ARTICLE

State Immunity as a Tool of Foreign Policy: The Unanswered Question of *Certain Iranian Assets*

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The Foreign Sovereign Immunities Act contains a number of "exceptions" to state immunity that are unique to the U.S. legal system. This issue came before the International Court of Justice in Certain Iranian Assets, where Iran submitted that non-recognition of its sovereign immunity due to alleged sponsorship of terrorism was in breach of international law. In its decision on the preliminary objections, the Court dismissed this aspect of Iran's claims on jurisdictional grounds. Yet, the question of the legality of the U.S. approach to state immunity lingers on. This article tackles this issue in two parts. The first part shows that "exceptions" to state immunity for state-sponsored terrorism, unlawful expropriations, and certain territorial torts are in breach of well-established principles of state immunity under international law. At the same time, these "exceptions" are conceived as responses to prior wrongful acts of the states whose immunity is denied. The second part argues that non-recognition of state immunity can, on certain conditions, qualify as a lawful countermeasure pursuant to the international legal rules governing the implementation of state responsibility. In order to reach this conclusion, the article proposes a distinction between "executive", "mixed", and "judicial" measures. It addresses potential objections to countermeasures affecting state immunity and shows that various measures may comply with the relevant requirements. Construing non-recognition of state immunity as a countermeasure provides the most suitable legal framework to allow the pursuit of certain foreign policy goals while preserving well-established principles of international law.

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I. INTRODUCTION

On 13 February 2019, the International Court of Justice (ICJ) rendered a judgment on the preliminary objections in *Certain Iranian Assets (Iran v. United States)*[1] that can be described as "Solomonic."[2] The dispute arose from certain measures that the United States, upon designating Iran as a "state sponsor of terrorism," enacted to subject the Iranian state, Iranian entities, and their assets to proceedings in the United States.[3] As a result of these measures, plaintiffs began to bring actions against Iran before U.S. courts for damages caused by terrorist acts allegedly supported by Iran. Iran, who considered these proceedings contrary to the international law of state immunity, declined to appear. When various default judgments were issued against Iran, the U.S. government took further measures to satisfy these judgments, among which was Executive Order 13599 of 2012. These measures blocked all assets of Iran, including the Central Bank of Iran (Bank Markazi), located in the United States or 'within the possession or control of any United States person'.[4] Bank Markazi challenged the legality of these measures before the Supreme Court, but to no avail.[5]

Unable to obtain a remedy before U.S. courts, Iran brought its grievances to the ICJ claiming that the measures taken by the United States disregarded Iran's sovereign immunity and the separate legal personality of some of the Iranian entities in breach of the 1955 Treaty of Amity between the two states.[6] Much like the biblical King of Israel mentioned at the outset, the Court split the matter in two and allowed only part of Iran's claims—those concerning the U.S. treatment of certain Iranian entities—to proceed to the merits stage.[7] Contrary to Iran's requests, the ICJ found it lacked jurisdiction to entertain the most controversial issue at stake, namely the alleged violation of Iran's sovereign immunity.[8] It speaks volumes that the United States greeted the judgment as a "significant victory."[9] Had the Court allowed the issue of state immunity to proceed to the merits stage, the United States would have had a difficult time defending the legality of its measures under international law.[10]

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1. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections (Feb. 13, 2019), https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf.

2. *Cf.* Nienke Grossman, *Solomonic Judgments and the Legitimacy of the International Court of Justice*, *in* LEGITIMACY AND INTERNATIONAL COURTS 43–61 (Andreas Follesdal et al. eds., 2018).

3. Application Instituting Proceedings, Certain Iranian Assets (Iran v. U.S.), 2016 I.C.J. Pleadings 164 (June 14, 2016), https://www.icj-cij.org/files/case-related/164/164-20160614-APP-01-00-EN.pdf.

