be able to criminalise certain conduct through the medium of international law and resort to the ordinary rules of jurisdiction for its punishment.<sup>198</sup>

At the opposite side of the debate, some authors argue that crimes under customary international law create obligations exclusively for individuals.<sup>199</sup> This is premised on a strict separation between obligations of the state and obligations of individuals. A rule of customary international law criminalising an offence would create criminal responsibility for the individual committing the offence, but it would not *per se* imply any obligations for the state.<sup>200</sup> Universal jurisdiction and other obligations associated with these crimes would need to be proven separately.<sup>201</sup>

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<sup>196</sup> Universal jurisdiction developed together with the notion of international crimes; see Higgins (n 11) 57. However, the concept of ‘international crimes’ remains unclear: Heller (n 97).

<sup>197</sup> eg Princeton Principles (n 193), principle 1; Guy Goodwin-Gill, ‘Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute’ in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 206; Kreß (n 19) 568; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 73.

<sup>198</sup> This was the case of early suppression conventions: text at n 34. See Heller (n 97) 390.

<sup>199</sup> eg O’Keefe, *International Criminal Law* (n 11) 121, n 11.

<sup>200</sup> *ibid.*

<sup>201</sup> Even in this case, the exercise of universal jurisdiction could be a means to implement international responsibility. Several international crimes are likely to be committed by members of the state apparatus (eg torture); see William Schabas, ‘State Policy as an Element of International Crimes’ (2007) 98 *JCrimL&Criminology* 953; Paola Gaeta, ‘When Is the Involvement of State Officials a Requirement for the Crime of Torture?’ (2008) 6 *JICJ* 183. In these cases, prosecution of the crimes could be a form of reparation owed by the wrongdoing state for the breach of the same primary obligation. According to O’Keefe, criminal liability before the Nurnberg Tribunal could have been interpreted in these terms: *International Criminal Law* (n 11) 74.

While theoretically possible, a strict separation between obligations of the state and obligations of individuals appears to be excessively narrow. It is paradoxical for states to agree upon the criminalisation of certain conduct of individuals without committing to any course of action on their part. In fact, this strict separation is not supported by the ICJ, which found that the criminalisation of genocide implies at least an obligation of the state not to perform the same conduct that is prohibited on the individual.<sup>202</sup> It seems reasonable to infer that, by criminalising conduct of individuals under international law, states also commit to criminalise and prosecute that very same conduct in their domestic systems.<sup>203</sup> For dualist systems, this is the only way in which the prohibition of individual conduct at the international level can have any effect in the municipal system.<sup>204</sup>

To be sure, this does not equate to an obligation for states to prosecute or extradite all accused found in their territory regardless of any jurisdictional connection with the conduct at the time it occurred.<sup>205</sup> If this was the content of the obligation, it would be tantamount to universal jurisdiction.<sup>206</sup> The obligation to criminalise implicit in the creation of international crimes has no expansive consequences on the jurisdiction of a state; it merely entails a duty to ensure that the conduct that it is criminal under international law

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<sup>202</sup> *Bosnian Genocide* [2007] ICJ Rep 43, 74 [166]. For a critical view, see Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 631.

<sup>203</sup> See Heller (n 97) 405 ('[T]he defining characteristic of an international crime is that all states have a *jus cogens* obligation to domestically criminalize the act in question.').

<sup>204</sup> cf (1966) II YILC 219 ('[W]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.');

Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 393.

<sup>205</sup> See O'Keefe, *International Criminal Law* (n 11) 336. The existence of a customary obligation to prosecute/extradite international crimes has encountered several objections; see Raphaël Van Steenberghe, 'The Obligation to Extradite or Prosecute' (2011) 9 JICJ 1089, 1103; Kittichaisaree (n 40) 33.

<sup>206</sup> See text at n 46.

is also criminal within the boundaries of that state's jurisdiction. Moreover, since criminalising certain acts without any prospect of punishing them makes the criminalisation meaningless, it can also be assumed that such obligation entails a duty to prosecute when a jurisdictional link exists—or to be more precise, to submit the case to the prosecuting authorities in order to decide on the matter.<sup>207</sup>

If such an obligation can be identified, the exercise of subsidiary universal jurisdiction is a clear tool to implement international responsibility. When domestic courts examine whether the state with jurisdictional connections is 'unwilling or unable to prosecute', they are effectively assessing whether that state has breached its obligations stemming from the international criminalisation of individual conduct. If the state has breached these obligations by failing to prosecute, the most immediate (secondary) obligation that stems from such breach is the duty to bring the wrongful omission to an end (i.e. ensure that the case is prosecuted).<sup>208</sup>

The exercise of universal jurisdiction is an instrumental reaction in two ways. First, it forces the wrongdoing state to reconsider its wrongful omission, as its nationals will continue to be subject to prosecution abroad if it does not provide for meaningful prosecutorial action through its courts. Second, the exercise of jurisdiction is a form of

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<sup>207</sup> cf (1972) II YBILC 318; O'Keefe, *International Criminal Law* (n 11) 332.

<sup>208</sup> Art 30 ARSIWA and Commentary. For Trapp, similar countermeasures could apply in response to a state's failure to criminalise terrorist activities pursuant to UNSC resolutions: (n 29) 363.

substitutive action that accomplishes the result that the wrongdoing state should have produced in the first place;<sup>209</sup> in this sense, it is a perfectly ‘corrective’ countermeasure.<sup>210</sup>

If the exercise of universal jurisdiction satisfies these conditions, whether or not a rule of customary international law authorising the exercise of universal jurisdiction exists is irrelevant to the legality of the state’s conduct. It will have all the features of a potential countermeasure and its wrongfulness could thus be precluded.

***Assessing the implications: universal jurisdiction over the crime of aggression***

While most commentators agree that customary international law provides for universal jurisdiction over ‘core’ international crimes (piracy, genocide, crimes against humanity, war crimes, and torture<sup>211</sup>), the practical implications of the countermeasures framework become evident when one considers that: (i) other crimes are gradually acquiring a claim of being crimes under international law (e.g. terrorism<sup>212</sup>) and it is not granted that this entails universal jurisdiction; and (ii) there is at least one offence that is already criminal under international law but lacks a corresponding rule of universal jurisdiction: the crime of aggression.

The criminality of initiating a war of aggression (‘the supreme international crime’<sup>213</sup>) was recognised by the International Military Tribunal at Nuremberg and has

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<sup>209</sup> On the exercise of universal jurisdiction as ‘substitutive’ to the jurisdiction of national and territorial states, see *Kenya section of the International Commission of Jurists v Attorney General* [2011] ILDC 1804 (KE 2011) (Kenya, Nairobi High Court) [62].

<sup>210</sup> See further Section 6.2.4.

<sup>211</sup> Text at nn 113–115.

<sup>212</sup> See Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 JICJ 933; Trapp (n 29) 359.

<sup>213</sup> Trial of the Major War Criminals Before the International Military Tribunal, vol 22 (1948) 427.

been confirmed on multiple occasions.<sup>214</sup> Yet, besides the judgments of the Tribunals at Nuremberg and Tokyo, there is no state practice on the prosecution of this crime,<sup>215</sup> let alone on the exercise of universal jurisdiction. In fact, very few states have adopted laws criminalising the offence to date.<sup>216</sup> This should already call into question the existence of a customary rule of universal jurisdiction over this offence.<sup>217</sup> But besides the lack of practice, there is a more fundamental problem that prevents a rule of universal jurisdiction over aggression from developing.

Unlike other international crimes, aggression is by definition premised on an internationally wrongful act.<sup>218</sup> An ‘act of aggression’ requires ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.’<sup>219</sup> This ‘problematic’<sup>220</sup> definition creates a conundrum at the heart of aggression. In order to establish jurisdiction over this crime, the courts of a state other than the aggressor state

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<sup>214</sup> ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/25/2625, Annex [1]; ‘Definition of Aggression’, UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/29/3314, Annex, Article 5(2).

<sup>215</sup> See Yoram Dinstein, ‘Aggression’, *MPEPIL* (2015) [4]–[6].

<sup>216</sup> As of November 2019, 10 states have implemented legislation on aggression; see ‘Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, Update No 34’ (27 November 2019) <<https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation>> [II(A)].

<sup>217</sup> In this sense, see Heller (n 97) 400. But see Michael Scharf, ‘Universal Jurisdiction and the Crime of Aggression’ (2012) 53 *HarvILJ* 357.

<sup>218</sup> Dapo Akande and Antonios Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’ in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression* (CUP 2016) 214.

<sup>219</sup> ICC Statute, art 8*bis*(2).

<sup>220</sup> See Andreas Paulus, ‘Second Thoughts on the Crime of Aggression’ (2009) 20 *EJIL* 1117.

should make a determination on the international responsibility of a foreign state.<sup>221</sup> The ordinary rules of jurisdiction and immunity do not allow this. When drafting the 1996 Code of Crimes Against the Peace and Security of Mankind, the ILC found that ‘[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*’.<sup>222</sup> This problem became particularly acute during the negotiations of the Kampala Amendments to the ICC Statute.<sup>223</sup> The final text does not support the idea that states possess extraterritorial jurisdiction over the crime of aggression. When the case is not referred to the ICC by the Security Council, the Court cannot exercise jurisdiction over aggression committed by nationals or in the territory of a state that has not accepted the Amendments.<sup>224</sup>

The conceptual problem at the basis of the prosecution of aggression is so fundamental that even the attacked state—which would ordinarily be entitled to establish jurisdiction through the principle of objective territoriality—would be precluded from doing so.<sup>225</sup> However, this does not mean that the attacked state has no means to punish individuals responsible for such egregious crime. Even if one does not accept that the existence of a crime under international law implies a duty of the state to punish such

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<sup>221</sup> See Dapo Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’ (2011) OxfordLSResPaper 10/2011, 32.

<sup>222</sup> ILC, Report on the Work of its 48<sup>th</sup> Session (1996) UN Doc A/51/10, 49-50.

<sup>223</sup> See Claus Kreß and Leonie Von Holtzendorff, ‘The Kampala Compromise on the Crime of Aggression’ (2010) 8 JICJ 1179, 1195.

<sup>224</sup> ICC Statute, art 121(5). Despite the plain meaning of the text, debate on the topic is still ongoing; see Dapo Akande and Antonios Tzanakopoulos, ‘Treaty Law and ICC Jurisdiction Over the Crime of Aggression’ (2018) 29 EJIL 939, 956.

<sup>225</sup> Akande (n 221) 32.

conduct, in the case of aggression the responsibility of the attacking state is always engaged. The aggressor state is by definition responsible for a particularly serious breach of the prohibition on the use of force.<sup>226</sup> Prosecution of the individuals responsible for such crimes is a form of reparation that the injured state may demand from the wrongdoing state as a consequence of the latter's responsibility.<sup>227</sup> If the wrongdoing state is unable or unwilling to prosecute, the injured state can take matters in its own hands and establish jurisdiction over the persons responsible for the crime regardless of the limits stemming from the rules of jurisdiction and immunity. The breach of these rules would almost certainly be justified as a countermeasure.<sup>228</sup>

### **3.3. Exercise of universal jurisdiction in civil proceedings**

If 'universal civil jurisdiction' is defined as the exercise of adjudicative jurisdiction over conduct that has no internationally accepted link with the forum, the concept is unremarkable. In civil matters, private individuals and entities can conclude choice of court agreements and—within certain limits—elect a forum to settle their controversies regardless of 'objective' jurisdictional connections.<sup>229</sup> The exercise of universal civil jurisdiction that has attracted the objections of some states and has been the subject of

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<sup>226</sup> See Akande and Tzanakopoulos (n 218) 225.

<sup>227</sup> See text at n 218.

<sup>228</sup> See Akande (n 221) 32 (describing it as 'a form of self-help'). Since the prohibition on the use of force is an obligation *erga omnes* (see *Nicaragua* [1986] ICJ Rep 151, sep op Singh 153; *Wall Opinion* [2004] ICJ Rep 246, sep op Elaraby 254) even non-injured states may be entitled to take 'lawful measures' to ensure the cessation and reparation; see Section 6.2.3. Universal jurisdiction in these cases could be a means to implement international responsibility, for instance, in case the victim state were unable to prosecute the attackers.

<sup>229</sup> See Alex Mills, *Party Autonomy in Private International Law* (CUP 2018) 116, 128, 222.

academic debate concerns the tort equivalent of universal criminal jurisdiction—the exercise of universal jurisdiction over claims for reparation by victims of international crimes.<sup>230</sup>

There is some debate as to whether international law poses any limits on the exercise of civil jurisdiction. This is because, unlike criminal proceedings, jurisdiction to prescribe and jurisdiction to adjudicate are not necessarily entwined in civil matters. For example, the courts of state X may hear a case about a tort occurring in state Y and apply the law of state Y by virtue of the rules of private international law. The conclusions drawn from this are ambivalent. For some, the rules of private international law are, themselves, constrained by the principles of prescriptive jurisdiction under public international law.<sup>231</sup> For Schachter, ‘the conditions for valid exercise of adjudicatory jurisdiction are somewhat different’ because they account for party autonomy and the operation of *renvois* to the laws of other states.<sup>232</sup> Akehurst, based on the frequent absence of diplomatic protests against civil proceedings having no real connection with the forum, concluded that ‘customary international law imposes no limits on the jurisdiction of municipal courts in civil trials.’<sup>233</sup>

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<sup>230</sup> IDI, ‘Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes, Preamble’ (2015) 76 AIDI 265 [IDI Resolution]. See generally Donald F Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 AJIL 142; Kate Parlett, ‘Universal Civil Jurisdiction for Torture’ (2007) 4 EHRLR 385; David Wallach, ‘The Irrationality of Universal Civil Jurisdiction’ (2014) 46 GeoJIL 803; Paul Mora, ‘Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in *Naït-Liman v. Switzerland*’ (2018) 65 NILR 155; Anna Su, ‘Rise and Fall of Universal Civil Jurisdiction’ (2019) 41 HumRtsQ 849.

<sup>231</sup> eg Frederick Mann, ‘The Doctrine of International Jurisdiction Revisited After Twenty Years’ (1984) 186 RdC 9, 28; Mills (n 4) 200–209.

<sup>232</sup> Schachter (n 1) 246–249.

<sup>233</sup> Akehurst (n 5) 177.

Yet, recent practice has shown that at least *some* exercises of civil jurisdiction having no connection with the forum have raised strong objections by other states.<sup>234</sup>

The lack of a clear understanding of the rules governing universal civil jurisdiction comes from the fact that practice in this area is extremely limited. No international treaty provides a legal basis to exercise universal civil jurisdiction.<sup>235</sup> State practice concerns mainly two categories of cases. In civil law systems, victims of certain criminal offences can bring their tort claims against the perpetrators by participating directly in the criminal proceedings against the latter (*partie civile*).<sup>236</sup> When this occurs in criminal proceedings brought under the principle of universality, the exercise of criminal and civil universal jurisdiction is indistinguishable.<sup>237</sup> Outside these scenarios, examples of universal civil jurisdiction properly so-called are extremely rare.<sup>238</sup> The only exception is provided by proceedings brought in the United States under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA).<sup>239</sup>

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<sup>234</sup> Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party (13 June 2012) in *Kiobel v Royal Dutch Petroleum*, 133 SCt 1659 (2013) [EU Brief]; Brief of the Governments of the Netherlands and the United Kingdom as *Amici Curiae* in Support of Neither Party, in *ibid* [Netherlands/UK Brief]. See Caroline Kaeb and David Scheffer, 'The Paradox of Kiobel in Europe' (2013) 107 AJIL 852.

<sup>235</sup> Luc Reydam, 'Universal Jurisdiction in Context' (2005) 99 ASIL Proc 118.

<sup>236</sup> Amnesty International, 'Universal Jurisdiction: The scope of universal civil jurisdiction' (1 July 2007) <[www.amnesty.org/en/documents/ior53/008/2007/en](http://www.amnesty.org/en/documents/ior53/008/2007/en)> [Amnesty Report] 5-9. See also Beth van Schaack, 'In Defense of Civil Redress' (2001) 42 HarvILJ 141, 145.

<sup>237</sup> eg Ould Dah, *Arrêt sur l'action civile*, No 71/05 (1 July 2005) (Cour d'assises du Gard); Nezzar (n 138). See also Sulzer (n 75) 135.

<sup>238</sup> In 2013, the District Court of The Hague (Netherlands) established jurisdiction over the foreign subsidiary of a Dutch company for environmental pollution of the Niger Delta, though the applicable substantive law was Nigerian tort law: *Akpan v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd*, LJM BY9854 (30 January 2013) <<https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf>>. See also Cedric Ryngaert, 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations' [2012] McGillIntlJSustDevL&Poly 245.

<sup>239</sup> To this list, the Anti-Terrorism Act (ATA) of 1991 could also be added: 18 USC § 2333 (2020). However, the ATA is limited to applicants holding US nationality and, thus, is strictly speaking an

Given the paucity of state practice and the lack of clarity concerning the existence of permissive rules of customary international law, the countermeasures framework may play an important role in providing an alternative legal basis to support the exercise of universal civil jurisdiction. Indeed, the international criminalisation of certain offences may involve at least two sets of obligations for the state connected with civil proceedings. Article 1 of the *Institut de droit international's* (IDI) Resolution on universal civil jurisdiction states that victims of international crimes have 'a right to appropriate and effective reparation from persons liable for the injury', and 'a right to an effective access to justice to claim reparation'.<sup>240</sup> In the preparatory works, IDI rapporteur Bucher stressed that both rights engage obligations of the state.<sup>241</sup> The former was found, for example, in Article 14 of the 1984 Convention against Torture (CAT) which provides the following:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his [sic] dependants shall be entitled to compensation.<sup>242</sup>

The language of Article 14 CAT is broad enough to imply that states that have no connection with the offence may be under a duty to provide civil remedies in their own

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exercise of passive personality jurisdiction. For a critical analysis, see Geoffrey Sant, 'So Banks Are Terrorists Now: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act' [2013] *ArizStLJ* 533.

<sup>240</sup> IDI Resolution (n 230) art 1. See also 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, [1]-[3]; Amnesty Report (n 236) 2-4.

<sup>241</sup> See Andreas Bucher, 'La compétence universelle civile en matière de réparation pour crimes internationaux' (2015) 76 *AIDI* 1, 39, 69.

<sup>242</sup> Article 14(1) Torture Convention.

system—that is, an obligation to establish universal civil jurisdiction.<sup>243</sup> However, this view is not supported by the preparatory works and has been rejected in the practice of states.<sup>244</sup> The better view is that the obligation under Article 14(1) CAT extends only to the states that would ordinarily have jurisdiction over the offence, that is, the territorial state or the state of nationality.<sup>245</sup>

In the light of this, the exercise of universal civil jurisdiction over torture and other international crimes may have a strong claim to be a means to implement the international responsibility of states who failed to comply with their obligations to provide effective remedies. Indeed, recent developments support the idea that universal civil jurisdiction, like its criminal counterpart, may be a form of remedial jurisdiction exercised as a way to ensure that other states comply with their international obligations. The IDI Resolution supports such model of ‘subsidiary’<sup>246</sup> universal civil jurisdiction:

1. A court should exercise jurisdiction over claims for reparation by victims provided that:
  - a) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or
  - b) even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State.
2. For the purposes of paragraph 1(b), courts shall be considered to provide an available remedy if they have jurisdiction and if they are capable of

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<sup>243</sup> This view was suggested by the UN Committee Against Torture; see ‘Conclusions and Recommendations, Canada’ (7 July 2005) CAT/C/CR/34/CAN [4(g)], [5(f)].

<sup>244</sup> The ECtHR found that Swiss courts’ refusal to exercise universal civil jurisdiction over a torture claim with no connection to Switzerland was not in breach of the right of access to a court; see *Nait-Liman v Switzerland* (2018) ECHR 243.

<sup>245</sup> See Parlett (n 230) 391; Nowak and McArthur (n 65) 494.

<sup>246</sup> See Bucher (n 241) 96.

dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress.<sup>247</sup>

This model of universal jurisdiction is strikingly similar to the subsidiary exercise of universal criminal jurisdiction examined in the previous section of this study. As argued above, this model ensures that the state who bears the primary obligations to provide effective remedies is put in a condition where it is capable of complying with its international obligations. Should the state fail to provide these remedies, the exercise of universal civil jurisdiction by other states is a means to induce the wrongdoing state into compliance and to bring such breach to an end, while contextually providing an alternative remedy to the victims injured by the wrongful act.

State practice, though embryonic and inconsistent, supports the use of universal civil jurisdiction as a tool of implementation of international responsibility. With respect to civil law states that adopt a subsidiary model of universal criminal jurisdiction, participation as *partie civile* in these criminal proceedings will be subject to the same conditions and have the same instrumental character of universal criminal jurisdiction analysed in the previous section.<sup>248</sup>

The US practice that fuelled much of the debate on this topic also offers clear elements of instrumentality in the use of universal civil jurisdiction. As stated above, much of this practice occurred pursuant to the ATS, a 200-year-old statute conferring jurisdiction over claims ‘where an alien sues for a tort only in violation of the law of nations or a treaty

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<sup>247</sup> IDI Resolution (n 230) art 2.

<sup>248</sup> Text at n 237.

of the United States.’<sup>249</sup> In 1980, a decision of the Second Circuit relied on this statute to establish jurisdiction in tort proceedings for torture that had no connections with the United States.<sup>250</sup> This spearheaded a wave of litigation for ‘torts in violation of the law of nations’,<sup>251</sup> which in turn led to controversy about the meaning and use of this statute.<sup>252</sup> The exercise of universal civil jurisdiction to such scale raised concerns from other states, which ‘object[ed] to the efforts of US litigators and judges to bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties where there is no significant nexus to the US.’<sup>253</sup> Remarkably, the solution proposed by some states to mitigate the excesses of such broad exercise of jurisdiction was to limit the use of ATS to international crimes and to turn it into a subsidiary form of universal jurisdiction:

Accordingly, before the United States may exercise universal jurisdiction under the ATS, international law requires exhaustion of local and international remedies or, alternatively, the claimant’s demonstration that such remedies are unavailable or their pursuit is futile.<sup>254</sup>

Exhaustion of local remedies before exercising universal civil jurisdiction would ensure that the state with jurisdictional connections—which, as seen above, bears a duty to provide effective remedies for the victims of international crimes—is given an opportunity to

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<sup>249</sup> 1 Stat 73, 77, § 9 (1789).

<sup>250</sup> *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980).

<sup>251</sup> For a summary, see Su (n 230) 851–858.

<sup>252</sup> See, among others, Curtis Bradley, *International Law in the U.S. Legal System* (2nd edn, OUP 2015) 201; Kenneth Randall, ‘Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute’ (1985) 18 NYUJIntL&Pol 1; Anne-Marie Burley, ‘The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor’ (1989) 83 AJIL 461; Curtis Bradley, ‘The Alien Tort Statute and Article III’ [2001] VaJIL 587; Anthony Bellia and Bradford Clark, ‘The Alien Tort Statute and the Law of Nations’ [2011] UChILRev 445.

<sup>253</sup> See Netherlands/UK Brief (n 234) 24. For further examples of protests, see Abhimanyu George Jain, ‘Universal Civil Jurisdiction in International Law’ (2015) 55 IJIL 209.

<sup>254</sup> EU Brief (n 234) 26. See also Netherlands/UK Brief (n 234) 33.

comply with its international obligations. If the territorial/national state fails to fulfil these obligations, the exercise of universal jurisdiction by another state becomes a means to implement the former state's responsibility.<sup>255</sup> The state affected by the exercise of universal jurisdiction would not be able to complain of the resulting interference with its sovereignty so long as it does not provide adequate remedies within its own jurisdiction.

Following the Supreme Court decision in *Kiobel*, the extraterritorial reach of the ATS has been largely curtailed.<sup>256</sup> At the same time, universal civil jurisdiction before US courts survives in a limited form pursuant to the TVPA. The TVPA was introduced in 1992 to allow tort proceedings against individuals who 'under actual or apparent authority, or color of law, of any foreign nation' subject other individuals to torture or extrajudicial killing.<sup>257</sup> When compared to the ATS, the TVPA is more clearly envisaged as an instrumental response to the wrongful act of foreign states. Unlike the ATS, the TVPA expressly states that the claimant must have exhausted 'adequate and available remedies in the place in which the conduct giving rise to the claim occurred' before US courts are able to exercise universal jurisdiction.<sup>258</sup> This clear requirement of exhaustion of local remedies

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<sup>255</sup> On the relationship between exhaustion of local remedies and standing to invoke international responsibility, see Section 6.2.3.

<sup>256</sup> *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659, 1669 (2013) (claims must 'touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application.'). See Julian G Ku, 'Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute' (2013) 107 AJIL 835; Nehal Bhuta, 'The Ninth Life of the Alien Torts Statute—Kiobel and After' (2014) 12 JICJ 539; Sarah H Cleveland, 'After Kiobel' (2014) 12 Journal of International Criminal Justice 551.

<sup>257</sup> Pub L No 102–256, 106 Stat 73 (1992).

<sup>258</sup> 106 Stat 73. See further *Estate of Rodriguez v Drummond Co*, 256 F Supp 2d 1250, 1268 (ND Ala 2003).

strengthens the argument that universal jurisdiction under the TVPA can be justified pursuant to the framework of countermeasures.<sup>259</sup>

For as long as the rules concerning the exercise of universal civil jurisdiction do not crystallise through the practice of states, the framework proposed in this Chapter is crucial to strengthen the claim that the exercise of universal civil jurisdiction is consistent with international law.

### **3.4. Interim conclusion**

While it is difficult to conclusively determine whether adjudicative jurisdiction can be assessed in isolation from other types of jurisdiction and whether international law limits this type of jurisdiction equally in civil and criminal proceedings, this Chapter has demonstrated that a potentially wrongful exercise of adjudicative ‘universal’ jurisdiction can be justified when it offers the features of a countermeasure. This exercise of jurisdiction may have a fundamental role in implementing state responsibility with regard to two fundamental sets of obligations: the duty to criminalise and prosecute persons responsible for international crimes, and the duty to provide effective remedies to the victims of these crimes. This instrumental use of universal jurisdiction is realised, both in criminal and civil proceedings, when the exercise of jurisdiction is carried out pursuant to the principle of subsidiarity, that is, when the state with jurisdictional connections is given an opportunity

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<sup>259</sup> If a strict approach to the principle of legality is adopted, claims under the TVPA should be decided according to the law of the place that would ordinarily have jurisdiction. This is not the case of the TVPA, which expressly confers a cause of action; see Curtis Bradley, ‘The ATS, the TVPA, and the Future of International Human Rights Litigation’ (2014) 108 ASIL Proc 145. On the question of non-retroactivity, see Section 6.2.5.

to criminalise/prosecute and/or provide effective remedies to the victims. The crucial importance of these obligations for the protection of interests of the international community suggests that such use of jurisdiction may strengthen the international rule of law. Given the uncertain state of customary international law in the area of universal jurisdiction, the use of countermeasures may also provide states with a second line of defence should the development of these rules not reach a sufficient level of generality to create new custom. These aspects are further explored in Chapter 6.

## 4. DENIAL OF STATE IMMUNITY

This Chapter assesses the extent to which denial of state immunity can be justified as a countermeasure. Section 4.1 establishes the general rules of state immunity and sets out a methodological presumption according to which denial of immunity for sovereign activities of foreign states may be potentially in breach of customary international law. Section 4.2 examines expansive interpretations of accepted exceptions that do not explicitly distinguish between sovereign and private acts. Section 4.3 surveys the practice of states asserting new exceptions to state immunity. Section 4.4 considers state practice openly disregarding existing customary rules of immunity. The conclusion is that considerable state practice presents the features of countermeasures and may be potentially justified regardless of the existence of accepted exceptions to state immunity under customary international law.

### 4.1. Identifying potentially wrongful denial of state immunity

The classic statement of the law of state immunity comes from the US Supreme Court's decision in *The Schooner 'Exchange' v McFaddon*, where Chief Justice Marshall recognised state immunity as a consequence of the 'perfect equality and absolute independence of sovereigns'.<sup>1</sup> According to this interpretation of the principle, '[i]t is an axiom of international law ... that a sovereign State cannot be sued in its own courts, or in

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<sup>1</sup> 11 US (7 Cranch) 116, 137 (1812). See Hazel Fox and Philippa Webb, *The Law of State Immunity* (rev&upd 3rd edn, OUP 2015) 28; Curtis Bradley, *International Law in the U.S. Legal System* (2nd edn, OUP 2015) 234; Xiaodong Yang, *State Immunity in International Law* (CUP 2012) 8.

any other, without its consent and permission.’<sup>2</sup> This notion of ‘absolute’ immunity completely exempting states from the jurisdiction of foreign courts was for a long time the default position of domestic courts, at least in common law systems.<sup>3</sup> At the turn of the 20<sup>th</sup> century, as states became more engaged in commercial activities, Italian and Belgian courts began to distinguish between acts carried out in a sovereign capacity (*acta jure imperii*), which continue to attract immunity, and acts of a private character, (*acta jure gestionis*) for which immunity is not warranted.<sup>4</sup> This ‘restrictive theory’ of state immunity gradually made its way into most civil and common law systems, and today it is the dominant understanding of the international rules governing state immunity.<sup>5</sup>

While perceived as more equitable, the restrictive doctrine of state immunity has proven difficult to apply when it comes to identifying immune transactions *in concreto*.<sup>6</sup> Debate still exists, for example, as to whether the sovereign character of an act should be

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<sup>2</sup> Hassard v United States of Mexico, 61 NYS 939 (46 AD 1899).

<sup>3</sup> For a critical assessment, see Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 20.

<sup>4</sup> See Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 BYIL 220, 222–223; Ian Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 167 RdC 113, 208.

<sup>5</sup> See Pierre-Hugues Verdier and Erik Voeten, ‘How Does Customary International Law Change? The Case of State Immunity’ (2015) 59 *International Studies Quarterly* 209; James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 472–473. See also Sinclair (n 4) 216; Peter Trooboff, ‘Foreign State Immunity: Emerging Consensus on Principles’ (1986) 200 RdC 235; Christoph Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988); Yang (n 1) 11; Fox and Webb (n 1) 32. China is one of the few states still abiding by a rule of absolute immunity: *DRC v FG Hemisphere*, [2011] 14 HKCFAR 395, FACV 5, 6, & 7/2010 (CFI). See Shen Wei, ‘FG Hemisphere Associates v. Democratic Republic of the Congo’ (2014) 108 AJIL 776.

<sup>6</sup> See James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1983) 54 BYIL 75, 118 (arguing that the theory rests on a distinction between private and public acts unfamiliar to a number of legal systems). See also Lauterpacht (n 4) 224; Ian Brownlie, ‘Contemporary Problems Concerning the Jurisdictional Immunity of States’ (1987) 62–I AIDI 13, 26–27 (‘the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis’). But see Fox and Webb (n 1) 34 (noting that the distinction between public and private acts is not unique to the law on state immunity).

determined by its ‘nature’ or ‘purpose’.<sup>7</sup> For this reason, several national codifications followed a different approach. State immunity is identified as the default position whenever proceedings are brought against a sovereign entity before domestic courts; this rule is accompanied by a closed number of exceptions for non-immune activities.<sup>8</sup> While no widely ratified treaty currently governs the rules of state immunity,<sup>9</sup> the UN Convention on State Immunity (UNCSI) (not yet in force) provides that, outside the numbered exceptions contained therein, ‘[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State’.<sup>10</sup> Domestic courts and the ICJ relied on this provision as evidence of the unavailability as a matter of customary international law of exceptions not specified in the Convention.<sup>11</sup> This choice of ‘legislative convenience’<sup>12</sup> does not do away completely with the distinction between *acta jure imperii*

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<sup>7</sup> The UN Convention on Jurisdictional Immunities of States and Their Property (2 December 2004) (not yet in force) [UNCSI] sets out a nature-based test, but also allows for the purpose to be considered in certain circumstances; see art 2(2). See also Stephan Wittich, ‘Article 2 (1)(c) and (2) and (3)’ in Roger O’Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 69.

<sup>8</sup> eg United States: Foreign Sovereign Immunities Act, Pub Law 94-583 (1976); United Kingdom: State Immunity Act (20 July 1978); Australia: Foreign States Immunities Act, No 196 (16 December 1985). But see Katherine Del Mar, ‘The Effects of Framing International Legal Norms as Rules or Exceptions’ (2013) 15 *IntCLRev* 143, 158 (arguing that state immunity should be understood as an exception to the rule of jurisdiction).

<sup>9</sup> A limited number of states are party to the European Convention on State Immunity (16 May 1972) 1495 UNTS 182 [ECSI].

<sup>10</sup> UNCSI art 5.

<sup>11</sup> See Tom Grant, ‘Article 5’ in Roger O’Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 103–104.

<sup>12</sup> Christoph Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988) 7.

and *acta jure gestionis*, as all—bar one<sup>13</sup>—generally accepted exceptions in customary international law reflect the non-sovereign character of the activity in question.<sup>14</sup>

The practical consequence of this approach to state immunity is a twofold presumption. First, as a rule of evidence in domestic proceedings, once it is recognised that the defendant is a foreign sovereign entity, the onus is on the plaintiff to demonstrate that the facts at the basis of the claim fall within one of the accepted exceptions.<sup>15</sup> Second, as a methodological rule for the identification of customary international law, when proceedings are brought against a foreign state with respect to its sovereign activities the presumption is that custom prescribes immunity and exceptions to the general rule must be demonstrated through sufficient state practice and *opinio juris* supporting the absence of immunity.<sup>16</sup> This presumption helps to identify instances of denial of state immunity that may not conform to customary international law. In practice, states have departed from the general rule of state immunity for sovereign activities in one of three ways: (i) by relying on accepted exceptions that do not explicitly distinguish between sovereign and private acts; (ii) by asserting new exceptions to state immunity; and (iii) by openly disregarding existing customary rules of immunity. Each category is analysed in turn.

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<sup>13</sup> On the territorial tort exception to state immunity, see further Section 4.2.1.

<sup>14</sup> eg UNCSI arts 10–11 and 13–17 (listing commercial transactions, contracts of employment, ownership, possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a State, and arbitration agreements). See also *Jurisdictional Immunities of the State (Germany/Italy)* (Judgment) [2012] ICJ Rep 99 [59] (‘[T]he Court notes that many States ... now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*. That approach has also been followed in the United Nations Convention’).

<sup>15</sup> Yang (n 1) 41; Grant (n 11) 103.

<sup>16</sup> State practice must be ‘sufficiently widespread and representative, as well as consistent’ and ‘undertaken with a sense of legal right or obligation.’ See ILC, Report on the Work of Its Seventieth Session (2018) UN Doc A/73/10, 119-120.

## 4.2. Expansive interpretation of recognised exceptions

### 4.2.1. Territorial Torts

#### *The inapplicability of the territorial tort exception to sovereign acts*

The exception to state immunity for territorial torts appears with slight differences in almost all existing codifications,<sup>17</sup> including Article 12 UNCSI:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

On a plain reading, this provision seems to discount the restrictive doctrine of state immunity; the exception is defined exclusively on the basis of the territorial connection between the forum state and the tortious conduct, regardless of the sovereign character of the latter.<sup>18</sup> This has led several commentators to conclude that customary international law provides for an exception to state immunity for territorial torts which does not distinguish between acts of a sovereign and non-sovereign nature.<sup>19</sup>

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<sup>17</sup> Other than UNCSI, a similar exception is codified in the legislation of Canada, United Kingdom, South Africa, Australia, Singapore, Argentina, and Israel. See Joanne Foakes and Roger O’Keefe, ‘Article 12’ in Roger O’Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 210.

<sup>18</sup> *ibid* 218–219.

<sup>19</sup> eg Crawford (n 6) 111; Yang (n 1) 199, 207–215; Kimberley Trapp and Alex Mills, ‘Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of *Germany v Italy*’ (2012) 1 *CJICL* 153, 156; Foakes and O’Keefe (n 17) 218; Fox and Webb (n 1) 468; Crawford (n 5) 482.

Notwithstanding this widespread opinion, it is not granted that customary international law supports the existence of a wider rule according to which sovereign acts of a state lose the immunity privilege if committed in the territory of other states. There are both conceptual and evidentiary objections to this argument. As to the first category, the theoretical foundations upon which the exception rests are not completely clear. When considering the territorial tort exception in its judgment in the *Jurisdictional Immunities* case, the ICJ asserted confidently that the exception applies to traffic accidents and other ‘insurable risks,’ but steered clear of identifying the rationale that supports it.<sup>20</sup> If the exception was limited to private torts (mirroring the commercial activities exception), the case for extending it to acts *jure imperii* would be seriously undermined.<sup>21</sup> The fundamental question that needs to be answered is why, when the *locus delicti commissi* is identified within the territory of the forum state, territorial sovereignty should prevail over sovereign equality of states. The tension between these two principles has characterised the rules of immunity since the seminal *The Schooner ‘Exchange’* judgment,<sup>22</sup> and the priority given to sovereign equality over territorial sovereignty has always been the guiding principle behind state immunity.<sup>23</sup> In this sense, the shift from absolute to restrictive immunity was less problematic because it left the substance of the immunity rationale intact; the focus on the sovereign element simply shifted from the status of the defendant, to the character of

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<sup>20</sup> *Jurisdictional Immunities* (n 14) [64].

<sup>21</sup> See Andrew Dickinson, ‘Germany v. Italy and the Territorial Tort Exception’ (2013) 11 JICJ 147, 151.

<sup>22</sup> Text at n 1.

<sup>23</sup> *Jurisdictional Immunities* (n 14) [123-124]. See also Fox and Webb (n 1) 767.

its acts.<sup>24</sup> The recognition of an exception that extends to sovereign acts would necessarily require a rethinking of these foundations.<sup>25</sup>

On the conceptual side of the issue, there is also the fact that opening the gates to judicial review of foreign sovereign acts begs the question of what reasons, if any, could stand in the way of such an exercise of jurisdiction.<sup>26</sup> That territorial jurisdiction is not absolute is beyond controversy and the activities of foreign armed forces are a case in point. While some codifications explicitly exempt them from the territorial jurisdiction of the forum state,<sup>27</sup> UNCSI does not contain any clause in this sense. When confronted with the issue, the ICJ engaged in an extensive analysis of state practice and concluded that (at least) the acts of armed forces performed during an armed conflict in the territory of the forum state remain immune.<sup>28</sup> If one accepts the mainstream view that territorial jurisdiction trumps the sovereign character of the acts that constitute territorial torts, why should the position revert back to immunity if the territorial torts considered are those of armed forces during an armed conflict? Some commentators attempted to provide an answer based on the *lex specialis* character of the law of armed conflict.<sup>29</sup> This justification, however, fails to fully convince. Nothing more than a ‘thin line’ separates these cases from other

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<sup>24</sup> See Van Alebeek (n 3) 49; Roger O’Keefe, ‘State Immunity and Human Rights’ (2011) 44 VandJTransnatL 999, 1030.

<sup>25</sup> This is one of the main critiques against an exception for *jus cogens* violations: Richard Garnett, ‘The Defence of State Immunity for Acts of Torture’ (1997) 18 AustYBIL 97, 124; O’Keefe, ‘State Immunity’ (n 24) 1030. See Section 4.3.4.

<sup>26</sup> See Dickinson (n 21) 152.

<sup>27</sup> See ECSI art 31. The United Kingdom and Singapore are the only States explicitly exempting all the activities of armed forces stationed in their territory, while other statutes, such as those of Canada, Australia, and Israel, exclude these activities only to the extent covered by Status of Forces Agreements. See also Trapp and Mills (n 19) 156–157.

<sup>28</sup> *Jurisdictional Immunities* (n 14) [77].

<sup>29</sup> eg Van Alebeek (n 3) 78; Trapp and Mills (n 19) 157; Fox and Webb (n 1) 480. See also *Jurisdictional Immunities* (n 14) sep op Keith [18].

manifestations of sovereignty that are instead considered to fall within the scope of the territorial tort exception, such as political assassination.<sup>30</sup> Moreover, a blanket ban on jurisdiction for military activities appear to some excessively strict and not necessarily reflective of state practice. Fox and Webb suggest that particularly heinous acts committed by armed forces, such as international crimes, should still justify an exception to immunity.<sup>31</sup> If this were to be an accurate picture of the current state of the territorial tort exception, the result would be extremely fragmented and incoherent.<sup>32</sup>

For the avoidance of doubt, although lacking a single, unifying principle, this picture would be perfectly acceptable if supported by adequate state practice. Borrowing O’Keefe’s words, ‘logic and the *opinio juris* of states do not always go hand in hand’.<sup>33</sup> It is always open to states to unequivocally indicate that only certain acts of particular types of state organs benefit from immunity regardless of where they are performed. The difficulty with this—and these are the evidentiary objections mentioned at the outset—is that state practice is not unambiguously oriented in that direction. There are various indications that cast doubt on the extent to which the territorial tort exception is apt to cover sovereign activities according to customary international law.

The codification of the territorial tort exception in the Draft Articles that later became UNCSI (DASI) arose from a practice that ILC Special Rapporteur Sucharitkul

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<sup>30</sup> Riccardo Pavoni, ‘An American Anomaly?’ (2012) 21 *ItalYrbkIntL* 143, 155.

<sup>31</sup> Fox and Webb (n 1) 478. See also *Jurisdictional Immunities* (n 14) diss op Gaja [9].

<sup>32</sup> Some believe the findings of the ICJ undermine the ‘legal validity’ of the territorial tort exception: Fox and Webb (n 1) 469 Van Alebeek (n 3) 77.

<sup>33</sup> Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *JICJ* 735, 750.

found to be ‘neither uniform nor consistent’.<sup>34</sup> Before various states enacted immunity legislation, there was ‘very little evidence’ of an exception in this regard;<sup>35</sup> support could be found exclusively in relation to personal injuries resulting from car accidents caused by representatives of foreign governments.<sup>36</sup> Even when Article 11 of the European Convention on State Immunity (1972) and the legislation of some nine jurisdictions incorporated the exception without reference to the nature of the tortious activity, this did not translate into a wave of litigation challenging sovereign acts; in fact, only US courts seemed to have actively embraced this new competence.<sup>37</sup>

As a result, when ILC Special Rapporteur Sucharitkul suggested that UNCSI should integrate a similar exception, he made it clear that the basis for this could not be found in customary international law; state practice supported at best an ‘emerging trend,’ which, in his view, needed to be ‘harmonize[d] and reorient[ed] ... towards to [sic] healthier direction.’<sup>38</sup> Various members of the Commission took issue with the draft provision, criticizing its ‘innovative ... nature’ and emphasizing that these disputes were more apt to ‘be resolved through diplomatic negotiations or by amicable settlement.’<sup>39</sup> When submitted to the states, the draft met some fierce resistance. The Soviet Union, for instance, objected that ‘[w]hen the question of state responsibility arises, the illegality of

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<sup>34</sup> Sompong Suchartikul, Fifth Report on Jurisdictional Immunities of States and Their Property, [1983] 2(1) YBILC 41 [76].

<sup>35</sup> *ibid.*

<sup>36</sup> Collision with a Foreign Government-Owned Motor Car (1961) 40 ILR 73, 74 (Austria).

<sup>37</sup> Text at nn 50–55.

<sup>38</sup> Fifth Report Suchartikul (n 34) [68], [99].

<sup>39</sup> [1983] 1(1) YBILC 82, 84.

the deed is determined by the rules of international law, with the help of international proceedings, and cannot be established by national courts.’<sup>40</sup>

Despite this, the provision made its way into the final version of DASI by virtue of a ‘general[] ... preference’ for its retention.<sup>41</sup> The ILC Commentary to DASI however reflects its troubled legislative history; while stating that Article 12 ‘appears to be confined principally to insurable risks,’ it adds that the scope of the provision is ‘wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.’<sup>42</sup> Nonetheless, a more accurate description is that the actual scope of Article 12 remains uncertain.<sup>43</sup> Many states continue to object to the inclusion of sovereign acts in the exception, including the United States itself.<sup>44</sup> States without immunity legislation have almost uniformly applied the territorial tort exception within the limits of *acta iure gestionis*;<sup>45</sup> the ECtHR endorsed this practice in *McElhinney*.<sup>46</sup> Perhaps the ultimate acknowledgement of the unsettled state of the matter came from the ICJ, which in the *Jurisdictional Immunities* case cautiously

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<sup>40</sup> [1988] 2(1) YBILC 83 [13]. See also *ibid* 61 [12] (Byelorussia); *ibid* 69 [21] (German Democratic Republic).

<sup>41</sup> ILC, Report on the Work of Its Forty-First Session [1989] 2(2) YBILC 111 [523]-[524].

<sup>42</sup> Draft Articles on Jurisdictional Immunities of States and Their Property, With Commentaries [1991] 2(2) YBILC 45 (Article 12(4)). See also Foakes and O’Keefe (n 17) 219.

<sup>43</sup> See Riccardo Pavoni, ‘How Broad Is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?’ (2016) 14 JICJ 573, 581.

<sup>44</sup> *Jurisdictional Immunities* (n 14) [64] (quoting the US representative to the General Assembly: ‘[Art 12] must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis* .... [Broadening its scope] would be contrary to the existing principles of international law.’).

<sup>45</sup> See Gerhard Hafner, Marcelo Kohen and Susan Carolyn Breau, *State Practice Regarding State Immunities* (Martinus Nijhoff 2006) 97–112.

<sup>46</sup> *McElhinney v Ireland* (2001) 2001-XI ECHR 37, 47 [38] (holding that, under ‘the present state of the development of international law’, the grant of immunity for an act *jure imperii* in the territory of the forum State does not fall ‘outside any currently accepted international standards’).

stressed that ‘it [was] not called upon in the present proceedings to resolve the question whether there is in customary international law a “tort exception” to state immunity applicable to *acta jure imperii* in general.’<sup>47</sup> Some read into this statement an implicit admission that customary international law might contain such an exception;<sup>48</sup> but the opposite can equally be argued. The most likely explanation for the Court’s reticence is that the judges may have recognised the developing state of the law in this area and decided not to take a position in order to avoid influencing such evolution.<sup>49</sup>

### ***The use of the exception for the implementation of state responsibility***

The most notorious decision involving the exercise of jurisdiction over sovereign acts under the territorial tort exception is *Letelier*, which dealt with the political assassination of the Chilean dissident leader on US soil under the instruction of the Pinochet regime. The District Court for the District of Columbia used both the letter and history of the territorial tort provision contained in the Foreign Sovereign Immunities Act (FSIA) to conclude that tortious acts are not limited to ‘private’ acts.<sup>50</sup> However, unlike other immunity codifications, the FSIA contains a peculiar clause that seems to reintroduce the *jure imperii/jure gestionis* distinction ‘through the back door’.<sup>51</sup> Acts consisting in an exercise of a ‘discretionary function’—an expression designed to capture the exercise of certain

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<sup>47</sup> *Jurisdictional Immunities* (n 14) [65].

<sup>48</sup> See Fox and Webb (n 1) 478.

<sup>49</sup> See Dickinson (n 21) 161–163.

<sup>50</sup> *Letelier v Republic of Chile*, 488 FSupp 665, 671-672 (DDC 1980).

<sup>51</sup> *Van Alebeek* (n 3) 70.

sovereign powers—remain covered by immunity.<sup>52</sup> It is to deal with this issue that the Court famously held that:

[w]hatever policy options may exist for a foreign country, it has no “discretion” to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.<sup>53</sup>

The unusual way in which the District Court reached this conclusion led virtually every commentator to consider this cryptic statement as an assertion that political assassination (as such) falls within the scope of the territorial tort exception. However, less attention has been paid to the fact that the Court denied immunity because it found that Chile had acted in a manner ‘clearly contrary to ... international law’.<sup>54</sup> A similar case decided by the Court of Appeals for the Ninth Circuit is even more explicit. In *Liu v Republic of China*, the Court went as far as listing the international treaties which, in its view, the ROC had breached by commissioning the murder of a Chinese dissident in the United States.<sup>55</sup> These aspects are not merely incidental; both *Letelier* and *Liu* were delivered in the context of highly controversial disputes between the United States and the foreign states involved. In the case of *Letelier*, the judgment of the District Court and the subsequent attempts to enforce a US \$5 million damages award had a fundamental role in exerting pressure on Chile to adhere to peaceful means of dispute resolution and ultimately agree to pay compensation

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<sup>52</sup> See 28 USC § 1605(a)(5) (2018); Joseph Dellapenna, *Suing Foreign Governments and Their Corporations* (Transnational Publishers 2003) 254.

<sup>53</sup> *Letelier*, 488 FSupp 673.

<sup>54</sup> *ibid.*

<sup>55</sup> *Liu v Republic of China*, 892 F2d 1419, 1433 (9th Cir 1989).

to the individual claimants.<sup>56</sup> It cannot be doubted that the denial of immunity had an instrumental role in implementing Chile's international responsibility.<sup>57</sup>

These cases bear a strong resemblance with the more recent stream of litigation in which Germany opposed claims before Greek and Italian courts for war crimes reparations. Both *Prefecture of Voiotia* and *Ferrini* dealt with tortious activities committed by the occupying armed forces of Nazi Germany during WWII. In *Prefecture of Voiotia* the use of the territorial tort exception is almost indiscernible from the contextual finding that the 'tortious activities' ascribed to Germany were breaches of international law. Specifically, the Greek Supreme Court found that Germany was responsible for crimes against humanity and war crimes and referred to these as breaches of *jus cogens* obligations.<sup>58</sup> The Italian Court of Cassation, for its part, fully subscribed to the reasoning of Greek courts when plaintiffs sought *exequatur* of the Greek award against Germany in Italy.<sup>59</sup> Prior to that, the Italian Court had employed similar arguments in *Ferrini*.<sup>60</sup> These findings are particularly important in providing an alternative justification for the denial of state immunity.<sup>61</sup> Given that the ICJ clarified that no exception to state immunity exists with

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<sup>56</sup> See Stefanie Schmahl, 'Letelier and Moffitt Claim', *MPEPIL* (2008) [7]; John Merrills, *International Dispute Settlement* (CUP 2011) 52.

<sup>57</sup> On denial of immunity in *Letelier* as a countermeasure, see Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 124.

<sup>58</sup> *Prefecture of Voiotia v Federal Republic of Germany* (2000) 129 ILR 519.

<sup>59</sup> *Prefecture of Voiotia (exequatur)* (Cass Sez I) Judgment No 11163/2011 [6].