4. Exec. Order No. 13599, 3 C.F.R. § 215 (2012).

5. Bank Markazi v. Peterson, 136 S.Ct. 1310 (2016).

6. *See* Memorial of Iran, Certain Iranian Assets (Iran v. U.S.), (Feb. 1, 2017), https://www.icj-cij.org/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

7. *See* Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, *supra* note 1, ¶ 47.

8. *Id.* ¶ 80.

9. Press Release, U.S. Embassy and Consulate in the Netherlands, Statement on ICJ Preliminary Judgment in the Certain Iranian Assets Case (Feb. 13, 2019), https://nl.usembassy.gov/statement-on-icj-preliminary-judgment-in-the-certain-iranian-assets-case.

10. *See* Karinne Coombes, *The Quest for Justice for Victims of Terrorism: International Law and the Immunity of States in Canada and the United States*, 69 U.N.B .L.J. 251, 287 (2018); Ingrid Wuerth, *Immunity*

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Given that the ICJ did not seize the opportunity to clarify the matter, the question of the legality of the denial of state immunity pursuant to measures such as those taken by the United States against Iran lingers on. This uncertainty is problematic for at least two reasons. First, the scope of the problem is wider than what emerged before the ICJ. As shown below, the denial of immunity for state sponsors of terrorism is just one of a growing number of exceptions to state immunity under U.S. law that are threatening long-established rules of international law. Moreover, the United States is not alone in pushing the boundaries of the law of state immunity to pursue its policy goals. Canada enacted legislation comparable to the U.S. laws on state-sponsored terrorism;[11] Iran adopted measures of its own limiting U.S. sovereign immunity on the basis of reciprocity.[12] This state of affairs is bound to generate further controversy in the future.

Secondly, while—as this article demonstrates—measures such as the U.S. exception for state sponsors of terrorism are incompatible with the current international law of state immunity, it is not at all clear that such breaches of international law automatically import the international responsibility of the state that commit them. Establishing the international responsibility of states is the result of a complex calculus that requires putting potential breaches of international law into context. Articles 20 to 25 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) provide that the wrongfulness of a breach of international law is precluded if the existence of certain circumstances can be established.[13] This author believes that a particularly important role in the context of state immunity is to be played by the circumstance codified in Article 22 of the ILC Articles, which provides that "[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State . . . ."[14] Countermeasures, as measures of self-help, are a fundamental part of the decentralized system of international law.[15] Their role is dual: on the one hand, they act as a "sword" to elicit compliance of wrongdoing with the secondary obligations that stem from the commission of the wrongful

from Execution of Central Bank Assets, *in* The Cambridge Handbook of Immunities and International Law 266 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019); Elena Chachko, *Certain Iranian Assets: The International Court of Justice Splits the Difference Between the United States and Iran*, LAWFARE (Feb. 14, 2019), https://www.lawfareblog.com/certain-iranian-assets-international-court-justice-splits-difference-between-united-states-and-iran. *See also* Philipp Janig & Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 GERMAN Y.B. INT'L L. 355 (2016) (addressing potential arguments in support of the U.S. position).

11. *See infra* text accompanying note 58.

12. For further reference, see GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 359 (5th ed. 2011).

13. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (containing Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries) [hereinafter ARSIWA and Commentary].

14. *Id.* at 75.

15. *See* Federica I. Paddeu, *Countermeasures*, in 2 The MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 11 (Rüdiger Wolfrum ed., 2015).

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act (mainly, cessation and reparation).[16] In this regard, the ILC Articles speak of "implementation" of international responsibility.[17] On the other hand, countermeasures are a "shield" that provides a justification for the state adopting the measures, which would otherwise be unlawful.[18]

The interaction between the international law of state immunity and state responsibility is a complex and under-explored topic. Much of the recent literature has focused on the potential emergence of a new exception to state immunity for human rights violations.[19] Very few authors have entertained the idea that non-recognition of state immunity could serve to implement international responsibility by operating as a countermeasure.[20] To date, no systematic study of the existing practice has been carried out from this perspective. This article aims to bridge this gap by proposing a new framework through which to analyze a considerable body of U.S. practice. The main thesis is that the structure of countermeasures under the law of state responsibility contributes to explaining and potentially justifying various "exceptions" to state immunity under U.S. law that would not otherwise be supported by a relevant rule of international law. This article does not claim that all these instances of denial of immunity are lawful countermeasures; the situation is often nuanced and requires a case-by-case assessment. The goal is to bring under the international law umbrella a number of questions that are now relegated to the realm of foreign policy. Renewed attention to these aspects may restore the international legality and strengthen the legitimacy of U.S. action on the international plane.

This article focuses on the United States because the latter has been particularly active in making use of the rules of immunity to advance its foreign policy goals. At the same time, it is worth stressing that similar considerations may apply to instances of state practice originating from

16. *See* Air Services Agreement of Mar. 27, 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 443 ¶¶ 81-82 (Perm. Ct. Arb. 1978). *See also* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 56, ¶ 87 (Sept. 25); Denis Alland, *The Definition of Countermeasures*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1127 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

17. *See* ARSIWA and Commentary, *supra* note 13, at 116.

18. *See, e.g.*, Air Services Agreement, 18 R.I.A.A. at 441-46 ("counter-measures . . . are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed"); *see also* Gabčíkovo-Nagymaros Project, 1997 I.C.J. Rep. at 56, ¶ 83.

19. *See, e.g.*, JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS (1997); ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2008); Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491 (2008); Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003); Pasquale De Sena & Francesco De Vittor, *State Immunity and Human Rights: the Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT'L L. 89 (2005); Christopher Keith Hall, *UN Convention on State Immunity: the Need for a Human Rights Protocol*, 55 INT'L & COMP. L.Q. 411 (2006); Kate Parlett, *Immunity in Civil Proceedings for Torture: The Emerging Exception*, 2006 EUR. HUM. RTS. L. REV. 49.

20. *See* Patricia Tarre Moser, *Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations*, 4 GOETTINGEN J. INT'L L. 809 (2012); Simone Vezzani, *Sul diniego delle immunità dalla giurisdizione di cognizione ed esecutiva a titolo di contromisura*, 97 RIVISTA DI DIRITTO INTERNAZIONALE 36, 87 (2014).

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other states.[21] Moreover, the present analysis only considers the rules governing immunity from jurisdiction and leaves aside questions of immunity from execution. Execution against sovereign assets of a state triggers a different set of rules under both U.S. law and international law.[22] 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 exclusively used for commercial purposes, this will ordinarily be considered lawful under international law.[23] While the United States has also adopted measures that potentially challenge the rule governing state immunity from execution,[24] a more detailed analysis of these issues is reserved for further studies.

The article proceeds as follows. Part II demonstrates that many asserted "exceptions" to state immunity under U.S. law are in fact incompatible with the rules of state immunity under customary international law. At the same time, it shows that these exceptions have been adopted to respond to perceived violations of international law on the part of foreign states. Part III questions whether and on what conditions such "responses" to internationally wrongful acts through denial of state immunity can be construed as justified countermeasures. It proposes an original classification based on the organs that adopt the measure involving non-recognition of state immunity: executive, mixed, and judicial measures. It demonstrates that, at the very least, executive and mixed measures are capable of meeting the substantive and procedural requirements of lawful countermeasures under the law of state responsibility. Part IV concludes by reflecting on the implications of these findings for the future practice of the United States and of other states.

II. FSIA EXCEPTIONS TO STATE IMMUNITY RESPONDING TO INTERNATIONALLY WRONGFUL ACTS

The United States has been a frontrunner in the development of the international law of state immunity. As is known, the classic statement of

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21. For instance, the framework advanced in this article may provide a justification for measures modelled after the U.S. anti-terrorism legislation, such as Canada's Justice for Victims of Terrorism Act. *See infra* text accompanying notes 58-59.