<sup>60</sup> *Ferrini v Germany* (Cass Sez Unite) Judgment No 5044/2004.

<sup>61</sup> cf Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights' (2005) 16 EJIL 89, 97.

respect to the extraterritorial activities of armed forces,<sup>62</sup> these denials of immunity can only be justified pursuant to the countermeasures framework.

#### 4.2.2. Implied Waiver

States can at any time submit themselves to the jurisdiction of foreign courts by giving their consent. As a general rule, such consent must be given separately and in express terms in order to produce legal effects;<sup>63</sup> only in limited circumstances can a waiver of immunity be inferred from the State's own conduct.<sup>64</sup> Since in these instances no analysis is required as to the nature of the acts involved, a number of domestic courts have relied on implied waiver to assert jurisdiction over foreign sovereign acts. A closer look reveals however that denial of immunity in these cases was often used as a tool to implement international responsibility.

As a response to internationally wrongful act, the doctrine of implied waiver has taken two forms.<sup>65</sup> First, the signing of an international treaty has been interpreted as implying waiver of immunity for cases resulting from breaches of that treaty.<sup>66</sup> The only

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<sup>62</sup> *Jurisdictional Immunities* (n 14) [76].

<sup>63</sup> See UNCSI art 7. See also Roger O'Keefe, 'Article 7' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 116.

<sup>64</sup> A State must have acted in a way that is incompatible with the will to subtract itself from jurisdiction. The only uncontroversial case is participation in proceedings before a foreign court for purposes other than contesting jurisdiction: UNCSI art 8; Fox and Webb (n 1) 381, 386–387.

<sup>65</sup> See Garnett (n 25) 110.

<sup>66</sup> A variation of this argument is that the signing of human rights treaties containing an obligation to provide effective remedies implies a waiver of immunity; see Jordan Paust, 'Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights' (1985) 8 *HoustonJIntlL* 49, 66; Andrea Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 *AJPIL* 195, 213–214.

court that explicitly endorsed this reasoning is the District Court for the District of Columbia in *Von Dardel*, where it found that the Soviet Union had implicitly waived its immunity by signing ‘treaties codifying the fundamental principle of diplomatic immunity.’<sup>67</sup> Behind this legal fiction, the argument was premised on the finding that the USSR had breached its international obligations by imprisoning a Swedish diplomat; thus, denial of immunity was instrumental in implementing this responsibility.<sup>68</sup> Shortly thereafter, the Supreme Court unequivocally rejected this argument in *Amerada Hess*,<sup>69</sup> as a result of which the District Court reversed its position and concluded no waiver had taken place.<sup>70</sup>

Second, implied waiver has been considered as resulting from the recognition of certain norms as non-derogable (*jus cogens*); as the argument goes, ‘in recognizing a group of peremptory norms, states are implicitly consenting to waive their immunity when they violate one of these norms.’<sup>71</sup> This argument was raised on a number of occasions before US courts and consistently rejected. In *Siderman de Blake*, the Court of Appeals for the Ninth Circuit considered at length the effects of peremptory norms on state immunity and ultimately lifted immunity on the basis of implied waiver; however, such waiver was not inferred from the *jus cogens* nature of the norms, but from the fact that Argentina had availed itself of the US courts in its efforts to prosecute the plaintiff (thus voluntary

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This view fundamentally misapprehend the content of such obligation; see Sevrine Knuchel, ‘State Immunity And The Promise Of Jus Cogens’ (2011) 9 NorthWJHR 149, 168.

<sup>67</sup> *Von Dardel v USSR*, 623 FSupp 246, 256 (DDC 1985).

<sup>68</sup> See Focarelli (n 57) 126 (qualifying this as a countermeasure).

<sup>69</sup> *Argentine Republic v Amerada Hess Shipping*, 488 US 428, 442-443 (1989).

<sup>70</sup> *Von Dardel v USSR*, 736 FSupp 1, 8 (DDC 1990).

<sup>71</sup> Adam Belsky, Mark Merva and Naomi Roht-Arriaza, ‘Implied Waiver under the FSIA’ (1989) 77 CalLRev 365, 394.

submitting to US jurisdiction).<sup>72</sup> In *Princz*, the Court of Appeals for the DC Circuit was even more categorical:

[A]n implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. ... We have no warrant ... for holding that the violation of *jus cogens* norms ... constitutes an implied waiver of sovereign immunity under the FSIA.<sup>73</sup>

Whereas at times other US courts considered the argument 'appealing', they all uniformly refused to expand implied waiver so as to include violations of *jus cogens* norms.<sup>74</sup>

Considering the little success that the argument had in the United States, it is perhaps surprising that years later the Greek Supreme Court relied on it as part of its justification to deny the immunity of Germany in *Prefecture of Voiotia*.<sup>75</sup> Such use of implied waiver is nothing more than a 'fiction',<sup>76</sup> which is particularly problematic because employed in situations where states have not shown any willingness to submit to the jurisdiction of foreign courts.<sup>77</sup> The fiction may play an important role in persuading a broader audience that certain situations *should* justify an exception to immunity,<sup>78</sup> but until a critical mass of states endorses this development, the use of implied waiver in similar

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<sup>72</sup> *Siderman de Blake v Republic of Argentina*, 965 F2d 699 (9th Cir 1992).

<sup>73</sup> *Princz v Federal Republic of Germany*, 26 F3d 1166, 1174 (DC Cir 1994).

<sup>74</sup> *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F3d 239, 242 (1996); *Sampson v Federal Republic of Germany*, 250 F3d 1145, 1151-52 (2001); see also Knuchel (n 66) 178-180.

<sup>75</sup> *Prefecture of Voiotia* (n 58) 521. For a critique, see Maria Gavouneli and Ilias Bantekas, 'Prefecture of Voiotia v Federal Republic of Germany' (2001) 951 AJIL 198. The decision was overturned by a Greek Special Supreme Court: *Germany v Margellos et al* (2003) 56 RHDI 199. The argument was also rejected by the Italian Court of Cassation; see *Ferrini* (n 60) [8.4].

<sup>76</sup> Lee Caplan, 'State Immunity, Human Rights, and Jus Cogens' (2003) 97 AJIL 741, 775.

<sup>77</sup> Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff 1997) 191; Caplan (n 76) 743; Knuchel (n 66) 167.

<sup>78</sup> When the restrictive theory of immunity started to take hold, a number of courts resorted to implied waiver to justify denial of immunity for commercial activities: eg *Storelli v Government of the French Republic* (1924) 2 ILR 129. See Lauterpacht (n 4) 252; Sinclair (n 4) 202-205; Van Alebeek (n 3) 50-51; Fox and Webb (n 1) 35-36.

cases is plainly in breach of customary international law on immunity. At the same time, the entire argument rests on the assumption that the defendant foreign state is responsible for a serious breach of international law. Beyond the fiction of implied waiver, these cases present all the features of an instrumental denial of state immunity for the implementation of international responsibility. The framework of countermeasures would provide a much stronger argument to support their legality compared to implied waiver.

### **4.3. Assertion of new exceptions to state immunity**

The assertion of new exceptions to state immunity may take different forms depending on whether or not the relevant municipal legal system has codified the rules of immunity into national legislation. For states that have enacted immunity statutes, questions of immunity often become issues of domestic law interpretation.<sup>79</sup> The ‘incorporation paradox’<sup>80</sup> does not imply that when national legislation is in place domestic courts can disregard customary international law. Denial of immunity pursuant to national legislation that is not consistent with international law will still amount to a breach of international law.<sup>81</sup> At the same time, national courts rarely question whether their immunity legislation complies with international law. For example, the US Supreme Court emphasised that the FSIA is the

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<sup>79</sup> O’Keefe, ‘State Immunity’ (n 24) 1020; Rosanne Van Alebeek, ‘Domestic Courts as Agents of Development of International Immunity Rules’ (2013) 26 LJIL 559, 565–567.

<sup>80</sup> Yuval Shany, ‘An Old House with New Bricks or a New House of Old Cards?’ [2012] JerRevLS 50, 62.

<sup>81</sup> See generally Antonios Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’ (2011) 34 LoyLAIntl&CompLRev 133; André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 139.

‘sole basis for obtaining jurisdiction over a foreign State.’<sup>82</sup> The Canadian Supreme Court went as far as to assert that, even where domestic legislation were to be in contrast with international law, the courts would still be bound by the municipal framework.<sup>83</sup> In this regard, the United States and Canada stand out compared to other states because, while both having domestic legislation that—on its face—codifies the restrictive doctrine of state immunity,<sup>84</sup> they also provide exceptions for acts that are clearly sovereign in nature and that no other state recognises as being exempted from immunity. Canadian and US laws prescribe that ‘state sponsors of terrorism’ are subject to the jurisdiction of domestic courts for their acts of ‘sponsorship’. The US FSIA also includes an exception to state immunity for ‘international takings’. Both exceptions present the distinctive features of countermeasures and are analysed separately below.

In states that have no domestic legislation on immunity, domestic courts often apply customary international law directly.<sup>85</sup> In so doing, they may identify exceptions to state immunity that have not reached a sufficient degree of acceptance among states so as to be considered new rules of custom. Indeed, ever since the restrictive doctrine became the dominant theory of state immunity, the debate shifted to whether customary international

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<sup>82</sup> *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428 (1989); John Murphy, ‘Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution’ (1999) 12 HarvHumRtsJ 1, 34; Gary Born and Peter Rutledge, *International Civil Litigation in United States Courts* (Wolters Kluwer 2011) 276.

<sup>83</sup> *Bouzari v Islamic Republic of Iran* [2004] Docket No C38295; see also Noah Novogrodsky, ‘Immunity for Torture: Lessons from Bouzari v. Iran’ (2007) 18 EJIL 939.

<sup>84</sup> United States: see HR Rep No 94-1487, at 8 (1976). See *Permanent Mission of India to the United Nations v City of New York*, 551 US 193 (2007); Born and Rutledge (n 82) 234; Bradley (n 1) 239. Canada: see Jewett Molot, ‘The State Immunity Act of Canada’ (1982) 20 CanYBIntL 79, 88; Karinne Coombes, ‘The Quest for Justice for Victims of Terrorism: International Law and the Immunity of States in Canada and the United States’ (2018) 69 UNBLJ 251, 261.

<sup>85</sup> See Nollkaemper (n 81) 132.

law has evolved to accommodate new exceptions, particularly in relation to serious breaches of human rights obligations.<sup>86</sup> Much of this debate—fuelled mainly by decisions of Greek and Italian courts denying immunity for *jus cogens* violations—has been brought to an abrupt end by the ICJ judgment in the *Jurisdictional Immunities* case, which found against the existence of a ‘human rights exception’ to state immunity.<sup>87</sup> At the same time, several instances of state practice asserting new purported exceptions have occurred with the stated aim of reacting to prior wrongs of the defendant states.

The next sections examine state practice concerning the following purported exceptions to state immunity: (i) state sponsorship of terrorism; (ii) international takings; (iii) breaches of international law in general; and (iv) breaches of peremptory norms. While these ‘exceptions’ are in fact breaches of the rules of state immunity, many of them present the features of countermeasures and may be justified on that basis.

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<sup>86</sup> eg Belsky, Merva and Roht-Arriaza (n 71) 365; Bianchi (n 66); Andrea Bianchi, ‘Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights’ in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff 1997) 405; Bröhmer (n 77) 143; Jean-François Flauss, ‘Droit Des Immunités et Protection Internationale Des Droits de l’homme’ (2000) 10 RSDIE 299; Caplan (n 76) 741; Lorna McGregor, ‘State Immunity and Jus Cogens’ (2006) 552 ICLQ 437; Alexander Orakhelashvili, ‘State Immunity and International Public Order Revisited’ (2006) 49 GermanYBIntL 327; Brigitte Stern, ‘Vers une limitation de l’ «irresponsabilité souveraine» des états et chefs d’état en cas de crime de droit international?’ in Marcelo Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill Nijhoff 2006) 511; Stacy Humes-Schulz, ‘Limiting Sovereign Immunity in the Age of Human Rights’ (2008) 21 HarvHumRtsJ 105; O’Keefe, ‘State Immunity’ (n 24) 999.

<sup>87</sup> See Section 4.3.4.

### 4.3.1. State sponsorship of terrorism

#### *US and Canadian laws breach the international law of state immunity*

In the United States, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 introduced Section 1605(a)(7)—later Section 1605A—of Title 28 US Code,<sup>88</sup> which stripped ‘state sponsors of terrorism’ of their immunity from claims for damages in relation to acts of ‘torture, extrajudicial killing, aircraft sabotage, hostage taking,’ or, under certain conditions, ‘provision of material support or resources’ for these acts.<sup>89</sup> This exception is subject to three limitations: (i) it applies only to a closed number of states preliminary identified by the Secretary of State as being ‘sponsors of terrorism’;<sup>90</sup> (ii) claims under this section can only be brought by US nationals;<sup>91</sup> and (iii) a prior attempt of dispute settlement through arbitration should be made when the acts at the basis of the claim occur in the territory of the foreign state.<sup>92</sup>

The legislative history of the AEDPA shows that the US State Department was strongly opposed to its introduction.<sup>93</sup> Much of this hostility came from the State Department’s awareness that such an exception to state immunity was a novelty in

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<sup>88</sup> PubL No 104-132, § 221, 110 Stat 1214 (1996). See generally Dellapenna (n 52) 415.

<sup>89</sup> 28 USC § 1605A(a)(1) (2018).

<sup>90</sup> A list of states that have ‘repeatedly provided support for acts of international terrorism’ is maintained by the Secretary of State under the authority of Section 6(k) of the Export Administration Act of 1979 (50 USC App § 2405(j)), Section 620A of the Foreign Assistance Act of 1961 (22 USC § 2371), and Section 40 of the Arms Export Control Act (22 USC § 2780). As of August 2020, the list comprises North Korea, Iran, Sudan, and Syria.

<sup>91</sup> See Born and Rutledge (n 82) 259.

<sup>92</sup> *Simpson v Socialist People's Libyan Arab Jamahiriya*, 326 F3d 230, 233-34 (DC Cir 2003). See Born and Rutledge (n 82) 358.

<sup>93</sup> See Keith Sealing, “‘State Sponsors of Terrorism’ Is a Question, Not an Answer’ (2003) 38 *TexasIntlLJ* 119, 123.

international law.<sup>94</sup> As is known, the notion of ‘terrorism’ is very controversial and, despite a number of sectorial conventions, there is still no agreement on a general definition in international law.<sup>95</sup> To complicate things, the AEDPA does not simply refer to acts of terrorism, but to state ‘support’ or ‘sponsorship’ of terrorism. In international law, the notion of ‘state-sponsored terrorism’ has no autonomous meaning. It is generally regarded as a shorthand for unlawful acts attributable to the state falling under other prohibitions, particularly those concerning the use of force, aggression, and non-intervention.<sup>96</sup> Notwithstanding the fact that these acts can be in breach of various international law obligations, it is unclear under which theory they would fall within the jurisdiction of US courts.

Alongside this, the other major problem of the AEDPA concerns the nature of the acts involved. As the DC Circuit noted, the acts that the exception seeks to capture have ‘long been understood for purpose [sic] of the restrictive theory as peculiarly sovereign in nature.’<sup>97</sup> In other words, under a plain reading of the rules of state immunity, this conduct is immune from the jurisdiction of foreign domestic courts. Establishing that a new exception for state-sponsored terrorism is reflective of ‘general practice accepted as law’<sup>98</sup>

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<sup>94</sup> Foreign Sovereign Immunities Act: Hearing on S 825 Before the Subcomm on Courts and Administrative Practice of the Subcomm on the Judiciary, 103d Cong 12 (1994) (statement of Jamison Borek). See Murphy (n 82) 35, 37.

<sup>95</sup> See Rosalyn Higgins and Maurice Flory, *Terrorism and International Law* (Routledge 1997) 14; Jörg Friedrichs, ‘Defining the International Public Enemy’ [2006] LJIL 69; Ben Saul, *Defining Terrorism in International Law* (OUP 2008) 10; Kimberley Trapp, *State Responsibility for International Terrorism* (OUP 2011) 14. See also *Flatow v Islamic Republic of Iran*, 999 FSupp 1, 17 (DDC 1998) (noting the absence of a ‘fixed, universally accepted definition of international terrorism’).

<sup>96</sup> See Higgins and Flory (n 95) 26; Trapp (n 95) 25.

<sup>97</sup> *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F3d 82, 88 (DC Cir 2002).

<sup>98</sup> On the identification of custom, see text at n 16.

is particularly difficult. The United States has long been the only state to recognise an exception for such conduct, as noted by the ICJ in the *Jurisdictional Immunities* case.<sup>99</sup>

In 2012, the Canadian Parliament passed the Justice for Victims of Terrorism Act (JVTA), which introduced an exception to state immunity modelled after the AEDPA.<sup>100</sup> According to the JVTA, civil claims can be brought against states that have been listed as sponsors of terrorism ‘on the recommendation of the Minister of Foreign Affairs’ when the Minister ‘is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism.’<sup>101</sup> Yet, Canada is to date the only state that has followed in the footsteps of the United States and opinions about the legality of the Canadian equivalent of the AEDPA are equally unfavourable.<sup>102</sup>

These negative opinions echo those voiced against the US anti-terrorist measures. In a communiqué to the UN Secretary General, the Coordinating Bureau of the Non-Aligned Movement—representing 120 states—expressed its opposition to the AEDPA:

The Bureau objects to United States defiance of international law through the unilateral waiving of the sovereign immunity of States and their institutions in total contravention of the international and treaty obligations

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<sup>99</sup> *Jurisdictional Immunities* (n 14) [88] ([T]his provision ... has no counterpart in the legislation of other States’). See Pavoni, ‘Anomaly’ (n 30) 149 (interpreting this as an implicit finding that the United States is in violation of international law).

<sup>100</sup> Justice for Victims of Terrorism Act, SC 2012, c1, s2 [JVTA]. See JG Castel and Matthew Castel, ‘Canadian State Immunity Act and the Absolute Immunity of Foreign States Committing or Supporting Acts of Terrorism or Violating International Humanitarian Law’ (2016) 45 *AdvocQ* 81; Coombes (n 84) 268; Fox and Webb (n 1) 473. See also René Provost, ‘Canada’s Alien Tort Statute’ (*EJIL: Talk!*, 29 March 2012) <[www.ejiltalk.org/canadas-alien-tort-statute](http://www.ejiltalk.org/canadas-alien-tort-statute)>.

<sup>101</sup> See State Immunity Act, RSC 1985, c S-18, s 6.1.

<sup>102</sup> See Castel and Castel (n 100) 89; Coombes (n 84) 303.

of the United States and on a spurious legal ground that the international community does not recognize.<sup>103</sup>

In a similar vein, several scholars expressed their doubts as to the compatibility of the exception with customary international law.<sup>104</sup> Nor can it be said that the conclusion of a number of international conventions criminalizing terrorist activities brought about a change in the law of state immunity. The relevant conventions are silent on the issue of immunity and exceptions cannot be inferred by the mere criminalization of certain conduct.<sup>105</sup> As stressed by the ICJ, the rules of state immunity are ‘procedural’ in character and independent from the legality of the conduct.<sup>106</sup>

In sum, the crystallization of an exception to immunity for terrorist-related activities has not occurred. On the contrary, the courts of various states reiterated that foreign sovereign immunity must be accorded even if the alleged acts underlying the claims are prohibited by international law.<sup>107</sup> As a result, the AEDPA exception for state sponsors of terrorism and its Canadian equivalent under the JVT A cannot be regarded as consistent with international law.<sup>108</sup>

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<sup>103</sup> Letter Dated May 5, 2016 from the Permanent Rep of Iran to the United Nations (5 May 2016) UN Doc A/70/861. See also Born and Rutledge (n 82) 359.

<sup>104</sup> eg Anne-Marie Slaughter and David Bosco, ‘Plaintiff’s Diplomacy’ (*Foreign Affairs*, 12 August 2015) <[www.foreignaffairs.com/articles/united-states/2000-09-01/plaintiffs-diplomacy](http://www.foreignaffairs.com/articles/united-states/2000-09-01/plaintiffs-diplomacy)>; Van Alebeek (n 3) 355; Yang (n 1) 227; Fox and Webb (n 1) 415–416; Daveed Gartenstein-Ross, ‘Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act’ (2002) 77 NYULRev 496.

<sup>105</sup> *Jurisdictional Immunities* (n 14) [91].

<sup>106</sup> *ibid* [93].

<sup>107</sup> eg *Bouzari v Iran*, [2002] 71 OJ No 1624 (Can Ont Sup Ct); Bundesgerichtshof Jun 26, 2003, III ZR 245/98, 42 ILM 1030 (Ger); *Germany v Margellos*, Anotato Eidiko Dikastirio [AED] [Special Supreme Court] 6/2002, 1 AED 11 (Greece); *Jones v Saudi Arabia* [2006] UKHL 26 (UK).

<sup>108</sup> See Hazel Fox, ‘In Defence of State Immunity’ (2006) 552 ICLQ 399, 405; Dapo Akande, ‘Civil Remedies for International Crimes’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 265, 267; Coombes (n 84) 287.

Despite its failure to gather support from other states through the AEDPA, the US Congress adopted the Justice Against Sponsors of Terrorism Act (JASTA) of 2016, which introduced a new exception to immunity covering an even wider range of terrorism-related activities.<sup>109</sup> The new Section 1605B FSIA strips state immunity for claims ‘for physical injury to person or property or death occurring in the United States’ that are caused by:

- (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 while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.<sup>110</sup>

There are two notable differences between JASTA and the AEDPA. First, the new exception does not require the defendant state to be listed as a sponsor of terrorism by the Secretary of State. Second, JASTA is limited to acts ‘occurring in the United States,’ whilst the AEDPA exception is primarily directed at acts of terrorism committed abroad.<sup>111</sup> These two innovations were designed to eliminate the obstacles encountered by the victims of the 9/11 attacks in their litigation against foreign states alleged to have sponsored Al Qaeda.<sup>112</sup> The State Department never listed Saudi Arabia as a ‘state sponsor of terrorism’ and showed little interest in doing so.<sup>113</sup> Congress sought to change this state of affairs by

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<sup>109</sup> Justice Against Sponsors of Terrorism Act, Pub L No 114–222, 130 Stat 852 (2016).

<sup>110</sup> 28 USC §1605B (2018).

<sup>111</sup> See Yang (n 1) 225. The territorial scope of JASTA remains source of confusion; see Stephen Schnably, ‘The Transformation of Human Rights Litigation’ (2017) 24 *UMiamiIntl&CompLRev* 285, 362–367.

<sup>112</sup> Sen Charles Schumer, ‘Justice Against Sponsors of Terrorism Act’ (17 September 2015) <[www.schumer.senate.gov/newsroom/press-releases/-schumer-cornyn-announce-justice-against-sponsors-of-terrorism-act\\_legislation-long-sought-by-9/11-families-will-allow-victims-of-9/11-and-other-terrorist-acts-to-sue-foreign-countries--others-that-funded-al-qaeda-isis](http://www.schumer.senate.gov/newsroom/press-releases/-schumer-cornyn-announce-justice-against-sponsors-of-terrorism-act_legislation-long-sought-by-9/11-families-will-allow-victims-of-9/11-and-other-terrorist-acts-to-sue-foreign-countries--others-that-funded-al-qaeda-isis)>.

<sup>113</sup> Tom O’Connor, ‘Why Doesn’t Saudi Arabia Join North Korea on U.S. State Terrorism List After 9/11?’ (*Newsweek*, 20 November 2017) <[www.newsweek.com/why-saudi-arabia-join-north-korea-us-state-terrorism-list-911-717640](http://www.newsweek.com/why-saudi-arabia-join-north-korea-us-state-terrorism-list-911-717640)>.

opening US courts to the claimants regardless of the intention of the executive. This move created considerable friction between the political branches of the United States, which culminated in Congress overriding President Obama's veto in order to pass the Act.<sup>114</sup>

Yet, among the chief reasons advanced by President Obama to veto this legislation was the concern that 'JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests.'<sup>115</sup> Former Legal Adviser to the US State Department John Bellinger had expressed similar reservations before the Senate Judiciary Committee:

This targeted amendment of the FSIA to permit litigation against U.S.-designated state sponsors of terrorism is not consistent with generally accepted principles of international law regarding sovereign immunity, which provides no such exception. ... Congress should carefully consider the risk that removing the protections that foreign governments enjoy in our courts could invite lawsuits in other countries against the US or its officials for alleged extrajudicial killings or acts of terrorism if the US is seen as departing from the sovereign immunity principles recognized in customary international law.<sup>116</sup>

JASTA encountered strong opposition from other states. Saudi Arabia issued a communiqué emphasizing that JASTA is of 'great concern to the community of nations

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<sup>114</sup> 'Obama says Congress Made a "Political Vote" Overriding his Veto of Saudi Lawsuit Bill' (*CNN*, 28 September 2016) <[www.cnn.com/2016/09/28/politics/obama-override-veto-911-bill-cnn-presidential-town-hall/index.html](http://www.cnn.com/2016/09/28/politics/obama-override-veto-911-bill-cnn-presidential-town-hall/index.html)>.

<sup>115</sup> Press Release, White House Office of the Press Secretary, Veto Message from the President, S.2040 (23 September 2016).

<sup>116</sup> Evaluating the Justice Against Sponsors of Terrorism: Hearing on Act, S 2930 Before the Subcomm on Crime and Drugs of the S Comm. on the Judiciary, 101st Cong,25 (2010) (statement of John Bellinger).

that object to the erosion of the principle of sovereign immunity.’<sup>117</sup> In a similar vein, the Secretary General of the Gulf Cooperation Council stressed that JASTA ‘disregards fundamental principles of inter-state relations, and especially the sovereign immunity of the state.’<sup>118</sup> The Russian Foreign Ministry released a statement accusing the United States of showing ‘complete disregard for international law by authorizing US courts to try cases against states suspected of sponsoring terrorism.’<sup>119</sup> Before JASTA became law, the European Union delegation to the United States called on President Barack Obama to block the Bill because its adoption ‘would be in conflict with fundamental principles of international law and in particular the principle of state sovereign immunity.’<sup>120</sup> In a letter addressed to the US House Judiciary Committee, the Parliament of the Netherlands also expressed its opposition to JASTA, considering it ‘a gross and unwanted breach of Dutch

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<sup>117</sup> Official at Ministry of Foreign Affairs: JASTA Great Concern to Community of Nations Objecting to Erosion of Principle of Sovereign Immunity, Saudi Press Agency (29 September 2016) <[www.spa.gov.sa/viewstory.php?lang=en&newsid=1543953](http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1543953)>.

<sup>118</sup> Les Monarchies du Golfe s’élèvent Contre la Loi Américaine sur le 11-Septembre (*Le Monde*, 12 September 2016) <[www.lemonde.fr/international/article/2016/09/12/les-monarchies-du-golfe-s-elevent-contre-la-loi-americaine-sur-le-11-septembre\\_4996362\\_3210.html](http://www.lemonde.fr/international/article/2016/09/12/les-monarchies-du-golfe-s-elevent-contre-la-loi-americaine-sur-le-11-septembre_4996362_3210.html)> (translation by the author).

<sup>119</sup> Ministry of Foreign Affairs of the Russian Federation, Comment by the Information and Press Department on the US passing the Justice Against Sponsors of Terrorism Act with extraterritorial jurisdiction (30 September 2016) <[www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2479122](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479122)>.

<sup>120</sup> European Union Asks Obama to Stop 9/11 Saudi Bill (*Reuters*, 21 September 2016) <[www.reuters.com/article/us-usa-sept11-saudi-eu/european-union-asks-obama-to-stop-9-11-saudi-bill-idUSKCN11R26L](http://www.reuters.com/article/us-usa-sept11-saudi-eu/european-union-asks-obama-to-stop-9-11-saudi-bill-idUSKCN11R26L)>.

sovereignty.<sup>121</sup> Members of the Parliament of France and the United Kingdom voiced similar concerns.<sup>122</sup>

If the AEDPA is not compatible with customary international law, similar considerations apply, all the more so, to JASTA. JASTA covers an even wider range of sovereign activities that, for the purpose of state immunity, are not within the competence of foreign domestic courts. The absence of a similar exception in other legal systems and the—even stronger—opposition encountered by JASTA confirm that the new exception, like the previous one, is in breach of the international law of state immunity.

***The exception for state-sponsored terrorism can be a tool to implement international responsibility***

While the US AEDPA and JASTA, and the Canadian JVTA are not supported by exceptions to state immunity under customary international law, they may have an important role to play in the implementation of international responsibility of other states. With regard to the AEDPA, the congressional hearings that preceded its adoption reveal that the Act was conceived as a response to conduct whose prohibition is ‘so fundamental and widely accepted among all states that the normal rules [on the assertion of jurisdiction]

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<sup>121</sup> Letter from Jeroen Recourt, Member of Dutch House of Representatives, to Trent Franks and Steven Cohen, Chairman and Ranking Minority Member of the Subcomm on the Constitution and Civil Justice Comm on the Judiciary (12 July 2016) <[www.al-monitor.com/pulse/files/live/sites/almonitor/files/documents/2016/JASTA\\_Motie%20Recourt\\_Unofficial\\_English\\_Translation.pdf](http://www.al-monitor.com/pulse/files/live/sites/almonitor/files/documents/2016/JASTA_Motie%20Recourt_Unofficial_English_Translation.pdf)>.

<sup>122</sup> ‘House Passes Bill Allowing 9/11 Lawsuits Against Saudi Arabia; White House Hints at Veto’ (*NY Times*, 9 September 2016) <[www.nytimes.com/2016/09/10/us/politics/house-911-victims-saudi-arabia.html](http://www.nytimes.com/2016/09/10/us/politics/house-911-victims-saudi-arabia.html)>; ‘Hurting America’s Friends in Pursuit of Its Enemies’ (*Wall StJ*, 29 September 2016) <[www.wsj.com/articles/hurting-americas-friends-in-pursuit-of-its-enemies-1475178578](http://www.wsj.com/articles/hurting-americas-friends-in-pursuit-of-its-enemies-1475178578)>.

are inapplicable.’<sup>123</sup> In other words, the departure from the rules of state immunity was considered justifiable to the extent the foreign state targeted by the measure is deemed to have violated international law. Emphasis on this aspect has been put in almost every decision that dealt with the exception for state sponsors of terrorism. In *Flatow*, the District Court for the District of Columbia stressed that this provision ‘creates no new responsibilities or obligations; it only creates a forum for the enforcement of pre-existing universally recognised rights under federal common law and international law.’<sup>124</sup> In *Daliberti*, the District Court was even more explicit:

The nations that Congress singled out are those that consistently operate outside the bounds of the international community by sponsoring and encouraging acts generally condemned by civilized nations. ... Those nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit that is within the prerogative of Congress to grant or withhold.<sup>125</sup>

These authorities demonstrate that US organs believe that the exception for state-sponsored terrorism responds to a breach of international law. However, there is less clarity as to what precisely this breach is.

The obvious conduct that the terrorism exception seems to target is that listed in Section 1605A(a)(1) AEDPA. In other words, by committing murder, torture, etc. against US nationals, the foreign state would violate international law at the expense of the United States and the subsequent denial of immunity would be a reaction to this injury. At a closer look, however, this interpretation is not particularly convincing. The terrorism exception

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<sup>123</sup> Hearing on S825 Before the Subcomm on Courts and Administrative Practice of the Subcomm on the Judiciary, 103d Cong, 81 (1994) (statement of Abraham Sofaer).

<sup>124</sup> *Flatow v Islamic Republic of Iran*, 999 FSupp 1, 13 (DDC 1998).

<sup>125</sup> *Daliberti v Republic of Iraq*, 97 FSupp 2d 38, 52 (DDC 2000).

applies exclusively for acts that occur *after* a state has been listed as sponsor of terrorism, or when the listing is a result of that act.<sup>126</sup> Since the executive obviously cannot react to acts that have not yet occurred, it would be up to the courts to determine that a state has violated international law and that this warrants a reaction in terms of non-recognition of state immunity. The difficulty with this is that, in order to engage the international responsibility of the defendant state, the terrorist acts should be attributed to the latter through the general rules of international law.<sup>127</sup> However, the focus of US courts has not been on the state's participation in the commission of specific terrorist acts, but on its 'sponsorship,' i.e. material support to terrorist organizations.<sup>128</sup> Such support need not be connected with the acts at the basis of the claim,<sup>129</sup> nor amount to 'direction or control', as the international law standard for attributing the acts of (a group of) private persons to the state requires.<sup>130</sup> US courts regard the mere 'routine provision of financial assistance' to be sufficient to meet this test.<sup>131</sup>

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<sup>126</sup> 28 USC § 1605A(a)(2)(A)(i)(I) (2018). Courts have applied this requirement inconsistently: Andrew Lyubarsky, 'Clearing the Road to Havana' (2016) 91 NYULRev 458, 467–468.

<sup>127</sup> See ARSIWA and Commentary 38.

<sup>128</sup> eg Taylor v Islamic Republic of Iran, 811 FSupp 2d 1, 11 (DDC 2011); Cicippio v Islamic Republic of Iran, 18 FSupp 2d 62, 68 (DDC 1998); Eisenfeld v Islamic Republic of Iran, 172 FSupp 2d 1, 7 (DDC 2000); Anderson v The Islamic Republic of Iran, 753 FSupp 2d 68, 79–80 (DDC 2010); Estate of Hirshfeld v Islamic Republic of Iran, 330 FSupp 3d 107, 134 (DDC 2018).

<sup>129</sup> Kilburn v Socialist People's Libyan Arab Jamahiriya, 376 F3d 1123, 1130 (DC Cir 2004) See Chad Marzen, 'Liability for Terrorism in American Courts' (2008) 25 TMCooleyLRev 503, 512.

<sup>130</sup> Or even less so, in terms of dependence, so that the group could be considered a *de facto* State organ: *Nicaragua* [1986] ICJ Rep 14 [109], [115]; ARSIWA and Commentary, art 8.

<sup>131</sup> US courts superimposed the domestic standard of agency (*respondeat superior*) on the international standard of attribution and deemed the latter satisfied pursuant to the lower threshold of the former. See Flatow v Islamic Republic of Iran, 999 FSupp 1, 18 (DDC 1998); Cicippio 18 FSupp 2d at 68 (DDC 1998); Alejandre v Republic of Cuba, 996 FSupp 1239, 1249 (SD Fla 1997); Wyatt v Syrian Arab Republic, 736 FSupp 2d 106, 112 (DDC 2010); Sean Mangan, 'Compensation for Certain Victims of Terrorism under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2002' (2001) 42 VaJIL 1037, 1043.

For this reason, non-recognition of state immunity is better understood as a reaction not so much to the acts at the basis of the individual claims, but to those acts that justified the listing of the state as a sponsor of terrorism. While these acts may include those at the basis of individual claims, they would normally encompass a broader range of activities of ‘support’ of terrorist groups that the US government considers unlawful.

This reading of Section 1605A is not devoid of complications.<sup>132</sup> It is unclear what the United States regards as terrorism for the purpose of this provision.<sup>133</sup> As mentioned above, what the US State Department labels as sponsorship of terrorism is not necessarily internationally wrongful *per se* but might overlap with other acts that are indeed wrongful under international law. Since the listing process is the product of a ‘complex calculus,’<sup>134</sup> ‘largely secretive,’ and often ‘based on confidential information,’<sup>135</sup> it is impossible to point with precision to the acts that triggered the inclusion of the state in the list. On various occasions, the US government has defended its listings by providing a variety of grounds.<sup>136</sup> When Iran brought proceedings to the ICJ claiming that the measures taken by the United States, among others, disregard Iran’s sovereign immunity,<sup>137</sup> the United States defended them as responses to the following international wrongs allegedly attributable to

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<sup>132</sup> See Sealing (n 93) 134–135.

<sup>133</sup> Section 1605A defines ‘state sponsor of terrorism’ in a circular way by referring to ‘a country the government of which the Secretary of State has determined [...under certain statutes] or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.’ A study found as many as twenty-two definitions of terrorism in US federal law. See Nicholas Perry, ‘The Numerous Federal Legal Definitions of Terrorism’ (2003) 30 JLegis 249.

<sup>134</sup> Sean Hennessy, ‘In Re the Foreign Sovereign Immunities Act’ (2011) 42 GeoJIL 855, 868.

<sup>135</sup> Alison Chase, ‘Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism’ (2004) 45 VaJIL 41, 85.

<sup>136</sup> See Sealing (n 93) 136–138; Matthew Peed, ‘Blacklisting as Foreign Policy’ (2005) 54 DukeLJ 1321, 1346; Lyubarsky (n 126) 478–479.

<sup>137</sup> *Certain Iranian Assets (Iran v USA)* (Memorial of Iran) (1 February 2017) <[www.icj-cij.org/files/case-related/164/164-20170201-WRI-01-00-EN.pdf](http://www.icj-cij.org/files/case-related/164/164-20170201-WRI-01-00-EN.pdf)>.

Iran: terrorist bombings, airline hijacking, breaches of non-proliferation and arms trafficking obligations, and a miscellany of human rights violations.<sup>138</sup> The ICJ did not address these allegations and it is far from established that all of them are well grounded. This aspect, however, has no bearing on the qualification of these measures as a reaction to a purported illegality. What matters, for the purpose of this thesis, is that the United States views such conduct as internationally wrongful.

The structure of the AEDPA exception further confirms that non-recognition of immunity is a tool of foreign policy in the hands of the executive. Neither Congress nor courts retain any significant control over the mechanism with which immunity is denied. The decision on whether and for how long a state is deprived of immunity before US courts is inextricably linked with the listing process and is part of a broader system of ‘sanctions’ aimed at applying economic pressure on states which are alleged to support terrorism.<sup>139</sup> The nature of non-recognition of immunity as a ‘sanction’ was also acknowledged by the Supreme Court.<sup>140</sup> The State Department has great discretion in making these determinations.<sup>141</sup> Still, non-recognition of immunity is primarily used as an instrument to ensure compensation to the victims and deter states from sponsoring future terrorist acts.<sup>142</sup> This aspect is particularly evident at the moment of de-listing. The relevant statute requires

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<sup>138</sup> *Certain Iranian Assets (Iran v USA)* (Preliminary Objections Submitted by the United States) (1 March 2017) 11–29 <[www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf](http://www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf)>.

<sup>139</sup> See Peed (n 136) 1326; Hennessy (n 134) 864.

<sup>140</sup> *Republic of Iraq v Beaty*, 556 US 848, 859 (2009).

<sup>141</sup> See Hennessy (n 134) 862.

<sup>142</sup> See *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F3d 82, 88-89 (DC Cir 2002). See also Royce Lamberth, ‘The Role of Courts in Foreign Affairs’ in John Moore (ed), *Foreign Affairs Litigation in United States Courts* (Martinus Nijhoff 2013) 19.

effective cessation of the wrongful activities and assurances of non-repetition.<sup>143</sup> Prior to de-listing, it is common for the US Government to negotiate an agreement with the targeted state concerning the settlement of all pending claims.<sup>144</sup> For example, when Libya and Iraq were removed from the list, compensation schemes were established for the victims of terrorist attacks on both occasions.<sup>145</sup> De-listing has consistently accompanied critical moments in the settlement of disputes between the United States and other states.<sup>146</sup> Upon de-listing, all pending cases against the state brought under the terrorism exception were terminated.<sup>147</sup> These characteristics reinforce the construction of Section 1605A FSIA as a measure for the implementation of state responsibility.

The Canadian JVTA is comparatively more recent than the AEDPA and its use remains limited, but the Canadian statute displays all the main features of its US counterpart. A list of state supporters of terrorism is maintained by the Ministry of Foreign Affairs on the basis of ‘reasonable grounds to believe they have supported or support terrorist entities.’<sup>148</sup> Notably, the JVTA also provides for the enforcement in Canada of foreign judgments against states that have been listed by Canada as sponsors of

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<sup>143</sup> Export Administration Act of 1979 § 6(j)(4)(A)(i)-(iii), 50 USC § 4605.

<sup>144</sup> See Lyubarsky (n 126) 462.

<sup>145</sup> Claims Settlement Agreement (Iraq-US) (2 September 2010) TIAS No 11-522; Claims Settlement Agreement (Libya-US) (14 August 2008) TIAS No 08-814.

<sup>146</sup> North Korea was de-listed in 2008 in the midst of nuclear deal negotiations. See Hennessy (n 134) 865. Cuba was removed in 2015 in an attempt to normalise diplomatic relations. See Lyubarsky (n 126) 460.

<sup>147</sup> See *Republic of Iraq v Beaty*, 556 US 848 (2009).

<sup>148</sup> Order Establishing a List of Foreign State Supporters of Terrorism, PC 2012-1067 (7 September 2012) <[www.gazette.gc.ca/rp-pr/p2/2012/2012-09-26/html/sor-dors170-eng.html](http://www.gazette.gc.ca/rp-pr/p2/2012/2012-09-26/html/sor-dors170-eng.html)>. As of August 2020, the listed states are Syria and Iran; see *ibid*, Schedule 1.

terrorism.<sup>149</sup> This has been used to enforce a number of US awards issued against Iran.<sup>150</sup> In this sense, denial of immunity before Canadian courts may also serve as an instrument to participate in measures taken by other states in order to put pressure on the wrongdoing state to comply with its international obligations.<sup>151</sup>

With respect to the recent US measures contained in JASTA, establishing a link with the implementation of international responsibility is more complicated. As mentioned above, JASTA was conceived as a means to obtain reparation for the 9/11 victims. Attacks of such scale and magnitude are certainly breaches of international obligations concerning the use of force and human rights and, if these breaches were attributable to a state, the latter would be under a duty to provide reparation. It is unclear, however, whether JASTA is as an instrument to achieve this goal. Under the AEDPA system, the establishment of a link between the denial of immunity and the wrongful acts of other states occurs through the listing process, which is subject to a “careful[] review [of] all available information” by the Department of State.<sup>152</sup> Pursuant to JASTA, the decision on denial of immunity is left to the judicial organs and there is no indication that such measure should be taken when it is established that the target state has committed a prior breach of international law.

In its current form, a way to reconcile JASTA with the system of international responsibility is through a particular provision included in the Act according to which proceedings can be stayed when ‘the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the

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<sup>149</sup> JSTA (n 100) s4(5).

<sup>150</sup> *Tracy v Iranian Ministry of Information and Security*, 2017 ONCA 549, 415 DLR (4th) 314.

<sup>151</sup> See Section 6.2.4.

<sup>152</sup> White House Press Release (n 115).

resolution of the claims against the foreign state.’<sup>153</sup> This provision, which echoes the structure of the AEDPA exception, reintroduces an element of executive control over the denial of state immunity.<sup>154</sup> This could ensure that litigation proceeds only when the executive has established that the relevant foreign state committed an internationally wrongful act and is unwilling to provide reparations.<sup>155</sup> Only if these conditions are met may the framework of countermeasures provide a justification for what would otherwise be an unlawful breach of the rules of state immunity.

#### 4.3.2. The ‘international taking’ exception

##### *The immune character of expropriation under international law*

Since its enactment, the US FSIA has contained an exception to state immunity concerning ‘rights in property taken in violation of international law’.<sup>156</sup> The ‘international taking’ exception, as it is frequently referred to, is another peculiar provision of the FSIA. It is the only provision of the FSIA whose very own wording explicitly mentions ‘international law’ as the benchmark against which the legality of the acts at the basis of non-recognition

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<sup>153</sup> 28 USC § 1605B(c)(1).

<sup>154</sup> See Ingrid Wuerth, ‘Justice Against Sponsors of Terrorism Act: Initial Analysis’ (*Lawfare*, 29 September 2016) <[www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis](http://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis)>.

<sup>155</sup> As things stand, the power of stay is purely discretionary. Proposals have been made to vest the President with the authority to waive JASTA with respect to certain countries: eg John Bellinger, ‘How Congress Could Fix JASTA: Give the President Waiver Authority’ (*Lawfare*, 5 October 2016) <[www.lawfareblog.com/how-congress-could-fix-jasta-give-president-waiver-authority](http://www.lawfareblog.com/how-congress-could-fix-jasta-give-president-waiver-authority)>. Alternatively, Congress should limit the effects of JASTA to a number of pre-designated states: Curtis Bradley and Jack Goldsmith, ‘How to Limit JASTA’s Adverse Impact’ (*Lawfare*, 3 June 2016) <[www.lawfareblog.com/how-limit-jastas-adverse-impact](http://www.lawfareblog.com/how-limit-jastas-adverse-impact)>.

<sup>156</sup> 28 USC § 1605(a)(3) (2018).

of immunity must be assessed.<sup>157</sup> In addition, a similar exception does not appear in any other codification of state immunity, whether at the international or national level. An analysis of state practice reveals that states do not recognise such an exception because acts of expropriation are deemed to be immune by virtue of their inherently sovereign character.<sup>158</sup> There is no shortage of domestic courts declining jurisdiction upon qualifying foreign expropriations as *acta jure imperii*.<sup>159</sup> As the Italian Court of Cassation found:

Judges in various countries had consistently refused, by rejecting compensation and restitution claims, to hold foreign States liable for nationalization measures. It had been made clear in fact that such measures were to be recognized in the State and were to be treated as *faits accomplis* and as the exercise of effective sovereignty.<sup>160</sup>

The sovereign character of acts of expropriation and their exemption from the jurisdiction of domestic courts were reaffirmed by, among other courts, the Federal Tribunal of Switzerland.<sup>161</sup> The practice of arbitral tribunals also confirms this tenet, though the issue of immunity in this context is generally pre-empted by means of waiver.<sup>162</sup> Along the same lines, states strongly resisted any inclusion of a reference to the issue of expropriation of

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<sup>157</sup> In particular, international law on the protection of aliens and their property. See Alice Ruzza, 'Expropriation and Nationalization', *MPEPIL* (2017) [1].

<sup>158</sup> See Yang (n 1) 298.

<sup>159</sup> See Schreuer (n 5) 55; Yang (n 1) 299–300.

<sup>160</sup> *Campione v Peti-Nitrogenmuvek*, 65 ILR 287, 288 (Cass 1972).

<sup>161</sup> *S v Socialist Republic of Romania*, 82 ILR 45, 46 (Fed Trib 1987).

<sup>162</sup> The sovereign character of the power exercised in the expropriating activity is the criterion relied upon by arbitral tribunals to distinguish ordinary breaches of contracts from expropriations relevant under international law: eg *Phillips Petroleum Co v Iran*, 21 Iran-US Cl Trib Rep 79 [76] (1989); *Jalapa Railroad and Power Co*, in 8 *DigIntL* 906, 909 (1967). See August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 418.

foreign property in DASI.<sup>163</sup> The ‘quintessentially sovereign’ character of such acts is also acknowledged by US courts,<sup>164</sup> despite some sporadic indications to the contrary.<sup>165</sup>

In sum, the United States stands out as the only state that denies immunity in relation to foreign acts of expropriation despite the sovereign character of the latter. As the Supreme Court acknowledged, a sovereign act neither ceases to be sovereign, nor loses its immune character for the simple fact of being unlawful.<sup>166</sup> All these factors thus point to the same conclusion: the ‘international taking’ exception under Section 1605(a)(3) FSIA is inconsistent with the current state of customary international law on state immunity.

### *The exception as a response to internationally wrongful acts*

The international taking exception concerns takings of property ‘in violation of international law’.<sup>167</sup> While this does little to ground the provision in the international law of state immunity, it establishes a link between the denial of immunity and the international responsibility of the target state. The rationale behind this provision becomes manifest when the international taking exception is compared with a similar derogation that can be found in the context of the ‘act of state’ doctrine. The act of state doctrine is a common law doctrine by which national courts avoid reviewing, among other things, the validity of acts

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<sup>163</sup> The provision would have excluded questions pertaining to ‘extraterritorial effects of measures of nationalization taken by a State’ from the scope of the Articles. See ILC, Report on the Work of Its Thirty-Eighth Session [1986] 2 YBILC 11, 17. See also Yang (n 1) 303.

<sup>164</sup> See Dellapenna (n 52) 399.

<sup>165</sup> eg *Altmann v Republic of Austria*, 317 F3d 954 (9th Cir 2002) (qualifying violations of international law as non-sovereign acts).

<sup>166</sup> *Argentine Republic v Amerada Hess Shipping*, 488 US 428, 435-36 (1989). See also *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 718-9 (9th Cir 1992).

<sup>167</sup> 28 USC § 1605(a)(3) (2018).

of a foreign government within that government's own territory.<sup>168</sup> In these broad terms, the doctrine goes beyond what international law requires;<sup>169</sup> however, to the extent that it identifies and exempts from judicial review acts of sovereign nature, the doctrine shares some essential features with the international law of state immunity.<sup>170</sup> Following a landmark decision in which the US Supreme Court held that the act of state doctrine excluded foreign expropriations from the competence of US courts 'even if the complaint alleges that the taking violates customary international law,'<sup>171</sup> Congress passed the 'Second Hickenlooper Amendment'.<sup>172</sup> The Amendment created an exception to the act of state doctrine for cases of expropriation by a foreign sovereign 'in violation of the principles of international law' and, thus, allowed proceedings halted by the Supreme Court to resume.<sup>173</sup>

The Second Hickenlooper Amendment, which pre-dated the FSIA by a decade, foreshadowed the international taking exception. Both provisions can be seen as part of a coherent choice to remove any bar to the judicial review of takings performed in violation of international law, despite their eminently sovereign nature.<sup>174</sup> This policy decision is in

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<sup>168</sup> Restatement (Third) of Foreign Relations Law § 443(1) (1987); Fox and Webb (n 1) 54.

<sup>169</sup> See *Oetjen v Cent Leather*, 246 US 297, 303-04 (1918).

<sup>170</sup> See *Agudas Chasidei Chabad of US*, 528 F3d at 934; *Nemariam v Fed Democratic Republic of Ethiopia*, 491 F3d 470 (DC Cir 2007).

<sup>171</sup> *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 428 (1964).

<sup>172</sup> Hickenlooper Amendment, PubL 88-633, 78 Stat 1013.

<sup>173</sup> eg *De Sanchez v Banco Central de Nicaragua*, 770 F2d 1385, 1395 (5th Cir 1985). See also Frances Hogan, 'The Hickenlooper Amendments' (1969) 11 *BCIndus&ComLRev* 77, 84; Lori Damrosch, 'Enforcing International Law Through Non-Forcible Measures' (1998) 1997 *RdC* 9, 67.