22. *See* 28 U.S.C. §§ 1609-1611 (2018). A codification of the relevant rules of customary international law can arguably be found in Arts. 18-19 of G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004) (not yet in force) [hereinafter UNCSI]. *See also* Chester Brown & Roger O'Keefe, *State Immunity from Measures of Constraint in Connection with Proceedings Before a Court, in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 292 (Roger O'Keefe, Christian J. Tams & Antonios Tzanakopoulos eds., 2013) [hereinafter THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES].

23. *See* Brown & O'Keefe, *supra* note 22 at 323; August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUR. J. INT'L L. 803, 821 (2006).

24. *See* Terrorism Risk Insurance Act 28 U.S.C. § 1610 (2018) (removing restraints from attachment of frozen state assets with regard to terrorism-related disputes). *See also* Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 542 (2003).

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the law of state immunity comes from the Supreme Court's decision in *Schooner Exchange v. McFaddon*, where Chief Justice Marshall identified sovereign immunity as a necessary consequence of the "perfect equality and absolute independence of sovereigns."[25] In the common law, this notion of absolute immunity remained the default judicial position for more than a century. As states became more engaged in commercial activities, domestic courts in various jurisdictions began to distinguish between acts carried out in a sovereign capacity, which continue to attract immunity, and acts of a private character, for which immunity is not warranted.[26] The development of this notion of "restrictive" immunity in the common law was again spearheaded by the United States. In 1952, the U.S. State Department embraced the restrictive approach and committed to lift immunity in relation to all private transactions of foreign states.[27] As time went by, the system of executive certifications was abandoned and the law of state immunity was codified with the Foreign Sovereign Immunities Act of 1976 (FSIA).[28] One of the main aims of the Act was precisely to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."[29]

The restrictive doctrine of state immunity, while perceived as more equitable, has proven particularly difficult to apply when it comes to identifying immune transactions *in concreto*.[30] Widespread debate still exists, for example, as to whether the sovereign character of an act should be determined by its "nature" or "purpose".[31] For this reason, national and

25. 11 U.S. (7 Cranch) 116, 137 (1812). *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 234 (2d ed. 2015); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 28 (3d ed. 2015); XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 8 (2012).

26. Italian and Belgian courts initiated this trend at the turn of the 20th century. *See* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 222-223 (1951).

27. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952) *reprinted in* 26 DEP'T ST. BULL. 984 (1952); BRADLEY, *supra* note 25, at 237-8; JOSEPH DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 33 (2003). *See also, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

28. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602-11 (2018)) [hereinafter FSIA]. *See also* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 352 INT'L & COMP. L.Q. 302 (1986) (providing an account of FSIA legislative history).

29. H.R. REP. NO. 94-1487, at 8 (1976). *See* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007); BORN & RUTLEDGE, *supra* note 12, at 234; BRADLEY, *supra* note 25, at 239; John E. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 33–34 (1999).

30. *See* James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75–118 (1984) (arguing that the theory rests on a distinction between private and public acts unfamiliar to a number of legal systems). *See also* Ian Brownlie, *Contemporary Problems Concerning the Jurisdictional Immunity of States*, 62–I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 13, 26-27 (1987); Lauterpacht, *supra* note 26, at 224 (1951) ("the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis"). *But see* FOX & WEBB, *supra* note 25, at 34 (noting that the distinction between public and private acts is not unique to the law on state immunity).

31. *See, e.g.*, UNCSI, *supra* note 22, at art. 2(2) (setting out a nature-based test, but also allowing for the purpose of the act to be considered in certain circumstances). *See also* Stephan Wittich, *Article 2 (1)(c) and (2) and (3)*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES, *supra* note 22, at 69.

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international codifications generally follow a different approach. State immunity is identified as the default position whenever proceedings are brought against a sovereign entity before the domestic courts of another state; this rule, however, is accompanied by a closed number of exceptions concerning non-immune activities.[32] The United States is no exception to this trend. According to the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided" in a number of specified exceptions.[33]

In the light of this, there can be little doubt that a rule of immunity is today the "baseline" required by customary international law when proceedings are brought against a foreign state.[34] As the ICJ held in the *Jurisdictional Immunities* case, state immunity is "a general rule of customary international law solidly rooted in the current practice of States"; "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality."[35] Indeed, there is no recorded state objection to the existence of a general rule of immunity. On the contrary, the question is whether the restrictive theory has achieved sufficient support to be now considered the dominant rule of customary international law.[36] Despite a general preference for the restrictive doctrine, some states still abide by a rule of absolute immunity.[37] Both the domestic courts of states where the rules of immunity are codified and those that apply directly customary international law follow the abovementioned "exceptions-to-the-general-rule" reasoning; the presumption is that a state is immune unless the acts at the basis of the claim fall within one of the exceptions.[38] The U.S. Supreme Court confirmed this in *Saudi Arabia v. Nelson*: "A foreign state is *presumptively immune* from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state."[39]

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32. *See* Tom Grant, *Article 5*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES, *supra* note 22, at 103. *But see* Katherine Del Mar, *The Effects of Framing International Legal Norms as Rules or Exceptions: State Immunity from Civil Jurisdiction*, 15 INT'L COMMUNITY L. REV. 143, 158 (2013) (arguing that state immunity should be understood as an exception to the rule of jurisdiction).

33. 28 U.S.C. § 1604 (2018).

34. *Contra* William S. Dodge, *Does JASTA Violate International Law?*, JUST SECURITY (Sept. 30, 2016), https://www.justsecurity.org/33325/jasta-violate-international-law-2.

35. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 56-57 (Feb. 3) (quoting the ILC).

36. *See* Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 23 (1991) ("There is common agreement that for acts performed in the exercise of the *prérogatives de la puissance publique* or 'sovereign authority of the State', there is undisputed immunity. Beyond or around the hard core of immunity, there appears to be a grey area in which opinions and existing case law and, indeed, legislation still vary."). It might be noted, however, that a sizable majority of states has by now embraced the restrictive theory; *see* Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209 (2015).

37. China is a notable example. *See* Democratic Republic of the Congo v. FG Hemisphere Assocs., [2011] 14 H.K.C.F.A.R. 395, FACV 5, 6, & 7/2010 (C.F.I.). *See also* Shen Wei, *FG Hemisphere Associates v. Democratic Republic of the Congo*, 108 AM. J. INT'L L. 776 (2014).

38. YANG, *supra* note 25, at 38–39.

39. 507 U.S. 349, 355 (1993) (emphasis added).

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If the presumption of immunity is "established as a principle of universal validity,"[40] this has at least two important consequences. First, as a rule of evidence in domestic proceedings, once it is recognized that the defendant is a sovereign entity and thus entitled to immunity, the onus is on the plaintiff to demonstrate that the facts at the basis of the claim fall within one of the accepted exceptions.[41] Secondly, as a methodological rule for the identification of customary international law, the existence of an exception to state immunity for sovereign activities must be demonstrated by establishing that sufficient state practice and *opinio juris* conform with an international legal rule in this sense. As the ILC Draft conclusions on identification of customary international law confirmed, this is a high threshold by which state practice must be "sufficiently widespread and representative, as well as consistent" and "undertaken with a sense of legal right or obligation."[42]

Establishing a methodological rule in this sense is particularly important when moving to consider whether the U.S. practice on state immunity is consistent with international law. Indeed, despite Congress's intention to bring the United States in line with the customary rule of restrictive immunity, the FSIA follows the restrictive doctrine only up to a certain extent. Alongside orthodox exceptions for commercial activities and the likes, the FSIA contains exceptions to state immunity that allow domestic courts to assert their jurisdiction over sovereign acts of foreign states—some of which have no equivalent in other legal systems. As the next sections demonstrate, whether these exceptions are consistent with the international law of state immunity is highly debatable. At the same time, these purported exceptions share a feature of great relevance in the context of the implementation of international responsibility: they are, in one way or another, responses to internationally wrongful actions of the other state. This aspect will be further illustrated by analyzing each of the following provisions in turn: (A) state sponsorship of terrorism under the amendments to the FSIA introduced by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 and the Justice Against Sponsors of Terrorism Act (JASTA) of 2016; (B) "international takings"; and (C) "territorial torts."