<sup>174</sup> See Damrosch (n 173) 71 (calling this a 'principled approach').

line with the United States' long-held protective stance towards aliens and their property, especially in the context of foreign investments.<sup>175</sup>

The level of protection against expropriation granted by international law has been a matter of controversy among states; capital-exporting and capital-importing states still disagree over the appropriate standards that should guide the provision of compensation for expropriated property.<sup>176</sup> The United States, together with a number of Western states, has consistently defended the so-called 'Hull formula,' according to which compensation should be 'prompt, adequate, and effective'.<sup>177</sup> The international taking exception is best explained as a tool through which the United States has advanced its claims in this area: a remedy against expropriations that do not comply with the international minimum standards furthered by the United States itself.<sup>178</sup> The approach taken by US courts in the application of Section 1605(a)(3) FSIA confirms this. According to these courts, the taking of property is 'in violation of international law' when it is: '(a) not for a public purpose, or (b) discriminatory, or (c) not accompanied by provision for just compensation.'<sup>179</sup> Of the three alternatives, the latter is often the decisive one. If plaintiffs demonstrate that no compensation has been given, US courts are satisfied that their jurisdiction is not barred by

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<sup>175</sup> See Davis Robinson, 'Expropriation in the Restatement (Revised)' (1984) 78 AJIL 176; Born and Rutledge (n 82) 329.

<sup>176</sup> Capital-importing countries contend that the Hull formula goes too far. According to them, compensation should not rely exclusively on the economic value of the property but should also take into account factors such as history and wealth. See Thomas Wälde and Borzu Sabahi, 'Compensation, Damages, and Valuation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1068–69; Hollin Dickerson, 'Minimum Standards', *MPEPIL* (2010) [15].

<sup>177</sup> See Oscar Schachter, 'Compensation for Expropriation' (1984) 78 AJIL 121.

<sup>178</sup> See Schreuer (n 5) 56.

<sup>179</sup> eg *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 712 (9th Cir 1992).

state immunity.<sup>180</sup> Outside these cases, the standard for determining when compensation is ‘just’ is (unsurprisingly) the Hull formula: ‘prompt, adequate, and effective’ compensation.<sup>181</sup>

That Section 1605(a)(3) is conceived as a remedy against internationally wrongful acts is further supported by the recurrent finding that claims cannot be brought by those who were nationals of the taking state at the time of the unlawful taking.<sup>182</sup> According to US courts, such expropriations ‘[do] not implicate settled principles of international law.’<sup>183</sup> The relevance of this limitation emerged after the Supreme Court held in *Altmann* that the taking exception applied retroactively, that is, to acts of expropriation that predated the entry into force of the FSIA.<sup>184</sup> This resulted in a stream of litigation for expropriations carried out by Nazi Germany before and during WWII.<sup>185</sup> These cases frequently did not classify as ‘international’ takings, since they occurred against German nationals belonging to Jewish and other minorities. US courts dealt with this issue in two ways. In certain cases, they downplayed the nationality requirement and allowed nationals

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<sup>180</sup> eg *Am Int’l Grp v Islamic Republic of Iran*, 493 F Supp 522, 524 (DDC 1980).

<sup>181</sup> *ibid.*

<sup>182</sup> *De Sanchez v Banco Central de Nicaragua*, 770 F2d 1385, 1395 (5th Cir 1985); *Jafari v Islamic Republic of Iran*, 539 F Supp 209 (ND Ill 1982).

<sup>183</sup> *Abelesz v Magyar Nemzeti Bank*, 692 F3d 661, 674 (7th Cir 2012); *Altmann v Republic of Austria*, 317 F3d 954, 968 (9th Cir 2002); *Siderman de Blake v Republic of Argentina*, 965 F2d at 711.

<sup>184</sup> 541 US 677, 700 (2004) (declaring the FSIA applicable retroactively). See also Riccardo Pavoni, ‘Sovereign Immunity and the Enforcement of International Cultural Property Law’ in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (OUP 2013) 87.

<sup>185</sup> eg *Abelesz*, 692 F3d at 675 (stressing that these takings were part of campaigns of looting and displacement, discriminating against ethnic and religious minorities, and in the absence of any compensation).

of the taking state to bring their claims in the United States.<sup>186</sup> In another case, the Court of Appeals for the Seventh Circuit moved the focus of the international taking exception from unlawful expropriations to other violations of international law. The Court recognised that, had the claims been based ‘*only* [on] expropriation of property,’ they would qualify as merely ‘domestic takings,’ which do not trigger international law obligations.<sup>187</sup> But the judges held that such expropriations ‘should be viewed ... as an integral part of the genocidal plan,’<sup>188</sup> which in turn was identified ‘as a violation of customary international law’.<sup>189</sup> This development suggests that the taking exception is a tool through which US courts can assess and remedy the illegality of a wide range of sovereign activities—including genocidal acts—to the extent that they materialise through the taking of property.

Another element that plays in favour of recognizing such an exception as a tool to implement international responsibility is the requirement, upheld by some courts, that local remedies must be exhausted before submitting the relevant claims. This is significant, considering that Section 1605(a)(3) does not contain any reference to this requirement. As seen for other jurisdictional measures,<sup>190</sup> the exhaustion of local remedies situates the measure in the system of implementation of international responsibility. It gives the

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<sup>186</sup> Cassirer v Kingdom of Spain, 461 FSupp 2d 1157, 1165-66 (CD Cal 2010); Agudas Chasidei Chabad of US v Russian Fed’n, 528 F3d 934, 943 (DC Cir 2008) (finding that Nazi Germany had stripped Jewish citizens of their nationality in any meaningful sense).

<sup>187</sup> Abelesz, 692 F3d 674.

<sup>188</sup> *ibid* 675.

<sup>189</sup> *ibid*.

<sup>190</sup> See Section 3.2.3.

wrongdoing state an opportunity to remedy its wrongful act before claims are taken to the inter-state level.<sup>191</sup> As Justice Breyer stated in *Altmann*:

Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged' .... A plaintiff who chooses to litigate in this country in disregard of the post-deprivation remedies in the 'expropriating' state may have trouble showing a 'tak[ing] in violation of international law.'<sup>192</sup>

In *Abelesz*, the Court of Appeals for the Seventh Circuit confirmed that the exhaustion of local remedies is a 'well-established rule of customary international law' and that hearing the claims without affording such opportunity should remain an 'extraordinary step'.<sup>193</sup>

To be sure, other courts have not upheld the exhaustion of local remedies requirement. In *Chabad v Russia*, the Court of Appeals for the DC Circuit held against the existence of such requirement and proceeded only to a 'prudential' assessment of the remedies available in Russia.<sup>194</sup> More recently, the same Court of Appeals refused to perform even such prudential assessment in *Simon v Hungary*, holding that "'prudential exhaustion'" would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the FSIA admits of no such bar.'<sup>195</sup> Similarly, the Court of Appeals for the Ninth Circuit did not recognise the existence of such rule in *Cassirer v*

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<sup>191</sup> See Section 6.2.3.

<sup>192</sup> Republic of Austria v Altmann, 541 US 677, 714-15 (2004).

<sup>193</sup> Abelesz, 692 F3d at 684 ('an alternative forum in which the plaintiff can recover nothing for a valid claim' is inadequate). See also Malewicz v City of Amsterdam, 362 F Supp 2d 298, 307 (DDC 2005) (a statute of limitations barring the plaintiff's claims would make the alternative forum inadequate).

<sup>194</sup> Chabad, 528 F3d 934, 949 (DC Cir 2008).

<sup>195</sup> Simon v Republic of Hungary, 911 F3d 1172, 1180 (DC Cir 2018).

*Spain*.<sup>196</sup> Yet, it acknowledged that the takings were in violation of international law because they were ‘part of Germany’s genocide against Jews’.<sup>197</sup> This finding is consistent with the fact that a violation of an *erga omnes* obligation, such as the prohibition on genocide, triggers different rules on standing for the invocation of state responsibility.<sup>198</sup> Even then, the international taking exception is used as a tool to implement the international responsibility of other states. As such, it fits the requirement of a potential countermeasure that may justify the breach of the rules of immunity.

#### 4.3.3. Other international law violations in general

Even though not contained in one of the listed exceptions to state immunity under the FSIA, US courts found that a ‘mere’ violation of international law, without further qualifications, may constitute a lawful basis for the denial of state immunity. In *Von Dardel*, alongside implied waiver,<sup>199</sup> the District Court for the District of Columbia relied on an argument based on Section 1604 of the FSIA, according to which immunity is ‘subject to’ international agreements to which the United States was a party at the time of its enactment.<sup>200</sup> Since the alleged imprisonment of a diplomat by the Soviet Union was a blatant breach of diplomatic treaties, the Court found that:

[i]n order for the conventions to operate effectively, the perpetrators of such offenses must be subject to liability for their acts. To the extent that the FSIA would shield the Soviet Union from such liability, it is in conflict with

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<sup>196</sup> *Cassirer v Kingdom of Spain*, 616 F3d 1019, 1034-35 (9th Cir 2010).

<sup>197</sup> *ibid* 1035.

<sup>198</sup> See Section 6.2.3.

<sup>199</sup> Text at n 67.

<sup>200</sup> *Von Dardel*, 623 FSupp 254-255.

the terms of the conventions and thwarts their effective operation. ... Under the Vienna Convention the USSR is pledged to protect the very rights it is violating. ... Against such a backdrop, the denial of immunity against claims seeking relief for such violations does not seem unjust.<sup>201</sup>

The District Court did not engage at length with whether this decision corresponded to an exception to immunity; the Court contrasted the law of diplomatic inviolability with the law of state immunity and concluded that denial of the latter was an adequate measure ('not unjust') to ensure compliance ('effective operation') with the former.

A similar conclusion was reached by the Court of Appeals for the Second Circuit in the *Amerada Hess* case.<sup>202</sup> In the midst of the Falklands War, a Liberian oil tanker came under attack by an Argentine military aircraft in international waters; the Liberian company chartering the vessel brought proceedings in the US against Argentina under the ATS.<sup>203</sup> Upon finding that Argentina was responsible for a number of breaches of its international obligations,<sup>204</sup> the Court of Appeals for the Second Circuit held that 'sovereigns are not immune from suit for their violations of international law.'<sup>205</sup>

While both decisions were overturned at the appeal stage on the basis of the absence of an exception for international law violations under the FSIA,<sup>206</sup> they both offer clear features of countermeasures. They are *prima facie* wrongful denials of immunity taken

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<sup>201</sup> Von Dardel, 623 FSupp 255.

<sup>202</sup> *Amerada Hess Shipping Corp v Argentine Republic*, 830 F2d 421 (1987).

<sup>203</sup> On the ATS, see Section 3.3.

<sup>204</sup> *Amerada Hess*, 830 F2d 423-424.

<sup>205</sup> *Amerada Hess*, 830 F2d 425.

<sup>206</sup> *Amerada Hess*, 488 US 428 (1989); *Von Dardel*, 736 FSupp 1, 8 (DDC 1990).

upon explicitly determining that the target state is responsible for an internationally wrongful act in the context of proceedings seeking reparation for that same act.<sup>207</sup>

The United States is not the only state to have denied immunity on the basis of a determination that the target state breached international law. States targeted by US measures have often responded with denial of immunity of this kind. For example, two multi-billion-dollar suits against the United States were brought before Cuban courts on the basis that the United States was responsible for violations of international law resulting in ‘human damages’ (including the Bay of Pigs invasion) and ‘economic damages’ (including the Cuban embargo).<sup>208</sup> Moreover, an Iranian national successfully sued the US government in a Tehran court claiming that US agents, upon charging him with violations of US sanctions against Libya, had unlawfully abducted him in the Bahamas.<sup>209</sup> The authority for the denial of immunity was found in the 1989 Law Intensifying Countermeasures Against the US Government’s Terrorist Activities,<sup>210</sup> a measure taken by Iran to respond to perceived violations of international law by the United States. Similarly, Syria announced measures to allow lawsuits against the United States for the killing of Syrian nationals and the supply of weaponry to the Israeli Air Force during the war in

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<sup>207</sup> See Focarelli (n 57) 128 (qualifying these decisions as countermeasures).

<sup>208</sup> Demanda del Pueblo de Cuba al Gobierno de Estados Unidos por Daños Humanos (31 May 1999) <[www.cuba.cu/gobierno/DEMANDA.html](http://www.cuba.cu/gobierno/DEMANDA.html)>; Demanda del Pueblo Cubano al Gobierno de los Estados Unidos por los daños económicos ocasionados a Cuba (3 January 2000) <[www.granma.cu/granmad/secciones/verdad/a015.htm](http://www.granma.cu/granmad/secciones/verdad/a015.htm)>. See Gustavo Guerra, ‘Laws Lifting Sovereign Immunity: Cuba’ (*Library of Congress*, June 2016) <[www.loc.gov/law/help/sovereign-immunity/cuba.php#\\_ftn6](http://www.loc.gov/law/help/sovereign-immunity/cuba.php#_ftn6)>.

<sup>209</sup> See Shadi Karimi, ‘Laws Lifting Sovereign Immunity: Iran’ (*Library of Congress*, June 2016) <[www.loc.gov/law/help/sovereign-immunity/iran.php#\\_ftn2](http://www.loc.gov/law/help/sovereign-immunity/iran.php#_ftn2)> [III].

<sup>210</sup> Law Intensifying Countermeasures Against the US Government’s Terrorist Activities (1 November 1989) <<http://rc.majlis.ir/fa/law/show/91723>> (in Persian). See Karimi (n 209) [I.C].

Lebanon in 2006.<sup>211</sup> Denial of immunity pursuant to all these measures is a direct response to perceived wrongful acts of the United States in an attempt to bring the latter to cease its alleged wrongdoings. It is evident (and explicit, in the case of the Iranian measure) that the legal framework supporting denial of immunity in these cases is that of countermeasures.

#### 4.3.4. Breach of peremptory norms

Beyond the law of treaties, the effects of recognising a norm as ‘peremptory’ or ‘*jus cogens*’—that is, as a norm from which no derogation is permitted according to the ‘international community of States as a whole’<sup>212</sup>—are contested.<sup>213</sup> For supporters of the ‘normative hierarchy’ theory, peremptory norms, being superior in character, trump all inconsistent norms of international law, including the norms of state immunity.<sup>214</sup> This suggestion, which had gained some traction in the literature<sup>215</sup> and in a number of domestic court decisions, has been widely refuted.<sup>216</sup> As the ICJ found,

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<sup>211</sup> See George Sadek, 'Laws Lifting Sovereign Immunity: Syria' (*Library of Congress*, June 2016) <[www.loc.gov/law/help/sovereign-immunity/syria.php](http://www.loc.gov/law/help/sovereign-immunity/syria.php)>.

<sup>212</sup> Article 53 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 [VCLT].

<sup>213</sup> See Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 164; Crawford (n 5) 581; Fox and Webb (n 1) 40.

<sup>214</sup> Alexander Orakhelashvili, ‘State Immunity and Hierarchy of Norms’ (2007) 18 EJIL 955, 963. See also *Al-Adsani v UK* (2002) 34 EHRR 273, diss op Rozakis and Caflisch [1]. Some also rely on value-based considerations relating to the fundamental nature of the rights at stake and the risk of impunity: eg Bianchi (n 66) 220; McGregor (n 86) 443.

<sup>215</sup> Text at n 86.

<sup>216</sup> See Stefan Talmon, ‘Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished’ (2012) 25 LJIL 979, 1002 (‘[I]t is one thing to argue that the values of the international community have materialised in the concept of *jus cogens*; it is another to hold that rules of *jus cogens* override all other rules of the international legal system. ... Any wider normative implications ... cannot simply be deduced out of the concept itself but have to be reflected in the *opinio juris* of states as evidenced by their practice’).

there is no conflict between those rules .... The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.<sup>217</sup>

In other words, from a formal standpoint the norm conflict on which the normative hierarchy argument is premised does not materialise.<sup>218</sup> As a result, the *jus cogens* nature of certain norms has no impact on the availability of remedies.<sup>219</sup> Developments regarding substantive norms—in particular, emergence of their *jus cogens* status—do not automatically transfer to procedural rules such as immunity.<sup>220</sup> The granting of immunity does not amount to recognition of an unlawful situation contrary to Article 41 ARSIWA.<sup>221</sup>

State practice is also supportive of these conclusions. The ICJ analysed several instances where domestic courts considered and rejected the normative hierarchy argument, and concluded that they outnumbered the few cases where the *jus cogens* exception was successfully invoked.<sup>222</sup> A human rights exception to state immunity was also considered during the ILC work on DASI, but the Commission decided against its inclusion because of lack of consensus.<sup>223</sup>

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<sup>217</sup> *Jurisdictional Immunities* (n 14) [93].

<sup>218</sup> Even before the ICJ decision, numerous commentators had pointed out this inconsistency; see, eg, Hazel Fox, *The Law of State Immunity* (OUP 2002) 524–525; Caplan (n 76) 741; Dapo Akande, ‘International Law Immunities and the International Criminal Court’ (2004) 98 AJIL 407; Christian Tomuschat, ‘L’immunité des Etats en cas de violations graves des droits de l’homme’ (2005) 109 RGDIP 51; Enzo Cannizzaro and Beatrice Bonafé, ‘Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights’ in Bruno Simma and Ulrich Fastenrath (eds), *From Bilateralism to Community Interest* (OUP 2011) 837; O’Keefe, ‘State Immunity’ (n 24) 1027.

<sup>219</sup> O’Keefe, ‘State Immunity’ (n 24) 1027.

<sup>220</sup> See, eg, *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 [61].

<sup>221</sup> *Jurisdictional Immunities* (n 14) [93].

<sup>222</sup> *Jurisdictional Immunities* (n 14) [81]–[97].

<sup>223</sup> ILC, Report on the Work of Its Fifty-First Session (1999) II(2) YBILC 172.

Once it is acknowledged that a new customary exception has never developed, the decisions that upheld the normative hierarchy theory fall squarely within those where the denial of immunity is instrumental to the implementation of international responsibility. One of the first decisions of this kind, the District Court for the District of Columbia judgment in *Princz v Germany*, is almost exclusively formulated in terms of international responsibility. The claim concerned a US citizen seeking reparation from Germany for injury suffered as a result of forced labour during the Holocaust.<sup>224</sup> The District Court distinguished this case from previous cases in which immunity was recognised despite the international wrongfulness of the acts on four grounds.

First, the applicant in this case was a US national<sup>225</sup>—a finding that has no direct correlation with the issue of immunity, but it is important to provide standing to invoke international responsibility.<sup>226</sup>

Second, the Court emphasised that it was not dealing with ‘common’ violations of international law, but with ‘acts of barbarism, committed by a merciless government in flagrant disregard of international law, the laws of civilized societies and all principles of human decency’, which the Court later framed as ‘crimes against humanity,’<sup>227</sup>

Third, the District Court engaged with the nature of the internationally wrongful act and its attribution to the defendant state, due to Germany’s suggestion that the actual responsibility lay with the company who exploited the plaintiffs:

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<sup>224</sup> *Princz v Federal Republic of Germany*, 813 FSupp 22 (1992).

<sup>225</sup> *ibid* 25.

<sup>226</sup> This qualifies it as an exercise of diplomatic protection; see Section 6.2.3.

<sup>227</sup> *Princz*, 813 FSupp 26.

It was the German government which orchestrated and executed the mass exploitation and genocide of millions of human beings during World War II. This case is about the German Government's responsibility for these crimes as they affected Mr. Princz. It is not only about slave labor.<sup>228</sup>

The Court was no longer dealing with the events of the particular claim, but it was balancing the granting of immunity against a multitude of acts of genocide and crimes against humanity—contextually attributed to Germany—as a justification for the denial of immunity.

Fourth, the Court went on to assess whether alternative remedies existed and concluded that recourse to the courts of the wrongdoing state would have been fruitless because Germany had already declined formal complaints brought by the US Government 'on behalf of Mr. Princz'.<sup>229</sup> Thus, the Court confirmed that the claims had already been espoused by the state of nationality and that an inter-state dispute existed between the United States and Germany in this regard.<sup>230</sup> By virtue of Germany's refusal to provide these remedies, denial of immunity was deemed justified to ensure reparation.

While this judgment was reversed on appeal on grounds that the exercise of jurisdiction did not fit any of the listed FSIA exceptions,<sup>231</sup> the measure taken by the District Court ultimately achieved its goal. Confronted with the prospect of further litigation before US courts, Germany returned to the negotiating table and—having obtained assurances that these cases would be discontinued—it established a foundation

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<sup>228</sup> *ibid.*

<sup>229</sup> *ibid.*

<sup>230</sup> This mechanism is further explored in Section 6.2.1.

<sup>231</sup> *Princz v Federal Republic of Germany*, 26 F3d 1166, 1174 ('[S]omething more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world.').

entrusted with providing compensation to the victims of forced labour.<sup>232</sup> It is acknowledged that the pressure exercised by private litigation had a direct bearing on Germany's decision.<sup>233</sup>

The Italian case law that led to the ICJ decision in the *Jurisdictional Immunities* case is similar to the *Princz* litigation. Victims of Nazi forced labour of Italian nationality were excluded from the compensatory mechanism created by Germany on the ground that Italy had waived all claims against Germany in several treaties.<sup>234</sup> There is some debate as to whether this waiver extended to claims for reparation for war crimes and crimes against humanity,<sup>235</sup> and the exclusion of Italian nationals from the compensatory mechanism was determined by the ICJ to constitute 'a matter of surprise—and regret'.<sup>236</sup> Be that as it may, when the question of war crimes reparation came before Italian courts in a number of suits against Germany, Italian courts were receptive to the argument that state immunity should not apply in these cases.

In *Ferrini*, the Court of Cassation found that Germany had breached *jus cogens* obligations on the prohibition of crimes against humanity and concluded that the protection of fundamental human rights should prevail over the customary rules of immunity.<sup>237</sup> Some noted that the Court did not resort to hierarchical reasoning in strictly formal terms; the

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<sup>232</sup> The 'Remembrance, Responsibility and Future' Foundation; Act of 2 August 2000, Bundesgesetzblatt 2000 I, 1263.

<sup>233</sup> See Michael Bothe, 'The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany' (2015) 24 *ItalYrbkIntL* 25, 34; Francesco Francioni, 'Access to Justice and Its Pitfalls' (2016) 14 *JICJ* 629, 632.

<sup>234</sup> See Francioni (n 233) 631ff.

<sup>235</sup> *ibid.* See also Bothe (n 233) 31–35.

<sup>236</sup> *Jurisdictional Immunities* (n 14) [99].

<sup>237</sup> *Ferrini* (n 60) [7.3], [7.4], [9].

notion of *jus cogens* was employed to convey a sense of ‘substantive’ superiority based on the values protected by these norms, rather than their status.<sup>238</sup> Thus, the gist of the argument was not so much normative hierarchy, but rather a balancing exercise between granting of immunity and ensuring reparation for the victims of international crimes.<sup>239</sup>

The declared aim of the Italian courts’ recognition of a *jus cogens* exception to state immunity was to induce a change in customary international law and provide support for the emergence of such new exception.<sup>240</sup> As the ICJ eventually confirmed, these efforts did not succeed in bringing about the desired change due to limited acceptance by other states. Yet, in times of uncertainty concerning the content of customary international law, the framework of countermeasures may provide a crucial role in justifying potentially unlawful conduct such as the denial of immunity by Italian courts. This argument was not clearly spelled out by Italian courts, but to some extent was used as a defence by Italy before the ICJ, where it argued that:

without aiming at a general holding that *jus cogens* violations require that immunities of all kinds be set aside, ... in the present cases Italian judges did not commit an unlawful act since lifting 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 adopted only after several attempts by the victims to institute proceedings in Germany and it was the only possible

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<sup>238</sup> De Sena and De Vittor (n 61) 101.

<sup>239</sup> *ibid* 102–103.

<sup>240</sup> Subsequent cases swung between an explicit acknowledgment of this law-making endeavour and attempts to justify the Italian position in the light of the pre-existing practice: eg *Lozano* (Cass Sez I) Judgment No 31171/2008, 91 RivDirInt 1224; *Milde* (Cass Sez I) Judgment no 1072/2009, 92 RivDirInt 618. See Carlo Focarelli, ‘Diniego dell’immunità alla Germania per crimini internazionali: la suprema Corte si fonda su valutazioni “qualitative”’ (2009) 922 RivDirInt 363; Natalino Ronzitti, ‘L’immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso Calipari’ (2008) 91 RivDirInt 1033.

means to ensure respect for and implementation of the imperative reparation regime established for serious violations of IHL.<sup>241</sup>

This point clarifies the claim concerning Germany's international responsibility and the instrumental nature of the denial of immunity in ensuring reparation for 'serious violations of IHL' when alternative means have failed; in sum, it contains all the main features of a countermeasure. However, since Italy did not explicitly put forward countermeasures as a defence, the ICJ did not consider this possibility in its judgment. This argument—which was the 'elephant in the room'<sup>242</sup> at the ICJ—might have provided a stronger legal basis to defend the legality of the denial of immunity.

#### **4.4. Explicit departure from the rules of state immunity**

States rarely depart from established rules of immunity without claiming—or at least implying—that their denial of immunity may be compatible with existing exceptions under customary international law. Doing otherwise would concede that their action constitutes a breach of international law and engages their international responsibility, unless they can advance circumstances precluding wrongfulness. This notwithstanding, there are circumstances that may lead a state to disregard the rules of immunity, particularly when it is clear that the breach may be justified as a countermeasure.

A first category of such cases is when state immunity is denied on the basis of reciprocity. Examples include the Act on Jurisdiction to Try Civil Cases Against Foreign

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<sup>241</sup> *Jurisdictional Immunities* (n 14) Counter-Memorial of Italy (22 December 2009) [6.39].

<sup>242</sup> Trapp and Mills (n 19) 163.

Governments adopted by Iran in 2012<sup>243</sup> and the Federal Law on Jurisdictional Immunities adopted by Russia in 2015.<sup>244</sup> As seen above, Iran has been the subject of multiple measures aimed at depriving it of its immunity, chiefly before US courts. In order to respond to what Iran deemed internationally wrongful denial of its sovereign prerogatives, the Iranian legislation allows actions for damages ‘against foreign governments that have violated the sovereign immunity of Iran or its officials.’<sup>245</sup> The Ministry of Foreign Affairs maintains a list of ‘countries subject to reciprocity’<sup>246</sup> that is particularly reminiscent of the list of state-sponsors of terrorism under the relevant US law.<sup>247</sup> The reciprocity of this measure is also expressed in the type and amount of damages that Iranian courts can award, which must be ‘similar to the rulings issued by a foreign court’.<sup>248</sup> By the same token, the Russian Federal Law states that the immunity of a foreign state can be limited if it is established that the immunity of Russia is subject to similar restrictions in that state; the Russian Ministry of Foreign Affairs is tasked with making recommendations on this matter.<sup>249</sup> The declared legislative intent was to abolish the previously used doctrine of absolute immunity.<sup>250</sup> Yet,

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<sup>243</sup> Act on Jurisdiction of the Judiciary of the Islamic Republic of Iran to Try Civil Cases Against Foreign Governments (8 May 2012) <<http://rooznamehrasmi.ir/Laws/ShowLaw.aspx?Code=715>> (in Persian). See Karimi (n 209).

<sup>244</sup> Federal Law No 297-FZ on Jurisdictional Immunity of a Foreign State and a Foreign State’s Property in the Russian Federation (23 October 2015) <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102381335&ИНТЕЛЕСЕАПИЦХ=>> (in Russian). See Peter Roudik, ‘Laws Lifting Sovereign Immunity: Russia’ (*Library of Congress*, June 2016) <[www.loc.gov/law/help/sovereign-immunity/russia.php#\\_ftn1](http://www.loc.gov/law/help/sovereign-immunity/russia.php#_ftn1)>.

<sup>245</sup> Act on Jurisdiction (n 243) art 1.

<sup>246</sup> *ibid.*

<sup>247</sup> Text at n 90.

<sup>248</sup> Act on Jurisdiction (n 243) art 4.

<sup>249</sup> Federal Law No 297-FZ (n 244) art 4.

<sup>250</sup> See Explanatory Note to Bill on Jurisdictional Immunity of a Foreign State and a Foreign State’s Property in the Russian Federation <<https://perma.cc/4DGL-7VY7>>.

Russian commentators suggested that this law was implemented as a response to the seizure of Russian property in France and Belgium in execution of the *Yukos* award.<sup>251</sup>

Reciprocity as a basis to deny immunity relies entirely on the structure of countermeasures.<sup>252</sup> The denial of immunity in these instances is supported by the fact that the state taking the measure claims to be injured by a prior wrongful act of the same nature. Like other exercises of jurisdiction based on reciprocity,<sup>253</sup> if the existence of the prior wrongful act is proven, it is very likely that these measures are not only potential countermeasures, but also proportionate ones.

The only case of overt disregard of the rules of immunity outside reciprocity was the result of the peculiar conditions created by the ICJ judgment in the *Jurisdictional Immunities* case. This decision had dissipated any doubts on the incompatibility of the Italian position with the current state of the international law of immunity. In the immediate aftermath, both the Italian government and the Court of Cassation took steps to reverse the denial of Germany's immunity: the former enacted legislation with the aim of implementing UNCSI and the ICJ judgment in full;<sup>254</sup> the latter, although not without critical remarks, reversed its previous decision.<sup>255</sup> However, in Judgment No 238 of 22 October 2014 the Italian Constitutional Court found that the Italian laws implementing

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<sup>251</sup> See Roudik (n 244) [IV].

<sup>252</sup> See Tom Ruys, 'Immunity, Inviolability and Countermeasures' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 707–708.

<sup>253</sup> See Section 2.3.1.

<sup>254</sup> Law No 5/2013, art 3. See Giuseppe Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in "Germany v. Italy"' (2013) 11 JICJ 185.

<sup>255</sup> *Albers* (Cass Sez I) Judgment No 32139/2012. See also note by Filippo Fontanelli in (2013) 107 AJIL 632.

the ICJ judgment were incompatible with fundamental principles of the Italian constitutional order, particularly the protection of fundamental human rights and access to a court.<sup>256</sup> The Court ruled that, to the extent that customary international law does not contemplate an exception to state immunity for serious human right violations, it never entered the Italian legal system through the mechanism of automatic incorporation set out in the Constitution.<sup>257</sup>

Judgment No 238 has drawn criticism from those that see it as a threat to the unity and coherence of the international legal order.<sup>258</sup> While some of these concerns are well placed, the decision of the Italian Constitutional Court contains some elements that make its instrumental character in the implementation of international responsibility particularly evident. First, the Constitutional Court did not attempt to challenge the ruling of the ICJ, accepting the determination of the latter with regard to the law of state immunity as ‘final’ and ‘particularly authoritative’.<sup>259</sup> In this sense, the Court was aware that a departure from the ICJ holding may engage Italy’s international responsibility.<sup>260</sup> Second, while the decision is mainly inward looking, the Court included several considerations that pertain

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<sup>256</sup> Judgment No 238/2014 (22 October 2014) (Italian Constitutional Court) <[www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238](http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238)> (author’s translation). See also Riccardo Pavoni, ‘Simoncioni v. Germany’ (2015) 109 AJIL 400.

<sup>257</sup> Reliance was made on the theory of ‘counter-limits’: Judgment No 238/2014 (n 256) [3].

<sup>258</sup> eg Anne Peters, ‘Let Not Triepel Triumph – How To Make the Best Out of Sentenza No 238 of the Italian Constitutional Court for a Global Legal Order’ (*EJIL:Talk!*, 22 December 2014) <[www.ejiltalk.org/let-not-triempel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i](http://www.ejiltalk.org/let-not-triempel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i)>.

<sup>259</sup> Judgment No 238/2014 (n 256) [3.1].

<sup>260</sup> See Filippo Fontanelli, ‘First Impressions on Judgment No. 238 of 2014 of the Italian Constitutional Court’ (*Verfassungsblog*, 22 October 2014) <<http://verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court>>. Strictly speaking, the decision of the Court did not directly materialise the breach but imposed this outcome on lower courts of the Italian legal system faced with this issue.

to international law. The Court acknowledged that a dispute concerning Germany's duty to provide reparation for war crimes had been protracted for decades and deemed that opening the door to domestic litigation was the only means left to the victims to obtain redress for these crimes.<sup>261</sup> In other words, the decision was 'heavily fact-specific' and a crucial role was played by the absence of alternative remedies.<sup>262</sup>

The Court was criticised for not putting enough emphasis on the remedies available at the inter-state level and failing to pressure the Italian Government to pursue them by means of diplomatic protection.<sup>263</sup> Yet, Italy had already espoused the claims of its nationals against Germany in its counter-claim submitted to the ICJ:

Italy asks the Court to adjudge that Germany is still under an ongoing obligation to make reparations for the large number of the unlawful acts committed by the Third Reich and that Germany's international responsibility is engaged by its failure to provide effective reparation more than 60 years after the relevant facts. The remedy to make good this violation should consist in an obligation on Germany to establish an appropriate and effective mechanism for addressing the reparation claims of Italian victims.<sup>264</sup>

The ICJ did not decide this issue as it fell outside the temporal scope of its jurisdiction, but there is no doubt that by that point Germany had received clear notice of Italy's demands, which remained unfulfilled at the time the Constitutional Court issued its judgment. In sum, Judgment No 238 offers all the distinctive features of a countermeasure: it is a breach in response to a prior wrongful act of the target state with a view to obtaining compliance

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<sup>261</sup> Judgment No 238/2014 (n 256) [2.1], [3.2].

<sup>262</sup> Pavoni, 'How Broad' (n 43) 576. See also Micaela Frulli, 'Time Will Tell Who Just Fell and Who's Been Left Behind' (2016) 14 JICJ 587, 589.

<sup>263</sup> See Paolo Palchetti, 'Can State Action On Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2015) 24 ItalYrbkIntlL 53; Francioni (n 233) 635.

<sup>264</sup> *Jurisdictional Immunities* (n 14) Counter-Memorial of Italy (22 December 2009) [7.10]–[7.11].

with the obligation of reparation. While Italian courts implementing the Constitutional Court judgment have attempted to justify the legality of their denial of immunity on different grounds,<sup>265</sup> countermeasures remain the only potential way to justify the legality of these decisions until sufficient state practice supports the emergence of a new rule of custom.

#### **4.5. Interim Conclusion**

Denial of state immunity is particularly amenable to use as a tool for implementing international responsibility. Despite some limited practice to the contrary, state sponsorship of terrorism, international takings, territorial (sovereign) torts, breaches of peremptory norms, and other breaches of international law have not crystallised as customary exceptions to the law of state immunity. Yet, when denial of immunity is premised on a wrongful act attributed to the target state, these cases frequently present the features of countermeasures. Because immunity is denied in tort proceedings against the wrongdoing state for acts that are often the same as (or closely related to) the internationally wrongful acts for which reparation is sought, the instrumental nature of these breaches of the rules of immunity is evident. Domestic courts have taken measures of this kind in different ways depending on whether denial of immunity was mandated by legislative provisions or not. Alongside cases in which states have plainly disregarded the rules of state immunity,

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<sup>265</sup> Italian courts are relying on the asserted incompatibility between the internationally recognised right of access to a court and the granting of state immunity: Giovanni Boggero, 'Ancora sul seguito della sentenza n. 238/2014' (*Diritti Comparati*, 20 November 2017) <[www.diritticomparati.it/ancora-sul-seguito-della-sentenza-n-2382014-una-recente-pronuncia-del-tribunale-di-sulmona](http://www.diritticomparati.it/ancora-sul-seguito-della-sentenza-n-2382014-una-recente-pronuncia-del-tribunale-di-sulmona)>. See Riccardo Pisillo Mazzeschi, 'Access to Justice in Constitutional and International Law' (2015) 24 *ItalYrbkIntL* 7.

municipal courts have adopted broad interpretations of generally accepted exceptions or attempted to put forward new exceptions to state immunity. While these attempts have not yet found sufficient support from other states, in such cases countermeasures may still provide a legal justification for the breach. The role that the countermeasures framework plays in cases where states seek to bring about a change in the customary rules of immunity is further explored in Chapter 6.

## 5. DENIAL OF THE IMMUNITY OF STATE OFFICIALS

This Chapter examines the extent to which countermeasures may provide a justification for the denial of the immunity of state officials. Section 5.1 establishes that the immunity of state officials is a privilege granted to the state and, thus, can in principle be denied as a tool to implement the responsibility of the state to which the officials belong. Yet, a distinction must be made between personal and functional immunity. Section 5.2 argues that the rules of personal immunity are unsuitable to be breached as a countermeasure because they protect interests that are excluded from the system of decentralised implementation of international responsibility. Conversely, the rules governing functional immunity may lend themselves to be breached as a way to induce the state to whom the officials belong to comply with its secondary obligations stemming from the commission of internationally wrongful acts. Section 5.3 explores this possibility by looking at instances of denial of functional immunity that offer the features of countermeasures.

### 5.1. Immunity of state officials as immunity of the state

The immunity of state officials is often classified into two categories: personal immunity (or immunity *ratione personae*) which pertains to a restricted number of high-ranking officials and exempts them from the jurisdiction of foreign courts for all acts so long as these officials are in office; and functional immunity (or immunity *ratione materiae*) which attaches to acts carried out in an official capacity by all state officials and continues to

attach to these acts even after the officials leave office.<sup>1</sup> Though frequently analysed separately from state immunity, the immunity of state officials originates from the same principles as does state immunity (sovereign equality and independence). Indeed, for a long time the immunity of heads of state and the immunity of states were virtually indistinguishable.<sup>2</sup> Today, the immunity of state officials remains a privilege granted to the state.<sup>3</sup> As such, only the state is competent to waive it;<sup>4</sup> the officials themselves do not have a right of their own not to be subjected to the jurisdiction of foreign states. Moreover, as held by the ICJ, ‘the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.’<sup>5</sup> There is therefore a connection between the immunity of state officials and the state to which the officials belong that makes this immunity, at least in principle, potentially suitable to be denied for

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<sup>1</sup> See Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, UN Doc A/CN.4/596 (2008) [88-89] [Secretariat Memorandum]; Roman Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, UN doc A/CN.4/601 (29 May 2008) 177; Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 8; Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 EJIL 815, 817; Roger O’Keefe, *International Criminal Law* (OUP 2015) 407–408; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2015) 2. See also *Al-Adsani v United Kingdom* (Grand Chamber, Judgment) App No 35763/97, (21 November 2001) [65]; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) 202 (Lord Browne-Wilkinson); *Public Prosecutor v Lozano*, No 31171/2008 (24 July 2008) 168 ILR 485 (Italy, Court of Cassation); *A v Swiss Federal Public Prosecutor and ors*, No BB.2011.140 (25 July 2012) ILDC 1933 (CH 2012) (Switzerland, Federal Criminal Court) [Nezzar] [5.3.4].

<sup>2</sup> Secretariat Memorandum (n 1) 20 [27]; Ian Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 167 RdC 113, 121.

<sup>3</sup> See Michael Tunks, ‘Diplomats or Defendants? Defining the Future of Head-of-State Immunity’ (2002) 52 DukeLJ 651, 672–673.

<sup>4</sup> *Arrest Warrant (DRC/Belgium)* [2002] ICJ Rep 3, 26 [61]; Secretariat Memorandum (n 1) 173 [265] (‘[S]uch immunity may only be waived by the sitting Government of the foreign official.’).

<sup>5</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti/France)* [2008] ICJ Rep 177, 244 [196].

the implementation of international responsibility of the state. At the same time, personal and functional immunities pertain to different officials and are different in scope because they protect different aspects of state sovereignty. This is reflected in the extent to which these two types of immunity can be denied for the implementation of international responsibility as justifiable countermeasures. The next sections examine the two types of official immunity separately.

## **5.2. Personal immunity and its unsuitability for the implementation of international responsibility**

The ICJ,<sup>6</sup> domestic courts,<sup>7</sup> and various scholars have recognised that customary international law provides personal immunity (or immunity *ratione personae*) for certain officials holding high-ranking positions in the state apparatus and for as long as they in office.<sup>8</sup> The scope of such immunity is ‘absolute’ or ‘full’, in that it provides complete exemption from suit in both civil and criminal proceedings and covers all acts performed in a personal and private capacity, including conduct that occurred before taking office.<sup>9</sup> At the same time, there is controversy regarding the officials that are entitled to personal immunity.

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<sup>6</sup> *Arrest Warrant* (n 4) 20-21 [51].

<sup>7</sup> eg *Pinochet* (n 1) 269 (Lord Browne-Wilkinson); *Gaddafi* (20 October 2000) 125 ILR 490 (France, Court of Cassation) 509. See further text at n 11.

<sup>8</sup> Secretariat Memorandum (n 1) 57 [94]; Ingrid Wuerth, ‘Foreign Official Immunity: Invocation, Purpose, Exceptions’ [2013] *SwissRevIntl&EurL* 207, 209; Pedretti (n 1) 57.

<sup>9</sup> See Secretariat Memorandum (n 1) 89-90 [137].

The least contentious category is heads of state,<sup>10</sup> as confirmed by various attempts to bring suit against incumbent heads of state which have been barred by the rules of personal immunity.<sup>11</sup> Personal immunity has traditionally been justified on grounds of sovereign equality, the same principle governing state immunity.<sup>12</sup> However, courts and commentators have recognised that sovereign equality alone is not sufficient to explain the modern concept of personal immunity.<sup>13</sup> This is best understood in terms of functional necessity. As stated by the *Institut de Droit International*, ‘special treatment is to be given to a Head of State ... as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner’.<sup>14</sup> Similarly, the Federal Supreme Court of the Federal Republic of Germany found that this immunity is granted ‘in the mutual interests of States in enjoying undisturbed bilateral relations.’<sup>15</sup>

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<sup>10</sup> See Arthur Watts, ‘The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers’ (1994) 247 RdC 9, 53; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 81; Hazel Fox and Philippa Webb, *The Law of State Immunity* (rev&upd 3rd edn, OUP 2015) 544.; Secretariat Memorandum (n 1) 59 [99]. See also UNCSI art 3(2) (‘The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.’).

<sup>11</sup> eg *Re Honecker*, No 2 ARs 252/84 (14 December 1984) 80 ILR 365 (Germany, Federal Supreme Court); *Gaddafi* (n 7); *Tatchell v Mugabe*, (14 January 2004) 53 ICLQ 769 (UK, Bow Street Magistrates’ Court); *Vallmajo I Sala v Kabarebe*, Order No 3/2008 (6 February 2008) ILDC 1198 (ES 2008) (Spain, National Court); *Habyarimana v Kagame*, 696 F3d 1029 (10th Cir 2012).

<sup>12</sup> See *Tachiona v Mugabe*, 169 FSupp 2d 259, 268 (SDNY 2001); Secretariat Memorandum (n 1) 62 [102]; Van Alebeek (n 1) 180. This position was common in classic international legal scholarship; see, eg, Lassa Oppenheim, *International Law: A Treatise, Vol II: War and Neutrality* (3rd edn, Longmans, Green 1921) 530.

<sup>13</sup> See Tunks (n 3) 656; Akande and Shah (n 1) 818.

<sup>14</sup> See IDI, Resolution on ‘Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law’ (2000-2001) 69 AIDI 743.

<sup>15</sup> *Re Honecker* (n 11) 366.

If the rationale behind personal immunity is protecting the exercise of the functions of certain representatives of the state, there is a case to extend personal immunity to other high-ranking officials that are in a position comparable to that of heads of state.<sup>16</sup> Heads of government, foreign ministers, and other ministers are all potential candidates, though state practice had long been too sparse and ambivalent to draw firm conclusions.<sup>17</sup> Faced with this evidentiary gap, the ICJ determined that foreign ministers enjoy ‘full immunity’ while in office because such protection is necessary for the exercise of their functions.<sup>18</sup> Despite some criticism,<sup>19</sup> the principle of functional necessity espoused in the judgment has influenced subsequent practice of domestic courts,<sup>20</sup> albeit its application has created occasional disagreement.<sup>21</sup>

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<sup>16</sup> See *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2013] QB 349, ILDC 1779 (UK 2011).

<sup>17</sup> See *Arrest Warrant* (n 4) 96 [1] (diss op Al-Khasawneh); Secretariat Memorandum (n 1) [122] 79; O’Keefe, *International Criminal Law* (n 1) 417.

<sup>18</sup> *Arrest Warrant* (n 4) 22 [53] (‘In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.’).

<sup>19</sup> *Arrest Warrant* (n 4) 87 [80] (sep op Higgins, Kooijmans, and Buergenthal); *ibid* 144 [13] (diss op Van den Wyngaert); Maurice Kamto, ‘Une troublante “immunité totale” du ministre des affaires étrangères’ [2002] RevBDI 518, 519; Jean Salmon, ‘Libres propos sur l’arrêt de la C.I.J. du 14 février 2002 dans l’affaire relative au mandat d’arrêt du 11 avril 2000’ [2002] RevBDI 512, 513; Jan Wouters, ‘The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks’ [2003] LJIL 253, 256.

<sup>20</sup> eg *Re Mofaz* (12 February 2004) 128 ILR 709 (UK, Bow Street Magistrates’ Court) 711–712; *Nezzar* (n 1) [5.4.2]; *Re Sharon and Yaron* (12 February 2003) ILDC 5 (BE 2003); 127 ILR 110, 123 (Belgium, Court of Cassation); *Prosecutor v Djukanovic*, No 49666 (28 December 2004) ILDC 74 (IT 2004) (Italy, Court of Cassation) [10].

<sup>21</sup> A UK Magistrates Court granted immunity to the Chinese Minister for Commerce and International Trade, on the basis that his functions were ‘equivalent’ to those of a foreign minister. See *Bo Xilai* (8 November 2005) ILDC 429 (UK 2005) (UK, Bow Street Magistrates Court) [5]. French and Italian courts, on the contrary, found that other high-ranking officials did not benefit from personal immunity. See ‘*Les Biens Mal Acquis*’, *Nguema Obiang Mangue v Prosecutor*, No 15-83156, (15 December 2015) ILDC 2825 (FR 2015) (France, Court of Cassation); *Italy v DM*, No 49666 (28 December 2004) ILDC 74 (IT 2004), (Italy, Court of Cassation) [35]. The ICJ found that the *procureur général* and the Head of National Security of Djibouti were not entitled to personal immunity; see *Mutual Assistance* (n 5) 243–4 [194].

The recognition of functional necessity as the rationale of the rules of personal immunity has two important consequences. First, it suggests that there is no meaningful distinction between the personal immunity of high-ranking senior officials and the ‘diplomatic’ immunities afforded to diplomatic agents,<sup>22</sup> members of special missions,<sup>23</sup> and state representatives at the UN.<sup>24</sup> Diplomatic immunities are granted to safeguard the functions of the relevant representatives of the state<sup>25</sup> and are similar (if not identical) in scope to personal immunity of the type analysed so far.<sup>26</sup> While they may have developed through different paths,<sup>27</sup> diplomatic immunities and personal immunity of other state officials are virtually indistinguishable today; indeed, some authors treat the former as a codified sub-species of the latter.<sup>28</sup>

Second, if personal immunity of high-ranking state officials is comparable to that of diplomatic personnel, this type of immunity may be unsuitable to be denied for the purpose of implementing international responsibility. Indeed, state practice offers no examples of personal immunity being denied to implement international responsibility. Personal immunity has been recognised even in cases involving international crimes and

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<sup>22</sup> Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95 [VCDR], art 31. See further Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 232.

<sup>23</sup> UN Convention on Special Missions (8 December 1969) 1400 UNTS 231, art 31.

<sup>24</sup> Convention on the Privileges and Immunities of the United Nations (13 February 1946) 1 UNTS 15, art IV(11)(g).

<sup>25</sup> See Mitchell Ross, ‘Rethinking Diplomatic Immunity’ [1989] *AmUJIntll&Poly* 173, 178.

<sup>26</sup> Art 31 VCDR provides for a limited number of exceptions to the personal immunity of diplomatic agents; see Denza (n 22) 239. While the ICJ found that there was no exception to the immunity enjoyed by foreign ministers, its focus was on war crimes and crimes against humanity: *Arrest Warrant* (n 4) 24 [58]. Some states codify the immunity of heads of state by reference to diplomatic immunity: eg State Immunity Act 1978, c 33, s 20(1) (UK).

<sup>27</sup> See Secretariat Memorandum (n 1) 19 [19].

<sup>28</sup> See O’Keefe, *International Criminal Law* (n 1) 413–414; Fox and Webb (n 10) 564.

other serious breaches of peremptory norms allegedly committed by senior state officials.<sup>29</sup> The only exception is when the status of the official entitled to personal immunity is denied. Notably, in *United States v Noriega* US courts refused to grant personal immunity to General Noriega, the *de facto* ruler of Panama, on grounds that the United States never recognised him as head of state.<sup>30</sup> Similarly, in *United States v Egorov* the District Court for the District of New York found that a Soviet diplomat and his wife charged with espionage did not benefit from personal immunity because Mr Egorov was never ‘authorized and received’ as a diplomatic agent by the US authorities.<sup>31</sup> In *R v Lambeth Justices, ex parte Yusufu*, a Divisional Court of the High Court of England and Wales refused to recognise the immunity of a member of the Nigerian diplomatic mission on the basis that the FCO had not received any communications from Nigeria concerning Yusufu’s appointment.<sup>32</sup> This argument was tenuous considering that the notification requirement under the VCDR is not constitutive of the status (and immunity) of diplomatic agents.<sup>33</sup> And yet, the Divisional Court did not consider it relevant for the purpose of

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<sup>29</sup> See *Fidel Castro*, Order No 1999/2723 (4 March 1999) 32 ILM 596 (Spain, National Court); *German citizen of Iranian origin*, No 2 Zs 1330/99 (16 May 2000) ILDC 2242 (DE 2000) (Germany, Higher Regional Court of Cologne) [9]; *Gaddafi* (n 7); *Re Sharon and Yaron* (n 20); *Plaintiffs A, B, C, D, E, F v Jiang Zemin*, 282 FSupp 2d 875 (ND Ill 2003); *Tachiona v Mugabe* (n 12); *Vallmajo I Sala* (n 11); *Re Mofaz* (n 20); *Lafontant v Aristide*, 844 FSupp 128 (EDNY 1994); *Kagame* (n 11).

<sup>30</sup> *United States v Noriega*, 117 F3d 1206, 1212 (11th Cir 1997). See Akande and Shah (n 1) 820.

<sup>31</sup> *US v Egorov*, 222 FSupp 106, 108 (1963). This can be contrasted with a case of espionage committed by Soviet diplomatic officials in Canada. In response, Canada withdrew its diplomats from the USSR and expelled the Soviet diplomats: Maxwell Cohen, ‘Espionage and Immunity—Some Recent Problems and Developments’ (1948) 25 BYIL 404, 408.

<sup>32</sup> *R v Lambeth Justices, ex parte Yusufu* [1985] 88 ILR 323, 328.

<sup>33</sup> The ILC commentary to art 9 of the 1958 Draft Articles on Diplomatic Intercourse and Immunities (which later became art 10 VCDR) mentions that ‘[i]t is *desirable* for the receiving State to know the names of the persons who may claim privileges and immunities’; (1958) II YBILC 92 (emphasis added). There is no indication that privileges and immunity depend on such notification. See also Denza (n 22) 350. The Divisional Court decision was quashed on appeal: *R v Secretary of State for the Home Department, ex parte Bagga* [1991] 1 QB 485.

denying immunity that the accused, a Nigerian state official, was accused of kidnapping, on instructions of his government, a former Nigerian Minister in the United Kingdom—an act which may have engaged the international responsibility of Nigeria.<sup>34</sup>

The absence of case law in which denial of personal immunity offers the features of countermeasures can be explained in the light of the rules governing the unilateral implementation of state responsibility. The taking of countermeasures cannot affect a number of obligations codified by the ILC in Article 50 ARSIWA.<sup>35</sup> Significantly, among the obligations that are excluded from this mechanism are obligations ‘to respect the inviolability of diplomatic or consular agents, premises, archives and documents.’<sup>36</sup> ‘Inviolability’ is not the same as personal ‘immunity’.<sup>37</sup> The former protects the person of the diplomat and the integrity of the diplomatic mission from measures of physical constraints and other interference.<sup>38</sup> The latter, like other types of immunity, has a procedural dimension;<sup>39</sup> it exempts its beneficiaries from judicial process before the courts of the receiving state.<sup>40</sup> This notwithstanding, the two concepts are closely connected, to the point that the ILC commentary states that ‘inviolability include[es] the jurisdictional

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<sup>34</sup> On immunity and extraterritorial abductions, see section 5.3.2.

<sup>35</sup> See Section 6.2.6.

<sup>36</sup> ARSIWA art 50(2)(b). See Laurence Boisson de Chazournes, ‘Other Non-Derogable Obligations’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1206.

<sup>37</sup> See O’Keefe, *International Criminal Law* (n 1) 409.

<sup>38</sup> See Paul Behrens, ‘The Personal Inviolability of Diplomatic Agents in Emergency Situations’ in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017) 75. This translates in an array of negative and positive duties on the receiving state; see VCDR arts 22-30.

<sup>39</sup> See Stefan Talmon, ‘Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished’ (2012) 25 LJIL 979.

<sup>40</sup> See VCDR arts 31-32. See also *Tehran Hostages* [1980] ICJ Rep 3, 37 [79]; Denza (n 22) 234.

immunity.’<sup>41</sup> Inviolability and personal immunity originated as a single concept and it is not infrequent for them to be treated as such,<sup>42</sup> given they both derive from the principle of functional necessity. For example, the ICJ held that:

the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction *and inviolability*. That immunity *and that inviolability* protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.<sup>43</sup>

If the rationale underpinning personal immunity and inviolability is the same, recourse to countermeasures affecting the personal immunity of high-ranking state officials may be constrained by the same limitations concerning the inviolability of serving diplomats. These limitations stem from the ICJ *dictum* in the *Hostages* case, according to which the rules of diplomatic law constitute a ‘self-contained regime’,<sup>44</sup> i.e. a system with a complete set of secondary rules that renders inapplicable the general rules of State responsibility (including countermeasures).<sup>45</sup> In order to reach this conclusion, the Court relied on Article 9 of the Vienna Convention on Diplomatic Relations (VCDR) and Article 23 of the Vienna Convention on Consular Relations (VCCR), which state that a member of a diplomatic or consular mission can at any time be declared *persona non grata* by the

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<sup>41</sup> ARSIWA and Commentary 133 [14]. Though the ILC employs broad language, the Commentary refers only to the ‘jurisdictional immunity’ of incumbent diplomats, ie personal immunity.

<sup>42</sup> See Denza (n 22) 232 (‘[I]mmunity of an envoy ... was in the earlier literature regarded as indistinguishable from his personal inviolability’); Behrens (n 38) 83 (describing inviolability as ‘part of’ diplomatic immunity).

<sup>43</sup> *Arrest Warrant* (n 4) 22 [54] (emphasis added).

<sup>44</sup> *Tehran Hostages* (n 40) 40 [86]. See Willem Riphagen, Fourth report on international responsibility (1983) II(1) YILC 3, 18 [97]; Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988) 116ff.

<sup>45</sup> Bruno Simma, ‘Self-Contained Regimes’ (1985) 16 NYIL 111, 116.

receiving state, at which point the sending state is under a duty to recall its official or terminate their functions.<sup>46</sup>

Despite the ICJ's finding, reliance on this special remedy provided by diplomatic law is hardly conclusive to determine which officials should be exempted from countermeasures. Like diplomatic officials, heads of state and other senior officials entitled to personal immunity may be declared *personae non gratae*. While with regard to diplomats this ordinarily translates into expulsion from the receiving state, heads of state and other officials are more likely to be denied entry into the territory of foreign states as a consequence of such declaration.<sup>47</sup>

Most importantly, the ICJ's reliance on the notion of self-contained regimes to justify the exemption of diplomatic inviolabilities from countermeasures has been described as 'jurisprudential overkill'.<sup>48</sup> Neither the VCDR nor the VCCR explicitly exclude recourse to countermeasures in general terms.<sup>49</sup> In fact, in certain circumstances diplomatic law falls back onto the general system of international responsibility and some limited countermeasures may be permissible even in this area.<sup>50</sup>

The justification for excluding diplomatic inviolabilities from the realm of countermeasures is more convincingly found in functional necessity. The prohibition

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<sup>46</sup> *Tehran Hostages* (n 40) 40 [85]. See in general Denza (n 22) 61.

<sup>47</sup> eg 'Hungarian President denied Slovak visit' (*Euronews*, 22 August 2009) <[www.euronews.com/2009/08/22/hungarian-president-denied-slovak-visit](http://www.euronews.com/2009/08/22/hungarian-president-denied-slovak-visit)>. See generally Foakes (n 10) 117; Tom Ruys, 'Immunity, Inviolability and Countermeasures' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 698.

<sup>48</sup> Simma (n 45) 121; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *EJIL* 483, 512.

<sup>49</sup> Denza (n 22) 407.

<sup>50</sup> See text at n 56.

derives from the special role that diplomatic channels serve in times of crisis.<sup>51</sup> This function would be seriously compromised if diplomatic agents could be held hostages of the host state.<sup>52</sup> The ILC commentary to Article 50 ARSIWA confirms this view:

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified *on functional grounds*.<sup>53</sup>

If countermeasures affecting diplomatic personnel are excluded on functional grounds, the conclusion should be similar for heads of state and other high-ranking state officials.<sup>54</sup> Denial of personal immunity of these officials would have even more disruptive effects on the political life of the targeted state, let alone on the diplomatic relations between the two states.<sup>55</sup>

In sum, countermeasures affecting personal immunity should in principle be regarded as unlawful. However, two caveats should be added to this conclusion. First, the limitation under Article 50(2)(b) ARSIWA—according to which countermeasures can *never* affect obligations concerning diplomatic inviolability—may be too stringent compared to customary international law. Some limited forms of countermeasures affecting diplomatic agents are accepted in the practice of states and ‘recourse to

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<sup>51</sup> Simma and Pulkowski (n 48) 514.

<sup>52</sup> According to Sicilianos, there is an ‘irreducible core’ of diplomatic law that has a peremptory character: *Les réactions décentralisées à l’illicite* (LGDJ 1990) 351.

<sup>53</sup> ARSIWA Commentary 134 (emphasis added).

<sup>54</sup> cf Oppenheim (n 12) 533 (equating heads of state to diplomatic envoys).

<sup>55</sup> See Akande and Shah (n 1) 824 (noting that arresting the leader of a country is to bring about a change in government—an unlawful interference with the autonomy and independence of the state).

countermeasures in this area should not be prohibited, but rather considerably limited.<sup>56</sup> Thus, it cannot be ruled out that exceptional circumstances may justify countermeasures affecting the personal immunity of state officials.<sup>57</sup>

Second, personal immunity is a limit to the taking of countermeasures only because it provides a (temporary) safeguard for the exercise of the functions of certain representatives of the state. When the immunity of state officials is not based on similar grounds—such as functional immunity—these considerations do not apply. As shown in the next section, breaches of the rules of functional immunity are more amenable to be justified as countermeasures.

### **5.3. Denial of functional immunity for the implementation of international responsibility**

#### 5.3.1. Functional immunity and its competing rationales

Functional immunity (or immunity *ratione materiae*) is immunity that attaches to acts performed on behalf of the state. When compared to immunity *ratione personae*, this type

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<sup>56</sup> Boisson de Chazournes (n 36) 1208. For example, refusal of rights of free movement of diplomats within the Soviet Union was met by the imposition of reciprocal restrictions: Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 98–99; Denza (n 22) 407. See also Sicilianos (n 52) 344–351; James Crawford, *State Responsibility: The General Part* (CUP 2013) 696–697.

<sup>57</sup> In its recent decision concerning the failure to arrest the (then) Sudanese President Al Bashir at the ICC's behest, the Supreme Court of South Africa reasoned that under customary international law no international crime exception to personal immunity had developed, yet it found that the domestic law implementing the ICC statute required South African courts to deny personal immunity of sitting heads of state regardless. See *Minister of Justice v Southern Africa Litigation Centre* (15 March 2016) 168 ILR 600 [49]-[85], [86]-[105]. This could be seen as an instrumental measure to implement the decision of an international court. See further Chapter 6.2.4.

of immunity is both narrower and broader.<sup>58</sup> On the one hand, functional immunity does not cover all acts performed by its beneficiaries, but only those that qualify as ‘official acts’—that is, ‘acts within the scope of their duties as organs of State’<sup>59</sup> and not ‘acts committed ... in a private capacity’.<sup>60</sup> On the other hand, functional immunity is not the prerogative of a limited number of state officials. It is conduct-based immunity that covers the official acts of all state officials and continues even after the officials leave their office.<sup>61</sup>

Having said that, the scope of functional immunity is highly contested. State practice is sparse and inconsistent to the point that some authors came to doubt the existence of a unitary principle of functional immunity.<sup>62</sup> Because of these difficulties, some scholars suggest that the identification of customary international law in this area should proceed from general principles through deductive reasoning.<sup>63</sup> Yet, the application

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<sup>58</sup> See Chimene Keitner, ‘Officially Immune?’ (2010) 36 YJIL 1, 9.

<sup>59</sup> *Mutual Assistance* (n 5) 243 [191]. See also Secretariat Memorandum (n 1) 101 [154].

<sup>60</sup> *Arrest Warrant* (n 4) 26 [61].

<sup>61</sup> See Secretariat Memorandum (n 1) 109, 112.

<sup>62</sup> According to these authors, there are only special rules for specific acts of a number of state officials: see Pasquale De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996) 101; Riccardo Pisillo Mazzeschi, ‘The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories’ in Pia Acconci and others (eds), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (Martinus Nijhoff 2016) 528; Micaela Frulli, ‘On the Consequence of a Customary Rule Granting Functional Immunity to State Officials and Its Exceptions’ (2016) 26 *DukeJComp&IntL* 479, 498.

<sup>63</sup> eg Rosanne Van Alebeek, ‘Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts’ in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 497. cf Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 *EJIL* 417, 423 (‘The deductive method is not an alternative to the inductive method but, rather, is complementary to it and may be applied whenever the Court cannot ascertain any rules of customary international law by way of induction.’). *Contra* Pisillo Mazzeschi (n 62) 516.

of deductive reasoning is made difficult by the lack of a shared understanding of the rationale underpinning this kind of immunity.<sup>64</sup>

A common approach construes functional immunity of state officials as a component of state immunity.<sup>65</sup> A typical example of this can be found in *Jones v Saudi Arabia*, where Lord Bingham held that ‘[a] state can only act through servants and agents; their official acts are the acts of the state; and the state’s immunity in respect of them is fundamental to the principle of state immunity’.<sup>66</sup> In essence, this approach turns functional immunity into a species of ‘indirect impleader’—that is, a case where state immunity bars the jurisdiction of domestic courts despite the fact that the state is not the nominated defendant against which proceedings are brought.<sup>67</sup> Alongside *Jones*, this approach finds support in the judgments of various domestic courts.<sup>68</sup> Nevertheless, this interpretation is not devoid of complications.

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<sup>64</sup> See Van Alebeek (n 63) 496.

<sup>65</sup> See Hans Kelsen, ‘Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals’ [1942] CLR 530, 540; Michael Akehurst, ‘Jurisdiction in International Law’ [1972] BYIL 145, 241; Wuerth (n 8) 214; O’Keefe, *International Criminal Law* (n 1) 426. See also Akande and Shah (n 1) 827.

<sup>66</sup> *Jones v Saudi Arabia* [2006] UKHL 26 [30]. See also *ibid* [66] (Lord Hoffmann).

<sup>67</sup> *ibid* [31] (Lord Bingham); *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 [17] (Lord Mance). Under UNCSI, state immunity applies even if the state is not nominated as a party to the proceeding when the latter ‘seeks to affect the property, rights, interests or activities of that ... State’: UNCSI art 6(2)(b). See Tom Grant, ‘Article 6’ in Roger O’Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 109.

<sup>68</sup> *Fang v Jiang* [2007] NZAR 420, ILDC 1226 (NZ 2006) (New Zealand, High Court) [73]; *Lozano* (n 1) [5]; *Cuiying Zhang v Jiang Zemin* [2010] NSWCA 255, ILDC 2024 (AU 2010), 141 ILR 542 (Australia, New South Wales Supreme Court) [65-66]. In the United Kingdom, s14(1) of the State Immunity Act was interpreted ‘as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself’: *Propend Finance Pty Ltd v Sing* [1997] 4 WLUK 254. In the United States, it was unclear for a long time whether the FSIA also covered state officials and some cases framed the issue in terms of state immunity: eg *In re Estate of Ferdinand Marcos*, F 3d 1467, 1472 (9th Cir 1994); *In re Terrorist Attacks on September 11*, 538 F 3d 71, 84 (2nd Cir 2008); *Mohammadi v Islamic Republic of Iran*, FSupp 2d 48, 72 (DDC 2013). See further text at n 226.

Under a theory of ‘absolute’ state immunity—which exempts foreign states from the jurisdiction of domestic courts under any circumstance<sup>69</sup>—the application of state immunity to acts performed by state officials can be easily conceptualised. For Kelsen, subjecting an individual to domestic court proceedings for ‘an act which, according to international law, is the act of another State, amounts to exercising jurisdiction over another State; and this is a violation of the rule of general international law that no State is subject to the jurisdiction of another State.’<sup>70</sup> In other words, once the act of the individual is attributed to the state, the rules of state immunity prevent domestic courts from exercising their jurisdiction. However, under a theory of ‘restrictive’ state immunity—today dominant among states<sup>71</sup>—it is no longer sufficient to attribute certain acts to the state to conclude that foreign domestic courts must refrain from exercising jurisdiction. It is also necessary to establish that these are *acta jure imperii*, that is, expressions of the sovereign attributes of a state.<sup>72</sup> This has two awkward implications for the functional immunity of state officials.

First, in civil proceedings state officials would not be exempted from the jurisdiction of foreign domestic courts with respect to acts that, despite being carried out in an official capacity, qualify as *acta jure gestionis*.<sup>73</sup> As Van Alebeek pointed out, this would make it possible to recover ‘a claim for payment of, say, pencils ordered for the

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<sup>69</sup> See Chapter 4.1.

<sup>70</sup> Kelsen, ‘Collective and Individual Responsibility’ (n 65) 540.

<sup>71</sup> See Chapter 4.1.

<sup>72</sup> *ibid.*

<sup>73</sup> See Akehurst (n 65) 242; O’Keefe, *International Criminal Law* (n 1) 429.

office ... from the personal bank account of the state official that happens to have placed the order.<sup>74</sup> This conclusion is counterintuitive and not supported by state practice.<sup>75</sup>

Second, the distinction between acts *jure imperii* and *jure gestionis* is completely unworkable in the criminal law context.<sup>76</sup> Even those that consider functional immunity as a projection of state immunity concede that the test in the criminal law context is whether the acts were carried out in an official capacity.<sup>77</sup> Yet, it is not clear how the ‘official acts’ test follows from the application of the rules of state immunity.

In both civil and criminal proceedings against state officials, the principal enquiry conducted by domestic courts is whether the acts are ‘official’—in that they can be ascribed

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<sup>74</sup> Van Alebeek (n 1) 106. In a similar vein, see also Gionata Piero Buzzini, ‘Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case’ (2009) 22 LJIL 455, 464.

<sup>75</sup> For example, an Italian court found that a diplomatic agent was not individually responsible for engaging in contractual obligations on behalf of the state: *Soc Vivai industriali Roma v Legazione dell’Arabia Saudita* (1955) 38 RDI 79. See also *Grunfeld v USA* (26 April 1968) 52 ILR 332 (Australia, Supreme Court of New South Wales) 334 (‘It is clear beyond all argument that Major Boyd did not contract in a personal capacity when he signed the Memorandum of Understanding.’). For an isolated example to the contrary, see *Saorstat and Continental Steamship Company Ltd v Rafael de las Morenas* [1945] IR 291 (Ireland, Supreme Court); Chimene Keitner, ‘Immunities of Foreign Officials from Civil Jurisdiction’ in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 532. See also Secretariat Memorandum (n 1) 107 [161]; Pierre d’Argent, ‘Immunity of State Officials and the Obligation to Prosecute’ (Brill 2014) 249 (‘Immunity *ratione materiae* extends to acts *iure imperii* and acts *iure gestionis*, provided that they were not performed in a private capacity.’). While some courts refer to *acta jure imperii* when applying functional immunity, the object of their enquiry is whether the acts are ‘sovereign’ in that they can be attributed to the state: eg *Church of Scientology Case* (26 September 1978) 65 ILR 193 (Federal Republic of Germany, Federal Supreme Court); *Kline v Kaneko*, 685 FSupp 386, 390 (SDNY 1988); *Jungquist v Nahyan*, 940 FSupp 312, 318 (DCC 1996); *Propend Finance Pty Ltd v Sing* (n 68); *Lozano* (n 1) [5].

<sup>76</sup> See Natalino Ronzitti, ‘L’immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso Calipari’ (2008) 91 RivDirInt 1033, 1039 (arguing that state immunity only covers civil proceedings). See also Concepción Escobar Hernández, ‘Fourth report on the immunity of State officials from foreign criminal jurisdiction’, UN Doc A/CN.4/686 (29 May 2015) 46 [104] (identifying a distinction between immunity from civil jurisdiction and immunity from criminal jurisdiction).

<sup>77</sup> See for further reference O’Keefe, *International Criminal Law* (n 1) 434.

to the state—or ‘private’—in that they belong exclusively to the individual official.<sup>78</sup> Thus, while functional immunity may be part of the broader concept of ‘state immunity’, it is conceptually different from the immunity that belongs to the state.<sup>79</sup> Since ‘official acts’ are attributable to the state and not to the officials, functional immunity serves as ‘a mechanism for diverting responsibility’ towards the actual defendant.<sup>80</sup>

Having said that, the question remains as to what criterion should be used to determine whether certain acts of state officials should be considered ‘official acts’. ILC Special Rapporteur Kolodkin endorsed an approach based on the attribution of conduct in accordance with the law of state responsibility.<sup>81</sup> While this criterion has some support in

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<sup>78</sup> See Secretariat Memorandum (n 1) 102 [105].

<sup>79</sup> See Fourth report Escobar Hernández (n 76) 46 [105]. Most theories converge on the assumption that, at least at its inception, functional immunity was a substantive defence: see Chimene Keitner, ‘The Forgotten History of Foreign Official Immunity’ [2012] NYULRev 704, 758; Pisillo Mazzeschi (n 62) 511–514; Keitner, ‘Immunities’ (n 75) 530. More recently, the focus of functional immunity has shifted from a substantive to a procedural defence: see Preliminary report Kolodkin (n 1) 177–178, n 147; O’Keefe, *International Criminal Law* (n 1) 406; Keitner, ‘Immunities’ (n 75) 534. Indeed, a state could not waive functional immunity of its officials if such immunity was a substantive limitation on the responsibility of the individuals: see Buzzini (n 74) 475.

<sup>80</sup> Akande and Shah (n 1) 826. See, eg, *Prosecutor v Blaškić* (Judgment on the Request for Review of the Decision of 18 July 1997) IT-95-14 (29 October 1997) [38]; *Re Rissmann* (1973) 71 ILR 577 (Italy, Court of Cassation) 581; *Baer v Tizon* (3 May 1974) 64 ILR 654 (Philippines, Supreme Court) 658; *Church of Scientology Case* (n 75) 198.

<sup>81</sup> Roman Kolodkin, ‘Second report on immunity of State officials from foreign criminal jurisdiction’, UN doc A/CN.4/631 (10 June 2010) 403 [24]. See also Secretariat Memorandum (n 1) 102 [156].

state practice,<sup>82</sup> it was questioned by some scholars<sup>83</sup> and was not followed by Special Rapporteur Escobar Hernández.<sup>84</sup>

One of the main difficulties in devising a test to determine the scope of functional immunity is that state practice does not seem to fit a uniform test, no matter how flexible. A number of cases have led some to identify potential exceptions to the general rule of functional immunity with regard to: (i) acts committed by foreign officials in the territory of the forum state in the absence of the latter's consent; and (ii) international crimes. In both sets of cases, there are doubts as to whether the sparse and inconsistent practice of states is sufficient to establish customary exceptions of this kind. However, both purported exceptions present clear characteristics that pertain to the implementation of international responsibility. Thus, countermeasures may explain and potentially justify instances of denial of functional immunity that would not be otherwise supported by a rule of custom.

Section 5.3.2 examines the practice connected to non-consensual activities of foreign state officials in the territory of the state and demonstrates that denial of functional immunity in these cases frequently fits the framework of countermeasures. Section 5.3.3 argues that the framework of countermeasures may also provide an alternative legal

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<sup>82</sup> *Jones v Saudi Arabia* (n 66) [68] (Lord Hoffmann); *Fang v Jiang* (n 68) [31-32].

<sup>83</sup> eg Joe Verhoeven, *Le droit international des immunités: contestation ou consolidation?* (Librairie generale de droit et de jurisprudence, Brussels 2004) 68; Chimene Keitner, 'Foreign Official Immunity and the Baseline Problem' [2011] *FordhamLRev* 605, 614; Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 *BYIL* 281, 296; Van Alebeek (n 63) 499. Some question, for example, whether *ultra vires* acts of state officials should always be exempted from the jurisdiction of foreign courts. At the same time, it would be incompatible with the notion of 'immunity' if only lawful acts were exempted; see Secretariat Memorandum (n 1) 104 [159]. Several domestic courts granted functional immunity with regard to *ultra vires* acts: eg *Boyer v Aldrete* (18 October 1956) 23 *ILR* 445 (France, Tribunal Civil de Marseille); *Jaffe v Miller (No 2)* (17 June 1993) 95 *ILR* 446, 460-462 (Canada, Ontario Court of Appeal). See also Mizushima Tomonori, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct' (2000) 29 *DenvJIntlL&Poly* 261, 276.

<sup>84</sup> Fourth report Escobar Hernández (n 76) 48-49 [111-112].

justification for denial of functional immunity for international crimes until an exception can be clearly identified in customary international law.<sup>85</sup>

### 5.3.2. Non-consensual presence and commission of certain activities in the forum state

#### *The purported exception to functional immunity*

ILC Special Rapporteur Kolodkin found that a ‘special case’ where there are ‘sufficient grounds to talk of an absence of immunity’ occurs when ‘an alleged crime has taken place, and [the forum] State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime.’<sup>86</sup> Despite Kolodkin’s conclusion, opinions are divided as to the existence of this purported exception.<sup>87</sup> According to O’Keefe, ‘its basis in positive customary international law is open to question, given the paucity of the relevant practice and the opacity of the attendant *opinio juris*.’<sup>88</sup> Indeed, Special Rapporteur Kolodkin cited only one doctrinal opinion and two cases in support of his view, neither of which—as seen

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<sup>85</sup> The analysis considers functional immunity both in the criminal and civil context; though examples of the former are more frequent, the rules are essentially the same. See Douglas (n 83) 301; Van Alebeek (n 63) 497. *Contra* Curtis Bradley and Laurence Helfer, ‘International Law and the U.S. Common Law of Foreign Official Immunity’ [2010] *SupCtRev* 213, 214.

<sup>86</sup> Second report Kolodkin (n 81) 426 [94(p)].

<sup>87</sup> In favour of the exception, see Luigi Migliorino, ‘Giurisdizione dello Stato territoriale rispetto ad azione non autorizzate di agenti di Stati stranieri’ (1988) 71 *RivDirInt* 784, 796; Paola Gaeta, ‘Extraordinary renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar’ [2006] *RivDirInt* 126; Ronzitti (n 76) 1036; Andrew Sanger, ‘Immunity of State Officials from the Criminal Jurisdiction of a Foreign State’ (2013) 62 *ICLQ* 193, 217–218; Van Alebeek (n 63) 504.

<sup>88</sup> O’Keefe, *International Criminal Law* (n 1) 437.

below—is conclusive on the point.<sup>89</sup> Some suggested that the scope of the purported exception should be ‘restricted to specific acts contrary to State sovereignty, such as espionage, political assassination and sabotage.’<sup>90</sup> The ILC Drafting Committee distanced itself from these propositions and deleted any reference to the purported exception for non-consensual activities on account that it ‘would only cover acts not performed in official capacity’ and would therefore be ‘superfluous’.<sup>91</sup>

According to Van Alebeek—the author cited by Special Rapporteur Kolodkin—the explanation for the purported exception lies elsewhere:

A State performing sovereign activity on foreign territory without consent of the territorial State is not exercising State authority under international law, and the forum State may therefore, if its criminal law is violated in the process, attribute personal responsibility to the State official who performed the act.<sup>92</sup>

This view is problematic. By hinging entirely on the consent of the forum state, it turns functional immunity into a rule of comity that can be granted or dispensed with by a decision of the forum state. This is foreign to the logic of immunity. The exemption from the jurisdiction of foreign courts depends on the character of the acts performed (official/private, *jure imperii/jure gestionis*) and not on their pre-emptive ratification by

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<sup>89</sup> See Second report Kolodkin (n 81) 423, n 217-219 (citing Van Alebeek’s opinion and the cases of *Abu Omar* and *Rainbow Warrior*). See text at n 92. The ILC Special Rapporteur Escobar Hernández proposed that the exception should be considered part of the ‘territorial tort’ exception from state immunity: ‘Fifth report on the immunity of State officials from foreign criminal jurisdiction’, UN Doc A/CN.4/701 (14 June 2016) 88-90. This proposition was criticised during the discussion in the ILC Plenary: see ILC, Report on the Work of its 69th Session, UN Doc A/72/10 (2017) 172-173 [126].

<sup>90</sup> UN Doc A/72/10 (2017) 172-173 [126].

<sup>91</sup> Aniruddha Rajput, Statement of the Chairperson of the Drafting Committee on ‘Immunity of State officials from foreign criminal jurisdiction’, (20 July 2017) 11 <[http://legal.un.org/ilc/documentation/english/statements/2017\\_dc\\_chairman\\_statement\\_iso.pdf](http://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_iso.pdf)>.

<sup>92</sup> Van Alebeek (n 63) 508.

the forum state. Moreover, as O’Keefe points out, it is not an attractive proposition in terms of policy ‘to suggest that the executive branch of a State can guarantee by simple *fiat* the local impunity of the executive branch of a foreign State in respect of crimes committed in the first State’s territory.’<sup>93</sup>

Rationalising state practice in this area as part of a coherent exception to functional immunity overlooks the fact that instances of non-recognition of functional immunity for non-consensual activities in the forum state occurred in response to (perceived) internationally wrongful acts. Most of the relevant case law offers all the features of countermeasures; functional immunity was denied in order to induce the wrongdoing state to comply with its obligations. As a result, regardless of whether an exception to functional immunity for non-consensual activity in the forum state has developed, countermeasures may provide an additional (or alternative) justification to support the exercise of jurisdiction in these cases. The case law under the purported exception has a markedly instrumental nature which has responded to three categories of internationally wrongful acts: (i) espionage activities; (ii) forcible activities; and (iii) activities outside consular and diplomatic functions. Each category is analysed in turn.

### ***Espionage activities***

Espionage can be broadly defined as ‘secretly engag[ing] in the collection of particularly sensitive information for intelligence purposes, usually serving the interests of a State, international organization, or corporate entity.’<sup>94</sup> According to some authorities, there is an

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<sup>93</sup> Roger O’Keefe, ‘Khurts Bat v Investigating Judge of the German Federal Court’ (2012) 82 BYIL 613, 628.

<sup>94</sup> Christian Schaller, ‘Spies’, *MPEPIL* (OUP 2015) [1]. The definition remains controversial; see Simon Chesterman, ‘The Spy Who Came in from the Cold War: Intelligence and International Law’

exception to functional immunity under customary international law for espionage activities carried out by state officials.<sup>95</sup> At times, the absence of functional immunity is linked to the fact that espionage is by definition carried out covertly and thus, in the eyes of the host state, it does not have the ‘appearance’ of an official act.<sup>96</sup> However, this explanation hinges on factors—such as the degree of awareness of the ‘official nature’ of acts of foreign states—that are subjective and extraneous to the logic of immunity.<sup>97</sup> Denial of immunity in these cases can be best explained in the light of the international wrongfulness of the conduct to which it responds.

While there is an ongoing debate as to whether peacetime espionage as such is prohibited under international law,<sup>98</sup> at least some espionage activities engage the responsibility of the state undertaking them. For example, remote sensing—i.e. espionage from outer-space—can be contrasted with ‘penetrative’ espionage, which involves physical

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(2005) 27 *MichJIntlL* 1071, 1073; Iñaki Navarrete and Russell Buchan, ‘Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions’ (2018) 51 *CornellIntlLJ* 897, 901–902.

<sup>95</sup> See *Prosecutor v Blaškić* (n 80) [41]; Oppenheim (n 12) 618–619; Hans Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ (1947) 1 *IntlLQ* 153, 159; Rain Liivoja, *Criminal Jurisdiction Over Armed Forces Abroad* (CUP 2017) 95.

<sup>96</sup> eg De Sena (n 62) 10.

<sup>97</sup> Text at n 80.

<sup>98</sup> International law is generally silent on the issue and for many this silence translates into a permissive rule; see Leslie Edmondson, ‘Espionage in Transnational Law’ (1971) 5 *VandJTransnatlL* 434, 436; Geoffrey Demarest, ‘Espionage in International Law’ (1995) 24 *DenvJIL&Poly* 321, 339; Christopher Baker, ‘Tolerance of International Espionage: A Functional Approach’ (2003) 19 *AmUIntlLRev* 1091, 1092; Chesterman (n 94) 1072; John Radsan, ‘The Unresolved Equation of Espionage and International Law’ (2006) 28 *MichJIntlL* 595, 596. For the contrary view, see Russell Buchan, *Cyber Espionage and International Law* (Bloomsbury 2018) 5; Navarrete and Buchan (n 94) 952; Jared Beim, ‘Enforcing a Prohibition on International Espionage’ (2017) 18 *ChiJIntlL* 647, 656. In the context of international armed conflicts, prosecution for espionage is expressly regulated: Convention respecting the Laws and Customs of War on Land (18 October 1907) art 30; Protocol Additional to the Geneva Conventions of 12 August 1949 (8 June 1977) art 46(1). See *Ex Parte Quirin*, 317 US 1 (1942); *Colepaugh v Looney*, 235 F2d 429 (10th Cir 1956); *Von Berenberg-Gossler* (30 May 1969) 52 *ILR* 492 (France, Court of Cassation).

intrusion into the territory of the state.<sup>99</sup> While it is difficult to point to a prohibition on the former,<sup>100</sup> the latter is likely to trigger a number of international obligations.<sup>101</sup> Even if not amounting to a breach of the principle of non-intervention,<sup>102</sup> penetrative espionage may constitute an infringement of customary international law governing the exercise of enforcement jurisdiction.<sup>103</sup> Enforcement jurisdiction—unlike its adjudicative and prescriptive counterparts—is strictly territorial.<sup>104</sup> Extraterritorial exercise of *jure imperii* activities without the consent of the forum state is plainly wrongful.<sup>105</sup> As Chesterman argues, the prohibition on extraterritorial enforcement jurisdiction

would clearly prohibit unauthorized entry into territory; it would also extend to unauthorized use of territory, such as Italian claims that CIA agents abducted an Egyptian cleric in Milan in February 2003 to send him to Egypt for questioning regarding alleged terrorist activities. It would also cover the

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<sup>99</sup> I owe this distinction to Russell Buchan.

<sup>100</sup> Spencer Beresford, 'Surveillance Aircraft and Satellites: A Problem of International Law' (1960) 27 *JAirL&Com* 107, 109.

<sup>101</sup> According to some, a general principle of 'territorial sovereignty' prohibits any physical intrusion in a state's territory by a state agent. This would make any type of penetrative espionage unlawful. See Michael Schmitt and Liis Vihul, 'Respect for Sovereignty in Cyberspace' (2017) 95 *TexLRev* 1639; Buchan (n 98) ch3; Sean Watts and Theodore Richard, 'Baseline Territorial Sovereignty and Cyberspace' (2018) 22 *Lewis&ClarkLRev* 771. For the opposite view, see Gary Corn and Robert Taylor, 'Sovereignty in the Age of Cyber' (2017) 111 *AJIL Unbound* 207.

<sup>102</sup> See Craig Forcese, 'Spies Without Borders: International Law and Intelligence Collection' (2011) 5 *JNatlSecL&Poly* 179, 198.

<sup>103</sup> See Katharina Ziolkowski, *Peacetime Regime for State Activities in Cyberspace* (NATO CCDCOE 2013) 163–164; Craig Forcese, 'Pragmatism and Principle: Intelligence Agencies and International Law' (2016) 102 *VaLRev* 67, 75; Iñaki Navarrete, 'L'espionnage en temps de paix en droit international public' (2016) 53 *ACDI* 1, 30.

<sup>104</sup> See *Lotus* (1927) PCIJ Ser A No 10, 18–19; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 462.

<sup>105</sup> See Alexander Orakhelashvili, 'Governmental Activities on Foreign Territory', *MPEPIL* (2010) [15]; Forcese (n 103) 75.

use of territorial airspace to transfer such persons as part of a programme of ‘extraordinary renditions’.<sup>106</sup>

Extraterritorial espionage activities without the state’s consent may also trigger international responsibility under several human rights treaties when, for instance, they consist in surveillance affecting the right to privacy of their targets.<sup>107</sup>

It is no coincidence that most instances of denial of functional immunity concern espionage activities of this kind. In these cases, the existence of an exception to functional immunity under customary international law is rarely the point. The measure denying immunity is taken as a direct response to the international wrong with a view to compel the state to which the official belongs to comply with its secondary obligations of cessation and reparation.

An early example is the *Flesche* case, in which a Dutch court convicted a German national for espionage activities prior to Germany’s invasion of the Netherlands.<sup>108</sup> The accused contended he had been called up for military service under the command of the German Legation at The Hague in 1939 and thus could not be prosecuted for acts performed after that date. The Court justified its exercise of jurisdiction as follows:

[Peacetime espionage], when taking place by order of a State, constitutes an international delinquency by that State against another State for which it is answerable under international law; as regards the individual spy, ... it is a crime falling exclusively under the criminal jurisdiction of the State against which he is operating. It is a crime governed by the sovereign legislation of

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<sup>106</sup> Simon Chesterman, ‘Secret Intelligence’, *MPEPIL* (2009) [14].

<sup>107</sup> See Forcese (n 102) 193; Navarrete (n 103) 35ff.

<sup>108</sup> *In re Flesche*, Case No 87 (17 February 1949) 16 ILR 266 (Netherlands, Special Criminal Court of Amsterdam).

that State, and is unrestricted in this respect by any rules of international law.<sup>109</sup>

In the eyes of the Court, the state could exercise its jurisdictional competence precisely because of the internationally wrongful nature of the act over which jurisdiction was exercised. The resulting denial of functional immunity was a prerogative of the ‘injured state’ to respond to such ‘international delinquency’. The link between denial of immunity and implementation of international responsibility was explicit.

A more recent example is the judgment in the *Bental* case, in which the Swiss Federal Criminal Court convicted an Israeli officer of Mossad for attempting to wiretap the line of a suspected terrorist in Switzerland.<sup>110</sup> The Court did not address whether international law provided an exception to functional immunity; it made it explicit that prosecution of the accused was directly connected to the fact that the crime in question was a ‘blatant violation of Swiss sovereignty’.<sup>111</sup> What is more, the accused was liberated shortly after his conviction, when Israel issued an official apology and paid £1.2 million compensation<sup>112</sup>—that is, when Israel provided reparation for its wrongful conduct in the form of both compensation and satisfaction. In this case, denial of functional immunity was clearly instrumental to implementing Israel’s responsibility for its wrongful act against Switzerland.

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<sup>109</sup> *ibid* 272.

<sup>110</sup> *Swiss Federal Prosecutor v Bental*, No 9X.1/1999 (7 July 2000) (Switzerland, Federal Criminal Court) <[www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr\\_1999/Entscheide\\_9X\\_1999/9X.1\\_\\_1999.html](http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_1999/Entscheide_9X_1999/9X.1__1999.html)>.

<sup>111</sup> *ibid* [10(b)] (author’s translation).

<sup>112</sup> Fiona Fleck, ‘Swiss Sentence Mossad Spy over Failed Phone-Tap’ (*The Telegraph*, 7 July 2000) <[www.telegraph.co.uk/news/worldnews/europe/switzerland/1347471/Swiss-sentence-Mossad-spy-over-failed-phone-tap.html](http://www.telegraph.co.uk/news/worldnews/europe/switzerland/1347471/Swiss-sentence-Mossad-spy-over-failed-phone-tap.html)>.

Penetrative espionage is also likely to infringe the rules governing aerial and maritime traffic in the territory of the state. State aircrafts that enter the airspace of another state without authorisation, even more so if the purpose is to gather intelligence, are in breach of international law.<sup>113</sup> Similarly, espionage activities turn any entry into the territorial waters of another state into ‘non-innocent’ (and thus unlawful) passage.<sup>114</sup> Most of the case law invoked to support a purported exception to functional immunity for espionage is a response to international wrongs of this kind. An early case occurred in 1951, when a US military airplane was intercepted by Soviet fighters over Hungary and forced to land.<sup>115</sup> The crew was charged with aiding spies and saboteurs, but ultimately convicted only for unlawful crossing of the Hungarian border. Though not addressing the issue of immunity, the United States protested against this detention, which it deemed unlawful.<sup>116</sup> Subsequently, the United States obtained the liberation of the crew by paying

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<sup>113</sup> Art 3 of the Convention on International Civil Aviation (7 December 1944) 15 UNTS 295. See Oliver Lissitzyn, ‘The Treatment of Aerial Intruders in Recent Practice and International Law’ (1953) 47 AJIL 559, 586; A Majid, ‘Jural Aspects of Unauthorised Entry Into Foreign Airspace’ (1985) 32 NILR 251, 253–254; John T Phelps, ‘Aerial Intrusions by Civil and Military Aircraft in Time of Peace’ (1985) 107 MilLRev 255, 291–292; Brian E Foont, ‘Shooting down Civilian Aircraft: Is There an International Law?’ (2007) 72 JAIRL&Com 695. See also Kubo Mačák, ‘Was the Downing of the Russian Jet by Turkey Illegal?’ (*EJIL:Talk!*, 26 November 2015) <[www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal](http://www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal)>.

<sup>114</sup> Art 19(2)(c) UNCLOS explicitly lists espionage as making passage ‘prejudicial to the peace, good order or security of the coastal State’. See also Ingrid Delupis, ‘Foreign Warships and Immunity for Espionage’ (1984) 78 AJIL 53.

<sup>115</sup> *Summary of Political and Economic Developments in Hungary in 1951, Document 280* (1951) 4 Foreign Relations of the United States 1482, 1486. See also Lissitzyn 581.

<sup>116</sup> ‘Formal Diplomatic Claims Preferred Against Hungary and USSR for Their Conduct in 1951 Plane Case’ (1953) 28 DeptStBull 496.

US \$123,000 to the Hungarian government.<sup>117</sup> The USSR consistently maintained the position that it was reacting to an international wrong committed by the United States.<sup>118</sup>

In 1960, a U-2 reconnaissance aircraft of the United States was shot down within the territory of the Soviet Union and its pilot, Francis Gary Powers, was captured and put on trial.<sup>119</sup> The United States—in an unusual move<sup>120</sup>—admitted that the flight was part of a series of intelligence-gathering missions.<sup>121</sup> The Soviet Union protested vehemently and proposed a UN Security Council resolution ‘[c]ondemning the incursions by the United States aircraft into other states and regard[ing] them as aggressive acts’.<sup>122</sup> Shortly thereafter, a Soviet court convicted Powers for espionage upon finding that:

[T]he intrusion of the American military intelligence plane constitutes a criminal breach of a generally recognized principle of international law, which establishes the exclusive sovereignty of every State over the air space above its territory.... Violation of this sacred and immutable principle of

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<sup>117</sup> The dispute between the two states also reached the ICJ but was struck out for lack of jurisdiction: *Aerial Incident of 7 October 1952* (United States v USSR) (Order) [1956] ICJ Rep 9. See Kay Hailbronner and Daniel Heilmann, ‘Aerial Incident Cases before International Courts and Tribunals’, *MPEPIL* (OUP 2009) [4].

<sup>118</sup> ‘Soviet Note of December 30, 1954, to the United States’, Annex (2) in *Aerial Incident of 7 October 1952* (United States v USSR) (Application Instituting Proceedings) 29 <[www.icj-cij.org/files/case-related/28/028-19550602-APP-1-00-EN.pdf](http://www.icj-cij.org/files/case-related/28/028-19550602-APP-1-00-EN.pdf)>.

<sup>119</sup> Quincy Wright, ‘Legal Aspects of the U-2 Incident’ (1960) 54 *AJIL* 836; Oliver J Lissitzyn, ‘Some Legal Implications of the U-2 and RB-47 Incidents’ (1962) 56 *AJIL* 135.

<sup>120</sup> See Delupis (n 114) 66 (noting that states rarely acknowledge responsibility for espionage).

<sup>121</sup> *United States Plane Downed in Soviet Union, Statement by Secretary Herter* (1960) 42 *Dept St Bull* 816. See Wright (n 119) 838; Demarest (n 98) 341.

<sup>122</sup> Wright (n 119) 841. The United States defended its action on the basis of previous espionage activity by the USSR; see Edmondson (n 98) 447.

international relations creates in the present conditions a direct menace to universal peace and international security.<sup>123</sup>

The United States did not object the shooting down and prosecution of Powers as such.<sup>124</sup> Some argue that the US tacit acceptance of the denial of functional immunity would demonstrate the US recognition of an exception in these circumstances.<sup>125</sup> However, it is more plausible that the United States was aware that prosecution of its official was a measure employed to secure the reparation it owed to the Soviet Union for the intrusion into the airspace of the latter.<sup>126</sup> This can be also inferred, *a contrario*, from the protests that the United States lodged in comparable incidents that did not involve intrusions in the territory of the forum state.<sup>127</sup>

That denial of immunity in these instances played an important role in the implementation of international responsibility is further demonstrated by the markedly different state practice characterising incidents where the wrongfulness of the intrusion into the territory of a state could be excluded by circumstances such as necessity or *force majeure*.<sup>128</sup> In 1964, for example, an RB-66 reconnaissance plane was shot down in East Germany and its US crew was captured.<sup>129</sup> This incident had all the characteristics of the *Powers* case and would have likely unfolded in a similar fashion; however, the United

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<sup>123</sup> *Powers Case* (19 August 1960) 30 ILR 69, 73 (USSR, Supreme Court).

<sup>124</sup> Lissitzyn (n 119) 135–136.

<sup>125</sup> See Migliorino (n 87) 792. See also, in a narrower sense, De Sena (n 62) 134.

<sup>126</sup> cf Demarest (n 98) 341.

<sup>127</sup> eg the seizing of the *Pueblo* by North Korea in 1968, which according to the United States occurred on the high seas; see Ximena Hinrichs Oyarce, ‘Pueblo Incident (1968)’, *MPEPIL* (OUP 2007). See also Delupis (n 114) 66 (arguing that the seizing would be unlawful even within the territorial waters). But see Edmondson (n 98) 447 (arguing that the incident supports a prohibition on espionage).

<sup>128</sup> cf De Sena (n 62) 114–115.

<sup>129</sup> ‘The RB-66 Issue’ (*NY Times*, 22 March 1964) E1.

States went to ‘unusual lengths’ to assure that the plane went off course and was not engaged in reconnaissance activities.<sup>130</sup> Once the United States took measures to ensure that similar accidents would not occur again—that is, when it provided assurances of non-repetition—the Soviet Union freed the US prisoners.<sup>131</sup> Similar incidents in which the United States promptly recognised the wrongful nature of the intrusion into Soviet airspace and issued an apology all concluded with the release of the US captives without trial.<sup>132</sup> These incidents reinforce the view that, when denial of functional immunity occurs, it is an instrument to implement the international responsibility of the wrongdoing state.

***Forcible activities: destruction of property and extrajudicial killing***

If penetrative espionage is internationally wrongful, all the more so are forcible activities carried out in the territory of foreign states such as destruction of property and extrajudicial killing. These evidently run counter to the prohibition on the use of force and the human rights of the individuals affected by the activities.<sup>133</sup> Some of the cases cited in support of the purported exception to functional immunity are reactions to breaches of this kind.

The most notorious is the *McLeod* case.<sup>134</sup> Following the *Caroline* incident of 1837,<sup>135</sup> McLeod—a British official—was arrested in the United States and charged with

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<sup>130</sup> *ibid.*

<sup>131</sup> ‘Russians to Free Rest of Jet Crew, Rusk Announces’ (*NY Times*, 23 March 1964) 7.

<sup>132</sup> eg Kuril incident of 1968: Samuel Jameson, ‘U.S. Shelves Policy to Win Jet Release’ (*Chicago Tribune*, 6 July 1968) 16; Leninakan incident of 1970: Terrence Smith, ‘Freedom Was Promised: 2 U.S. Generals Are Freed and Returned to Turkey’ (*NY Times*, 10 November 1970) 1. The United States had brought proceedings before the ICJ a few years earlier with regard to a similar incident: *Aerial Incident of 7 November 1954 (United States v USSR)* (Order of 7 October 1959) [1959] ICJ Rep 276. See also Migliorino (n 87) 792–793.

<sup>133</sup> cf Orakhelashvili, ‘Governmental Activities’ (n 105) [19].

<sup>134</sup> See Robert Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 AJIL 82.

<sup>135</sup> For an account, see Christopher Greenwood, ‘The Caroline’, *MPEPIL* (2009).

participating in the attack against the vessel moored in the US port. In the inter-state correspondence that followed, British Minister Fox objected to McLeod's prosecution on grounds of non-personal responsibility of state officials for acts carried out on behalf of their state.<sup>136</sup> Since US Secretary of State Webster conceded this point,<sup>137</sup> this correspondence is often cited as one of the earliest statements of the principle of functional immunity.<sup>138</sup> And yet, this principle was not followed on that occasion.<sup>139</sup> Despite the exchanges between the two state representatives, McLeod was tried (and eventually acquitted) in the United States.<sup>140</sup> Thus, some argue that the *McLeod* case provides support for the purported exception to functional immunity for non-consensual acts in the territory of foreign states.<sup>141</sup>

At the same time, the prosecution of McLeod occurred in the context of one of the seminal disputes concerning the use of force between states. The United States had unequivocally invoked the responsibility of the United Kingdom in the correspondence between their representatives.<sup>142</sup> Arguments concerning the wrongfulness of the UK

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<sup>136</sup> *Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr McLeod* (1840–41) 29 BFSP 1126, 1127 ('It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who with the sanction or by the orders of the constituted authorities of a State engaged in military or naval enterprises in their country's cause.').

<sup>137</sup> *ibid* 1131.

<sup>138</sup> eg Hans Kelsen, *Principles of International Law* (Rinehart 1952) 236; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407, 413; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 110; Greenwood (n 135) [11]; Keitner, 'Forgotten History' (n 79) 752.

<sup>139</sup> See Tomonori (n 83) 262; Benedetto Conforti, 'In tema di immunità funzionale degli organi statali stranieri' [2010] RivDirInt [4]; Pisillo Mazzeschi (n 62) 522; Frulli (n 62) 483.

<sup>140</sup> *People v McLeod*, 25 Wend 483 (NY 1841).

<sup>141</sup> eg Migliorino (n 87) 789.

<sup>142</sup> *Correspondence between Great Britain and the United States, respecting the Destruction of the Steamboat Caroline* (1841–42) 30 BFSP 193.

actions and the duty to provide reparation had a prominent role in the decision on McLeod's immunity; they were submitted by the prosecutor<sup>143</sup> and the defence,<sup>144</sup> and they occupied a significant part of the Court's reasoning.<sup>145</sup> While the Court remained ambiguous as to the basis on which it denied functional immunity,<sup>146</sup> indications of an instrumental role of non-recognition of immunity can be inferred from the emphasis on the international responsibility of the United Kingdom and the context in which the judgment was issued, particularly in the light of the correspondence between the two states involved.

More recently the German Federal Court of Justice heard a case concerning a KGB agent charged with killing two political exiles in West Germany in 1959 despite the crime being committed under the orders of the Soviet Union.<sup>147</sup> The judgment offers the features of an instrumental response to a prior wrong. The Court found that, in ordering the execution of two political murders in West German territory, the Soviet Union 'grossly ignor[ed] all principles of civilisation and the obligations of international law governing the appropriate diplomatic relations between two states.'<sup>148</sup> Denial of functional immunity was not justified on the basis of a customary exception,<sup>149</sup> but it stemmed directly from this

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<sup>143</sup> *People v McLeod* (n 140) 541-542 ('Great Britain has taken the lead amongst modern nations in establishing the principle that she will not listen to a demand for redress, however just, after the demanding nation has attempted by violence to redress itself, until the offensive act of violence is first atoned for.').

<sup>144</sup> *ibid* 562, 563 ('No other than the law of nations has been violated, and according to that code must satisfaction be sought and obtained.').

<sup>145</sup> *ibid* 581.

<sup>146</sup> The decisive issue appeared to be one of standard of proof: see *ibid* 602.

<sup>147</sup> *Staschyinskij* (19 October 1962) 9 StE 4/62 <<https://openjur.de/u/55500.html>>. See Van Alebeek (n 1) 125.

<sup>148</sup> *Staschyinskij* (n 147) [152] (author's translation).

<sup>149</sup> The Court simply found the agent bore individual criminal responsibility by virtue of his 'moral self-determination': *ibid* [137].

finding on the international responsibility of the USSR and on the duty to provide reparation.

That denial of functional immunity can be a means to implement international responsibility for wrongful acts committed in the territory of the forum is also evident in the *Rainbow Warrior* case.<sup>150</sup> Following the explosion of a civilian vessel in the port of Auckland, two French secret agents were arrested, charged with manslaughter and wilful damage, and sentenced to ten years imprisonment in New Zealand, regardless of their action being an undercover (but official) operation.<sup>151</sup> The resulting dispute between New Zealand and France was submitted to the mediation of the UN Secretary-General, who ruled that the officials should be returned to French custody and detained for a period of three years.<sup>152</sup> New Zealand did not fully articulate a theory for the denial of the French official immunity. In its Memorandum to the Secretary General, New Zealand addressed at lengths the international responsibility of France for the attack on its territory and went on to specify that, as a form of reparation, it specifically sought the punishment of the agents responsible for the attack.<sup>153</sup>

It is hard to escape the conclusion that New Zealand considered the detention of the French officials a specific form of reparation required on the part of France to remedy its wrongful act. The UNSG ruling—which did not address the issue of immunity<sup>154</sup>—

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<sup>150</sup> See Michael Pugh, 'Legal Aspects of the Rainbow Warrior Affair' (1987) 36 ICLQ 655.

<sup>151</sup> *R v Mafart and Prieur* (1985) 74 ILR 241 (New Zealand, High Court).

<sup>152</sup> UNSG, 'Ruling on Rainbow Warrior Affair between France and New Zealand' (1987) 26 ILM 1346 [UNSG Ruling].

<sup>153</sup> UNSG Ruling (n 152) 1352, 1356. The injured state has the right to elect the preferred form of reparation under art 43(2)(b) ARSIWA.

<sup>154</sup> See Migliorino (n 87) 795.

confirmed that such detention was an important element of the reparation owed to New Zealand.<sup>155</sup> Later events endorse this reading. Within two years, both officials were released contrary to France's agreement with New Zealand.<sup>156</sup> An arbitral tribunal constituted under the terms of this agreement held that, in releasing the officials, France had again breached international law.<sup>157</sup> The persistence with which New Zealand sought the enforcement of the detention of the two French officials confirms that this detention was the form of reparation pursued since the trials carried out before New Zealand courts. Denial of functional immunity in this case was an instrument to induce France to comply with its secondary obligations, including obtaining the desired reparation.

The purported exception to functional immunity analysed in this Section was applied by a Divisional Court of the High Court of England and Wales in the *Khurts Bat* case.<sup>158</sup> The accused was the head of the Mongolian Secret Service and a former special secret service agent of Mongolia, who had been arrested in the United Kingdom on suspicion of having abducted a Mongolian national in France and transported him to the Mongolian embassy in Berlin. Since the Divisional Court was not concerned with issues of prosecution in the United Kingdom but with extradition to Germany,<sup>159</sup> the reasoning it employed was rather odd. The Court (per Moses LJ) considered, *inter alia*, whether the

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<sup>155</sup> See UNSG Ruling (n 152) 1370.

<sup>156</sup> Exchanges of Letters between the Government of New Zealand and the Government of France concerning the Implementation of the Ruling of 6 July 1986.

<sup>157</sup> *Rainbow Warrior (New Zealand/France)* (Award of 30 April 1990) (1990) 20 RIAA 215, 255-264. However, the tribunal also found that this declaration was a sufficient form of reparation; *ibid* 272-273.

<sup>158</sup> *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), ILDC 1779 (UK 2011).

<sup>159</sup> Extradition cases are not particularly instructive for the establishment of rules of functional immunity; see text at n 219.

accused would benefit from functional immunity *in Germany* and concluded that he would not.<sup>160</sup> This approach is unusual, as the question of whether the accused would benefit from immunity in Germany is ultimately a question of German law.<sup>161</sup> In any event, it is no coincidence that the ‘non-consensual activities’ for which a purported exception to immunity was identified (transnational abduction, arbitrary detention, and extraordinary rendition) were breaches of *erga omnes* obligations.<sup>162</sup> In these circumstances, the United Kingdom may have been entitled to take measures to implement international responsibility even if not directly injured by the wrongful conduct. This aspect, which the Court failed to explore, would have strengthened the legality of the Court’s verdict under international law.

#### ***Activities outside consular and diplomatic functions***

According to Van Alebeek, ‘[w]hen a diplomat or consular agent commits a crime in the course of activities that are *not* part of the functions the forum State agreed could be exercised on its territory, the crime will not be recognised as an official act for functional immunity purposes, even if it were clearly committed under the authority of the home State.’<sup>163</sup> However, state practice is not wholly supportive of this conclusion and much of the case law used to substantiate it presents strong elements of implementation of international responsibility.

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<sup>160</sup> *ibid* [63-101].

<sup>161</sup> See O’Keefe, ‘Khurts Bat’ (n 93) 624.

<sup>162</sup> Or possibly peremptory norms: UN HRC, CCPR General Comment No 29 (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 [11]; Working Group on Arbitrary Detention, Deliberation No 9 (24 December 2012) UN Doc A/HRC/22/44 [51]–[75].

<sup>163</sup> Van Alebeek (n 63) 506.

When confronted with questions of diplomatic and consular immunity, most states are bound by the provisions of two widely ratified treaties: the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR).<sup>164</sup> Diplomatic agents enjoy broad personal immunity while in office.<sup>165</sup> Like other high-rankings state officials, issues of functional immunity emerge only after their term ends. In this regard, Article 39(2) VCDR provides that former diplomats continue to enjoy immunity ‘with respect to acts performed by such a person in the exercise of his [sic] functions as a member of the mission.’<sup>166</sup> There is no indication that these acts are limited to the exercise of the functions to which the receiving state explicitly gave its consent. The Federal Constitutional Court of Germany confirmed this interpretation in a case involving allegations that the former Syrian ambassador to the German Democratic Republic (GDR) aided and abetted terrorist bombing in West Berlin.<sup>167</sup> The Court held that, had the accused acted pursuant to the instructions of the sending state, his acts would have been official acts covered by functional immunity regardless of whether they fell within the meaning of ‘diplomatic functions’ under Article 3 VCDR.<sup>168</sup> At the same time, the Court denied functional immunity on the basis that the ambassador had been accredited by the GDR before the German unification, and the obligations of the GDR did not bind the Federal

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<sup>164</sup> The immunity codified in these treaties does not necessarily correspond to the immunity of state officials under general international law; see Frulli (n 62) 484. At the same time, there is no indication that states intended to depart from custom when drafting these treaties; see Haro Van Panhuys, ‘In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities’ (1964) 13 ICLQ 1193, 1206; Van Alebeek (n 1) 110; O’Keefe, *International Criminal Law* (n 1) 453.

<sup>165</sup> See text at n 22.

<sup>166</sup> See further Denza (n 22) 356.

<sup>167</sup> *Former Syrian Ambassador to the German Democratic Republic*, No 2 BvR 1516/96 (10 June 1997) 115 ILR 595 (Germany, Federal Constitutional Court).

<sup>168</sup> *ibid* 605-607.

Republic.<sup>169</sup> This highly formalistic reasoning stands out in the context of a case that dealt with acts of support of terrorist bombings which, according to the Court, engaged the responsibility of Syria.<sup>170</sup> In any event, whether denial of immunity was instrumental in implementing this responsibility was not further explored by the Court.

With respect to consular officials, the VCCR provides no personal immunity, but it establishes that both serving and former consular officials benefit from functional immunity. In this regard, the language of the Convention has generated some confusion. Article 43 VCCR states that serving consular officials are immune from the jurisdiction of the host state ‘in respect of acts performed in the exercise of their *consular* functions’.<sup>171</sup> Conversely, under Article 53(4) former consular officials continue to benefit from immunity ‘with respect to acts performed by a consular officer or a consular employee *in the exercise of his* [sic] *functions*’.<sup>172</sup> Given the different language used by the two provisions, there is some debate as to whether the immunity of serving consular officials covers all ‘official’ acts or only those that are ‘consular’ in nature. Limiting the scope of the immunity of serving consular officials to ‘consular’ acts is odd and inconsistent with the rationale of functional immunity as a mechanism to divert responsibility towards the state for acts committed on its behalf.<sup>173</sup> This is confirmed by the ILC Commentary to the

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<sup>169</sup> *ibid* 614-617.

<sup>170</sup> *ibid* 606.

<sup>171</sup> Vienna Convention on Consular Relations (24 April 1963) 596 UNTS 261 [VCCR] art 43 (emphasis added).

<sup>172</sup> VCCR art 53(4) (emphasis added).

<sup>173</sup> In this sense, see *Re Rissmann* (n 80) 581 (speaking of consular immunity as a substantive defence). *contra* note by Luigi Condorelli in (1976) 2 *ItalYrbkIntL* 339.

Draft Articles on Consular Relations, which refers interchangeably to ‘consular acts’ and ‘official acts’ of consular agents:

The rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State, is part of customary international law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative.<sup>174</sup>

Moreover, if Article 43 and 53 VCCR were different in scope, former consular officials would paradoxically benefit from greater immunity than incumbent ones. All these elements suggest that functional immunity of serving and former consular agents covers all official acts performed as consular officers.<sup>175</sup>

The case law supporting the narrower interpretation and denying immunity for acts outside ‘consular’ functions reveal, at a closer look, that denial of functional immunity served a fundamental role in implementing the international responsibility of the sending state.<sup>176</sup> In *Gerritsen v de la Madrid Hurtado*,<sup>177</sup> Mr Gerritsen filed tort proceedings against, among others, members of the Mexican Consulate in the United States alleging that, as he was distributing leaflets in front of the Consulate, he was assaulted, kidnapped, and interrogated by the officers. The Court of Appeals for the Ninth Circuit paid particular attention to the fact that these acts went beyond ‘the limits permitted by international

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<sup>174</sup> ILC, ‘Draft articles on consular relations and commentaries’ (1961) II YBILC 92, 117.

<sup>175</sup> See O’Keefe, *International Criminal Law* (n 1) 454–455.

<sup>176</sup> Most case law deals with former consular officials, though in some cases it is not clear whether the agents were still in office during the proceedings. With respect to incumbent consular officials, countermeasures may be limited on functional grounds; see text at n 53.

<sup>177</sup> *Gerritsen v de la Madrid Hurtado*, 819 F 2d 1511, 1516 (1987), rev’d *Gerritsen v Escobar Y Cordova*, 721 FSupp 253, 259 (CD Cal 1988).

law'.<sup>178</sup> Indeed, the Court made an explicit finding on the international responsibility resulting by the acts of these state officials:

Wrongful acts committed by an official or employee of a Mexican consulate within the United States to suppress criticism of Mexico within this country constitute an interference with the United States' internal affairs because these acts impair the citizenry's ability to promote self-government through robust discourse concerning issues of public import. Therefore, the acts of the two consuls general and the vice consul alleged in the complaint are not "within the limits permitted by international law".<sup>179</sup>

As a result, the implementation of the responsibility of Mexico was a key component of the decision to deny the immunity of Mexican state officials.<sup>180</sup>

Similar considerations apply to the *Abu Omar* case.<sup>181</sup> Two members of the US consular staff in Italy, alongside with various CIA agents, were accused of aiding in the abduction of Osama Mostafâ Hassan Nasr (Abu Omar), the Imam of Milan, as part of the extraordinary rendition programme of the United States. The two consular agents pleaded functional immunity under Article 43 VCCR and under customary international law before the Italian courts. Like the US court in *Gerritsen*, the Italian Court of Cassation interpreted Article 43 as comprising only 'consular functions' and held that kidnapping was not part of these functions as it was incompatible with 'the laws ... of the receiving state'.<sup>182</sup> The implications of this interpretation are illogical, considering that functional immunity would have no meaning if it could be denied by virtue of a mere violation of the laws of the

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<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> For Van Alebeek, this was based on the notion of 'state authority under international law': (n 1) 120.

<sup>181</sup> *Abu Omar*, No 46340/2012 (29 November 2012) ILDC 1960 (Italy, Supreme Court of Cassation).

<sup>182</sup> *ibid* [23.4].

receiving state. However, it is significant that in the same judgment the Court declared that the allegations against the US officials concerning breaches of international humanitarian law and crimes against humanity were ‘serious’,<sup>183</sup> and that the practice of extraordinary rendition was contrary to international humanitarian law and other international obligations on the prohibition on torture.<sup>184</sup> Taken together, these findings situate denial of functional immunity in the framework of an instrumental response to perceived wrongful acts of the state to which the officials belong.

### 5.3.3. International crimes and denial of functional immunity

#### *An emerging exception to functional immunity?*

There is ongoing debate about the existence of an international crime exception to functional immunity under customary international law.<sup>185</sup> Some statements concerning the incompatibility of immunity and the punishment of serious crimes committed by Nazi officials during World War II can be found in the judgments handed down by the IMT at Nuremberg and by the District Court of Jerusalem in *Eichmann*.<sup>186</sup> In these cases, however,

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<sup>183</sup> *ibid* [23.5].

<sup>184</sup> *ibid* [23.7]

<sup>185</sup> eg Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 EJIL 237; Antonio Cassese, ‘When May Senior State Officials Be Tried for International Crimes?’ (2002) 13 EJIL 853; Hazel Fox, ‘State Immunity and the International Crime of Torture’ [2006] EHRLR 142; Akande and Shah (n 1); Alexander Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (2011) 22 EJIL 849; Roger O’Keefe, ‘An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely’ (2015) 109 AJIL Unbound 167.

<sup>186</sup> IMT (Nuremberg), *Judgment and Sentences* (1 October 1946) in (1947) 41 AJIL 172, 221 (‘He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.’); *Attorney-General v. Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem) [21].

the issue of immunity was never raised and it is unclear whether Germany could have legally done so at Nuremberg given its status as occupied territory.<sup>187</sup> The watershed moment was the judgment of the House of Lords in the *Pinochet* case. Though largely based on the language of the Torture Convention,<sup>188</sup> some saw this judgment as the catalyst for the crystallisation of a customary rule excluding functional immunity with respect to international crimes.<sup>189</sup> Yet, there is much controversy as to whether sufficient state practice and *opinio juris* support a new exception to the customary rules of functional immunity.<sup>190</sup>

Following *Pinochet*, only a handful of states passed legislation (some of which later abrogated it) removing functional immunity for international crimes and an even smaller number of courts denied immunity in such scenarios.<sup>191</sup> In some of these cases, the relevant foreign states never invoked immunity for their officials, leaving open the question as to whether these instances count as acquiescence in favour of the exception.<sup>192</sup> In the civil context, denial of functional immunity for international crimes is even more rare.<sup>193</sup> These

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<sup>187</sup> See Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 AJIL 731, 763; O'Keefe, *International Criminal Law* (n 1) 438–439.

<sup>188</sup> The ratio decidendi of the majority was that 'torture', as defined in art 1(1) of Torture Convention, could not attract immunity: *Pinochet* (n 1) 220–1 (Lord Saville), 231–2 (Lord Millet). This ratio was confirmed in *Jones v Saudi Arabia* (n 66) [19] (Lord Bingham), [81]–[83] (Lord Hoffmann).

<sup>189</sup> eg Bianchi (n 185) 259; Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms' (2007) 18 EJIL 955, 969.

<sup>190</sup> See Wuerth (n 187) 766; O'Keefe, 'International Crime Exception' (n 185) 168; Sean D Murphy, 'Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?' (2018) 112 AJIL Unbound 4 (pointing to the absence of 'widespread and representative, as well as consistent' practice necessary to establish a new rule of custom).

<sup>191</sup> Text at nn 208–217. See also Murphy (n 190) 5–7.

<sup>192</sup> See Wuerth (n 187) 750.

<sup>193</sup> Text at nn 223–228.

limited departures from the rule of functional immunity are counterbalanced by cases in which immunity *ratione materiae* was granted regardless of the nature of the crimes.<sup>194</sup> Moreover, few states have expressly made statements in favour of an exception to functional immunity, while others have expressly rejected this idea.<sup>195</sup>

The debate over an international crime exception has produced conflicting outcomes. ILC Special Rapporteur Escobar Hernandez departed from the position taken by her predecessor—according to whom no international crime exception had emerged in the practice of states<sup>196</sup>—and found that ‘it [was] possible to identify a trend in favour of the exception’.<sup>197</sup> This finding—reflected in the text of Draft Article 7 as approved by the ILC in 2017<sup>198</sup>—has since come under criticism for being premature.<sup>199</sup> When presented to the UNGA Sixth Committee, the reaction by states was mixed and many expressed reservations as to the extent to which Draft Article 7 was a codification of existing custom.<sup>200</sup>

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<sup>194</sup> For example, the German Federal Prosecutor refused to open an investigation against the former president of China, Jiang Zemin: Amnesty International, *Germany: End Impunity Through Universal Jurisdiction*, EUR 23/003/2008 (16 October 2008) 71-72 <[www.amnesty.org/en/documents/EUR23/003/2008/en](http://www.amnesty.org/en/documents/EUR23/003/2008/en)>. See also Cedric Ryngaert, 'Functional immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law' (*EJIL:Talk!*, 2 March 2020) <[www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law](http://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law)>. In the civil context, see *Ye v Zemin*, 383 F.3d 620 (7th Cir 2004); *Jones v Saudi Arabia* (n 66).

<sup>195</sup> See, also for further analysis, O’Keefe, *International Criminal Law* (n 1) 443–444.

<sup>196</sup> Second report Kolodkin (n 81) 425 [90].

<sup>197</sup> Fifth report Escobar Hernandez (n 89) 76 [184].

<sup>198</sup> ILC, Report on the Work of its Sixty-Ninth Session, UN Doc A/72/10 (2017) 176.

<sup>199</sup> See Murphy (n 190) 4.

<sup>200</sup> See, also for further references, *ibid* 7.

Some argue that the existence of an exception should be inferred from the development of direct individual responsibility for international crimes under international law.<sup>201</sup> If the rationale of functional immunity is to deflect responsibility to the state when the individual state official is not the ‘actual’ defendant in the proceedings,<sup>202</sup> this logic would not apply when said proceedings involve crimes for which the individuals are personally responsible under international law.<sup>203</sup> Yet, any argument based on this principle is undermined by the fact that—as mentioned above—the rationale of functional immunity is contested.<sup>204</sup> Moreover, no theory of immunity can dispense with the requirements of state practice and *opinio juris* necessary to establish new custom. Given that state practice is scant and fragmented, there does not (yet) seem to be enough support for a customary exception for international crimes.<sup>205</sup>

Considering the unsettled nature of the law in this area, considerations pertaining to the implementation of international responsibility could play a fundamental role in justifying what would otherwise be, in all likelihood, unlawful breaches of the law of functional immunity. As argued in Chapter 3, the criminalisation of an offence under international law generally entails a number of obligations for the state, inducing the duty to criminalise and prosecute the offence, and the duty to provide effective remedies for the

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<sup>201</sup> This argument has been proposed in different forms, although they are all based on the incompatibility between individual responsibility and functional immunity: eg Akande and Shah (n 1) 840; Douglas (n 83) 338; Sanger (n 87) 220; Van Alebeek (n 63) 509.

<sup>202</sup> Text at n 80.

<sup>203</sup> See Akande and Shah (n 1) 840.

<sup>204</sup> For O’Keefe, there is no logical incompatibility, as the attribution of responsibility and the official character of the acts are separate questions; see *International Criminal Law* (n 1) 450–451.

<sup>205</sup> In this sense, O’Keefe, ‘International Crime Exception’ (n 185) 171.

victims.<sup>206</sup> In addition, when an international crime is committed by a state official, the responsibility of the state to which the official belongs may also be engaged by virtue of the breach of the same primary norms prohibiting the relevant conduct.<sup>207</sup> Denial of functional immunity may therefore play an important role in implementing the responsibility deriving from a breach of these obligations. While courts denying functional immunity in these cases tend to focus on the existence of a customary exception, there are features in their judgments pertaining to the implementation of international responsibility that may strengthen the international legality of these decisions.

***Implementation of international responsibility through denial of functional immunity for international crimes***

State practice with respect to non-recognition of functional immunity for international crimes can be divided into three groups. First, there are cases where courts deny functional immunity without discussing the relevant legal basis. An example of this is the Belgian Court of Cassation's judgment in *Sharon and Yaron*.<sup>208</sup> Upon recognising the personal immunity of the Israeli Prime Minister Sharon, the Court found jurisdiction over General Yaron without addressing the issue of functional immunity.<sup>209</sup> Cases like this offer little

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<sup>206</sup> See Sections 3.2.3 and 3.3.

<sup>207</sup> There is debate as to whether the primary norms concerning international crimes are the same for both states and individuals. The ICJ supported the notion of identity of obligations: *Bosnian Genocide* [2007] ICJ Rep 43 [166]. For a critical view, see Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 631, 641. See generally Sotirios-Ioannis Lekkas, *Duality of Responsibility in International Law* (DPhil thesis, University of Oxford, 2019) (on file with the author).

<sup>208</sup> *Re Sharon and Yaron* (n 20).

<sup>209</sup> Similarly, a New Zealand judge dismissed proceedings against the Israeli Lieutenant General Moshe Ya'alon for lack of evidence with no mention of immunity; see Treasa Dunworth, 'From Rhetoric to Reality: Prosecuting War Criminals in New Zealand' (2008) 5 NZYB Intl Law 163. For a similar case, see Salvatore Zappalà, 'The German Federal Prosecutor's Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?' (2006) 4 JICJ 602.

evidence of *opinio juris* with respect to the existence of a customary exception to functional immunity. Because denial of functional immunity follows directly from the finding that there are grounds to believe the official is responsible for an international crime, these cases may offer some indications that denial of immunity is a response to that wrong. However, the responsibility of the state and the instrumental nature of the response are not further addressed.

Second, there are cases in which issues of functional immunity are linked to the principle of universal jurisdiction.<sup>210</sup> As seen in Chapter 3, various instances of exercise of universal jurisdiction present the clear features of countermeasures, in that jurisdiction is exercised to remedy a state's failure to criminalise and prosecute international crimes.<sup>211</sup> If this framework can justify the exercise of universal jurisdiction, it should also exempt from responsibility for denial of functional immunity of former state officials. For example, in the *Bouterse* case, the District Court of Amsterdam addressed explicitly Suriname's failure to prosecute the crimes of which Bouterse was accused prior to deciding on the exercise of universal jurisdiction.<sup>212</sup> When considering the connected question of whether Suriname's former head of state benefitted from functional immunity, the District Court concluded in one sentence that the crimes did not attract immunity.<sup>213</sup> In a different case concerning the exercise of universal jurisdiction over a former Afghan state official, the Supreme Court of

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<sup>210</sup> Some examples of universal jurisdiction over former state officials did not address the issue of functional immunity: eg *Ely Ould Dah* (Ordonnance de mise en accusation) (25 May 2001) No 4/99/48 (Court of Assize of Montpellier).

<sup>211</sup> See Section 3.2.3.

<sup>212</sup> *Desi Bouterse* (Judgment) (20 November 2000) (Court of Appeal of Amsterdam) in (2000) 3 YIHL 677, 682.

<sup>213</sup> *Bouterse* (n 212) 687-688 [4.2] ('The Court of Appeal need not consider [the submission concerning functional immunity ...] because the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State.').

the Netherlands reached the same conclusion.<sup>214</sup> Similarly, the Swiss Federal Criminal Court in the *Nezzar* case explicitly found that Algeria was failing to comply with its international obligations to prosecute the accused (a former Algerian defence minister charged with war crimes) before concluding that the exercise of universal jurisdiction was warranted in that case.<sup>215</sup> With regard to functional immunity, the Court found it would be ‘contradictory’ to affirm an obligation to punish the most serious violations of human rights while espousing a broad concept of functional immunity.<sup>216</sup>

In a third group of cases, the non-existence of functional immunity for international crimes is put forward independently from issues of jurisdiction. The number of cases in this area is very small. Most of the practice cited in support of an exception to functional immunity consists in mere *obiter dicta* contained in decisions that did not rely upon the asserted exception.<sup>217</sup> The most prominent precedent remains the House of Lords judgment in the *Pinochet* case,<sup>218</sup> though the case was not concerned with the exercise of jurisdiction in the United Kingdom but with issues of extradition to Spain.<sup>219</sup> And yet, issues pertaining to the international responsibility of Chile were discussed by some judges before finding that the former Chilean head of state did not benefit from functional immunity. Lord Hutton addressed these issues with respect to one of the arguments raised by Chile, namely that

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<sup>214</sup> *H v Public Prosecutor* (Judgment) (8 July 2008) Case No 07/10063; ILDC 1071 (NL 2008) (Supreme Court of the Netherlands) [7.2].

<sup>215</sup> *Nezzar* (n 1) [3.4].

<sup>216</sup> *ibid* [5.4.3]. See Akande and Shah (n 1) 833–834; Wuerth (n 8) 221; O’Keefe, *International Criminal Law* (n 1) 448–449. See also Ammann’s note in ILDC 1933 (CH 2012) (criticising the vagueness of the reasoning adopted by the Court).

<sup>217</sup> eg *Lozano* (n 1) [6].

<sup>218</sup> See Wuerth (n 187) 735.

<sup>219</sup> See Colin Warbrick and Dominic McGoldrick, ‘Extradition Law Aspects of Pinochet 3’ (1999) 48 ICLQ 958.

Chile had a sovereign right to investigate and try the crimes of which Pinochet was accused before its own courts.<sup>220</sup> Lord Hutton made an express finding on the international responsibility of Chile, stating that ‘under international law Chile [was] responsible for acts of torture carried out by Senator Pinochet.’<sup>221</sup> Chile’s unwillingness to prosecute or extradite under the Torture Convention was also suggested by Lord Millet:

Chile insists on the exclusive right to prosecute [Pinochet]. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (*and it does not*) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.<sup>222</sup>

Overall, issues concerning Chile’s international responsibility did not have a central role in the judgment, though they were certainly present. The extent to which an alternative justification based on the framework of countermeasures would have supported the legality of this measure remained unexplored.

State practice concerning denial of functional immunity in civil proceedings is even less informative. With the exception of civil actions (as *partie civile*) attached to some of the criminal proceedings analysed in Chapter 3,<sup>223</sup> the only instances in which functional immunity was denied with respect to international crimes come from the ATS and TVPA litigation in the United States.<sup>224</sup> In these cases, the courts’ reasoning has been inconsistent

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<sup>220</sup> *Pinochet* (n 1) [245]-[255].

<sup>221</sup> *ibid* [262]. Nevertheless, Lord Hutton stressed that the central question was whether torture ‘was a function of the head of state of Chile under international law’: *ibid* [256].

<sup>222</sup> *ibid* [334] (emphasis added).

<sup>223</sup> eg *Ould Dah*, No 71/05 (Arrêt sur l’action civile) (1 July 2005) (France, Assizes Court of Gard); *Nezzar* (n 1).

<sup>224</sup> See Section 3.3.

and fraught with uncertainty.<sup>225</sup> In 2010, the Supreme Court held that functional immunity is not regulated by the FSIA but by the common law (including customary international law).<sup>226</sup> Following this decision, the case law split between courts that continued to recognise functional immunity,<sup>227</sup> and courts that denied immunity on the basis that international crimes cannot be considered ‘official acts’.<sup>228</sup> This finding in the context of civil proceedings is even more problematic than equivalent claims made in the criminal context. In civil actions, there is no trace of even that vague ‘trend’ towards an exception to functional immunity identified by some courts in criminal cases.<sup>229</sup> No particular attention in this context seems to have been paid to questions concerning the implementation of international responsibility. However, Chapter 3 showed that some of these judgments (particularly those under the TVPA) have great potential as means for the implementation of international responsibility.<sup>230</sup> Acknowledging this aspect would strengthen the claim that these measures are justifiable under customary international law despite being in breach of the customary rules of functional immunity.

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<sup>225</sup> Some courts did not address the question of functional immunity despite the fact that the defendant was a state official at the time of the acts: eg *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980). See also Bradley and Helfer (n 85) 223.

<sup>226</sup> *Samantar v Yousuf*, 560 US 305, 324, 130 S Ct 2278, 2292 (2010).

<sup>227</sup> eg *Belhas v Ya'alon*, 515 F3d 1279, 1287-1288 (DC Cir 2008); *Matar v Dichter*, 500 FSupp 2d 284, 291 (SDNY 2007), affd on other grounds, 563 F3d 9 (2d Cir 2009); *Doe v State of Israel*, 400 FSupp 2d 86, 105 (DDC 2005).

<sup>228</sup> eg *In re Estate of Ferdinand Marcos*, 25 F3d 1467, 1472 (9th Cir 1994); *Yousuf v Samantar*, 699 F3d 763, 776-777 (4th Cir 2012). The basis of such conclusions was itself unclear; see Bradley and Helfer (n 85) 225.

<sup>229</sup> See Bradley and Helfer (n 85) 240-241; Curtis Bradley, 'Foreign Official Immunity in U.S. Courts Since *Samantar*' (Lawfare, 17 December 2012) <[www.lawfareblog.com/foreign-official-immunity-us-courts-samantar](http://www.lawfareblog.com/foreign-official-immunity-us-courts-samantar)>. For the contrary view, see William S Dodge, 'Making Sense of the Fourth Circuit's Decision in *Samantar*' (OpinioJuris, 3 November 2012) <<http://opiniojuris.org/2012/11/03/making-sense-of-the-fourth-circuits-decision-in-samantar>>.

<sup>230</sup> See Section 3.3.

## 5.4. Interim Conclusion

The implementation of international responsibility has a role to play in supporting and potentially justifying denial of the immunity of foreign state officials. Personal immunity is generally excluded from this mechanism due to the fundamental role of the relevant officials in the performance of state functions. Yet, this is only a temporary shield. Functional immunity, which covers all ‘official acts’ of state officials, is more amenable to be denied in order to respond to wrongful acts of the state to which the officials belong. State practice supporting exceptions to functional immunity is sparse and ambivalent. At the same time, many cases in which functional immunity was denied clearly present the features of countermeasures. This is particularly evident with respect to denial of immunity for non-consensual acts performed in the territory of the forum state. In some cases, particularly those that occurred in the context of high-level disputes between the forum state and the alleged wrongdoer, the instrumental goals are explicit, and denial of immunity often achieved such goals. In this area, it seems that countermeasures provide not just an alternative but also the most plausible legal basis for denial of functional immunity. With respect to denial of functional immunity for international crimes, on the other hand, any firm conclusion on the existence of a customary exception would be premature. Indications of implementation of international responsibility in these judgments are less frequent, but they are certainly present. In this context, the countermeasures framework has strong potential for justifying possible breaches of the rules of immunity until an exception can be clearly identified in the practice and *opinio juris* of states. This rationale is further explained in the next and final chapter.

## 6. JURISDICTIONAL COUNTERMEASURES

The previous chapters have shown that state practice offers multiple examples of potential breaches of the rules governing jurisdiction and immunity which took place in response to prior wrongful acts of other states. Given that these measures were often instrumental in implementing the international responsibility of the targeted states—that is, in realising the obligations of cessation, reparation, and non-repetition stemming from the commission of internationally wrongful acts—they presented the features of potentially justified countermeasures. Measures consisting in breaches of the rules of jurisdiction and immunity ultimately result in the assertion/exercise of jurisdiction of a state and can therefore be collectively referred to as ‘jurisdictional countermeasures’. This Chapter ties together the findings of the previous chapters by investigating three further sets of questions common to all jurisdictional countermeasures. The first concerns the function of the countermeasures framework in relation to the rules of jurisdiction and immunity. Considering that states rarely characterise their measures as ‘countermeasures’, what does this qualification add and why would states rely on it to justify their action? These issues are addressed in Section 6.1. Section 6.2 considers the second set of questions. It deals with the extent to which measures consisting in breaches of the rules of jurisdiction and immunity may fulfil all the requirements of *lawful* countermeasures as prescribed by the customary rules of state responsibility. Finally, Section 6.3 considers potential normative objections to the use of jurisdictional countermeasures.

## 6.1. The function of jurisdictional countermeasures

The primary function of jurisdictional countermeasures, like all countermeasures, is the implementation of international responsibility. By exerting pressure on wrongdoing states, they aim to induce compliance with the secondary obligations of cessation, reparation, and non-repetition stemming from the commission of internationally wrongful acts and, in so doing, they reinforce the primary rule that was violated.<sup>1</sup> At the same time, it has already been observed that states resorting to countermeasures rarely do so in explicit terms.<sup>2</sup> In the case of jurisdictional countermeasures, this justification is almost never advanced as the primary legal basis for adoption.<sup>3</sup> On most occasions, states either rely on a purported rule of custom (i.e. the alleged existence of permissive bases of jurisdiction or exceptions to immunity) or do not address the question of legality under international law. It has also been noted that this is not detrimental to qualifying these measures as countermeasures if all the features of countermeasures are present.<sup>4</sup> Yet, it can be questioned whether qualifying this practice as countermeasures adds something meaningful to its interpretation or—seen from a different perspective—whether states receive any benefit from taking jurisdictional ‘countermeasures’ without characterising them as such.

The answer lies in the fact that most rules of jurisdiction and immunity—particularly those that are breached by the countermeasures analysed in this study—are rules of customary international law. Because the two constitutive components of custom

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<sup>1</sup> See Mary O’Connell, *The Power and Purpose of International Law* (OUP 2008) 257–258; Monica Hakimi, ‘Unfriendly Unilateralism’ (2014) 55 HarvILJ 105, 121.

<sup>2</sup> See Section 1.3.

<sup>3</sup> Iran passed some laws labelled ‘countermeasures’ that also contain provisions on denial of immunity; see Section 4.4.

<sup>4</sup> See Section 1.3.

(state practice and *opinio juris*<sup>5</sup>) evolve with the reality of inter-state relations, customary international law is in a constant state of flux.<sup>6</sup> Moreover, custom is general in character, thus a change in the law will affect all states.<sup>7</sup> Since states are both law-recipients and law-makers with respect to custom, their conduct is never only a matter of compliance with or breach of customary international law. A state acting in accordance with a rule of custom contributes to strengthening the rule; a state departing from the same rule through its acts may weaken the rule or put the existence of the rule in question. In other words, as D'Amato puts it, '[e]ach deviation contains the seeds of a new rule'.<sup>8</sup>

States are often faced with a dilemma. On the one hand, a state may benefit from departing from a rule of custom in a specific situation ('free riding'<sup>9</sup>) but it may also have an interest in preserving the rule for the future. With regard to state immunity, for example, a state may have certain short-term benefits from depriving other states of their immunity, but a change in custom will expose the same state to similar outcomes before the courts of other states. At the opposite end of the spectrum, a state may very well intend on bringing about a change in custom. However, it is virtually impossible to know in advance how

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<sup>5</sup> Attempts at discounting one of the two elements have been numerous; see Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 64. The view supported by the ILC insists on the contextual presence of both elements, though the strength of evidence required in each case may vary; see ILC, Draft conclusions on identification of customary international law, with commentaries (2018) UN Doc A/73/10, 124 ['ILC Conclusions'].

<sup>6</sup> See Francisco Orrego Vicuña, 'Customary International Law in a Global Community: Tailor Made?' (2005) 38 *Estudios Internacionales* 21.

<sup>7</sup> See *North Sea Continental Shelf (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, 38–39 [63]. Persistent objectors are the exception to this rule; see ILC Conclusions (n 5) 152.

<sup>8</sup> Anthony D'Amato, *The Concept of Custom in International Law* (Cornell UP 1971) 98. See also Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' [2001] *AJIL* 757, 784.

<sup>9</sup> See Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 *AJIL* 389, 392.

other states will react and whether a departure from existing rules will contribute to the emergence of new law or will be relegated to a breach of existing rules.<sup>10</sup> The law compliance/law violation dichotomy is unsatisfactory in situations in which the only way in which the law can change is through a ‘breach’ of the old law. Countermeasures offer a third option for states grappling with this dilemma. Depending on the circumstances of each case, countermeasures may act as a ‘safety valve’ or a ‘second line of defence’ for states departing from existing rules of custom, as the following sections demonstrate.

### 6.1.1. Countermeasures as a ‘safety valve’

The concept of ‘safety valve’ refers to the possibility of derogating from a certain legal rule under exceptional circumstances without jeopardising the validity of the rule itself. In treaty law, this is ordinarily possible thanks to ‘flexibility clauses’ which allow a state to derogate from its treaty obligations without denouncing or terminating the treaty.<sup>11</sup> For example, Article XXI of the GATT allows for limited measures inconsistent with the GATT when the state seeks to protect its essential security interests.<sup>12</sup> Similarly, human rights treaties such as the ICCPR provide for certain derogations in times of public emergency that threatens the life of the nation.<sup>13</sup> The importance of flexibility clauses in

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<sup>10</sup> See Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013) 36.

<sup>11</sup> See Verdier and Voeten (n 9) 395.

<sup>12</sup> Art XXI General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 190 [GATT]. See Krzysztof Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (CUP 2016) 93. For similar provisions in bilateral investment treaties, see Anne Van Aaken, ‘Smart Flexibility Clauses in International Investment Treaties and Sustainable Development’ (2014) 15 JWIT 827, 827–861.

<sup>13</sup> Article 4 ICCPR. See Emilie Hafner-Burton, Laurence Helfer and Christopher Fariss, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65 IntlOrg 673.

treaty regimes is well documented.<sup>14</sup> They make it more attractive for states to enter into treaty regimes by providing an ‘insurance’ against future uncertainty; they also act as a ‘buffer’ that preserves the integrity and continuing existence of the regime when the cost of compliance outweighs the benefits.<sup>15</sup>

The same level of flexibility is harder to achieve in customary international law.<sup>16</sup> Non-compliance with customary law obligations weakens the very existence of the relevant rules as it constitutes state practice against them. In order to assess state practice inconsistent with an existing rule, special emphasis is placed on *opinio juris*.<sup>17</sup> However, *opinio juris* is not always easy to identify. With respect to jurisdiction and immunity, states often avoid making any claim as to the legality of their conduct.<sup>18</sup> This may be interpreted as an implicit claim that international law at least permits the relevant conduct.<sup>19</sup> Yet, the absence of explicit statements concerning the legality of such conduct is more likely a deliberate strategy. States may not know whether a permanent change of custom is a desirable long-term outcome; avoiding taking a clear stance on the state of customary

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<sup>14</sup> See generally Jean d’Aspremont, ‘Formalism versus Flexibility in the Law of Treaties’ in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 257.

<sup>15</sup> See Laurence Helfer, ‘Flexibility in International Agreements’ in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 175–176; Pelc (n 12) 24.

<sup>16</sup> Verdier and Voeten (n 9) 395–6.

<sup>17</sup> As stated by the ICJ, state practice inconsistent with a certain rule of custom does not threaten its existence (and, in fact, may reassert it) when it is presented as an exception to the relevant rule; see *Nicaragua* (Merits) [1986] ICJ Rep 14 [186]. See also Maurice Mendelson, ‘The Formation of Customary International Law’ (1998) 272 RdC 214.

<sup>18</sup> This ambiguity is common to several controversial areas regulated by custom; see, eg, Marko Milanovic, ‘The Syria Strikes: Still Clearly Illegal’ (*EJIL: Talk!*, 15 April 2018) <[www.ejiltalk.org/the-syria-strikes-still-clearly-illegal](http://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal)>.

<sup>19</sup> Even such an implicit claim can have two readings: (i) customary law is such as it permits the action taken; or (ii) customary law permits the derogation by way of countermeasures.

international law in these circumstances is a form of ‘constructive ambiguity’.<sup>20</sup> In these circumstances, countermeasures may act as a ‘safety valve’.<sup>21</sup> They provide the flexibility to engage in conduct that is justified by virtue of the specific circumstances of the case, while retaining the integrity of the rule that prohibits that conduct. All that is required is for the state to point to an internationally wrongful act that justifies the response and make a plausible case as to how the exercise of jurisdiction or the denial of immunity is conducive to the implementation of international responsibility. In these cases, the state is *not* obliged to take a position on whether the exercise of jurisdiction/denial of immunity is consistent with the relevant *primary* rule of customary international law. If custom allows the exercise of jurisdiction/denial of immunity, the measure will amount to a retorsion, which by definition is a lawful—if unfriendly—act. If the measure is inconsistent with customary international law, the conduct may be justified as a countermeasure. By ensuring that the *features* of a countermeasure are met, a state is already providing a legal justification for its conduct based on *secondary* norms, regardless of whether a permissive *primary* rule of custom exists.

This attitude is very common in the practice of states. In Chapter 2, it was noted that the United States has made exorbitant assertions of prescriptive jurisdiction on the basis of controversial grounds, while at the same time it opposed equally exorbitant assertions of jurisdiction made by the League of Arab States.<sup>22</sup> The United States has never fully made clear whether it considers its acts consistent with customary international law;

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<sup>20</sup> See generally Michael Byers, ‘Still Agreeing to Disagree: International Security and Constructive Ambiguity’ [2020] JUFIL 1, 3.

<sup>21</sup> Necessity under art 25 ARSIWA could have a similar function; see Verdier and Voeten (n 9) 396.

<sup>22</sup> Compare Section 2.2.2 and Section 2.3.2.

however, when emphasising the existence of a wrongful act and the instrumental nature of the assertion of jurisdiction in ensuring compliance with the secondary obligations, these departures from the rules of jurisdiction may qualify as (justified) countermeasures.<sup>23</sup>

Similarly, Canada and the United States have never explicitly claimed that purported exceptions to the law of state immunity for state-sponsorship of terrorism are consistent with customary international law.<sup>24</sup> Yet, by pointing to factors that may qualify them as countermeasures, they have already provided a legal justification for their acts. Indeed, the same justification provides the legal basis for states such as Iran and Cuba to take equivalent measures against the United States while objecting to the legality of the US measures.<sup>25</sup> In general, all reciprocal countermeasures act as a safety valve.<sup>26</sup>

Another example of countermeasures as a safety valve can be found in the lifting of immunity of state officials for ‘non-consensual’ activities in the territory of the forum state. States like the USSR, the United States, the Netherlands, Germany, New Zealand, and the United Kingdom have lifted the immunity of state officials while some of them protesting the legality of similar measures by other states.<sup>27</sup> This inconsistency can be explained if the legal justification for the lifting of immunity lies not in the primary rules, but in the secondary rules precluding wrongfulness on a case-by-case basis.

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<sup>23</sup> eg US measures against Uganda: see Section 2.3.3.

<sup>24</sup> See Section 4.3.1. Similar considerations apply to the US exception for international takings: Section 4.3.2.

<sup>25</sup> See Section 4.4.

<sup>26</sup> eg blocking measures against exorbitant assertions of jurisdiction: Section 2.3.1.

<sup>27</sup> See Section 5.3.2.

### 6.1.2. Countermeasures as a ‘second line of defence’

In some cases, the exercise of jurisdiction or denial of immunity is accompanied by explicit statements concerning the existence of a rule of customary international law in support of the relevant measure. A clear example can be found in the Italian courts’ denial of state immunity for *jus cogens* violations.<sup>28</sup> Similarly, certain cases involving the exercise of universal jurisdiction or denial of functional immunity for international crimes contained statements concerning the permissibility of such exercise of jurisdiction under customary international law.<sup>29</sup> While the previous chapters showed that many of these claims *were not* consistent with customary international law at the time they were made, the relevant states were arguably pursuing another objective by making these claims: they were seeking to induce a change in customary international law.

Any change in customary international law poses well-known challenges. There is a contradiction in requiring a state to act with the *opinio juris* that a new rule is custom when, by definition, the new rule contradicts pre-existing custom.<sup>30</sup> Indeed, it would appear that a change of custom can only materialise through practice that, if examined statically and in isolation, would qualify as a breach of international law.<sup>31</sup> Only in its dynamic dimension can a deviation from existing rules qualify as the beginning of new custom; it all hinges on whether it achieves sufficient approval by other states so as to be deemed ‘generally accepted’ as law.<sup>32</sup> Therefore, a state seeking a change in customary

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<sup>28</sup> See Section 4.3.4.

<sup>29</sup> See Sections 3.2.2 and 5.3.3.

<sup>30</sup> See Thirlway (n 5) 94.

<sup>31</sup> See D’Amato (n 8) 97.

<sup>32</sup> *Fisheries Jurisdiction (UK/Iceland)* (1974) ICJ Rep 3, 23–6.

international law finds itself in a predicament. On the one hand, it must externalise its ‘belief’ (or, rather, claim) that customary international law *already* contains (or should contain) a new rule allowing the relevant conduct. On the other hand, by acting in conformity with this claim, the state exposes itself to the risk that its conduct may fail to attract approval sufficient to be considered new custom. In that event, its acts would be a ‘mere’ breach of customary international law engaging its responsibility.

Countermeasures may offer an alternative to this binary outcome. For example, Italian courts upholding an exception to state immunity for violations of *jus cogens* were, as determined by the ICJ, in breach of international law—insufficient state practice and *opinio juris* had accumulated to create new customary exceptions. However, by pointing to the international responsibility of Germany and taking a measure clearly oriented to ensure compliance with the obligation of reparation, Italian courts might have already put forward an alternative legal basis for their action.<sup>33</sup> In cases where states seek to promote a development of customary international law, countermeasures provide an alternative justification that operates at the level of *secondary* norms when the main justification based on the *primary* norms fails. In this sense, they operate as a ‘second line of defence’.

Regardless of the legal justification explicitly put forward (if at all), a state may act according to the belief that there is more than one potential legal basis authorising its conduct. This kind of alternative reasoning is commonplace before international courts and tribunals. Countermeasures are hardly, if ever, pleaded as the sole or even the main legal

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<sup>33</sup> See Section 4.3.4. Trapp and Mills believe countermeasures may have provided a more effective defence strategy: ‘Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of Germany v Italy’ (2012) 1 CJICL 153, 164–167.

justification.<sup>34</sup> And yet, states regularly plead countermeasures before international courts,<sup>35</sup> even when the term ‘countermeasure’ had not been mentioned in the dispute up to that point. The lesson is that, so long as the state has fulfilled all the relevant requirements of a circumstance precluding wrongfulness, that defence may be used to justify its conduct.

In this regard, two features of countermeasures are important: the existence of the prior wrongful act and the instrumental nature of the measure in ensuring compliance with the obligations of cessation, reparation, and non-repetition. Clearly, the *opinio juris* of a state advancing a new rule of custom (e.g. a new exception to immunity) is that its acts are lawful.<sup>36</sup> The absence of a ‘breach’ (from the perspective of the state taking the measure) is not inconsistent with the rules of state responsibility, as a state can take *lawful* measures to implement the international responsibility of other states in the form of retorsion. Once the other requirements are fulfilled (prior wrong and instrumental character), the desired change in customary international law may or may not materialise—this will not affect the

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<sup>34</sup> For example, in *Gabčíkovo-Nagymaros* Slovakia ‘did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful’: [1997] ICJ Rep 7 [82]. Similarly, in the *Air Service* arbitration, the United States claimed that the measures affecting French flights were justified both under the law of treaties *and* as countermeasures: (1978) 18 RIAA 417, 428. In *Guyana v Suriname*, Suriname alleged that Guyana did not have a title over the territorial sea over which the disputed events occurred, and only in the alternative it submitted that its action constituted countermeasures: PCA Case No 2004-04, (2013) XXX RIAA 1 (17 September 2007) [268-270]. In *Cargill v Mexico*, Mexico argued that its measures did not breach substantive NAFTA provisions and, only in the alternative, it argued that they constituted lawful countermeasures: ICSID Case No ARB(AF)/05/2 (13 August 2009) [379].

<sup>35</sup> For a recent example, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar/UAE)*, Public sitting held on Thursday 28 June 2018 (CR 2018/13) 63 [25].

<sup>36</sup> For Ruys, this may signify that states perceive immunity as a closed system where countermeasures are unavailable: Tom Ruys, ‘Immunity, Inviolability and Countermeasures’ in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 707. However, the *opinio juris* of a state concerning the content of primary rules does not have any implication for the availability of secondary rules.

legality of the measures taken by the state, which will qualify as either retorsions or countermeasures.

For this reason, countermeasures may have played a critical role in the early stages of the development of a rule of custom such as that allowing the exercise of universal jurisdiction over international crimes.<sup>37</sup> As practice and *opinio juris* solidify, the need for an alternative legal justification decreases. Indeed, the very issue of the legality of the exercise of jurisdiction is hardly discussed in recent cases such as those involving war crimes committed in Syria.<sup>38</sup> Conversely, given the paucity of state practice in support of an exception to state immunity for *jus cogens* violations,<sup>39</sup> the existence of an alternative legal basis is necessary to ensure the legality of denial of immunity until sufficient state practice and *opinio juris* accrue for a new rule of custom to emerge.<sup>40</sup>

## 6.2. The legality of jurisdictional countermeasures

Even if a *prima facie* wrongful exercise of jurisdiction or denial of immunity presents all the features of a countermeasure, the breach of the rules of jurisdiction or immunity is not automatically justified by virtue of the law of countermeasures. Countermeasures are subject to a number of requirements under customary international law that the ILC sought

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<sup>37</sup> See Section 3.2.2.

<sup>38</sup> See Chapter 3 n 142.

<sup>39</sup> The same applies to the international crime exception to functional immunity of state officials.

<sup>40</sup> Similar considerations apply *mutatis mutandi* to: exorbitant trade control measures based on the control theory (Section 2.3.3); exercise of universal jurisdiction for the crimes other than the four ‘core crimes’ (Section 3.2.3); denial of state immunity for state-sponsored terrorism and unlawful expropriations (Section 4.3.1 and 4.3.2); denial of the immunity of state officials for non-consensual acts committed in the territory of the forum and for international crimes (Sections 5.3.2 and 5.3.3).

to codify (and partially develop) in an attempt ‘to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.’<sup>41</sup> The following sections test the notion of jurisdictional countermeasures against these conditions to assess whether measures affecting the law of jurisdiction and immunity can be lawful means for the implementation of international responsibility. Section 6.2.1 distinguishes different types of jurisdictional countermeasures according to the organs participating in their adoption. The analysis then proceeds according to three ‘stages’ of implementation of international responsibility (determination, invocation, and resort to countermeasures). Section 6.2.2 assesses whether the determination of prior wrongful acts is possible despite the preliminary character of the rules of jurisdiction and immunity. Section 6.2.3 examines how the responsibility of other states can be invoked when taking jurisdictional countermeasures. Sections 6.2.4–6.2.8 evaluate whether jurisdictional countermeasures can comply with the substantive and procedural conditions of countermeasures.

### 6.2.1. State organs participating in the implementation of international responsibility and the problem of judicial countermeasures

Logically, if not chronologically, the process of implementation of international responsibility involves three steps. First, a state must determine that a wrongful act has been committed by another state (auto-determination of state responsibility). Second, the state seeking to implement the international responsibility of the wrongdoing state must

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<sup>41</sup> ARSIWA Commentary 128 [2].

call upon the latter to comply with its international obligations (invocation of state responsibility). Finally, if the state determines that its requests have not been met and wishes to ‘enforce’ these obligations unilaterally, it may proceed to take countermeasures.<sup>42</sup> While the implementation of international responsibility is hardly ever in the hands of exclusively one organ of the state,<sup>43</sup> all jurisdictional countermeasures are ultimately taken by domestic courts, except for cases in which assertion of prescriptive jurisdiction is not enforced through judicial proceedings.<sup>44</sup>

The participation of judicial organs in the taking of these measures may appear as colliding with the rationale of countermeasures.<sup>45</sup> Like all ‘sanctions’, countermeasures are tools with which states pursue foreign policy goals.<sup>46</sup> The conduct of foreign relations is ordinarily a prerogative of executive organs and their role as representative of the state is, to a certain extent, also recognised under international law.<sup>47</sup> It is thus unsurprising that countermeasures are closely associated with the competences of executive organs.<sup>48</sup>

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<sup>42</sup> Part III ARSIWA and Commentary 116.

<sup>43</sup> Even ‘traditional’ countermeasures such as assets freezing may require the involvement of courts for their enforcement.

<sup>44</sup> Adjudicative jurisdiction is by definition exercised by judicial bodies. The lifting of state immunity can only occur when private individuals or entities bring claims before domestic courts against foreign states. The immunity of state officials is denied in the context of civil or criminal proceedings against foreign state officials.

<sup>45</sup> See Marco Longobardo, ‘State Immunity and Judicial Countermeasures’ (forthcoming EJIL) (on file with the author).

<sup>46</sup> See Rahmat Mohamad, ‘Unilateral Sanctions in International Law: A Quest for Legality’ in Ali Marossi and Marisa Bassett (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (TMC Asser 2015) 71.

<sup>47</sup> The law of treaties, for example, regards certain executive officials as representatives of the state without the need to exhibit full powers; VCLT art 7(2). The very same subjects are vested with the power of making unilateral declarations binding on the state; ILC ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations’ (2006) GAOR 61st Session Supp 10, 367. See generally Arthur Watts, ‘The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers’ (1994) 247 RdC 9.

<sup>48</sup> See René Provost, *State Responsibility in International Law* (Ashgate/Dartmouth 2002) xv.

Nevertheless, other organs of the state are not necessarily excluded from the taking of countermeasures.

The ILC Articles suggest that international responsibility, including its implementation, is a matter for the state as a whole. Article 4 ARSIWA codifies a ‘well-established rule’ of customary international law according to which the conduct of any organ of a state, regardless of whether it exercises executive, legislative, or judicial functions, must be regarded as an act of that State.<sup>49</sup> If ARSIWA establishes that domestic courts can commit internationally wrongful acts, and it provides for circumstances precluding the wrongfulness of these acts, these circumstances—including countermeasures—should reasonably apply to wrongful acts committed by domestic courts. The problem with the participation of judicial organs in the taking of countermeasures lies elsewhere. While domestic courts are not *legally* barred from taking countermeasures, it is possible that *in practice* they may encounter some obstacles that make the adoption of countermeasures impossible. These obstacles may derive from two sets of restrictions. First, the ‘judicial nature’ of the function they exercise inevitably limits the range of acts they can perform.<sup>50</sup> Second, the municipal legal framework in which they

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<sup>49</sup> The so-called principle of unity of the state; see ARSIWA Commentary 40; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep [62-63]; Djamchid Momtaz, ‘Attribution of Conduct to the State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The law of international responsibility* (OUP 2010) 239. The fact that domestic courts through their judgments engage the responsibility of their state is uncontroversial in the ICJ jurisprudence; see Simon Olleson, ‘Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility’ (2013) 26 LJIL 615, 619.

<sup>50</sup> cf Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 2.

are embedded may further constrain the scope of their action.<sup>51</sup> This is not to say that international law reserves certain competences for specific organs of the state;<sup>52</sup> on the contrary, international law is in principle agnostic with respect to qualifications stemming from domestic legal systems.<sup>53</sup> However, domestic constraints may put domestic courts in a situation where they are *de facto* unable to meet the requirements for taking countermeasures even if they seek to do so.

To assess these potential limitations, some distinctions are necessary. Not all jurisdictional countermeasures require the involvement of judicial organs at all stages of implementation of international responsibility. According to the stage at which different state organs are involved, it is possible to distinguish three categories of measures:

(i) *Executive measures*. Here, the entire process of implementation of international responsibility is in the hands of executive organs:<sup>54</sup> they determine that the target state is

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<sup>51</sup> Through rules on jurisdiction, competence, procedure, and so forth; see Patricia Tarre Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations' (2012) 4 *GoJIL* 809, 835.

<sup>52</sup> The principle of separation of powers is foreign to international law; see Mohamed Shahabuddeen, 'Municipal Law Reasoning in International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 94; Hernández (n 50) 45. Therefore, objections to the availability of judicial countermeasures based on the 'political nature' of the latter are immaterial; *contra* Andrea Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years' (2010) 19 *ItYBIL* 33, 36; Andrea Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ' (2011) 24 *LJIL* 173, 183; Simone Vezzani, 'Sul diniego delle immunità dalla giurisdizione di cognizione ed esecutiva a titolo di contromisura' (2014) 97 *RivDirInt* 36, 53.

<sup>53</sup> See Pierre-Marie Dupuy, 'Relations Between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 173. The principle has been described as 'reciprocal indetermination of legal orders': Carlo Santulli, *Le statut international de l'ordre juridique étatique* (Pedone 2001) 31.

<sup>54</sup> On rare occasions, it is the legislature that enacts measures specifically targeting foreign states: eg Comprehensive Anti-Apartheid Act (1986) 22 USC § 5001; Cuban Democracy Act (1992); Iran and Libya Sanctions Act (1996) [later Iran Sanctions Act (2006)] 50 USC § 1701. These 'legislative' measures mandate the executive and domestic courts to take action vis-à-vis foreign states and their effects are essentially equivalent to executive measures.

responsible for an internationally wrongful act; they invoke its responsibility by requesting compliance with its secondary obligations; they proceed to take countermeasures by mandating the exercise of jurisdiction or the denial of immunity. The role of domestic courts consists exclusively in giving effect to these measures without replacing or reviewing the determinations made by the executive. This category comprises assertions of prescriptive jurisdiction such as trade control measures imposed through executive orders,<sup>55</sup> and denial of state immunity under a mechanism controlled by the executive, such as the state-sponsors of terrorism exception in the US and Canada, or the system of reciprocal denial of immunity implemented by Iran.<sup>56</sup> This also includes all instances (today less frequent) in which the immunity of foreign states and foreign state officials is recognised pursuant to certifications given by the government of the forum state.<sup>57</sup> These measures are the least problematic because they do not differ in any meaningful way from ‘traditional’ countermeasures taken by the executive such as the imposition of a travel ban.

(ii) *Mixed measures*. In these measures, the countermeasure *stricto sensu*—the exercise of jurisdiction or the denial of immunity—is taken by judicial organs; the decision, however, is based on pre-existing determination and invocation of state responsibility made by the executive (and, on rare occasions, the legislature). Cases in which the responsibility of the target state is ascertained by pointing to a pre- or co-existing dispute between the forum state and the target state fall within this category. Examples of this kind include the

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<sup>55</sup> eg measures under the IEEPA, 91 Stat 1626 § 203.

<sup>56</sup> See Sections 4.3.1 and 4.4. See also Gattini (n 52) 183.

<sup>57</sup> For example, a certificate from the Central Government is necessary in order to sue foreign states pursuant to Article 86(1) of the Indian Code of Civil Procedure (Act No 5 of 1908). cf Mark Chorazak, ‘Clarity and Confusion: Did Republic of Austria v. Altmann Revive State Department Suggestions of Foreign Sovereign Immunity?’ (2005) 55 DukeLJ 373, 390.

lifting of state immunity pursuant to decisions such as the US District Court judgment in *Princz*<sup>58</sup> and the Italian Constitutional Court's Judgment No 238/2014,<sup>59</sup> and the denial of the immunity of state officials in the various cases originating from aerial intrusions such as the *Powers* case.<sup>60</sup> As seen below, these measures do not present difficult challenges since they build on pre-existing determinations by state organs that are well placed to invoke the responsibility of other states.

(iii) *Judicial (or 'purely judicial') measures*. Domestic courts in these instances are presented with civil or criminal proceedings that allow them to identify an internationally wrongful act of another state. Based on their own determination and invocation of international responsibility, they exercise jurisdiction and/or deny immunity as a way to implement said responsibility. These cases—which comprise, for example, several cases in which universal jurisdiction was exercised (and/or functional immunity was denied) with respect to international crimes—are the most difficult to assess because, prior to the seisin of domestic courts, no dispute exists between the forum state and the target state. The entire process of implementation of international responsibility lies on the judges and, thus, each stage (determination, invocation, taking of the measure) requires careful consideration. These aspects are explored in the next sections.

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<sup>58</sup> *Princz*, 813 FSupp 22 (1992).

<sup>59</sup> Judgment No 238/2014 (22 October 2014).

<sup>60</sup> *Powers Case* (19 August 1960) 30 ILR 69 (USSR, Supreme Court).

## 6.2.2. Unilateral determination of international responsibility, existence of prior breach, and preliminary character of jurisdictional rules

Countermeasures are premised on the prior commission of an internationally wrongful act by the target state. In previous chapters, a standard of plausibility was adopted to identify practice that, in principle, could be seen as implementing international responsibility. In order for this practice to meet the requirements of (lawful) countermeasures, it is not sufficient for the state taking the measure to allege that the target state has breached international law;<sup>61</sup> the breach must have actually occurred.<sup>62</sup> This is to avoid potential abuse resulting from states resorting to countermeasures by simply asserting the existence of an internationally wrongful act.<sup>63</sup> At the same time, it is not necessary that the existence of the internationally wrongful act is established by a court or other third-party mechanism.<sup>64</sup> Given the absence of a centralised system of determination of international responsibility, each state proceeds to take countermeasures on the basis of its own autonomous appreciation of the legal situation, and at its own risk.<sup>65</sup> Because

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<sup>61</sup> See Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite* (LGDJ 1990) 32; James Crawford, 'Counter-Measures as Interim Measures' (1994) 5 EJIL 65, 66; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 269; Federica Paddeu, *Justification and Excuse in International Law* (CUP 2018) 262.

<sup>62</sup> See ARSIWA Art 49 Commentary [2]; *Naulilaa* (1928) II RIAA 1011, 1027; *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal/Allemagne)* (1930) II RIAA 1035, 1056 [Cysne]; *Gabčíkovo-Nagymaros* (n 34) 55 [83]. See also Sicilianos, *Les réactions* (n 61) 21; Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 287; Paddeu (n 61) 261.

<sup>63</sup> See Denis Alland, 'The Definition of Countermeasures' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1129.

<sup>64</sup> Proposals to have the UNSC determine the existence of a breach of communitarian norms were rejected as contrary to the Charter: ILC, 'Report on the Work of Its Forty-seventh Session' (1995) UN Doc A/50/10, 47 [250]. See also Dawidowicz (n 62) 82.

<sup>65</sup> See *Lac Lanoux* [1957] 12 RIAA 310 [16]; *Tehran Hostages* [1980] ICJ Rep 28 [53]; *Nicaragua* (n 17) [268]; *Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 26; *Air Service* (n 34) [81]. See also Leo Gross, 'States as Organs of International Law and the Problem of Auto-Interpretation' in George A Lipsky (ed), *Law and Politics in the World Community* (UCal Press 1953) 77; Josef Kunz,

countermeasures depend on this power of ‘auto-interpretation’,<sup>66</sup> states must be capable of unilaterally determining the international responsibility of the target state in order to resort to justified responses in the form of countermeasures. This may create a problem of logical consistency with respect to jurisdictional countermeasures. The rules of (adjudicative) jurisdiction and immunity are ‘procedural in character’, which means they ‘do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.’<sup>67</sup> As a ‘corollary’,<sup>68</sup> questions of jurisdiction and immunity are preliminary matters that must be ‘expeditiously decided *in limine litis*’,<sup>69</sup> that is to say at a stage where the merits of the case have not yet been considered. The ICJ made this point with respect to state immunity:

[N]ational courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of

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‘Sanctions in International Law’ [1960] AJIL 324; Charles Leben, ‘Les contre-mesures inter-étatiques et les réactions à l’illicite dans la société internationale’ (1982) 28 AFDI 9, 21, 35; Sicilianos, *Les réactions* (n 61) 31; Georges Abi-Saab, “‘Interprétation” et “auto-interprétation”: quelques réflexions sur leur rôle dans la formation et la résolution du différend international’ in U Beyerlin and others (eds), *Recht zwischen Umbruch und Bewahrung* (Springer 1995) 15; Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 114.

<sup>66</sup> See Abi-Saab (n 65) 15. See *Tehran Hostages* (n 65) [53]; *Nicaragua (Jurisdiction)* [1984] ICJ Rep 392 [268]. See also Tzanakopoulos (n 65) 114.

<sup>67</sup> *Jurisdictional Immunities of the State (Germany/Italy)* (Judgment) [2012] ICJ Rep 99 [93].

<sup>68</sup> Roger O’Keefe, ‘Jurisdictional Immunities’ in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 110.

<sup>69</sup> *Immunity of a Special Rapporteur* (n 49) [63].

the specific circumstances of each case to be conducted by the national court before which immunity is claimed.<sup>70</sup>

If the legality of the acts of the target state is to be determined from the proceedings before the court, the exercise of jurisdiction or denial of immunity cannot be premised on that same wrong—the argument is circular.<sup>71</sup> As the ICJ stated:

[A] national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.<sup>72</sup>

The issue of logical consistency is challenging, but ultimately not detrimental to the argument advanced in this study. The ICJ was tasked with deciding whether *primary* rules of state immunity contained an exception based on the gravity of the unlawful act at the basis of the proceedings. An exception of this kind would inevitably compel courts to look into the merits of the case before deciding on their jurisdiction, thereby exposing them to the circularity identified by the Court. This is not necessarily the case when the legal basis for the exercise of jurisdiction or denial of immunity lies in the *secondary* rules governing the implementation of international responsibility.

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<sup>70</sup> *Jurisdictional Immunities* (n 67) [106].

<sup>71</sup> See Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff 1997) 193; Ruys (n 36) 706.

<sup>72</sup> *Jurisdictional Immunities* (n 67) [82].

As seen in the previous section, not all jurisdictional countermeasures are based on the determination of responsibility made by judicial organs. The objection based on the preliminary character of jurisdiction and immunity does not apply to executive and mixed measures, where the decision on the responsibility of the target state is not made by the courts, but by other organs of the state that are normally tasked with foreign policy decisions. For instance, the decision concerning the international responsibility of a ‘state sponsor of terrorism’ under the relevant US and Canadian laws is made entirely by executive organs.<sup>73</sup>

At a closer look, even judicial measures in which the determination of responsibility of the target state is made by domestic courts are not affected by the problem of logical consistency. The idea that domestic courts are completely barred from taking into account factual elements that pertain to the merits of the case when they decide questions of jurisdiction does not correspond to the reality of adjudication. Very commonly, the jurisdiction of a court depends on factors that also belong to the merits of the case, as noted by Casad and Richman:

When a long-arm statute describes the basis for jurisdiction in terms of ‘commission of a tortious act’ or ‘entering a contract,’ the fact on which the defendant’s susceptibility to jurisdiction depends also may be the ultimate substantive issue ... The question of whether the defendant can be forced to appear and litigate the issue becomes circular: a court cannot decide whether

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See Section 4.3.1.

a tort has been committed without jurisdiction, but it cannot determine whether jurisdiction exists without deciding whether there was a tort.<sup>74</sup>

Burke Robertson refers to this as the ‘inextricable merits’ problem.<sup>75</sup> Like other branches of law, international law contains well-accepted rules of jurisdiction and immunity that depend on factual elements belonging to the merits of the case. For example, when a suit is filed against a foreign state by virtue that the latter ‘engage[d] in a commercial transaction’<sup>76</sup> with the plaintiff, domestic courts must have reasonable grounds to establish that a certain activity has been performed by the state which offers the features of a ‘commercial transactions’; otherwise, states will be subject to the jurisdiction of foreign courts ‘simply by skilful construction of the claim’.<sup>77</sup>

These considerations suggest that the problem of logical consistency is overblown. The question is not so much whether courts can examine elements pertaining to the merits of the case in order to establish their jurisdiction, but how far they can go in their analysis. In other words, the problem is one of *standard of proof*.<sup>78</sup> This goes to the very heart of the prerogative on which countermeasures are built: the power of auto-determination of international responsibility.<sup>79</sup> As stated above, each state determines the international responsibility of other states autonomously. International law does not set specific

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<sup>74</sup> Robert Casad and William Richman, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (3rd edn, Lexis Law 1998) § 4-2.

<sup>75</sup> See Cassandra Burke Robertson, ‘The Inextricable Merits Problem in Personal Jurisdiction’ (2011) 45 UCCLR 1301, 1305. See also Kevin Clermont, ‘Jurisdictional Fact’ (2005) 91 CornellLR 973 (arguing that the problem arises in ‘all factual and legal questions of forum authority, from venue to subject-matter jurisdiction’).

<sup>76</sup> UNCSI art 10.

<sup>77</sup> *Jurisdictional Immunities* (n 67) [82].

<sup>78</sup> See Clermont (n 75).

<sup>79</sup> See text at n 66.

standards that a state must meet in order to determine that a breach occurred.<sup>80</sup> Not even good faith belief in the existence of the prior wrongful act could justify the state's response if the wrongful act never occurred.<sup>81</sup> Because of this, a state is free to resort to countermeasures whenever it is satisfied—on the basis of its own self-assessment—that the factual and legal situation warrant this course of action. This does not equate to the power of one state to impose its will on other states at whim. Whenever a state resorts to countermeasures, it does so at its own risk.<sup>82</sup> A competent third party may at a later stage find that the state's assessment was erroneous and that in acting on this basis the state engaged its own international responsibility.<sup>83</sup> Alternatively, the state parties to the dispute may later, through whatever means, including through diplomatic methods of dispute settlement, come to an agreement that the state's assessment was erroneous and thus resort to countermeasures was wrongful.

In this sense, judicial measures are in no meaningful way different from measures adopted by any other organ of the state.<sup>84</sup> When domestic courts make their own (preliminary) findings on the existence of a breach of international law and its attribution to the target state, these courts are unilaterally assessing the legality of a given situation in

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<sup>80</sup> Crawford suggested that 'some formula such as "gross and reliably attested breach" was called for', but states rejected this proposal: James Crawford, *Third Report on State Responsibility* (2000) II(1)YBILC 3, 37 [115].

<sup>81</sup> Damrosch argued that a rule of good faith would eliminate the uncertainty surrounding the taking of countermeasures: 'Retaliation or Arbitration—Or Both?' (1980) 74 AJIL 785, 795. This view has remained controversial; see Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988) 49. Eventually, it was disavowed by the ILC: 'Report on the Work of Its Forty-eight Session' (1996) UN Doc A/51/10, 67 [1].

<sup>82</sup> ARSIWA and Commentary 130. See also Sicilianos, *Les réactions* (n 61) 32; Hjortur Sverrisson, *Countermeasures, the International Legal System, and Environmental Violations* (Cambria Press 2008) 127.

<sup>83</sup> See Elagab (n 81) 52–55; Tzanakopoulos (n 65) 117.

<sup>84</sup> cf Alland (n 63) 1129.

their capacity as organs of the state to which they belong. A domestic court could be satisfied that the plaintiff has made a *prima facie* case against the defendant state and determine that this empowers it to adopt countermeasures even at the preliminary stage of the proceedings.<sup>85</sup> If the same court at the merits stage were to determine that the claim against the foreign state is in fact unsubstantiated, by revisiting its previous position it would *de facto* concede the illegality of its own action.<sup>86</sup> This is not a logical inconsistency; it is a consequence of the power of auto-determination, which by its own definition implies that a state may change its previous assessment on the basis of a more in-depth analysis of the same legal situation. In sum, the determination of international responsibility is possible regardless of the organ taking jurisdictional countermeasures.

### 6.2.3. Standing to invoke international responsibility and to take countermeasures

#### *The content of invocation*

While international responsibility arises automatically from the commission of a wrongful act, the implementation of such responsibility requires other states to ‘invoke’ it. Despite

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<sup>85</sup> See Clermont (n 75) 978 (arguing for a *prima facie* standard of proof in the assessment of all jurisdictional facts). cf Moser (n 51) 838; Massimo Iovane, ‘The Italian Constitutional Court Judgment No. 238 and the Myth of the “Constitutionalization” of International Law’ (2016) 14 *Journal of International Criminal Justice* 595, 599.

<sup>86</sup> cf Moser (n 51) 839 (arguing that the forum State could provide ‘spontaneous’ reparation to the defendant state injured by the denial of state immunity by ordering the plaintiff to pay compensation).

its importance in the edifice of international responsibility,<sup>87</sup> the content of invocation is not defined in the ILC Articles. The commentary to Article 42 states that:

[I]nvocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests.<sup>88</sup>

The commentary sets the bar high by prescribing measures ‘of a relatively formal character’. In practice, states enjoy considerable flexibility in the presentation of claims and there are no pre-determined forms in which such notice should be submitted.<sup>89</sup> If there are no prescribed procedures to invoke state responsibility, it can also be inferred that there are no state organs specifically tasked with this role. In his Third Report, ILC Special Rapporteur Crawford stated that ‘*in practice* claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States’,<sup>90</sup> but also added that the ‘ICJ has sometimes been satisfied with rather informal modes of invocation’.<sup>91</sup> The ILC commentary to Article 42 adds that invocation of responsibility can be found in inter-state contacts that ‘involve specific claims by the

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<sup>87</sup> See James Crawford, ‘Overview of Part Three of the Articles on State Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 932 (‘[P]erhaps the crucial article in the entire text’).

<sup>88</sup> ARSIWA Commentary Art 42 [2] 117.

<sup>89</sup> See Jacqueline Peel, ‘Notice of Claim by an Injured State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1030. Scobbie noted that, with respect to invocation by the non-injured state pursuant to Article 48 ARSIWA, invocation is indistinguishable from protest: Iain Scobbie, ‘The Invocation of Responsibility for the Breach of “Obligations under Peremptory Norms of General International Law”’ (2002) 13 EJIL 1201, 1206.

<sup>90</sup> Third Report Crawford [237] (emphasis added).

<sup>91</sup> *ibid* (citing *Certain Phosphate Lands in Nauru* [1992] ICJ Rep 254-5 [36]).

State concerned, such as for compensation for a breach affecting it, or specific action *such as ... the taking of countermeasures*'.<sup>92</sup>

The requirements of invocation can be easily satisfied with respect to executive and mixed countermeasures. Here, invocation occurs pursuant to the ordinary procedures in the hands of the political organs of the state. For example, in the case of denial of immunity for 'state sponsors of terrorism', notice of claims is given to the target state by executive organs during the listing procedure.<sup>93</sup>

Furthermore, even judicial countermeasures can meet the requirements of invocation. Courts are organs of the state equipped with the power to make findings vis-à-vis other entities (including foreign states) on behalf of the state to which they belong.<sup>94</sup> The 'notice of claims', in these cases, will be contained in the interim judgment on jurisdiction or even directly in the final judgment of the case. Domestic courts frequently rely on executive organs for their interaction with foreign states when the latter are involved in domestic proceedings. For example, service of process against a foreign state is made through diplomatic channels.<sup>95</sup> The 'correspondence' between domestic courts and

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<sup>92</sup> ARSIWA Commentary Art 42 [2] 117 (emphasis added).

<sup>93</sup> See Section 4.3.1.

<sup>94</sup> When a foreign state is brought before domestic courts on the basis of the commercial activities exception to state immunity, a judicial decision concerning the (contractual) responsibility of the latter is a 'claim' by the forum state concerning the legal situation at the basis of the proceedings. There is no meaningful difference between this scenario and that in which a court finds that the foreign state is responsible for an internationally wrongful act as far as the presentation of claims is involved.

<sup>95</sup> See Hazel Fox and Philippa Webb, *The Law of State Immunity* (rev&upd 3rd edn, OUP 2015) 11–12. Service of process is prescribed also in the case of default proceedings: Helmut Steinberger, 'State Immunity' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 1987) 437–438.

a foreign state offers all the formalities of a notice of claims delivered by other organs of the state.

If there is an objection in these cases it is that, when a domestic court presents its claims vis-à-vis the target state and simultaneously exercises jurisdiction or denies immunity, it is invoking responsibility *and* taking countermeasures at the same time. However, strictly speaking, this is not a problem of ‘invocation’—which is perfected when the claim is properly notified to the target state. This is a question involving the requirements for the taking of countermeasures; as such, it is analysed separately in Section 6.2.8.

### **Invocation and taking of countermeasures by the injured state**

Not all states are entitled to invoke the responsibility of wrongdoing states, but only those that have a subjective right or a legal interest in the performance of the obligation breached.<sup>96</sup> This is a matter of ‘standing’.<sup>97</sup> In order to identify the legal entitlement to invoke international responsibility, the ILC focused on the notion of ‘injured state’.<sup>98</sup> While the definition of injured state was the subject of lengthy discussions,<sup>99</sup> in their final draft the ILC Articles provide different rules for invocation by the ‘injured state’ and invocation by ‘states other than the injured state’.

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<sup>96</sup> See ARSIWA Commentary 116; Giorgio Gaja, ‘The Concept of an Injured State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 941–2.

<sup>97</sup> cf Angela Del Vecchio, ‘International Courts and Tribunals, Standing’, *MPEPIL* (2010) [1].

<sup>98</sup> ‘Injury’ is not to be understood as material harm, but as ‘legal injury’ following from the infringement of an obligation; see Riphagen, Third Report on State Responsibility, UN Doc A/CN.4/354 (1982), 26 [60].

<sup>99</sup> See Third Report Crawford, 26-29; Crawford, ‘Overview of Part Three’ (n 87) 933–934; Gaja (n 96) 941.

When invocation is made by the ‘injured state’ according to Article 42 ARSIWA, the state enjoys the broadest freedom to take countermeasures.<sup>100</sup> This occurs when the obligation breached is owed to that state individually or when the state is specially affected by the breach of an obligation owed to a group of states or to the international community as a whole.<sup>101</sup> In the case of jurisdictional countermeasures, this circumstance can be inferred from a number of factors.

On some occasions, it is clear that the state is taking jurisdictional countermeasures for the protection of rights of its nationals injured by the wrongful acts of other state. The mechanism with which states achieve this is diplomatic protection.<sup>102</sup> In jurisdictional countermeasures, this frequently occurs when the prior wrongful act justifying the countermeasure is the very basis of the claim underlying the proceedings in which jurisdiction is exercised or immunity is denied. For example, non-recognition of state immunity for claims brought under the US international taking exception is a response to the same wrongful act for which proceedings are brought (unlawful expropriation).<sup>103</sup> To be sure, the action brought by the plaintiff is always formulated according to the domestic law of the forum state. In turn, this results in the wrongful act being treated as a private law

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<sup>100</sup> ARSIWA art 42 and Commentary 117 [3]. See also James Crawford, ‘Responsibility to the International Community as a Whole’ (2001) 8 IJGLS 303, 320.

<sup>101</sup> This includes breaches of interdependent obligations, ie breach of such a character as radically to change the position of the other states. See Linos-Alexander Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 EJIL 1127, 1134; Gaja (n 96) 945.

<sup>102</sup> See *Mavrommatis Palestine Concessions* [1924] PCIJ Rep Ser A No 2, 12. See generally John Dugard, ‘Diplomatic Protection’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1051.

<sup>103</sup> See Section 4.3.2. This can also occur in criminal proceedings against state officials when the responsibility of the state is engaged by acts for which the state officials stand trial (eg aggression); see Section 3.2.3.

tort.<sup>104</sup> Nonetheless, there might be considerable overlap between these two concepts,<sup>105</sup> particularly when domestic tort law incorporates the minimum standard of treatment of aliens or internationally guaranteed human rights.<sup>106</sup> When the internationally wrongful act at the basis of the countermeasure coincides with the tortious act suffered by the claimant, denial of immunity is a means to exert pressure on the wrongdoing state to bring the wrongful act to an end (if ongoing) and to obtain reparation in the form of compensation to the victims.<sup>107</sup>

Since diplomatic protection is limited to nationals of the state,<sup>108</sup> the connection between the forum state and the events over which jurisdiction is exercised provides a useful test to determine whether the exercise of jurisdiction or the denial of immunity is an exercise of diplomatic protection.<sup>109</sup> Whenever jurisdiction is exercised on the basis of nationality of the plaintiff (in civil cases) or of the victims (in criminal cases),<sup>110</sup> there is a presumption that the state is acting on the basis of diplomatic protection. It is no coincidence, for example, that the US and Canadian exceptions for state-sponsored

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<sup>104</sup> Chittharanjan Amerasinghe, *Diplomatic Protection* (OUP 2008) 37. The remedies available will ‘inevitably vary from State to State’ and there can be ‘no ... absolute rule governing all situations’; Draft Articles on Diplomatic Protection, with Commentaries (2006) UN Doc A/61/10 [DADP] 72.

<sup>105</sup> Fox notes this partial overlap, for example, in *Amerada Hess*, a tort law case which was ‘entirely governed by international law’: Hazel Fox, ‘State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts’ (1989) 20 NYIL 3, 6, 13. See also André Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’ (2007) 101 AJIL 760, 770.

<sup>106</sup> *Ahmadou Sadio Diallo (Guinea/DRC)* (Preliminary Objections) [2007] ICJ Rep 582 [39].

<sup>107</sup> Once diplomatic protection is exercised, the espousing state becomes the ‘sole claimant’ and is under no obligation to return any sum received to the injured national; *Mavrommatis* (n 102) 2. However, a state can establish an internal mechanism of automatic transfer, which is recommended by art 19(c) DADP and Commentary 97.

<sup>108</sup> See art 3 DADP and Commentary. To be precise, customary international law requires *continuous* nationality of the claimants: arts 5 and 10 DADP and Commentaries.

<sup>109</sup> cf Bröhmer (n 71) 193.

<sup>110</sup> Especially with respect to events occurring in the territory of the wrongdoing state.

terrorism are only available to US and Canadian nationals.<sup>111</sup> The protection of the rights of injured nationals is the central interest pursued by the measures denying immunity. These examples are particularly striking because they often also comply with the second condition for the exercise diplomatic protection: exhaustion of local remedies.<sup>112</sup>

Alongside these cases, it is not uncommon to find indications that states take jurisdictional countermeasures for injuries they suffered regardless of whether their nationals were also injured.<sup>113</sup> In practice, many claims before domestic courts are of a ‘mixed’ character, in that they contain elements of both injury to the state and injury to individuals.<sup>114</sup> For example, exorbitant assertions of jurisdiction contained in blocking statutes taken in response to exorbitant assertions of jurisdiction by the United States are responses to the injury suffered both by nationals affected by the wrongful assertion of jurisdiction and by the state whose jurisdictional competence has been infringed.<sup>115</sup>

There is no ‘true test’ to distinguish between cases of injury to the state and injury to individuals:

‘[The] distinction can only be made on a case-by-case basis taking into account the specific primary norm invoked and, as in the case of moral

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<sup>111</sup> See Section 4.3.1.

<sup>112</sup> See *Interhandel Case (Switzerland/USA)* (Preliminary Objections) [1959] ICJ Rep 6, 27; *Elettronica Sicula (USA/Italy)* (Merits) [1989] ICJ Rep 15, 42; art 14 DADP and Commentary. Some courts imposed a requirement of exhaustion of local remedies even when there were no legislative instructions in this sense: eg *Abelesz* 692 F3d 684; *Malewicz* 362 FSupp2d 298: see Section 4.3.2.

<sup>113</sup> In these cases, exhaustion of local remedies is not required, and countermeasures can be taken also in respect of claims brought by non-nationals. See DADP Commentary 74; *Air Service* (n 34) [30]; Theodor Meron, ‘The Incidence of the Rule of Exhaustion of Local Remedies’ (1959) 35 BYIL 83, 84; Ian Brownlie, *State Responsibility* (OUP 1983) 236; Chittharanjan Amerasinghe, *Local Remedies in International Law* (CUP 2004) 145.

<sup>114</sup> See DADP Commentary 74; Gerald Fitzmaurice, ‘Hersch Lauterpacht – The Scholar as Judge, Part I’ (1961) 37 BYIL 1, 54.

<sup>115</sup> See Section 2.3.1.

damage, the specific circumstances of the given case, in particular the gravity of the violation of the norm'.<sup>116</sup>

At the same time, whenever a jurisdictional countermeasure in the form of denial of state immunity or immunity of state officials is taken in proceedings where jurisdiction is exercised on the basis of a *territorial* connection between the forum state and the wrongful act, the latter constitutes primarily an injury against the state itself—particularly when force is used.<sup>117</sup> For instance, denial of state immunity for sovereign acts pursuant to the territorial tort exception is likely to be a countermeasure taken in response to an injury suffered primarily by the state.<sup>118</sup>

In all cases in which a state is acting as an injured state, there is a clear entitlement to invoke international responsibility and take countermeasures. This may not be the case with respect to responses by states other than the injured state, as the next section shows.

### **Invocation and taking of countermeasures by states other than the injured state**

According to Article 48 ARSIWA, states having a legal interest in compliance with certain obligations—though not technically ‘injured’ according to the ILC definition<sup>119</sup>—are entitled to invoke the international responsibility of other states.<sup>120</sup> This echoes the oft-

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<sup>116</sup> Stephan Wittich, ‘Direct Injury and the Incidence of the Local Remedies Rule’ (2000) 5 *AustrianRevInt&EurL* 121, 185. See John Dugard, ‘Second report on diplomatic protection’ (2001) UN Doc A/CN.4/514, 104; DADP Commentary 74. The ILC settled on a test of preponderance: Article 14(3) DADP.

<sup>117</sup> See Section 5.3.2. See also UNSC Res 138 [1960] (‘[Extraterritorial abductions] affect the sovereignty of a Member State ... [and require] appropriate reparation.’).

<sup>118</sup> See Section 4.2.1. Similar considerations apply to denial of immunity of state officials with respect to ‘non-consensual activities’ in the territory of the forum state; see Section 5.3.2.

<sup>119</sup> Sicilianos refers to these states as ‘indirectly injured States’: ‘La codification des contre-mesures par la Commission du droit international’ (2005) 38 *RBDI* 447, 473.

<sup>120</sup> See Article 48 ARSIWA and Commentary 126-128.

quoted *Barcelona Traction* judgment, in which the ICJ recognised that some obligations ‘are the concern of all States’ and thus ‘all States can be held to have a legal interest in their protection’.<sup>121</sup> These are obligations created for the protection of a collective interest of a group of states or the international community as a whole (obligations *erga omnes partes* and *erga omnes*, respectively).<sup>122</sup> At the same time, the drafting of Article 48 raised difficult questions with respect to the consequences stemming from invocation by states other than the injured state.<sup>123</sup> Some voiced strong concerns against the possibility that these states may be entitled to take countermeasures, fearing that allowing countermeasures in the common interest (or ‘collective countermeasures’) would create potential for abuse.<sup>124</sup> Others welcomed a development in this sense, seeing collective countermeasures as a ‘useful and necessary tool’ for the enforcement of communitarian norms.<sup>125</sup> According to Special Rapporteur Crawford, customary international law on the legality of collective countermeasures was ‘rather embryonic, but that fact point[ed] both ways’.<sup>126</sup> Eventually, the ILC decided ‘it [was] not appropriate to include ... a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures’.<sup>127</sup> A

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<sup>121</sup> *Barcelona Traction* [1970] ICJ Rep 3 [33]. This was a complete change of course compared to the earlier decision to deny standing to Liberia and Ethiopia in the *South West Africa* cases; see [1966] ICJ Rep 6, 31. See also Third Report Crawford [85].

<sup>122</sup> See Sicilianos, ‘The Classification of Obligations’ (n 101) 1135–6; Scobbie (n 89) 1208; Giorgio Gaja, ‘States Having an Interest in Compliance with the Obligation Breached’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

<sup>123</sup> See James Crawford, Fourth Report on State Responsibility (2001) A/CN.4/517 and Add, 11 [39–42].

<sup>124</sup> See Topical summary of the discussion held in the Sixth Committee, UN Doc A/CN.4/513 (2000) 32–33 [174–177].

<sup>125</sup> See ILC, ‘Report on the Work of Its Fifty-third Session’ (2001) UN Doc A/56/10(Supp), 36 [54]. For a summary of the debate in the Sixth Committee, see Dawidowicz (n 62) 10–11.

<sup>126</sup> Fourth Report Crawford 18 [71].

<sup>127</sup> Article 54 ARSIWA and Commentary 139.

saving clause was added in Article 54 preserving the right of states other than the injured state to take ‘lawful measures’ to ensure cessation and reparation ‘in the interest of the injured State or of the beneficiaries of the obligation breached’.<sup>128</sup> However, since the approval of the ILC Articles, there is mounting evidence towards a progressive recognition of collective countermeasures in state practice.<sup>129</sup> In a comprehensive study of the topic, Dawidowicz concluded that there is ‘strong support’ for the legality of these measures in contemporary international law.<sup>130</sup>

If the legality of collective countermeasures is accepted, many examples of jurisdictional countermeasures analysed in the previous chapters qualify as countermeasures of this kind. Exorbitant assertions of prescriptive jurisdiction such as trade control measures taken against South Africa and Uganda may qualify as justified responses to serious breaches of *erga omnes* obligations such as the prohibition on genocide and apartheid.<sup>131</sup> Many instances of exercise of universal jurisdiction may be justified responses to other states’ failure to punish international crimes, that is *erga omnes* obligations.<sup>132</sup> Similar considerations apply to denial of the immunity of state officials for

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<sup>128</sup> *ibid* 137.

<sup>129</sup> See Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 273; Denis Alland, ‘Countermeasures of General Interest’ (2002) 13 EJIL 1221; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 249; Linos-Alexandre Sicilianos, ‘Countermeasures in Response to Grave Violations of Obligations Owed to the International Community’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Dawidowicz (n 62); Paddeu (n 61) 266. See also Michael Schmitt, ‘Estonia Speaks Out on Key Rules for Cyberspace’ (*Just Security*, 10 June 2019) <[www.justsecurity.org/64490/estonia-speaks-out-on-key-rules-for-cyberspace/](http://www.justsecurity.org/64490/estonia-speaks-out-on-key-rules-for-cyberspace/)> (‘Estonia is furthering the position that states which are not directly injured may apply countermeasures to support the state directly affected’).

<sup>130</sup> Dawidowicz (n 62) 383. See also Tams (n 129) 241 (‘[P]ractice provides strong support for the view that even in the absence of individual injury, States are entitled to respond to serious breaches of obligations *erga omnes*.’).

<sup>131</sup> Similar considerations apply to measures taken to implement UNSC resolutions; see Section 2.3.3.

<sup>132</sup> See Section 3.2.3.

international crimes and denial of state immunity for *jus cogens* violations.<sup>133</sup> If these cases are construed as countermeasures, much of the state practice considered in this study may further corroborate the finding that collective countermeasures are recognised as lawful by states.

#### 6.2.4. Temporary character and reversibility of jurisdictional countermeasures

##### *Reversible measures*

Countermeasures aim to elicit compliance with the secondary obligations stemming from the commission of an internationally wrongful act and cannot be directed at punishing the wrongdoing state.<sup>134</sup> For this reason, their character is inherently temporary; once the circumstances that legitimise them have ceased, they should be terminated and the prior situation restored.<sup>135</sup> In the light of this, it might be questioned whether a breach of the rules of jurisdiction and immunity possesses the provisional character required to fit this condition. As the ICJ noted with respect to state immunity, the substance of the rules of immunity is not (solely) to protect their beneficiaries from the adverse consequences of a judgment, but ‘from being subjected to the trial process’ in the first place.<sup>136</sup> Thus, it may be argued, once immunity is denied and jurisdiction is exercised, the breach is permanent.

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<sup>133</sup> eg the Italian judgment of *exequatur* of the decision in *Prefecture of Voiotia* (international crimes) and the US DDC judgment in *Von Dardel* (diplomatic inviolabilities as *erga omnes partes* obligations). See Section 4.3.4.

<sup>134</sup> ARSIWA Commentary 131; Alland (n 63) 1130.

<sup>135</sup> *Gabčíkovo-Nagymaros* (n 34) 56 [87]; ARSIWA Commentary Art 49 [7]. See Sicilianos, *Les réactions* (n 61) 264; Focarelli (n 129) 432; Maurice Kamto, ‘The Time Factor in the Application of Countermeasures’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1174; Dawidowicz (n 62) 304.

<sup>136</sup> *Jurisdictional Immunities* (n 67) [82].

Even if the wrongdoing state complies with its secondary obligations, there is no possible ‘returning’ to the prior situation.

This objection, however, fails to consider that not all breaches of the rules of jurisdiction and immunity are completely irreversible measures. Removing jurisdictional countermeasures requires different steps depending on the relevant type of measure. Exorbitant assertions of prescriptive jurisdiction are withdrawn by abrogating the domestic norms no longer justified by the prior wrongful act. For example, revoking an exorbitant trade control measure may require repealing the executive acts and/or statutes containing these assertions.<sup>137</sup> To be sure, by the time they are abolished these measures may already have had ‘external’ consequences; for example, domestic court judgments may have been issued enforcing exorbitant trade control measures. When adjudicative jurisdiction is exercised, further action is required to remove these measures.

Countermeasures in the form of exercise of adjudicative jurisdiction (in the absence of an accepted head of jurisdiction or exception from immunity) can be withdrawn in two ways contingent upon the type of proceedings (civil or criminal) and the stage at which they have progressed. For civil proceedings that are still ongoing,<sup>138</sup> removing the measure requires halting the proceedings.<sup>139</sup> How this is concretely achieved, depends on the domestic law of the forum state and will likely be linked to the way in which the

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<sup>137</sup> eg withdrawal of US sanctions against Uganda; see Section 2.3.3.

<sup>138</sup> See *Arrest Warrant* [2002] ICJ Rep 3, sep op Koroma [5] (‘[Immunity is an] exemption from the jurisdiction or competence of the courts and tribunals of a foreign State’). Thus, a breach of immunity is not confined to the judicial decision rejecting the immunity plea, but continues with every subsequent step in the proceedings. On the distinction between continuing breaches and enduring effects of completed breaches, see ARSIWA art 14(2) and Commentary 60; Jean Salmon, ‘Duration of the Breach’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 384.

<sup>139</sup> ARSIWA art 53.

countermeasure was taken. For denial of state immunity, for example, the executive may remove the basis on which immunity was denied (as in the case of de-listing of a state as sponsor of terrorism under the US and Canadian laws).<sup>140</sup> Alternatively, if the state against which proceedings are brought has offered compensation to the victims ‘spontaneously’, proceedings may be declared moot by the court.

If the wrongdoing state provides reparation only after civil proceedings have ended, no removal of the proceedings resulting from the jurisdictional countermeasure is possible.<sup>141</sup> However, it is still possible to re-establish the *status quo ante* existing before the taking of the countermeasure. This will be achieved by halting the enforcement of the judgments resulting from the breach of the rules of jurisdiction and immunity.<sup>142</sup> Each domestic system will independently decide how this result is better achieved; in the aftermath of the *Jurisdictional Immunities* judgment, for example, Italy passed legislation that permitted to set aside judgments (even where they had become *res judicata*) issued in violation of the rules of immunity.<sup>143</sup> Similar steps appear sufficient to satisfy the reversibility requirement under Article 49 ARSIWA.<sup>144</sup>

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<sup>140</sup> eg US President’s power to suspend sanctions as recognised in *Iraq v Beatty*; see Section 4.3.1.

<sup>141</sup> See ARSIWA Commentary 60 (‘Where a continuing wrongful act has ceased ... the act is considered for the future as no longer having a continuing character.’).

<sup>142</sup> In the *Jurisdictional Immunities*, the relief sought by Germany was a declaration of Italy’s responsibility and ensuring that all the decisions taken in violation of state immunity ‘become unenforceable’: see (n 67) [15].

<sup>143</sup> Giuseppe Nesi, ‘The Quest for a “Full” Execution of the ICJ Judgment in “Germany v. Italy”’ (2013) 11 JICJ 185.

<sup>144</sup> See Trapp and Mills (n 33) 166; Vezzani (n 52) 58.

### *Non-reversible ‘corrective’ measures*

Admittedly, some jurisdictional countermeasures are difficult to reverse. The problem is particularly evident with respect to criminal jurisdiction exercised in breach of the rules of jurisdiction and immunity; reversing judgments in the criminal setting may not always be possible and may have human rights implications.<sup>145</sup> However, jurisdictional countermeasures of this kind are not automatically unlawful. While the regime of countermeasures discourages measures that cause irreversible harm, ‘what is irreversibility for this purpose needs to be viewed broadly.’<sup>146</sup> Under Article 49 ARSIWA, countermeasures should not be reversible in absolute terms, but only ‘as far as possible’.<sup>147</sup> The ILC, in other words, acknowledged that there are situations where it is impossible to remove all the effects of a countermeasure, yet the measure should not be considered impermissible as long as the goal remains coercive and not punitive.<sup>148</sup>

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<sup>145</sup> For instance, there might be a breach of the *ne bis in idem* principle if the accused is tried for the same crimes by the state of nationality; cf George Fletcher, ‘Against Universal Jurisdiction’ (2003) 1 JICJ 580, 582.

<sup>146</sup> Crawford, ‘Counter-Measures’ (n 61) 68. See also Paddeu (n 61) 262.

<sup>147</sup> This point is in line with the ICJ dictum in *Gabcikovo-Nagymaros*, according to which reversibility comes from the fact that the purpose of the measure ‘must be to induce the wrongdoing State to comply with its obligations’: [1997] ICJ Rep 7, 56-57 [87].

<sup>148</sup> For example, an activity undertaken without complying with a requirement of prior notification could still qualify as a countermeasure: ARSIWA Commentary 131. The ARSIWA Commentary might be misleading in stating that this provision was ‘inspired’ by article 72(2) VCLT (suspension of a treaty). In the First Reading of the Draft Articles, the expression ‘non-compliance with an obligation’ was preferred to ‘suspension of’ in order to avoid the suggestion that only certain types of obligations might be the subject of countermeasures, with the exclusion of obligations ‘requiring the achievement of a specific result’: Draft articles on State Responsibility (First Reading) (1996) 307. To borrow Crawford’s words, ‘the distinction between continuous acts and single acts in time does not correspond ... to a distinction between interim and permanent measures’: ‘Counter-Measures’ (n 61) 74.

As a number of authors noted, in ‘exceptional circumstances’ even some irreversible countermeasures may be permissible.<sup>149</sup> In particular, Sicilianos and Gianelli have identified countermeasures that are essentially ‘corrective’ in nature and, therefore, need not be removed after the wrongful act for which they have been taken has ceased.<sup>150</sup> In Sicilianos’s view, this is the case when a state seeks to enforce judgments of international courts and tribunals. For example, following the ICJ decision in *Corfu Channel*, the United Kingdom attempted (unsuccessfully) to satisfy the award by attaching Albanian assets in the United Kingdom; this was inconsistent with Albania’s immunity from execution and yet, according to Sicilianos, no protest was recorded.<sup>151</sup> The rationale is self-evident: when the countermeasure realises the effects of the conduct that the wrongdoing state should have adopted in order to comply with the judgment, there is no reason why the measure should be eliminated. In order to comply with its obligations, the wrongdoing state should engage in the exact same conduct.

For this reason, Gianelli takes Sicilianos’s ideas further, arguing that corrective (permanent) countermeasures are all those in which the injured state replaces the wrongdoing state in fulfilling the original obligation, regardless of whether the responsibility of the wrongdoing state has been established by an international court.<sup>152</sup> This view has some merit. While states targeted with countermeasures regularly dispute

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<sup>149</sup> Sicilianos, ‘La codification’ (n 119) 467. See also Elagab (n 81) 87; Sicilianos, *Les réactions* (n 61) 269. Ladislav Reitzler, *La Réparation Comme Conséquence De L’acte Illicite En Droit International* (Recueil Sirey, 1938) 84; Riccardo Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento* (Giuffrè 1984) 321.

<sup>150</sup> Sicilianos, *Les réactions* (n 61) 268–271; Alessandra Gianelli, *Adempimenti preventivi all’adozione di contromisure internazionali* (Giuffrè 1997) 129–130 (calling them ‘executive’ countermeasures).

<sup>151</sup> Sicilianos, *Les réactions* (n 61) 269.

<sup>152</sup> Gianelli (n 150) 142.

the existence of the prior wrongful act, if the dispute is to be resolved there are only two possible outcomes: either (a) it is established that the original wrongful act never occurred; or (b) the original wrongful act is somehow acknowledged by the wrongdoing state. Under (a), any ‘countermeasure’ taken in response to lawful acts, regardless of its reversibility, will not be justified; it will be a wrongful act triggering the responsibility of the state taking the measure. Under (b), if the (lawful) countermeasure realises the obligation that the state should have fulfilled to begin with,<sup>153</sup> the measure *should not* be reversed. The measure will have fully implemented the international responsibility of the wrongdoing state with no further action required from the original wrongdoer other than tolerating the (lawful) effects of the measure.

Compensation, being a fungible type of reparation, is the privileged form of corrective countermeasures. When countermeasures transfer monetary assets from the wrongdoing state to the injured state, the transfer *is* the provision of reparation and may not have to be reversed.<sup>154</sup> Thus, if jurisdictional countermeasures consist in domestic proceedings whose outcome is the award of monetary compensation, the measure (if lawful) should not necessarily be removed.<sup>155</sup> The same rationale may apply to cessation and types of reparation other than compensation. For example, countermeasures consisting

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<sup>153</sup> The injured state has the right to elect the preferred form of reparation: art 43(2)(b) ARSIWA and Commentary 119-120.

<sup>154</sup> Laura Picchio Forlati, *La sanzione nel diritto internazionale* (CEDAM 1974) 68–69; Andrea De Guttry, *La rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Giuffrè 1985) 37–39; Gianelli (n 150) 142. Kelsen listed confiscation of property of a state or its nationals as the ‘typical example’ of a countermeasure: Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966) 21.

<sup>155</sup> Issues of *quantum* may become controversial; at that point, some form of agreement between the states is necessary to reach a solution. Yet, jurisdictional countermeasures remain a means to induce compliance with the obligation of reparation.

in the exercise of universal jurisdiction and/or denial of the immunity of state officials are often taken in response to the failure by the state of nationality<sup>156</sup> to comply with its obligations to criminalise and prosecute international crimes.<sup>157</sup> If the countermeasure results in criminal proceedings against individuals that the state of nationality (wrongfully) failed to prosecute, returning the accused to freedom without trial would in fact restore the original breach.<sup>158</sup> In order to be terminated, these countermeasures require some form of arrangement between the prosecuting state and the state of nationality with which the latter commits to prosecute its nationals or carry out the sentence in its territory. This is not dissimilar to the proposal advanced by the UN Secretary-General in his ruling on the *Rainbow Warrior* case, which, as seen in Chapter 5, was likely the result of a jurisdictional countermeasure taken by New Zealand to implement France's responsibility.<sup>159</sup>

### ***Recognition of the measure by third states***

Jurisdictional countermeasures may display effects outside the bilateral relationship between the injured state and the wrongdoing state. For example, exorbitant trade control measures taken by the United States against China and the USSR became the subject of judicial proceedings in France and the Netherlands, respectively.<sup>160</sup> Similarly, judgments resulting from the denial of Germany's immunity in Greek courts were recognised and

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<sup>156</sup> The same considerations apply to the territorial state, if different.

<sup>157</sup> See Section 3.2.3.

<sup>158</sup> See Kimberley Trapp, 'Jurisdiction and State Responsibility' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 364 ('[H]ad the state of nationality complied with its international obligations, the third party in question would have been subject to prosecution.').

<sup>159</sup> See Section 5.3.2.

<sup>160</sup> *Soci t  Fruehauf Corp v Massardy*, 1968 DS Jur 147, 1965, 5 ILM 476 (1966); *Compagnie Europ enne des P troles SA v Sensor Nederland BV* (1983) 22 ILM 66. See Sections 2.2.1 and 2.3.2.

enforced by Italian courts.<sup>161</sup> US judgments against Iran based on anti-terrorism legislation have been enforced in Canada under the JVTAs provisions.<sup>162</sup> In these scenarios, countermeasures may escape the oversight of the state that took them; problems of reversibility may arise in case the countermeasure is withdrawn by the state of origin.

This issue requires two clarifications. First, recognition and enforcement of a jurisdictional countermeasure by another state involves the participation of that state in the implementation of international responsibility. The Italian *exequatur* of the Greek judgments against Germany was, in substance, a ‘new’ countermeasure. Similarly, Canadian measures of enforcement of US judgments against Iran are countermeasures themselves. Indeed, in order for foreign judgments to be enforced in Canada the target state must have been listed as a sponsor of terrorism by the Canadian Foreign Office.<sup>163</sup> Conceptually, this practice is sound when the state taking the new countermeasure is injured by the same wrongful act or is acting for the protection of *erga omnes (partes)* obligations; in these circumstances, that state has autonomous standing to take lawful measures for the implementation of international responsibility.<sup>164</sup>

Second, third states recognising the jurisdictional countermeasures of another state have a duty to monitor the continuing existence of the legal justification supporting the measures. The means by which a state recognises foreign laws and foreign judgments depend on the relevant rules of private international law, which are essentially a matter of

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<sup>161</sup> *Prefecture of Voioitia (exequatur)* (Cass Sez I) Judgment No 11163/2011. See Section 4.2.1.

<sup>162</sup> JVTAs, s4(5). See Section 4.3.1.

<sup>163</sup> *ibid.*

<sup>164</sup> Text at n 120.

domestic law.<sup>165</sup> Nonetheless, domestic courts are generally capable of assessing that there are no grounds supporting the legality of the foreign measure and thus denying its recognition. Both French and Dutch courts refused recognition of US trade control measures against third states upon establishing that they were exorbitant and not supported by the reasons advanced by the United States.<sup>166</sup> Similarly, recognition of foreign judgments is frequently subject to a fresh assessment concerning the jurisdiction of the courts that issued them.<sup>167</sup> Foreign judgments that are inconsistent with the law of jurisdiction and immunity are unlikely to be recognised in third states unless those states have in place measures similar to those existing in the state originally taking the countermeasure, such as Canada with respect to denial of immunity for state-sponsored terrorism.<sup>168</sup>

In sum, jurisdictional countermeasures require the usual assessment performed by domestic courts when assessing foreign laws and foreign judgments. The fact that the legal basis for these measures is found in countermeasures is not in conflict with the requirements of reversibility. Thus, countermeasures of this kind may still be lawful.

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<sup>165</sup> In the English system, an important role is played by the common law and EU regulations (until the UK withdrawal from the EU); see Adrian Briggs, *The Conflict of Laws* (4th edn, OUP 2019) 1–4.

<sup>166</sup> *Fruehauf* (n 160); *Sensor* (n 160) [7.4]–[7.5]. Compare with similar reluctance to recognise foreign ‘acts of states’ outside the territory of the relevant state under English law; see Lord Mance, ‘Justiciability’ (2018) 67 ICLQ 739, 749.

<sup>167</sup> For example, in the UK, the Civil Jurisdiction and Judgments Act 1982, s31(1) provides that a foreign judgment against a state other than the UK shall be recognised only if the foreign court would have had jurisdiction had it applied the UK SIA. See Paul Torremans, ‘Recognition and Enforcement of Foreign Judgments—The Traditional Rules’ in P Torremans and JJ Fawcett (eds), *Cheshire, North & Fawcett Private International Law* (OUP 2017) 602.

<sup>168</sup> The same applies to Italian courts ‘participating’ in the Greek countermeasures against Germany: text at n 161.

### 6.2.5. The targets of jurisdictional countermeasures and other affected parties

In an interdependent world where states are increasingly bound by multilateral obligations, countermeasures taken against one state may have repercussions on other states.<sup>169</sup> These *indirect* effects of countermeasures on third states are acceptable, so long as they do not amount to breaches of obligations owed to these states.<sup>170</sup> As seen in Chapter 2, when countermeasures directly target third states, these will be treated as unlawful regardless of whether they may contribute to implementing the responsibility of the wrongdoing state.<sup>171</sup>

More contentious is the extent to which countermeasures can affect individuals. In practice, most countermeasures ‘against the state’ consist in measures affecting individuals (e.g. as a result of a travel ban vis-à-vis certain states). Nationals of the state targeted by the measures are particularly exposed to these ‘incidental effects’, which are nonetheless justified—in principle—by the lawful nature of the countermeasure.<sup>172</sup> Some cases also provide support for the legality of countermeasures affecting the nationals of third states, so long as these effects are ‘indirect and unintentional consequences’ of the countermeasure.<sup>173</sup> In both cases, the litmus test is given not so much by the rights of the

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<sup>169</sup> See (1993) I YILC 141 [8].

<sup>170</sup> See Sicilianos, *Les réactions* (n 61) 85; Antonios Tzanakopoulos, ‘The Right to Be Free from Economic Coercion’ (2015) 4 CJICL 616, 625–626.

<sup>171</sup> See Section 2.2.2. See also Article 49 ARSIWA and Commentary 129-130; (1979) II(2) YILC 120 [18]; Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Brill Nijhoff 1988) 98; Sicilianos, *Les réactions* (n 61) 82; Tzanakopoulos (n 170) 625; Dawidowicz (n 62) 288–9.

<sup>172</sup> See Sicilianos, *Les réactions* (n 61) 73; Laura Picchio Forlati, ‘The Legal Core of International Economic Sanctions’ in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004) 124.

<sup>173</sup> eg *Cysne* (n 62) 1057. Roberto Ago endorsed this statement in his Eighth Report; (1979) II(1) YILC 46-47 [97-98]. The ILC’s view was more conservative: (1979) II(2) YILC 120 [18] (‘[T]he legitimate application of a sanction against a given State can in no event constitute per se a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction was justified.’).

states involved, but by the human rights of the individual concerned.<sup>174</sup> The practice of the UN Security Council shows that collective sanctions are often accompanied by humanitarian exceptions; this suggests that the same limitations apply to unilateral sanctions in the form of countermeasures.<sup>175</sup> Indeed, the General Assembly has urged states to cease adopting unilateral coercive measures encroaching upon rights set forth in international human rights instruments.<sup>176</sup>

The exercise of jurisdiction and denial of immunity may have implications on a number of human rights, particularly in the context of criminal proceedings. The right to liberty and the right to a fair trial are obviously impacted by criminal prosecution before a state's courts; however, these rights do not entail an expectation to be tried before *specific courts*, but before a court with *specific attributes*.<sup>177</sup> For this reason, the exercise of adjudicative jurisdiction as a result of a countermeasure does not *per se* involve a violation of these rights; the legality of these proceedings from this perspective hinges on the circumstances of each case and on the guarantees provided by the relevant domestic legal

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<sup>174</sup> On indirect breaches of human rights as a consequence of countermeasures, see Third Report Crawford 92 [349]; Dawidowicz (n 62) 324–325.

<sup>175</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 8: The relationship between economic sanctions and respect for economic, social and cultural rights, (12 December 1997) UN Doc E/C.12/1997/8 [4], [11]. See generally UNGA Res 60/01 (16 September 2015) [106].

<sup>176</sup> UNGA Res 70/151 (7 March 2016) [1]. See also Dawidowicz (n 62) 336.

<sup>177</sup> For example, the ECtHR recognised that the right to a fair trial was compatible with prosecution before German courts for acts of genocide committed in Bosnia: *Jorgic v Germany*, [66]–[71]. See also *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1 [45] ('For a tribunal ... to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.').

system.<sup>178</sup> Moreover, immunity of state officials does not entail an individual right to be exempted from the jurisdiction of foreign courts; it remains a right of the state and, as such, it can be withdrawn by means of countermeasures.<sup>179</sup> Another human right potentially affected is the principle of legality, particularly in its *nullum crimen sine lege* component.<sup>180</sup> In this regard, the exercise of jurisdiction to prescribe and jurisdiction to adjudicate must be distinguished. Assertion of exorbitant prescriptive jurisdiction is consistent with the principle of legality so long as the normative prescription is not applied retrospectively and its addressees receive adequate notice.<sup>181</sup> In other words, unless a state issues retroactive measures (e.g. trade control measures prohibiting past activities), there is no breach of the principle of legality simply by virtue of their exorbitant character. As to the exercise of adjudicative jurisdiction (for example, in cases of universal jurisdiction), domestic and international courts recognised that domestic prosecution for offences that were criminalised under customary international law at the time they were committed does not breach the prohibition on retroactivity.<sup>182</sup> Thus, countermeasures in the form of exercise of jurisdiction over international crimes may be consistent with the principle of legality.<sup>183</sup> In conclusion, jurisdictional countermeasures do not pose obstacles with respect

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<sup>178</sup> For Trapp, this is a question of proportionality. The closer the accused is put to the position they would have found themselves had they been prosecuted by the state of nationality, the more proportionate the countermeasure: Trapp (n 158) 364.

<sup>179</sup> See Section 5.1.

<sup>180</sup> eg ECHR art 7; ICCPR art 15; ACHR art 9. On its customary nature, see Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2008) 352.

<sup>181</sup> On accessibility and foreseeability as the essence of the principle of legality, see *SW v United Kingdom*, App No 20166/92 [1995] ECHR 52 [35]. See also Gallant (n 180) 363.

<sup>182</sup> eg *Kononov v Latvia*, App No 36376/04 [2010] ECHR 667 [186], [213], [227], [237], [244]; *Korbely v Hungary*, App No 9174/02 [2008] ECHR 848 [78]-[85]; *Vasiliauskas v Lithuania*, App No 35343/05 [2015] ECHR 923 [171]-[175].

<sup>183</sup> See Section 3.1.

to the target of the measures or the parties affected by them, so long as jurisdiction is exercised respecting human rights obligations.

### 6.2.6. Obligations exempted from jurisdictional countermeasures

When taking countermeasures, states have broad discretion with respect to the obligations that can be temporarily breached in order to implement international responsibility.<sup>184</sup> However, this discretion is not unlimited. The tribunal in *Naulilaa* recognised that ‘reprisals’ encountered some limitations stemming from the principles of humanity and good faith.<sup>185</sup> This is reflected in Article 50 ARSIWA, which stipulates a number of obligations that cannot be affected by countermeasures. Peremptory norms of international law fall straightforwardly into this category.<sup>186</sup> Beyond these norms, the selection of obligations exempted from countermeasures is so diverse that Special Rapporteur Crawford lamented that the list ‘was not based on any principle’.<sup>187</sup> The catalogue includes obligations concerning the use of force, fundamental human rights, reprisals prohibited under international humanitarian law, obligations concerning dispute settlement, and diplomatic inviolabilities.<sup>188</sup>

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<sup>184</sup> See Dawidowicz (n 62) 307.

<sup>185</sup> *Naulilaa* (n 62) 1026. See also IDI Resolution (1934) Art 6(4).

<sup>186</sup> ARSIWA art 50(1)(d) and Commentary [9] (‘[If certain obligations are] not subject to derogation as between two States even by treaty, [they] cannot be derogated from by unilateral action in the form of countermeasures.’). See also Third Report Crawford 90 [342].

<sup>187</sup> I YILC (2001) 6 [36].

<sup>188</sup> ARSIWA arts 50(1)(a-c) and 50(2) and Commentaries 131-134. For some of these obligations—particularly those of humanitarian character—the rationale lies in their structure as ‘objective regimes’: see Fourth Report Riphagen [88-89]; Third Report Crawford [340]. Since their beneficiaries are third parties, the obligations are incapable of being suspended on the basis of reciprocity; see Dawidowicz (n 62) 310. Others, such as the obligations concerning dispute

None of the exempted obligations identified by the ILC is an obstacle to jurisdictional countermeasures. As far as obligations concerning use of force and international humanitarian law are concerned, the reason is self-explanatory.<sup>189</sup> The previous section also demonstrated that, while individuals may be affected by some of these measures, the use of jurisdictional countermeasures *per se* does not violate human rights obligations provided it occurs within certain boundaries.<sup>190</sup> Similarly, a breach of the rules of jurisdiction and immunity does not in and of itself say anything on the state's conduct regarding an existing system of dispute settlement.<sup>191</sup> The prohibition on countermeasures affecting diplomatic inviolabilities has been explored at length in Chapter 5. It has been argued that these privileges are fundamentally different from the types of immunity analysed in the present research, with the exception of personal immunity of certain state officials.<sup>192</sup> As such, all other types of immunity are not captured by this prohibition.<sup>193</sup>

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settlement and diplomatic inviolabilities, may be justified by virtue of their importance for resolution of disputes giving rise to the use of countermeasures: Federica Paddeu, 'Countermeasures', *MPEPIL* (2015) [21]. For Paddeu, the unifying principle is the inability to forfeit these rights: (n 61) 279. According to Gaja, obligations affected by countermeasures must be capable of being bilateralised: (2000) I YILC 279 [24].

<sup>189</sup> See Moser (n 51) 820.

<sup>190</sup> Text at n 181. It is unclear to what extent all human rights obligations are excluded, given the Commission was mostly preoccupied with non-derogable rights; see Dawidowicz (n 62) 329–330.

<sup>191</sup> The state taking the countermeasure is not relieved from its duties concerning any dispute settlement system available to the parties; see ARSIWA art 50(2)(a) and Commentary 133. At the same time, such system may explicitly limit recourse to countermeasures, as in the case of WTO or the EU; see generally Peter-Tobias Stoll, 'World Trade Organization, Dispute Settlement', *MPEPIL* (2014) paras 42–54.

<sup>192</sup> See Section 5.2.

<sup>193</sup> See Ruys (n 36) 705. The self-contained aspect is totally absent with respect to state immunity and functional immunity of state officials which, unlike diplomatic inviolabilities, do not offer special remedies; see Vezzani (n 52) 49; Vincenzo Cannizzaro, *Diritto internazionale* (Giappichelli 2012) 341.

Even if not listed in Article 50 ARSIWA, it may be questioned whether the rules of jurisdiction and immunity should nonetheless be exempted from countermeasures by virtue of the interests they protect. In this sense, Special Rapporteur Arangio-Ruiz proposed a clause aiming at excluding in general measures ‘affecting the independence, sovereignty or domestic jurisdiction of the wrongdoer’.<sup>194</sup> The drafting committee deemed the text to be ‘couched in excessively broad terms, amounting, in effect, to a quasi-prohibition of countermeasures’.<sup>195</sup> Accordingly, the provision was expunged from the final draft. Indeed, there is no reason to exclude sovereign attributes such as jurisdiction and immunity from the realm of countermeasures. Much like there is no ‘core’ of sovereignty safeguarded by the principle of domestic jurisdiction (which can only be defined negatively as that on which a state has not assumed international obligations at a given time<sup>196</sup>), there is no ‘core’ of sovereignty protected by the rules of jurisdiction and immunity. These rules have changed over time—e.g. through the expansion of extraterritorial jurisdiction and the acceptance of exceptions to the absolute rule of state immunity—to accommodate the evolving needs of an increasingly interdependent international community and the emergence of community interests.<sup>197</sup> The goal of the rules of jurisdiction and immunity has always been to minimise, not eliminate, potential conflict of sovereignty.<sup>198</sup> Moreover, sovereign equality *is* the foundation on which the

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<sup>194</sup> Arangio-Ruiz, Fifth Report on State Responsibility (1993) II(1) YILC 1, 51 [230].

<sup>195</sup> (1993) 1 YILC 140, 144 [27].

<sup>196</sup> Tzanakopoulos (n 170) 620.

<sup>197</sup> See generally Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 RdC.

<sup>198</sup> Competing jurisdictions are the rule, not the exception: Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 146–147.

power to take countermeasures is built.<sup>199</sup> In the absence of a centralised system of enforcement of international law, self-help remains the default mechanism to ensure compliance with the law among sovereign equals. As stressed by ILC Special Rapporteur Crawford, ‘whether that State complies with its international obligations of cessation and reparation is not a matter of its domestic jurisdiction.’<sup>200</sup> In other words, the use of countermeasures—within the limits prescribed by customary international law—is merely another way to accommodate conflicting sovereign interests.

In conclusion, none of the obligations excluded from the mechanism of countermeasures affect the viability of jurisdictional countermeasures.

### 6.2.7. Proportionality

Proportionality is a firmly established feature of countermeasures.<sup>201</sup> Its aim is to avoid ‘inequitable results’ and provide a ‘safeguard against abuse’<sup>202</sup> by ensuring that the system of self-enforcement based on unilateral breaches of international law does not lead to a cycle of mutual, retaliatory countermeasures that may spiral out of control.<sup>203</sup> However, proportionality remains to a large extent an indeterminate concept,<sup>204</sup> particularly in the

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<sup>199</sup> Zoller (n 171) 72.

<sup>200</sup> Third Report Crawford 93 [354].

<sup>201</sup> See *Naulilaa* (n 62) 1028; *Air Service* (n 34) 443; *Gabčíkovo-Nagymaros* (n 34) 56. See Elagab (n 81) 93; Thomas Franck, ‘On Proportionality of Countermeasures in International Law’ (2008) 102 AJIL 715, 716; Roger O’Keefe, ‘Proportionality’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1157. See also (1981) I YILC 130 [9] (Riphagen). But see Focarelli (n 129) 381, 423.

<sup>202</sup> Art 51 ARSIWA and Commentary 129, 135.

<sup>203</sup> Franck (n 201) 763; O’Keefe, ‘Proportionality’ (n 201) 1160.

<sup>204</sup> Rosalyn Higgins, *Problems and Process* (OUP 1995) 236; Franck (n 201) 716.

context of countermeasures.<sup>205</sup> As the *Air Service* Tribunal held, ‘judging the “proportionality” of counter-measures ... can at best be accomplished by approximation’.<sup>206</sup> To compound this difficulty, several tests have been employed to perform the proportionality assessment.<sup>207</sup> Earlier decisions relied on a negative standard according to which countermeasures should be ‘not clearly disproportionate’ to the injury to which they respond;<sup>208</sup> this allowed considerable latitude to the state taking the measure. For their part, the ICJ and the ILC chose a more restrictive test of ‘commensurability with the injury suffered’, taking into account the rights in question and the gravity of the breach.<sup>209</sup>

At the same time, proportionality does not require perfect equivalence between the wrongful act and the response. On the one hand, countermeasures are more likely to be proportionate if they are taken in relation to the same or closely related obligations.<sup>210</sup> For example, ‘clawback laws’ taken in response to exorbitant assertions of US jurisdiction,<sup>211</sup> or Russian and Iranian laws denying immunity on the basis of reciprocity<sup>212</sup> are equivalent responses to wrongful acts of the same nature by other states. However, only a minority of

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<sup>205</sup> ARSIWA Commentary 135 [5]; Zoller (n 171) 127; Sicilianos, *Les réactions* (n 61) 273; Crawford, ‘Counter-Measures’ (n 61) 66; O’Keefe, ‘Proportionality’ (n 201) 1165; Dawidowicz (n 62) 347; Paddeu (n 61) 263.

<sup>206</sup> *Air Service* (n 34) [83].

<sup>207</sup> See Focarelli (n 129) 382–393; Dawidowicz (n 62) 348.

<sup>208</sup> *Air Service* (n 34) [83]. See also *Naulilaa* (n 62) 1028 (‘out of all proportion’). See Sicilianos, *Les réactions* (n 61) 275.

<sup>209</sup> *Gabčíkovo-Nagymaros* (n 34) 85; ARSIWA Commentary 135. See O’Keefe, ‘Proportionality’ (n 201) 1166.

<sup>210</sup> ARSIWA Commentary 129 [5]. For some, these countermeasures are proportionate by definition: Elagab (n 81) 88; Zoller (n 171) 130; Sicilianos, *Les réactions* (n 61) 274.

<sup>211</sup> See Section 2.3.1.

<sup>212</sup> See Section 4.4.

jurisdictional countermeasures qualify as reciprocal countermeasures; more frequently, the exercise of jurisdiction or denial of immunity is a response to a breach of a different nature.<sup>213</sup> Excessive insistence on a strict comparison between injuries would emphasise the retributive aspect of countermeasures, which is incompatible with their coercive nature.<sup>214</sup> As Special Rapporteur Crawford stressed, the ‘inducement factor’ should also play a role in assessing proportionality.<sup>215</sup> Some circumstances might require reactions that are quantitatively disproportionate in order to achieve compliance with international law.<sup>216</sup> This was acknowledged by the *Air Service* tribunal and is reflected in the Commentary to the ILC Articles, which states that proportionality should also take into account ‘qualitative’ factors.<sup>217</sup>

Given the complexities of the proportionality assessment, it seems pointless to strike a balance in the abstract between breaches of the law of jurisdiction and immunity, and other breaches of international law. All that can be said at this level of generality is that the interest protected by the former—sovereignty in its components of independence and equality—is ‘one of the fundamental principles of the international legal order’,<sup>218</sup> but this does not imply that it cannot be balanced out by other, equally central interests

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<sup>213</sup> The nature of the breach may limit resort to reciprocal countermeasures; see ARSIWA Commentary 129 [5]; Elagab (n 81) 89; Enzo Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12 EJIL 889, 910.

<sup>214</sup> Sicilianos, *Les réactions* (n 61) 276.

<sup>215</sup> Third Report [346]; Fourth Report [65]. See also Zoller (n 171) 135; Cannizzaro (n 213) 915.

<sup>216</sup> In Ago’s vision, ‘limited forms of escalation’ were permitted when necessary to induce the wrongdoing state to comply with its obligations; a more articulated balance that goes beyond purely quantitative factors was also advocated in Fourth Report Riphagen (1983) II(1) YILC 15 [41]. See also Cannizzaro (n 213) 908. The final (narrower) wording of the Article is the result of a feedback loop between the ILC and the ICJ; see David Bederman, ‘Counterintuiting Countermeasures’ (2002) 96 AJIL 817, 822.

<sup>217</sup> *Air Service* (n 34) [85]; ARSIWA art 51 and Commentary 135 [6].

<sup>218</sup> *Jurisdictional Immunities* (n 67) [57].

protected under international law.<sup>219</sup> Moreover, ‘bare violations of sovereignty’, while important as a matter of principle, tend to have limited consequences in practice.<sup>220</sup> The rules of immunity are a case in point; as long as their breaches do not affect foreign sovereign assets, they tend not to trigger vigorous protests.<sup>221</sup> The proportionality of jurisdictional countermeasures must be assessed on a case-by-case basis.<sup>222</sup>

In the context of executive countermeasures, the assessment of proportionality is—or should be—part of the process through which the government resolves to exercise jurisdiction or deny immunity vis-à-vis other states. This means that the assessment of proportionality in measures such as the listing of a state as sponsor of terrorism is completely in the hands of the executive.<sup>223</sup> In mixed and judicial countermeasures, the assessment of proportionality must be carried out autonomously by domestic courts before exercising jurisdiction or denying immunity. The language of proportionality is not always explicitly used by courts when resorting to these measures. Nonetheless, this does not mean that no proportionality assessment is made. It is rather common (also among international

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<sup>219</sup> This balancing becomes ‘all the more compelling’ when peremptory norms are at play; O’Keefe, ‘Proportionality’ (n 201) 1163.

<sup>220</sup> As Brownlie notes, they are often not the subject of adjudication and, in any case, do not usually lead to the award of substantial damages: (n 113) 237.

<sup>221</sup> Proceedings in breach of jurisdictional immunity are often ignored by the respondent state; see Fox and Webb (n 95) 15. Significantly, Germany’s decision to bring proceedings before the ICJ came right after Italian courts issued measures of constraint against German state property: *Jurisdictional Immunities* (n 67) [35]. Similarly, the DRC brought proceedings against Belgium only once an arrest warrant was issued against its then-sitting foreign minister: *Arrest Warrant* (n 138).

<sup>222</sup> For example, denial of state immunity pursuant to the US international taking exception may be more justifiable with respect to large-scale and discriminatory—if not flat-out genocidal—campaigns, than with respect to one-time takings of relatively small scale. See Section 4.3.2.

<sup>223</sup> A number of authors have challenged the legality of the US terrorism exception on the basis of its asserted disproportionate character: see Paul Stephan, ‘Sovereign Immunity and the International Court of Justice’ in John Moore (ed), *Foreign Affairs Litigation in United States Courts* (Martinus Nijhoff 2013) 81; Vezzani (n 52) 74. However, nothing makes these measures inherently disproportionate; the final assessment must be made *in concreto* on the basis of the reasons advanced to justify the measures.

courts) to present the outcome of the proportionality test as self-evident, or as Franck puts it, ‘as if the thing explained itself’.<sup>224</sup> When domestic courts assess proportionality, they very often follow the same pattern. Upon considering—at times at great length—the unlawful character of the breach, they introduce the exercise of jurisdiction or denial of immunity as a ‘necessary’,<sup>225</sup> ‘uncontroversial’,<sup>226</sup> or ‘appropriate’<sup>227</sup> consequence; alternative outcomes would be ‘paradoxical’<sup>228</sup> and ‘would create a severe imbalance in the reciprocity ... between nations.’<sup>229</sup> Domestic courts also frequently assess whether alternative remedies exist outside the target state.<sup>230</sup> If the measure is a *last resort*, its proportionality is strengthened.<sup>231</sup> All these considerations lead to the conclusion that domestic courts can (and frequently do) perform an assessment of proportionality before resorting to jurisdictional countermeasures.

#### 6.2.8. Procedural requirements

In order to serve their goal and bring wrongdoing states into line with international law, countermeasures must be adopted by following certain procedural steps.<sup>232</sup> In their final

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<sup>224</sup> Franck (n 201) 739.

<sup>225</sup> *Prefecture of Voiotia* (2000) 129 ILR 519, 521.

<sup>226</sup> *Ferrini v Germany*, Judgment No 5044/2004 [11].

<sup>227</sup> *Bouterse* (2000) 3 YIHL 677, 687.

<sup>228</sup> *Nezzar* (25 July 2012) No BB.2011.140 [5.4.3].

<sup>229</sup> *Princz*, 813 FSupp 22, 26 (1992).

<sup>230</sup> eg cases under the international taking exception; *Princz*, and Judgment 238/2014; cases in which universal jurisdiction is exercised under the principle of subsidiarity; judgments under the TVPA.

<sup>231</sup> cf *Fox and Webb* (n 95) 29 (‘[I]f there is no remedy at home for the individual plaintiff, it surely becomes the more imperative for the forum State’s courts to provide one.’). See also *Iovane* (n 85) 601.

<sup>232</sup> ARSIWA Commentary 136; see also *Kamto* (n 135) 1170.

draft,<sup>233</sup> the ILC Articles identify two conditions that must be fulfilled before resorting to countermeasures: (i) the injured state must call upon the wrongdoing state to comply with the obligations of cessation and reparation (so called '*sommat*ion');<sup>234</sup> and (ii) it must notify the latter state of the intention of taking countermeasures and offer to negotiate (notification).<sup>235</sup>

Both *sommat*ion and notification are accessible conditions if the measure is taken by executive organs. For example, when the US State Department lists a state as sponsor of terrorism, it is normally after international claims have been brought against the target state; the threat of being included in the list gives sufficient notice as to the adverse consequence of the state's inaction.<sup>236</sup> In the case of mixed countermeasures, domestic courts can still rely on the action of the executive in order to fulfil, at least in part, these conditions. For example, the Italian Constitutional Court's refusal to recognise immunity for war crime reparations could rely on the prior invocation of Germany's responsibility made by the Italian government.<sup>237</sup> Given that executive organs are responsible for the

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<sup>233</sup> The codification of these requirements proved particularly controversial in the ILC. Special Rapporteur Arangio-Ruiz subordinated resort to countermeasures to exhaustion of all dispute settlement procedures; see Fourth Report 22. This proposal was strongly opposed for its 'choking effect' on countermeasures: Bruno Simma, 'Counter-Measures and Dispute Settlement: A Plea for a Different Balance' (1994) 5 EJIL 102. See further Dawidowicz (n 62) 367.

<sup>234</sup> This requirement was a simplification proposed by Special Rapporteur Crawford: see Third Report 93-94. Nevertheless, states continued to voice some objections: ILC, 'Report on the work of its fifty-second session' (2000) UN Doc A/CN.4/513, 28. The relationship between *sommat*ion and invocation of responsibility is unclear, but they are arguably two ways of framing the same condition.

<sup>235</sup> ARSIWA art 52(1).

<sup>236</sup> Stephan (n 223) 81.

<sup>237</sup> See Section 4.4.

invocation of international responsibility, these measures ordinarily comply with the requirement of *sommatio*.<sup>238</sup>

Notification of the countermeasure may not always occur before the exercise of jurisdiction or denial of immunity. Yet, while announcing a countermeasure before taking it may contribute to inducing the wrongdoing state into compliance,<sup>239</sup> there is very little practice supporting this requirement,<sup>240</sup> which is almost certainly an innovation of the ILC.<sup>241</sup> In any event, it is unlikely that the notification requirement consists in disclosing the exact nature of the measure the state is contemplating.<sup>242</sup> There is also no agreement on the time that should elapse between the notification and the taking of the measure. According to the ILC prior notification should give the state a chance to reconsider its position faced with the prospect of countermeasures,<sup>243</sup> but when the request is likely to be met with inaction, countermeasures might be taken immediately.<sup>244</sup> Moreover, when urgent countermeasures are necessary to preserve the state's rights, notification can be completely omitted.<sup>245</sup>

Judicial countermeasures encounter further obstacles in complying with these requirements. The judicial decision through which jurisdiction is exercised or immunity is denied—which contains the determination and invocation of international responsibility of

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<sup>238</sup> cf Third Report Crawford 93 [357].

<sup>239</sup> Sicilianos, 'La codification' (n 119) 479.

<sup>240</sup> Gianelli (n 150) 557.

<sup>241</sup> See Sicilianos, 'La codification' (n 119) 479; Paddeu (n 61) 265 ('not a strict requirement').

<sup>242</sup> Elagab (n 81) 71.

<sup>243</sup> ARSIWA Commentary 136.

<sup>244</sup> Elagab (n 81) 71.

<sup>245</sup> Article 52(2) ARSIWA.

the target state—represents the first occasion on which the forum state formally raises its claims against the alleged wrongdoer. Prior to the taking of the countermeasure, there is no dispute between the forum state and the target state on the breach justifying the response.<sup>246</sup> In these cases, the target state is deprived not so much of the prior notification, but of the *sommation*—the duty to ‘call upon the responsible State ... to fulfil its obligations’.<sup>247</sup> This condition cannot be easily disregarded. It is hard to defend the legality of a countermeasure when the wrongdoing state has not been given a chance to review its acts, advance justifications, or alternatively terminate the wrongful conduct and offer reparation.<sup>248</sup>

Today, few scholars defend the idea that countermeasures can be taken without any preliminary procedural conditions.<sup>249</sup> Yet, there is support for the view that these prior requirements should be qualified.<sup>250</sup> According to Sicilianos, everything hinges on the gravity of the breach and the urgency of the situation.<sup>251</sup> A serious breach combined with the urgency resulting from the continuing nature of the wrongful act may justify immediate

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<sup>246</sup> In all likelihood, Italy did not plead countermeasures before the ICJ because of the uncertainty as to whether these requirements had been met: Trapp and Mills (n 33) 166; Vezzani (n 52) 38. When dismissing the countermeasure argument in his oral pleadings, Tomuschat referred to the failure to fulfil the procedural conditions: *Jurisdictional Immunities* (n 67) (Oral Transcript) (12 September 2011) CR 2011/17 [14].

<sup>247</sup> ARSIWA art 51(1)(a) and Commentary 136.

<sup>248</sup> See Kamto (n 135) 1170; Dawidowicz (n 62) 367. If the remedies sought could be obtained by means of a simple request, any coercive measure would be automatically disproportionate; see Elagab (n 81) 77; Yuji Iwasawa and Naoki Iwatsuki, ‘Procedural Conditions’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1152–1155.

<sup>249</sup> eg Zoller (n 171) 119; Focarelli (n 129) 360. Massimo Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Giuffrè 1990) 206–207. See generally Gianelli (n 150) 24.

<sup>250</sup> eg Peter Malanczuk, ‘Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’ (1983) 43 *ZaöRV* 705, 725–726; Jean Combacau and Denis Alland, ‘“Primary” and “Secondary” Rules in the Law of State Responsibility Categorizing International Obligations’ (1985) 16 *NYIL* 81, 107; Sicilianos, *Les réactions* (n 61) 202.

<sup>251</sup> Sicilianos, *Les réactions* (n 61) 202.

responses.<sup>252</sup> Certain jurisdictional countermeasures provide fitting examples. Countermeasures in the form of exercise of universal jurisdiction or denial of foreign official immunity may take place when foreign nationals accused of international crimes find themselves (often for a brief period of time) in the territory of another state willing to prosecute.<sup>253</sup> At times, the unwillingness of the state of nationality to comply with its obligations to prosecute is blatant.<sup>254</sup> In these exceptional circumstances, a notice of claim would not give the wrongdoing state a chance to comply with its obligations but, most likely, an opportunity to shield its nationals from prosecution. This risk may, with due caution, justify invoking the responsibility of the wrongdoing state and contextually taking jurisdictional countermeasures to preserve the rights at the basis of the claim. In these cases, the involvement of executive organs after urgent countermeasures have been taken by the courts could cure potential defects in the *sommation*.<sup>255</sup> Once again, the legality of these countermeasures must be assessed based on the circumstances of specific cases and no assumption can be made solely on the basis of the nature of the countermeasure.

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<sup>252</sup> ibid 210–212. According to Dominice, *sommation* is a strict requirement only when reparation, not cessation, is the remedy sought: Christian Dominicé, ‘Observations sur les droits de l’État victime d’un fait internationalement illicite’ in Jeanne Belhumeur and Luigi Condorelli (eds), *L’ordre juridique international entre tradition et innovation* (Graduate Institute Publications 1997) [163].

<sup>253</sup> eg *Nezzar* (n 228). See Section 3.2.2.

<sup>254</sup> For example, in *Ely Ould Dah* prosecution in Mauritania (the national state) was inhibited by an amnesty law; see Section 3.2.2.

<sup>255</sup> Possible solutions may include notifying the target state through the diplomatic channels of the forum state; cf Moser (n 51) 841.

### **6.3. Normative considerations**

Jurisdictional countermeasures, like all countermeasures, are tools of foreign policy in the hands of states. Legal considerations form only part of what ultimately guides decision makers in adopting their policies; whether, when, and how states should resort to this type of measures depends at least in part on extra-legal considerations that, as such, are reserved for other studies. This final section focuses on a narrower issue which is whether jurisdictional countermeasures present distinctive features that should discourage their adoption even if they encounter no fundamental obstacles under international law. Among the potential objections that can be raised against these measures, three stand out: effectiveness; potential for abuse; and the floodgates risk.

#### **6.3.1. Effectiveness**

It may be questioned whether countermeasures consisting in the exercise of jurisdiction by domestic courts are an effective way to remedy internationally wrongful acts. O'Keefe advanced similar objections with respect to the proposed exception to state immunity for international crimes:

Even were they to succeed in the fullest sense in individual cases, civil actions against foreign states in respect of internationally unlawful ill-treatment could only be a band-aid solution to the problem of civil impunity for violations of international rules on the humane treatment of individuals. Redress obtained through the courts of a state not party to the violation does nothing to foster the rule of law in the responsible state, contempt for which is what by and large leads in the first place to the violation in question and

to the denial of local remedies for death or personal injury occasioned by it.<sup>256</sup>

In order to assess effectiveness, there must be some agreement on the yardstick against which it should be tested. The broader the objectives—e.g. bringing about political change or fostering the rule of law in the wrongdoing state—the less suitable countermeasures appear to achieve them. However, like all sanctions, the effectiveness of individual countermeasures cannot be assessed in isolation. Scholarly literature on sanctions shows that ‘[a] definitive judgement on [their effectiveness] is difficult to arrive at because sanctions are usually one factor amongst many in a complex causal chain stretching over a longer period of time. A whole-sale judgement that deems them as generally ineffective is, however, by no means justified.’<sup>257</sup> The sanctions debate points to a complex matrix of contextual factors that determine their effectiveness, ranging from economic factors (e.g. the size of the economies and the involvement of significant trading partners), to political factors (e.g. the democratic or authoritarian nature of the system of government), to other factors (e.g. affected interest groups).<sup>258</sup>

At the same time, the goal of countermeasures is more specific compared to that of ‘sanctions’ in general. Countermeasures are employed to implement international responsibility, that is to bring about cessation, reparation, and non-repetition following the commission of international wrongs. It is against this goal that their effectiveness should

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<sup>256</sup> Roger O’Keefe, ‘State Immunity and Human Rights’ (2011) 44 *VandJTransnatlL* 999, 1039.

<sup>257</sup> Peter Rudolf, ‘Sanctions in International Relations: On the Current State of Research’ (German Institute for International and Security Affairs 2007) 6 <[www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2007\\_RP06\\_rdf\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2007_RP06_rdf_ks.pdf)>.

<sup>258</sup> *ibid* 11–14; Gary Clyde Hufbauer and others, *Economic Sanctions Reconsidered: History and Current Policy* (Institute for International Economics 2007) 155.

be tested.<sup>259</sup> In this regard, a distinction should be made between countermeasures in general and corrective countermeasures. In general, the notion that countermeasures alone can bring an end to the wrongful act to which they respond is unrealistic.<sup>260</sup> The same wisdom derived from the literature on sanctions holds true for countermeasures in general. These are at their most effective when used as part of an incremental approach involving the concerted effort of multiple actors.<sup>261</sup> Conversely, ‘corrective’ jurisdictional countermeasures are by definition ‘effective’.<sup>262</sup> If the countermeasure fulfils the obligations that the wrongdoing state should have originally realised, the countermeasure *is* the realisation of cessation and/or reparation. Certainly, this measure does not address the root causes that generated the wrongful act and its ‘removal’ requires further action by all interested parties. In this respect, even corrective countermeasures are only as effective as the context in which they are used.

### 6.3.2. Potential for abuse

Jurisdictional countermeasures—like all countermeasures—are built on a paradox. States are allowed to respond to threats to the international legal order by means of unilateral acts that are themselves threats to that order.<sup>263</sup> A certain level of scepticism towards these measures is therefore understandable. There is no denying that, while in theory they are

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<sup>259</sup> See Dawidowicz (n 62) 277.

<sup>260</sup> *ibid* 278. According to Tams, the actual effects of individual countermeasures are often trivial: (n 129) 229.

<sup>261</sup> See Rudolf (n 257) 15; Dawidowicz (n 62) 279.

<sup>262</sup> Text at n 150.

<sup>263</sup> Elagab (n 81) 44.

available to all states, some states may be better placed than others to take countermeasures.<sup>264</sup> However, jurisdictional countermeasures in this respect are neither better nor worse than other countermeasures. While the risk of abuse can never be fully eliminated, there is no realistic alternative in a system that is still to a large extent decentralised and where proper ‘law enforcement’ (particularly with regard to communitarian norms) is still very limited.<sup>265</sup> The argument was convincingly made by Higgins:

We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made. The role of norms is the achievement of values for the common good. Whether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision-makers—by the Security Council, by the International Court of Justice, by various international bodies.<sup>266</sup>

### 6.3.3. Floodgates risk

Given the special role that the rules of jurisdiction and immunity have in allocating competences among states,<sup>267</sup> there is a risk that jurisdictional countermeasures might open the floodgates for an endless cycle of retaliatory responses that would compromise the stability of the international legal system. Fox captured the spirit of this objection when

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<sup>264</sup> Leben (n 65) 20–21; Yoshiro Matsui, ‘Countermeasures in the International Legal Order’ [1994] *JapanAnnIntL* 1, 7–8; Paddeu (n 61) 226.

<sup>265</sup> See Bederman (n 216) 830 (describing countermeasures as a ‘necessary evil’). The expansion of countermeasures may be seen as an alternative to the use of force: Dawidowicz (n 62) 12.

<sup>266</sup> Rosalyn Higgins, *Problems and Process* (OUP 1995) 247.

<sup>267</sup> But see text at n 198.

she warned that ‘courts would be overwhelmed with disgruntled individuals’ claims’ and that ‘public administration of the State would [be] neglect[ed] in disposing of individual complaints.’<sup>268</sup> Yet, while caution in approaching countermeasures of this kind is required, they are no cause for unnecessary alarm. Similar warnings have been sounded against collective countermeasures, which in the eyes of the critics would undermine ‘the stability of the international legal order’<sup>269</sup> and lead to ‘chaos and violence’.<sup>270</sup> As it turns out, these warnings are grossly exaggerated.<sup>271</sup> The notion that regulating specific types of countermeasures, including jurisdictional countermeasures, may result in their increased use is misplaced. The idea behind the project of codification of international responsibility is that a degree of formalism may actually lead to restraint on unilateral action.<sup>272</sup> Acknowledging that countermeasures can consist of breaches of the rules of jurisdiction and immunity serves to bring these measures under a rules-based framework that responds to the complexities of the states’ calculations in this area. As seen above, the law of state responsibility provides a number of guarantees against abuse. Alongside these, the most effective deterrent against the abuse of jurisdiction and immunities was aptly identified by Lauterpacht, who noted that the threat of retaliation ‘may provide in most cases a substantial safeguard against ... the flood of petty and vexatious actions and extortions in

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<sup>268</sup> Hazel Fox, ‘Private Law Damages as a Method of State Accountability: The Tort Exception to State Immunity’ [1993] TWLS 107, 113. See also Lori Damrosch, ‘Enforcing International Law Through Non-Forcible Measures’ (1998) 1997 RdC 9, 191.

<sup>269</sup> DN Hutchinson, ‘Solidarity and Breaches of Multilateral Treaties’ (1988) 59 BYIL 151, 202. See also James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 584.

<sup>270</sup> Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 AJIL 413, 433.

<sup>271</sup> Tams (n 129) 230.

<sup>272</sup> Bederman (n 216) 826–827.

foreign countries.<sup>273</sup> When assessing whether jurisdictional countermeasures are the appropriate means to respond to wrongful acts, states must take into account the risk of exposing themselves to similar measures by other states and modulate their actions accordingly.<sup>274</sup> As seen in the previous chapters, these considerations are very much present in the minds of legal experts, policy makers, and judicial bodies when taking these measures.<sup>275</sup>

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<sup>273</sup> Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220, 248.

<sup>274</sup> See *Abelesz v Magyar Nemzeti Bank*, 692 F3d 661, 682 (7th Cir 2012) ('If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not complain if other countries' courts decide to do the same.').

<sup>275</sup> See, eg, the discussion before the US Senate Judiciary Committee preceding the adoption of JASTA: Section 4.3.1.

## 7. CONCLUSION

This thesis set out to investigate whether rules of jurisdiction and immunity can be breached by way of (lawful) countermeasures, that is, as a means to implement the international responsibility of other states following the commission of internationally wrongful acts. The analysis of state practice in four areas (prescriptive jurisdiction, adjudicative jurisdiction, state immunity, and immunity of state officials) has revealed that there is ample support for an affirmative answer. In fact, the framework of countermeasures contributes to explaining considerable practice inconsistent with the general rules of jurisdiction and immunity which, to date, has been examined only in terms of exception or breach of these rules.

Exorbitant assertions of prescriptive jurisdiction in the form of trade control measures are particularly likely to be justifiable as countermeasures in these scenarios: (i) when they exclusively target the wrongdoing state and states that aided or assisted in the commission of the wrongful act; (ii) when they seek to enforce UNSC resolutions vis-à-vis other UN member states; (iii) when they respond to serious breaches of peremptory norms of international law. Other measures are possible, particularly in the context of armed conflict, but it is often difficult to identify obligations of all states affected by them.

The exercise of adjudicative jurisdiction (assuming it is possible to isolate this type of jurisdiction) in the absence of an internationally accepted basis can also be justifiable as a countermeasure. In the criminal law context, countermeasures have an important role to play with respect to offences that states have an obligation to criminalise and prosecute, but where a basis of jurisdiction may not be available under customary international law.

The exercise of jurisdiction over the crime of aggression is an emblematic case. In the civil law context, though significantly less developed, countermeasures may justify the exercise of jurisdiction that seeks to implement responsibility for a state's failure to provide effective remedies for the victims of international crimes.

There is abundant practice where state immunity is denied in response to wrongful acts of the target state. This is at times achieved through expansive interpretation of existing exceptions or through the assertions of new ones. In most cases, there does not appear to be a permissive rule of custom for the denial of immunity. Yet, the instrumental nature of such measure (which seeks to obtain cessation and reparation from wrongdoing states through judicial proceedings) may provide a stronger legal basis to justify denial of immunity. Indeed, some measures are plainly grounded on the countermeasures framework, such Iranian and Russian measures based on reciprocity.

With respect to the immunity of state officials, the rationale behind personal immunity of certain high-ranking officials makes it generally unsuitable to be breached for the implementation of international responsibility. Conversely, functional immunity has often been denied as a way to respond to wrongful acts committed in the territory of the forum. Countermeasures may also provide an alternative justification for denial of functional immunity for international crimes until an exception can be clearly identified under customary international law.

This thesis has advanced some arguments concerning the function that the framework of countermeasures may have with respect to the development of customary rules of jurisdiction and immunity. Countermeasures may act as a 'safety valve', allowing states to derogate from the general rules of jurisdiction and immunity when exceptional

circumstances warrant it, while preserving the integrity of the rules. The countermeasures framework may also provide a ‘second line of defence’ for states that wish to advance a new *primary* rule of jurisdiction and immunity (e.g. a new head of jurisdiction or exception to immunity). If the new rule fails to gather enough support from other states, the framework of countermeasures may offer an alternative justification based entirely on *secondary* norms—a common defence before international courts and tribunals.

This thesis demonstrated that countermeasures consisting in exercise of jurisdiction and denial of immunity (or ‘jurisdictional countermeasures’) may to a large extent comply with the substantive and procedural requirements of lawful countermeasures. Some caution is required when countermeasures are taken by judicial organs without a prior determination and invocation of responsibility by executive organs. However, in exceptional circumstances even such measures may be permissible. The conclusion is that the legality of jurisdictional countermeasures can only be assessed on a case-by-case basis taking into account all the relevant circumstances.

Jurisdictional countermeasures may raise some concerns due to the unilateral nature of these measures and their potential for abuse. However, these concerns are not justified in light of the practice of states. Many of the measures that are more justifiable as countermeasures have been taken in response to breaches of international obligations that were well documented and of a serious character (prohibition of international crimes, obligation to comply with UNSC resolutions, individual right to an effective remedy and access to a court, prohibition on the use of force). Measures that seek to induce compliance with the secondary obligations deriving from the breach of these norms are more likely to strengthen rather than undermine the international rule of law.

In any event, the goal of recognising that countermeasures may affect the rules of jurisdiction and immunity is not to give *carte blanche* to states to disregard these rules, but to bring these measures under a rule-based framework that may offer the most appropriate standards to assess the legality of state action as opposed to the legal grey area in which this practice has taken place to date. Indeed, it is likely that the framework proposed in this study may be applicable to other areas of international law beyond jurisdiction and immunity. Acknowledging that the legality of certain state practice should not be sought exclusively in terms of breach/compliance with primary norms, but also in preclusion stemming from secondary norms opens up new avenues for future research.

## Bibliography

Abi-Saab G, “‘Interprétation’ et ‘auto-interprétation’: quelques réflexions sur leur rôle dans la formation et la résolution du différend international’ in U Beyerlin and others (eds), *Recht zwischen Umbruch und Bewahrung* (Springer 1995)

Abi-Saab G, ‘The Concept of “War Crimes”’ in Wang Tieya and Sienho Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001)

Abramovsky A, ‘Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in *United States v. Yunis*’ (1990) 15 YJIL 121

Ago R, ‘Le Délit International’ (1939) 68 RdC 419

Akande D and Shah S, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 EJIL 815

Akande D and Tzanakopoulos A, ‘The International Court of Justice and the Concept of Aggression’ in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression* (CUP 2016)

—, ‘Treaty Law and ICC Jurisdiction Over the Crime of Aggression’ (2018) 29 EJIL 939

Akande D, ‘International Law Immunities and the International Criminal Court’ (2004) 98 AJIL 407

—, ‘Civil Remedies for International Crimes’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009)

Akehurst M, ‘Jurisdiction in International Law’ [1972] BYIL 145

Akhavan P, *Reducing Genocide to Law*, vol 87 (CUP 2012)

Alain Pellet and Alina Miron, ‘Sanctions’, *MPEPIL* (2013)

Alford R, ‘The Self-Judging WTO Security Exception’ [2011] UtahLRev 697

Alija Fernández RA, ‘The 2014 Reform of Universal Jurisdiction in Spain: From All to Nothing’ [2014] ZIS 717

Alland D, ‘Countermeasures of General Interest’ (2002) 13 EJIL 1221

—, ‘The Definition of Countermeasures’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Allen S and others, ‘Defining State Jurisdiction and Jurisdiction in International Law’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019)

Allison R, ‘Cuba’s Seizures of American Business’ (1961) 47 ABAJ 48

- Amerasinghe C, *Local Remedies in International Law* (CUP 2004)
- , *Diplomatic Protection* (OUP 2008)
- Anglin V, ‘Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks’ (2015) 104 *GeoLJ* 693
- Anzilotti D, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi 1902)
- Ascensio H, ‘Are Spanish Courts Backing down on Universality?’ (2003) 1 *JICJ* 690
- Atteritano A, ‘Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years’ (2010) 19 *ItYBIL* 33
- Baker C, ‘Tolerance of International Espionage: A Functional Approach’ (2003) 19 *AmUIntlLRev* 1091
- Bakker C, ‘Universal Jurisdiction of Spanish Courts over Genocide in Tibet’ (2006) 4 *JICJ* 595
- Bassiouni C, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *VaJIL* 81
- , ‘Crimes Against Humanity: The Case for a Specialized Convention’ (2010) 9 *WashUGlobalStudLRev* 575
- Beaucillon C, ‘Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation’ in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016)
- Bederman D, ‘Counterintuiting Countermeasures’ (2002) 96 *AJIL* 817
- Behrens P, ‘The Personal Inviolability of Diplomatic Agents in Emergency Situations’ in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017)
- Beim J, ‘Enforcing a Prohibition on International Espionage’ (2017) 18 *ChiJIntlL* 647
- Bellia A and Clark B, ‘The Alien Tort Statute and the Law of Nations’ [2011] *UChiLRev* 445
- Bellinger J and Haynes W, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 892007 *IntlRevRedCross* 443
- Belsky A, Merva M and Roht-Arriaza N, ‘Implied Waiver under the FSIA’ (1989) 77 *CalLRev* 365
- Beresford S, ‘Surveillance Aircraft and Satellites: A Problem of International Law’ (1960) 27 *JAirL&Com* 107
- Besson S, ‘Sovereignty’, *MPEPIL* (2011)
- Bhuta N, ‘The Ninth Life of the Alien Torts Statute—Kiobel and After’ (2014) 12 *JICJ* 539

- Bianchi A, 'Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony Between European and US Approaches' (1992) 35 GYIL 366
- , 'Denying State Immunity to Violators of Human Rights' (1994) 46 AJPIIL 195
- , *L'applicazione extraterritoriale dei controlli all'esportazione* (CEDAM 1995)
- , 'Reply to Professor Maier' in Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996)
- , 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights' in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff 1997)
- , 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237
- Bockslaff K, 'The Pipeline Affairs of 1981/82: A Case History' (1984) 27 GermanYBIntL 28
- Bodansky D, 'Human Rights and Universal Jurisdiction' in Mark Gibney (ed), *World Justice? U.S. Courts and International Human Rights* (Westview 1991)
- Boisson de Chazournes L, 'Other Non-Derogable Obligations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- Boister N, *An Introduction to Transnational Criminal Law* (OUP 2012)
- , 'Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law' in Harmen Van Der Wilt (ed), *Legal Responses to Transnational and International Crimes* (Edward Elgar 2017)
- Booyesen H, 'Convention on the Crime of Apartheid' (1976) 2 SAfrYBIntL 56
- Born G and Rutledge P, *International Civil Litigation in United States Courts* (Wolters Kluwer 2011)
- Bothe M, 'The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany' (2015) 24 ItalYrbkIntL 25
- Bowett D, 'Economic Coercion and Reprisals by States' (1972) 13 VaJIL 1
- Bowett D, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1983) 53 BYIL 1
- Bradley C and Helfer L, 'International Law and the U.S. Common Law of Foreign Official Immunity' [2010] SupCtRev 213
- Bradley C, 'The Alien Tort Statute and Article III' [2001] VaJIL 587
- , 'The ATS, the TVPA, and the Future of International Human Rights Litigation' (2014) 108 ASIL Proc 145
- , *International Law in the U.S. Legal System* (2nd edn, OUP 2015)

- Brierly J, 'The "Lotus" Case' (1928) 44 LQR 154
- Briggs A, *The Conflict of Laws* (4th edn, OUP 2019)
- Bröhmer J, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff 1997)
- Broomhall B, *International Justice and the International Criminal Court* (OUP 2003)
- Brown B, 'Primacy or Complementarity' (1998) 23 YJIL 383
- Brown C and O'Keefe R, 'State Immunity from Measures of Constraint in Connection with Proceedings Before a Court' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)
- Brownlie I, *State Responsibility* (OUP 1983)
- , 'Contemporary Problems Concerning the Jurisdictional Immunity of States' (1987) 62–I AIDI 13
- Buchan R, *Cyber Espionage and International Law* (Bloomsbury 2018)
- Bucher A, 'La compétence universelle civile en matière de réparation pour crimes internationaux' (2015) 76 AIDI 1
- Burley A-M, 'The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor' (1989) 83 AJIL 461
- Buzzini GP, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case' (2009) 22 LJIL 455
- Byers M, 'Still Agreeing to Disagree: International Security and Constructive Ambiguity' [2020] JUFIL 1
- Calamita J, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' [2009] VandJTransnatlL 1393
- Cameron I, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth 1994)
- Cann, Jr W, 'Creating Standards and Accountability for the Use of the WTO Security Exception' (2001) 26 YJIL 413
- Cannizzaro E and Bonafé B, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights' in Bruno Simma and Ulrich Fastenrath (eds), *From Bilateralism to Community Interest* (OUP 2011)
- Cannizzaro E, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889
- , *Diritto internazionale* (Giappichelli 2012)

Cannon Farrar Q, 'US Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction' (2011) 79 *FordhamLRev* 2347

Caplan L, 'State Immunity, Human Rights, and Jus Cogens' (2003) 97 *AJIL* 741

Carter B, *International Economic Sanctions: Improving the Haphazard US Legal Regime* (CUP 1988)

——, 'Economic Sanctions', *MPEPIL* (2011)

Casad R and Richman W, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (3rd edn, Lexis Law 1998)

Cassese A, 'When May Senior State Officials Be Tried for International Crimes?' (2002) 13 *EJIL* 853

——, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *JICJ* 589

——, *International Law* (2nd edn, OUP 2005)

——, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law' (2006) 4 *JICJ* 410

——, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *JICJ* 933

——, *International Criminal Law: Cases and Commentary* (OUP 2011)

Castel J-G and Castel M, 'Canadian State Immunity Act and the Absolute Immunity of Foreign States Committing or Supporting Acts of Terrorism or Violating International Humanitarian Law' (2016) 45 *AdvocQ* 81

Chase A, 'Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism' (2004) 45 *VaJIL* 41

Chehtman A, 'Terrorism and the Conceptual Divide Between International and Transnational Criminal Law' in Harmen Van Der Wilt (ed), *Legal Responses to Transnational and International Crimes* (Edward Elgar 2017)

Chesterman S, 'The Spy Who Came in from the Cold War: Intelligence and International Law' (2005) 27 *MichJIntlL* 1071

——, 'Secret Intelligence', *MPEPIL* (2009)

Chorazak M, 'Clarity and Confusion: Did Republic of Austria v. Altmann Revive State Department Suggestions of Foreign Sovereign Immunity?' (2005) 55 *DukeLJ* 373

Clagett B, 'A Reply to Professor Lowenfeld' (1996) 90 *AJIL* 641

Clark R, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus' (2011) 22 *CrimLF* 519

- Clermont K, 'Jurisdictional Fact' (2005) 91 *CornellLRev* 973
- Cleveland S, 'Norm Internalization and US Economic Sanctions' (2001) 26 *YJIL* 1
- , 'After Kiobel' (2014) 12 *Journal of International Criminal Justice* 551
- Cohen M, 'Espionage and Immunity—Some Recent Problems and Developments' (1948) 25 *BYIL* 404
- Colangelo A, 'The New Universal Jurisdiction' (2004) 36 *GeoJIL* 537
- , 'The Legal Limits of Universal Jurisdiction' (2006) 47 *VaJIL* 149
- , 'Universal Jurisdiction as an International False Conflict of Laws' (2009) 30 *MichJIntlL* 881
- , 'Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction' (2013) 28 *Md JIL* 65
- , 'What Is Extraterritorial Jurisdiction?' (2013) 99 *Cornell L Rev* 1303
- Combacau J and Alland D, "'Primary" and "Secondary" Rules in the Law of State Responsibility Categorizing International Obligations' (1985) 16 *NYIL* 81
- Conforti B, 'In tema di immunità funzionale degli organi statali stranieri' [2010] *RivDirInt*
- Constantinople G, 'Towards a New Definition of Piracy: The Achille Lauro Incident' (1985) 26 *VaJIL* 723
- Coombes K, 'The Quest for Justice for Victims of Terrorism: International Law and the Immunity of States in Canada and the United States' (2018) 69 *UNBLJ* 251
- Coppel J, 'A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law Student Contributions' (1993) 6 *LJIL* 73
- Corn G and Taylor R, 'Sovereignty in the Age of Cyber' (2017) 111 *AJIL Unbound* 207
- Corten O, 'The Obligation of Cessation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- Coughlan S and others, *Law Beyond Borders* (Irwin 2014)
- Craig WL, 'Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massardy*' (1970) 83 *HLR* 579
- Crawford J, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 *BYIL* 75
- , 'Democracy and International Law' (1993) 64 *BYIL* 113
- , 'Counter-Measures as Interim Measures' (1994) 5 *EJIL* 65
- , 'Responsibility to the International Community as a Whole' (2001) 8 *IJGLS* 303

- , ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 AJIL 874
- , ‘Overview of Part Three of the Articles on State Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- , *State Responsibility: The General Part* (CUP 2013)
- , *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019)
- Cryer R, Robinson D and Vasiliev S, *An Introduction to International Criminal Law and Procedure* (CUP 2019)
- d’Amato A, *The Concept of Custom in International Law* (Cornell UP 1971)
- d’Argent P, ‘Immunity of State Officials and the Obligation to Prosecute’ (Brill 2014)
- d’Aspremont J, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’ (2010) 43 ILR 301
- , ‘Formalism versus Flexibility in the Law of Treaties’ in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014)
- Damrosch L, ‘Retaliation or Arbitration—Or Both?’ (1980) 74 AJIL 785
- , ‘Enforcing International Law Through Non-Forcible Measures’ (1998) 1997 RdC 9
- Darcy S, ‘Retaliation and Reprisal’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)
- Davis M, ‘The Pinochet Case’ [2000] ISA Research Papers
- Dawidowicz M, ‘Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council’ (2007) 77 BYIL 333
- , ‘The Obligation of Non-Recognition of an Unlawful Situation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- , *Third-Party Countermeasures in International Law* (CUP 2017)
- De Guttry A, *La rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Giuffrè 1985)
- De Mestral A and Gruchalla-Wesierski T, *Extraterritorial Application of Laws of Export Control Legislation: Canada and the USA* (Martinus Nijhoff 1990)
- De Sena P and De Vittor F, ‘State Immunity and Human Rights’ (2005) 16 EJIL 89
- De Sena P, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996)

- Dekieffer D, 'Foreign Policy Trade Controls and the GATT' (1988) 22 *JWT* 73
- Del Mar K, 'The Effects of Framing International Legal Norms as Rules or Exeptions' (2013) 15 *IntCLRev* 143
- Del Vecchio A, 'International Courts and Tribunals, Standing', *MPEPIL* (2010)
- Dellapenna J, *Suing Foreign Governments and Their Corporations* (Transnational Publishers 2003)
- Delupis I, 'Foreign Warships and Immunity for Espionage' (1984) 78 *AJIL* 53
- Demarest G, 'Espionage in International Law' (1995) 24 *DenvJIL&Poly* 321
- Denza E, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016)
- dePender Zeigler A, 'Siberian Pipeline Dispute and the Export Administration Act: What's Left of Extraterritorial Limits and the Act of State Doctrine' (1983) 6 *HoustonJIntIL* 63
- Dickerson H, 'Minimum Standards', *MPEPIL* (2010)
- Dickinson A, 'Germany v. Italy and the Territorial Tort Exception' (2013) 11 *JICJ* 147
- Dinstein Y, 'Aggression', *MPEPIL* (2015)
- Dominicé C, 'Observations sur les droits de l'État victime d'un fait internationalement illicite' in Jeanne Belhumeur and Luigi Condorelli (eds), *L'ordre juridique international entre tradition et innovation* (Graduate Institute Publications 1997)
- , 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- Donovan DF and Roberts A, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *AJIL* 142
- Douglas Z, 'State Immunity for the Acts of State Officials' (2012) 82 *BYIL* 281
- Drake M, 'United States v. Yunis: The DC Circuit's Dubious Approval of US Long-Arm Jurisdiction Over Extraterritorial Crimes' (1992) 87 *NwULRev* 697
- Dugard J, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *LJIL* 1001
- , 'Diplomatic Protection' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- Dunworth T, 'From Rhetoric to Reality: Prosecuting War Criminals in New Zealand' (2008) 5 *NZYB Intl Law* 163

Dupuy P-M, 'Relations Between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Edmondson L, 'Espionage in Transnational Law' (1971) 5 *VandJTransnatlL* 434

Elagab O, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988)

Emmenegger S, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 *ArizJIntl&CompL* 631

Ergec R, *La Compétence Extraterritoriale à La Lumière Du Contentieux Sur Le Gazoduc Euro-Sibérien* (Bruylant 1984)

Escobar Hernández C, 'Universal Jurisdiction in Spain' [2013] *SpanYrbkIntlL* 255

Evans M and Galani S, 'Piracy and the Development of International Law' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea* (Bloomsbury 2014)

Fitzmaurice G, 'State Immunity from Proceedings in Foreign Courts' (1933) 14 *BYIL* 101

——, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *RdC* 1

——, 'Hersch Lauterpacht – The Scholar as Judge, Part I' (1961) 37 *BYIL* 1

Flauss J-F, 'Droit Des Immunités et Protection Internationale Des Droits de l'homme' (2000) 10 *RSDIE* 299

Fletcher G, 'Against Universal Jurisdiction' (2003) 1 *JICJ* 580

Foakes J and O'Keefe R, 'Article 12' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)

Foakes J, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014)

Focarelli C, *Le contromisure nel diritto internazionale* (Giuffrè 1994)

——, 'Diniego dell'immunità alla Germania per crimini internazionali: la suprema Corte si fonda su valutazioni "qualitative"' (2009) 922 *RivDirInt* 363

Foont BE, 'Shooting down Civilian Aircraft: Is There an International Law?' (2007) 72 *JAirL&Com* 695

Forcese C, 'De-Immunitizing Torture: Reconciling Human Rights and State Immunity' (2007) 52 *McGillLJ* 127

——, 'Spies Without Borders: International Law and Intelligence Collection' (2011) 5 *JNatlSecL&Poly* 179

——, ‘Pragmatism and Principle: Intelligence Agencies and International Law’ (2016) 102 VaLRev 67

Fox H and Webb P, *The Law of State Immunity* (rev&upd 3rd edn, OUP 2015)

Fox H, ‘State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts’ (1989) 20 NYIL 3

——, ‘Private Law Damages as a Method of State Accountability: The Tort Exception to State Immunity’ [1993] TWLS 107

——, *The Law of State Immunity* (OUP 2002)

——, ‘In Defence of State Immunity’ (2006) 552 ICLQ 399

——, ‘State Immunity and the International Crime of Torture’ [2006] EHRLR 142

Francioni F, ‘Access to Justice and Its Pitfalls’ (2016) 14 JICJ 629

Francis A, ‘LIBERTAD or Liberty? Breaking the Law in the Name of Democracy’ (2019) 28 TulJIntl&CompL 55

Franck T, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46

——, ‘On Proportionality of Countermeasures in International Law’ (2008) 102 AJIL 715

Friedrichs J, ‘Defining the International Public Enemy’ [2006] LJIL 69

Frulli M, *Immunità e crimini internazionali* (Giappichelli 2007)

——, ‘On the Consequence of a Customary Rule Granting Functional Immunity to State Officials and Its Exceptions’ (2016) 26 DukeJComp&IntlL 479

——, ‘Time Will Tell Who Just Fell and Who’s Been Left Behind’ (2016) 14 JICJ 587

Gaeta P, ‘Extraordinary renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar’ [2006] RivDirInt 126

——, ‘On What Conditions Can a State Be Held Responsible for Genocide?’ (2007) 18 EJIL 631

——, ‘When Is the Involvement of State Officials a Requirement for the Crime of Torture?’ (2008) 6 JICJ 183

Gaja G, ‘States Having an Interest in Compliance with the Obligation Breached’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

——, ‘The Concept of an Injured State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

——, ‘Barcelona Traction, Light and Power Company (Belgium v Spain) (1970)’ in Cameron Miles and Eirik Bjorge (eds), *Landmark Cases in Public International Law* (Bloomsbury 2017)

- Gallant K, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2008)
- Garnett R, 'The Defence of State Immunity for Acts of Torture' (1997) 18 *AustYBIL* 97
- Gartenstein-Ross D, 'Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act' (2002) 77 *NYULRev* 496
- Gattini A, 'The Dispute on Jurisdictional Immunities of the State before the ICJ' (2011) 24 *LJIL* 173
- Gavouneli M and Bantekas I, 'Prefecture of Voiotia v Federal Republic of Germany' (2001) 951 *AJIL* 198
- Gazzini T, 'The Normative Element Inherent in Economic Collective Enforcement Measures: United Nations and European Union Practice' in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004)
- Gestri M, 'EUNAVFOR MED: Fighting Migrant Smuggling Under UN Security Council Resolution 2240 (2015)' (2016) 25 *ItalYrbkIntL* 19
- Gianelli A, *Adempimenti preventivi all'adozione di contromisure internazionali* (Giuffrè 1997)
- Gierbolini L, 'The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum' (1996) 6 *JTransnatlL&Poly* 289
- Goodwin-Gill G, 'Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute' in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999)
- Grant T, 'Article 5' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)
- , 'Article 6' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)
- Greene P, 'The Arab Economic Boycott of Israel: The International Law Perspective' [1978] *VandJTransnatlL* 77
- Greenwood C, 'The Caroline', *MPEPIL* (2009)
- Gross L, 'States as Organs of International Law and the Problem of Auto-Interpretation' in George A Lipsky (ed), *Law and Politics in the World Community* (UCal Press 1953)
- Grotius H, *The Rights of War and Peace: Including the Law of Nature and of Nations* (Archibald Colin Campbell tr, MW Dunne 1901)
- Guilfoyle D, 'SS Lotus (France v Turkey) (1927)' in Cameron Miles and Eirik Bjorge (eds), *Landmark Cases in Public International Law* (Bloomsbury 2017)
- Gurson M, 'The US Jurisdiction over Transfers of US Dollars Between Foreigners and over Ownership of US Dollar Accounts in Foreign Banks' [2004] *ColumBusLRev* 721

- Hafner G, Kohen M and Breau SC, *State Practice Regarding State Immunities* (Martinus Nijhoff 2006)
- Hafner-Burton E, Helfer L and Fariss C, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 *IntlOrg* 673
- Hailbronner K and Heilmann D, 'Aerial Incident Cases before International Courts and Tribunals', *MPEPIL* (OUP 2009)
- Hakimi M, 'Unfriendly Unilateralism' (2014) 55 *HarvILJ* 105
- Happold M and Eden P (eds), *Economic Sanctions and International Law* (Bloomsbury 2016)
- Harvard Research, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *AJIL Supp* 439
- Helfer L, 'Flexibility in International Agreements' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012)
- Heller KJ, 'What Is an International Crime?' (2017) 58 *HarvILJ* 353
- Henckaerts J-M, *Customary International Humanitarian Law: Volume 1, Rules* (CUP 2005)
- Hennessy S, 'In Re the Foreign Sovereign Immunities Act' (2011) 42 *GeoJIL* 855
- Hernández G, *The International Court of Justice and the Judicial Function* (OUP 2014)
- Hertogen A, 'Letting Lotus Bloom' (2015) 26 *EJIL* 901
- Higgins R and Flory M, *Terrorism and International Law* (Routledge 1997)
- Higgins R, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?' (1972) 21 *ICLQ* 270
- , *Problems and Process* (OUP 1995)
- Hill C and Smith KE, *European Union Foreign Policy: Key Documents* (Routledge 2000)
- Hinrichs Oyarce X, 'Pueblo Incident (1968)', *MPEPIL* (OUP 2007)
- Hogan F, 'The Hickenlooper Amendments' (1969) 11 *BCIndus&ComLRev* 77
- Honniball A, 'Private Political Activists and the International Law Definition of Piracy' (2015) 36 *AdelLRev* 279
- Hovell D, 'The Authority of Universal Jurisdiction' (2018) 29 *EJIL* 427
- Hufbauer GC and others, *Economic Sanctions Reconsidered: History and Current Policy* (Institute for International Economics 2007)

Humes-Schulz S, 'Limiting Sovereign Immunity in the Age of Human Rights' (2008) 21 HarvHumRtsJ 105

Hutchinson DN, 'Solidarity and Breaches of Multilateral Treaties' (1988) 59 BYIL 151

Iovane M, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the "Constitutionalization" of International Law' (2016) 14 Journal of International Criminal Justice 595

Iskander M, *The Arab Boycott of Israel* (PLO Research Center 1966)

Iwasawa Y and Iwatsuki N, 'Procedural Conditions' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Jackson M, *Complicity in International Law* (OUP 2015)

Jain AG, 'Universal Civil Jurisdiction in International Law' (2015) 55 IJIL 209

Jennings R, 'The Caroline and McLeod Cases' (1938) 32 AJIL 82

Jessup PC, *Transnational Law* (Yale UP 1956)

Jørgensen N, 'The Obligation of Non-Assistance to the Responsible State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Jouet M, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond' (2006) 35 GaJIntl&CompL 495

Joyner C, 'Boycott', *MPEPIL* (2009)

Joyner D, *Iran's Nuclear Program and International Law: From Confrontation to Accord* (OUP 2016)

Kaeb C and Scheffer D, 'The Paradox of Kiobel in Europe' (2013) 107 AJIL 852

Kaleck W and Kroker P, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16 JICJ 165

Kamto M, 'Une troublante "immunité totale" du ministre des affaires étrangères' [2002] RevBDI 518

——, 'The Time Factor in the Application of Countermeasures' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Keitner C, 'Officially Immune?' (2010) 36 YJIL 1

——, 'Foreign Official Immunity and the Baseline Problem' [2011] FordhamLRev 605

——, 'The Forgotten History of Foreign Official Immunity' [2012] NYULRev 704

——, 'Immunities of Foreign Officials from Civil Jurisdiction' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019)

- Kelsen H, 'Théorie générale du droit international public' (1932) 42 RdC 117
- , 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' [1942] CLR 530
- , 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1943) 53 YLJ 207
- , 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 IntlQ 153
- , *Principles of International Law* (Rinehart 1952)
- , *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1992)
- , *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966)
- Keppler E, 'Preventing Human Rights Abuses by Regulating Arms Brokering' (2001) 19 BerkeleyJIntlL 381
- Khalil M, *The Arab States and the Arab League: A Documentary Record* (Khayats 1962)
- Kittichaisaree K, *The Obligation to Extradite or Prosecute* (OUP 2018)
- Knuchel S, 'State Immunity And The Promise Of Jus Cogens' (2011) 9 NorthWJHR 149
- Kohl U, 'Jurisdiction in Cyberspace' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015)
- , 'Territoriality and Globalization' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019)
- Kontorovich E and Art S, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104 AJIL 436
- Kontorovich E, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 HarvILJ 183
- Koskenniemi M, 'The Future of Statehood' (1991) 32 HarvILJ 397
- Kreß C and Von Holtendorff L, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 JICJ 1179
- Kreß C, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 JICJ 561
- Krizek M, 'The Protective Principle of Extraterritorial Jurisdiction' (1988) 6 BUIntlLJ 337
- Ku JG, 'Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute' (2013) 107 AJIL 835

- Kunz J, 'The Theory of International Law' (1938) 32 ASIL Proc 23
- , 'Sanctions in International Law' [1960] AJIL 324
- Kuyper PJ, 'The European Community and the US Pipeline Embargo: Comments on Comments' (1984) 27 GermanYBIntlL 72
- Lamberth R, 'The Role of Courts in Foreign Affairs' in John Moore (ed), *Foreign Affairs Litigation in United States Courts* (Martinus Nijhoff 2013)
- Langer M and Eason M, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 EJIL 779
- Langer M, 'The Diplomacy of Universal Jurisdiction' (2011) 105 AJIL 1
- Lauterpacht H, 'La théorie des différends non justiciables en droit international' (1930) 34 RdC 494
- , 'Boycott in International Relations' [1933] BYIL 125
- , 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220
- , *The Development of International Law by the International Court* (CUP 1982)
- Leben C, 'Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale' (1982) 28 AFDI 9
- Levy P, 'Sanctions on South Africa: What Did They Do?' (1999) 89 AmEcRev 415
- Liivoja R, *Criminal Jurisdiction Over Armed Forces Abroad* (CUP 2017)
- Lissitzyn O, 'The Treatment of Aerial Intruders in Recent Practice and International Law' (1953) 47 AJIL 559
- , 'Some Legal Implications of the U-2 and RB-47 Incidents' (1962) 56 AJIL 135
- Lohmann S, 'The Convergence of Transatlantic Sanction Policy Against Iran' (2016) 29 Cambridge Rev Int Aff 930
- Lowe V, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 AJIL 257
- , *Extraterritorial Jurisdiction* (Grotius 1983)
- , 'International Law Issues Arising in the Pipeline Dispute: The British Position' (1984) 27 GermanYBIntlL 54
- , 'Public International Law and the Conflict of Laws: The European Response to the United States Export Administration Regulations' (1984) 33 ICLQ 515
- , 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 ICLQ 378

- , ‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’ (1999) 10 EJIL 405
- , *International Law* (OUP 2007)
- Lowenfeld A, ‘Sauce for the Gander: The Arab Boycott and United States Political Trade Controls’ (1977) 12 *TexasIntlLJ* 25
- , ‘Congress and Cuba: The Helms-Burton Act’ (1996) 90 *AJIL* 419
- , ‘Trade Controls for Political Ends: Four Perspectives’ (2003) 4 *CJIL* 355
- , *International Economic Law* (2nd edn, OUP 2008)
- Lyubarsky A, ‘Clearing the Road to Havana’ (2016) 91 *NYULRev* 458
- Maison R, ‘Les premiers cas d’application des dispositions pénales des Conventions de Genève par les juridictions internes’ (1995) 6 *EJIL* 260
- Majid A, ‘Jural Aspects of Unauthorised Entry Into Foreign Airspace’ (1985) 32 *NILR* 251
- Malanczuk P, ‘Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’ (1983) 43 *ZaöRV* 705
- Mance, Lord, ‘Justiciability’ (2018) 67 *ICLQ* 739
- Mangan S, ‘Compensation for Certain Victims of Terrorism under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2002’ (2001) 42 *VaJIL* 1037
- Mann F, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *RdC* 1
- , ‘The Doctrine of International Jurisdiction Revisited After Twenty Years’ (1984) 186 *RdC* 9
- Marcuss S and Richard E, ‘Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory’ (1981) 20 *ColumJTransnatlL* 439
- Marks S, ‘What Has Become of the Emerging Right to Democratic Governance?’ (2011) 22 *EJIL* 507
- Marschik A, ‘The Politics of Prosecution’ in Timothy MacCormack and Gerry Simpson (eds), *The Law of War Crimes* (Martinus Nijhoff 1997)
- Marzen C, ‘Liability for Terrorism in American Courts’ (2008) 25 *TMCoooleyLRev* 503
- Matsui Y, ‘Countermeasures in the International Legal Order’ [1994] *JapanAnnIntlL* 1
- Mavroidis P, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ (2000) 11 *EJIL* 763
- McCarthy J, ‘The Passive Personality Principle and Its Use in Combatting International Terrorism’ [1989] *FordhamIntlLJ* 298

- McGregor L, 'State Immunity and Jus Cogens' (2006) 552 ICLQ 437
- , 'Torture and State Immunity: Deflecting Impunity, Distorting Impunity' (2007) 18 EJIL 903
- Meessen K, 'Antitrust Jurisdiction under Customary International Law' (1984) 78 AJIL 783
- , 'Extraterritoriality of Export Control: A German Lawyer's Analysis of the Pipeline Case' (1984) 27 GermanYBIntlL 97
- , *International Law of Export Control: Jurisdictional Issues* (Graham & Trotman 1992)
- (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996)
- Mendelson M, 'The Formation of Customary International Law' (1998) 272 RdC
- Meron T, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 BYIL 83
- Merrills J, *International Dispute Settlement* (CUP 2011)
- Migliorino L, 'Giurisdizione dello Stato territoriale rispetto ad azione non autorizzate di agenti di Stati stranieri' (1988) 71 RivDirInt 784
- Milanović M, 'Is the Rome Statute Binding on Individuals?' (2011) 9 JICJ 25
- Mills A, *The Confluence of Public and Private International Law* (CUP 2009)
- , 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 187
- , *Party Autonomy in Private International Law* (CUP 2018)
- Mohamad R, 'Unilateral Sanctions in International Law: A Quest for Legality' in Ali Marossi and Marisa Bassett (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (TMC Asser 2015)
- Molot J, 'The State Immunity Act of Canada' (1982) 20 CanYBIntlL 79
- Momtaz D, 'Attribution of Conduct to the State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The law of international responsibility* (OUP 2010)
- Mora P, 'Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in Naït-Liman v. Switzerland' (2018) 65 NILR 155
- Moser PT, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations' (2012) 4 GoJIL 809
- Muir JD, 'The Boycott in International Law' [1974] JIntlL&Econ 187
- Murphy J, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) 12 HarvHumRtsJ 1
- Murphy SD, 'Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?' (2018) 112 AJIL Unbound 4

Nagan W, 'An Appraisal of the Comprehensive Anti-Apartheid Act of 1986' (1987) 5 *JL&Relig* 327

Navarrete I and Buchan R, 'Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions' (2018) 51 *CornellIntlLJ* 897

Navarrete I, 'L'espionnage en temps de paix en droit international public' (2016) 53 *ACDI* 1

Nesi G, 'The Quest for a "Full" Execution of the ICJ Judgment in "Germany v. Italy"' (2013) 11 *JICJ* 185

Nollkaemper A, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *AJIL* 760

—, *National Courts and the International Rule of Law* (OUP 2011)

Novogrodsky N, 'Immunity for Torture: Lessons from *Bouzari v. Iran*' (2007) 18 *EJIL* 939

Nowak M and McArthur E, *The United Nations Convention Against Torture: A Commentary* (OUP 2008)

O'Connell M, *The Power and Purpose of International Law* (OUP 2008)

O'Connor J, 'Agrarian Reforms in Cuba, 1959-1963' (1968) 32 *Science & Society* 169

O'Keefe R, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *JICJ* 735

—, 'The Doctrine of Incorporation Revisited' (2009) 79 *BYIL* 7

—, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *JICJ* 811

—, 'Proportionality' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

—, 'State Immunity and Human Rights' (2011) 44 *VandJTransnatL* 999

—, 'Khurts Bat v Investigating Judge of the German Federal Court' (2012) 82 *BYIL* 613

—, 'Article 7' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)

—, 'Jurisdictional Immunities' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013)

—, 'An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely' (2015) 109 *AJIL Unbound* 167

—, *International Criminal Law* (OUP 2015)

Olleson S, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 *LJIL* 615

- Olmstead C, 'Jurisdiction' (1989) 14 YJIL 468
- Oppenheim L, *International Law: A Treatise, Vol II: War and Neutrality* (3rd edn, Longmans, Green 1921)
- Orakhelashvili A, 'State Immunity and International Public Order Revisited' (2006) 49 *GermanYBIntlL* 327
- , 'State Immunity and Hierarchy of Norms' (2007) 18 *EJIL* 955
- , *The Interpretation of Acts and Rules in Public International Law* (OUP 2008)
- , 'Governmental Activities on Foreign Territory', *MPEPIL* (2010)
- , 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 *EJIL* 849
- (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015)
- Orrego Vicuña F, 'Customary International Law in a Global Community: Tailor Made?' (2005) 38 *Estudios Internacionales* 21
- Oxman B, 'Jurisdiction of States', *MPEPIL* (2007)
- Paddeu F, 'Countermeasures', *MPEPIL* (2015)
- , *Justification and Excuse in International Law* (CUP 2018)
- Palchetti P, 'Can State Action On Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2015) 24 *ItalYrbkIntlL* 53
- Paparinskis M, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *BYIL* 264
- Parlett K, 'Immunity in Civil Proceedings for Torture: The Emerging Exception' [2006] *EHRLR* 49
- , 'Universal Civil Jurisdiction for Torture' (2007) 4 *EHRLR* 385
- Parrish A, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 *VandLRev* 1455
- Paulus A, 'Second Thoughts on the Crime of Aggression' (2009) 20 *EJIL* 1117
- Paust J and Blaustein A, 'The Arab Oil Weapon: A Reply and Reaffirmation of Illegality' (1976) 15 *ColumJTransnatlL* 57
- Paust J, 'Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights' (1985) 8 *HoustonJIntlL* 49
- Pauwelyn J, 'Enforcement and Countermeasures in the WTO' (2000) 94 *AJIL* 335
- Pavoni R, 'An American Anomaly?' (2012) 21 *ItalYrbkIntlL* 143

—, ‘Sovereign Immunity and the Enforcement of International Cultural Property Law’ in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (OUP 2013)

—, ‘How Broad Is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?’ (2016) 14 JICJ 573

Pedretti R, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2015)

Peed M, ‘Blacklisting as Foreign Policy’ (2005) 54 DukeLJ 1321

Peel J, ‘Notice of Claim by an Injured State’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Pelc K, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (CUP 2016)

Perry N, ‘The Numerous Federal Legal Definitions of Terrorism’ (2003) 30 JLegis 249

Phelps JT, ‘Aerial Intrusions by Civil and Military Aircraft in Time of Peace’ (1985) 107 MilLRev 255

Picchio Forlati L, *La sanzione nel diritto internazionale* (CEDAM 1974)

—, ‘The Legal Core of International Economic Sanctions’ in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004)

Pisillo Mazzeschi R, ‘Access to Justice in Constitutional and International Law’ (2015) 24 ItalYrbkIntL 7

—, ‘The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories’ in Pia Acconci and others (eds), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (Martinus Nijhoff 2016)

Poels A, ‘Universal Jurisdiction in Absentia’ (2005) 23 NQHR 65

Provost R, *State Responsibility in International Law* (Ashgate/Dartmouth 2002)

Pugh M, ‘Legal Aspects of the Rainbow Warrior Affair’ (1987) 36 ICLQ 655

Rabinovitch R, ‘Universal Jurisdiction in Absentia’ (2004) 28 FordhamIntLJ 500

Radsan J, ‘The Unresolved Equation of Espionage and International Law’ (2006) 28 MichJIntL 595

Randall K, ‘Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute’ (1985) 18 NYUJIntL&Pol 1

—, ‘Universal Jurisdiction Under International Law’ (1987) 66 TexLRev 785

- Rathbone M, Jeydel P and Lentz A, 'Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws' (2012) 44 *GeoJIL* 1055
- Reinisch A, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 *EJIL* 803
- , 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)
- Reydams L, 'Niyonteze v. Public Prosecutor' (2002) 96 *AJIL* 231
- , 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case' (2003) 1 *JICJ* 428
- , *Universal Jurisdiction* (OUP 2003)
- , 'Universal Jurisdiction in Context' (2005) 99 *ASIL Proc* 118
- , 'The Rise and Fall of Universal Jurisdiction' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011)
- Rissing-van Saan R, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 *JICJ* 381
- Roberts A, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' [2001] *AJIL* 757
- Robertson A and Demetriou M, "'But That Was in Another Country...": The Extraterritorial Application of US Antitrust Laws in the US Supreme Court' (1994) 43 *ICLQ* 417
- Robertson CB, 'The Inextricable Merits Problem in Personal Jurisdiction' (2011) 45 *UCDLRev* 1301
- Robinson D, 'Expropriation in the Restatement (Revised)' (1984) 78 *AJIL* 176
- , 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43
- Roht-Arriaza N, 'The Pinochet Precedent and Universal Jurisdiction' (2000) 35 *NewEngLRev* 311
- Ronzitti N, 'L'immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso Calipari' (2008) 91 *RivDirInt* 1033
- Ross M, 'Rethinking Diplomatic Immunity' [1989] *AmUJIntLL&Poly* 173
- Rotblat C, 'Weaponizing the Plumbing: Dollar Diplomacy, Yuan Internationalization, and the Future of Financial Sanctions' (2017) 21 *UCLAJILForeignAff* 311
- Rudolf P, 'Sanctions in International Relations: On the Current State of Research' (German Institute for International and Security Affairs 2007) <[www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2007\\_RP06\\_rdf\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2007_RP06_rdf_ks.pdf)>
- Ruffert M, 'Reprisals', *MPEPIL* (2015)

- Ruys T, 'Immunity, Inviolability and Countermeasures' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019)
- Ruzza A, 'Expropriation and Nationalization', *MPEPIL* (2017)
- Ryngaert C, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 CJIL 625
- , 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations' [2012] *McGillIntlJSustDevL&Poly* 245
- , *Jurisdiction in International Law* (2nd edn, OUP 2015)
- , 'Whither Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects' in Cedric Ryngaert, Erik Molenaar and Sarah Nouwen (eds), *What's Wrong with International Law?* (Brill 2015)
- Safferling C, 'Public Prosecutor v. Djajic' (1998) 92 AJIL 528
- Salmon J, 'Libres propos sur l'arrêt de la C.I.J. du 14 février 2002 dans l'affaire relative au mandat d'arrêt du 11 avril 2000' [2002] *RevBDI* 512
- , 'Duration of the Breach' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)
- Sanger A, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 *ICLQ* 193
- Sant G, 'So Banks Are Terrorists Now: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act' [2013] *ArizStLJ* 533
- Santulli C, *Le statut international de l'ordre juridique étatique* (Pedone 2001)
- Saul B, *Defining Terrorism in International Law* (OUP 2008)
- Schabas W, *Genocide in International Law* (CUP 2000)
- , 'The Crime of Torture and the International Criminal Tribunals' (2005) 37 *CaseWResJIntL* 349
- , 'State Policy as an Element of International Crimes' (2007) 98 *JCrimL&Criminology* 953
- , 'Post-Genocide Justice in Rwanda: A Spectrum of Options' in Phil Clark and Zachary Kaufman (eds), *After Genocide* (ColumbUP 2009)
- Schachter O, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *RdC* 16
- , 'Compensation for Expropriation' (1984) 78 *AJIL* 121
- Schaller C, 'Spies', *MPEPIL* (OUP 2015)

Scharf M, 'Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States' (2000) 35 *NewEngLRev* 363

——, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53 *HarvILJ* 357

——, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013)

Schiff Berman P, 'Jurisdictional Pluralism' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019)

Schmahl S, 'Letelier and Moffitt Claim', *MPEPIL* (2008)

Schmitt M and Vihul L, 'Respect for Sovereignty in Cyberspace' (2017) 95 *TexLRev* 1639

Schnably S, 'The Transformation of Human Rights Litigation' (2017) 24 *UMiamiIntl&CompLRev* 285

Schreuer C, *State Immunity: Some Recent Developments* (Grotius 1988)

——, 'The Warning of the Sovereign State: Towards a New Paradigm for International Law' (1993) 4 *EJIL* 447

Schwarz A, 'War Crimes', *MPEPIL* (2014)

Scobbie I, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 *EJIL* 1201

Sealing K, "'State Sponsors of Terrorism" Is a Question, Not an Answer' (2003) 38 *TexasIntlLJ* 119

Shahabuddeen M, 'Municipal Law Reasoning in International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996)

Shany Y, 'An Old House with New Bricks or a New House of Old Cards?' [2012] *JerRevLS* 50

Shearer I, 'Piracy', *MPEPIL* (2010)

Shihata I, 'Destination Embargo of Arab Oil: Its Legality Under International Law' (1974) 68 *AJIL* 591

Sicilianos L-A and Picchio Forlati L (eds), *Economic Sanctions in International Law* (Brill 2004)

Sicilianos L-A, *Les réactions décentralisées à l'illicite* (LGDJ 1990)

——, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *EJIL* 1127

——, 'La codification des contre-mesures par la Commission du droit international' (2005) 38 *RBDI* 447

——, ‘Countermeasures in Response to Grave Violations of Obligations Owed to the International Community’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Simma B and Paulus A, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 AJIL 302

Simma B and Pulkowski D, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 EJIL 483

Simma B, ‘Self-Contained Regimes’ (1985) 16 NYIL 111

——, ‘Counter-Measures and Dispute Settlement: A Plea for a Different Balance’ (1994) 5 EJIL 102

——, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 RdC

——, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1

Sinclair I, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 167 RdC 113

Slomanson W, *Fundamental Perspectives on International Law* (6th edn, Wadsworth 2010)

Sornarajah M, *The International Law on Foreign Investment* (3rd edn, CUP 2010)

Staker C, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018)

Steinberger H, ‘State Immunity’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 1987)

Stephan P, ‘Sovereign Immunity and the International Court of Justice’ in John Moore (ed), *Foreign Affairs Litigation in United States Courts* (Martinus Nijhoff 2013)

Stern B, ‘L’extra-territorialité «revisitée»: où il est question des affaires Alvarez-Machain, Pâte de Bois et de quelques autres’ (1992) 38 AFDI 239

——, ‘Can the United States Set Rules for the World? A French View’ (1997) 31 JWT 5

——, ‘The Obligation to Make Reparation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

——, ‘Vers une limitation de l’ «irresponsabilité souveraine» des états et chefs d’état en cas de crime de droit international?’ in Marcelo Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill Nijhoff 2006)

Stigen J, ‘The Relationship Between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’ in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl 2010)

Stoll P-T, ‘World Trade Organization, Dispute Settlement’, *MPEPIL* (2014)

Strupp K, *Eléments du droit international public universel, européen et américain* (Rousseau 1927)

- Su A, 'Rise and Fall of Universal Civil Jurisdiction' (2019) 41 HumRtsQ 849
- Sulzer J, 'Implementing the Principle of Universal Jurisdiction in France' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007)
- Svantesson D, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft' (2015) 109 AJIL Unbound 69
- Sverrisson H, *Countermeasures, the International Legal System, and Environmental Violations* (Cambria Press 2008)
- Swart M, 'Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"' (2010) 70 ZaöRV 459
- Talmon S, 'The Security Council as World Legislature' (2005) 99 AJIL 175
- , 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes* (Martinus Nijhoff 2006)
- , 'Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 LJIL 979
- , 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417
- Tams CJ, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005)
- Taylor A, 'Another Front in the War on Terrorism?' (2003) 45 ArizLRev 533
- Thirlway H, *The Sources of International Law* (2nd edn, OUP 2019)
- Tomonori M, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct' (2000) 29 DenvJIntlL&Poly 261
- , 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (2008) 71 MLR 734
- Tomuschat C, 'L'immunité des Etats en cas de violations graves des droits de l'homme' (2005) 109 RGDIP 51
- , 'Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes' (2005) 71 AIDI 213
- Torremans P, 'Recognition and Enforcement of Foreign Judgments—The Traditional Rules' in P Torremans and JJ Fawcett (eds), *Cheshire, North & Fawcett Private International Law* (OUP 2017)
- Trapp K and Mills A, 'Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of Germany v Italy' (2012) 1 CJICL 153
- Trapp K, *State Responsibility for International Terrorism* (OUP 2011)

——, 'Jurisdiction and State Responsibility' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019)

Trooboff P, 'Foreign State Immunity: Emerging Consensus on Principles' (1986) 200 RdC 235

Trouille H, 'France, Universal Jurisdiction and Rwandan Génocidaires: The Simbikangwa Trial' (2016) 14 JICJ 195

Tunks M, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 DukeLJ 651

Turck N, 'A Comparative Study of Non-United States Responses to the Arab Boycott' (1978) 8 GaJIntl&CompL 711

Tzanakopoulos A, *Disobeying the Security Council* (OUP 2011)

——, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 LoyLAIntl&CompLRev 133

——, 'The Right to Be Free from Economic Coercion' (2015) 4 CJICL 616

Vagets DF, 'The Pipeline Controversy: An American Viewpoint' (1984) 27 GermanYBIntlL 38

Van Aaken A, 'Smart Flexibility Clauses in International Investment Treaties and Sustainable Development' (2014) 15 JWIT 827

Van Alebeek R, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008)

——, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 LJIL 559

——, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019)

Van Der Wilt H, 'Universal Jurisdiction Under Attack' (2011) 9 JICJ 1043

Van Panhuys H, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 ICLQ 1193

Van Steenberghe R, 'The Obligation to Extradite or Prosecute' (2011) 9 JICJ 1089

Vattel E de, *The Law of Nations* (Joseph Chitty tr, T & JW Johnson 1852)

Verdier P-H and Voeten E, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 AJIL 389

——, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59 International Studies Quarterly 209

Verdross A, 'Règles générales du droit international de la paix' (1929) 30 RdC 271

- Vezzani S, 'Sul diniego delle immunità dalla giurisdizione di cognizione ed esecutiva a titolo di contromisura' (2014) 97 RivDirInt 36
- Wälde T and Sabahi B, 'Compensation, Damages, and Valuation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)
- Wallach D, 'The Irrationality of Universal Civil Jurisdiction' (2014) 46 GeoJIL 803
- Warbrick C and McGoldrick D, 'Extradition Law Aspects of Pinochet 3' (1999) 48 ICLQ 958
- Watson G, 'The Passive Personality Principle' (1993) 28 TexasIntLLJ 1
- Watts A, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 RdC 9
- Watts S and Richard T, 'Baseline Territorial Sovereignty and Cyberspace' (2018) 22 Lewis&ClarkLRev 771
- Wayne R, 'Extraterritorial Application of the Export Administration Amendments of 1977' (1978) 8 GaJIntl&CompL 741
- Wei S, 'FG Hemisphere Associates v. Democratic Republic of the Congo' (2014) 108 AJIL 776
- Weil P, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413
- Werle G and Jeßberger F, *Principles of International Criminal Law* (3rd edn, OUP 2014)
- Weston B, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth International Law of Expropriation' (1981) 75 AJIL 437
- Whitcomb Corcoran JI, 'The Trading with the Enemy Act and the Controlled Canadian Corporation' (1968) 14 McGillLJ 174
- White N, *The Cuban Embargo under International Law* (Routledge 2014)
- Wilner G, 'International Reaction to the Cuban Democracy Act' (1993) 8 FlaJIL 401
- Wittich S, 'Direct Injury and the Incidence of the Local Remedies Rule' (2000) 5 AustrianRevInt&EurL 121
- , 'Barcelona Traction Case', *MPEPIL* (2007)
- , 'Article 2 (1)(c) and (2) and (3)' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013)
- , 'Domestic Courts and the Content and Implementation of State Responsibility' (2013) 26 LJIL 643
- Wolfrum R, 'The Decentralized Prosecution of International Offences through National Courts' in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996)

Wouters J, 'The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks' [2003] LJIL 253

Wright Q, 'Legal Aspects of the U-2 Incident' (1960) 54 AJIL 836

Wuerth I, 'Pinochet's Legacy Reassessed' (2012) 106 AJIL 731

——, 'Foreign Official Immunity: Invocation, Purpose, Exceptions' [2013] SwissRevIntl&EurL 207

Yang X, *State Immunity in International Law* (CUP 2012)

Yee S, 'Universal Jurisdiction: Concept, Logic and Reality' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015)

Young R, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 BCIntl&CompLRev 23

Zappalà S, 'The German Federal Prosecutor's Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?' (2006) 4 JICJ 602

Zegveld L, 'The Bouterse Case' (2001) 32 NYIL 97

Zhang SG, *Economic Cold War: America's Embargo against China and the Sino-Soviet Alliance, 1949-1963* (StanUP 2001)

Ziolkowski K, *Peacetime Regime for State Activities in Cyberspace* (NATO CCDCOE 2013)

Zoller E, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Brill Nijhoff 1988)

Zorzi Giustiniani F, 'Giurisdizione penale universale e immunità degli organi statali: la decisione del Tribunale Federale svizzero nel caso Nezzar' [2013] DirUmDirInt 159

## **Statement of previous acceptance of thesis for degree**

Chapters 4 and 6 of the present thesis further develop my MPhil dissertation entitled ‘Non-Recognition of State Immunity in Response to Internationally Wrongful Acts’ and submitted to the University of Oxford in Trinity Term 2016.