A. *State sponsorship of terrorism under the AEDPA and JASTA amendments to the FSIA*

1. *The AEDPA and JASTA breach the international law of state immunity*

The exception for state sponsors of terrorism at the center of Iran's submissions in *Certain Iranian Assets* refers to the provisions of section 1605A of Title 28 U.S. Code, which was originally introduced as Section

40. YANG, *supra* note 25, at 39.
41. *Id.* at 41; Grant, *supra* note 32, at 103.
42. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 119-120 (2018).

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1605(a)(7) by the AEDPA in 1996.[43] Under this section, "state sponsors of terrorism" are stripped of their immunity from claims for money 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.[44] At the same time, the exception is subject to three limitations: (1) it applies only to a closed number of states preliminary identified by the Secretary of State as being "sponsors of terrorism";[45] (2) claims under this section can only be brought by U.S. nationals;[46] and (3) 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.[47]

The various qualifications to which this exception is subject suggest that the provision is the result of a "delicate legislative compromise" between opposing views.[48] The legislative history of the AEDPA confirms that the U.S. State Department was strongly opposed to its introduction.[49] Much of this hostility came from the State Department's awareness that a similar exception to state immunity was a novelty in international law.[50] The State Department found it "especially troubling" that plaintiffs would have to allege that the conduct took place "under the authority of the foreign government or under color of its law" and, in any case, feared that an "an inquiry by a U.S. court into the legitimacy of foreign government sanctions [would be] likely to be viewed as highly intrusive and offensive."[51]

The AEDPA amendments have indeed the potential of stirring up the proverbial hornet's nest. The problems start with the AEDPA's language. Few terms in international law have created more controversy than the

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43. Pub. L. No. 104-132, § 221, 110 Stat. 1214 (1996). *See generally* DELLAPENNA, *supra* note 27, at 415.

44. 28 U.S.C. § 1605A(a)(1) (2018).

45. 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 U.S.C. App. § 2405(j)), Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371), and Section 40 of the Arms Export Control Act (22 U.S.C. § 2780). As of July 2019, the list comprises the following states: North Korea, Iran, Sudan, and Syria.

46. *See* BORN & RUTLEDGE, *supra* note 12, at 259.

47. Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 233-34 (D.C. Cir. 2003). *See also* BORN & RUTLEDGE, *supra* note 12, at 358.

48. *See* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1035 (D.C. Cir. 2004); Royce C. Lamberth, *The Role of Courts in Foreign Affairs*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 8 (John Norton Moore ed., 2013).

49. *See* Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: The Terrorism Amendment to FSIA Makes Less Sense Now Than it Did Before 9-11*, 38 TEX. INT'L L.J. 119, 123 (2003).

50. The U.S. State Department was unaware of "any instance in which a state permits jurisdiction over such tortious conduct of a foreign state without territorial limitations." *Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary,* 103d Cong. 12 (1994) (statement of Jamison S. Borek, Deputy Legal Adviser, Dep't of State). *See also* Murphy, *supra* note 29, at 35, 37.

51. *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary,* 101st Cong., 22-29 (1990) (statement of David P. Stewart, Assistant Legal Adviser, Dep't of State).

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notion of "terrorism";[52] as is known, the international community has grappled with this issue for decades, and despite a number of sectorial conventions, there is still no agreement on a general definition.[53] To complicate things even further, the AEDPA amendments do not simply refer to acts of terrorism, but to state "support" or "sponsorship" of terrorism—terms which raise more than a few eyebrows outside the United States. 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.[54] 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 U.S. courts.

Alongside this, the other major problem of the AEDPA amendments concerns the nature of the acts involved. As the D.C. Circuit noted, the acts that the exception seeks to capture have "long been understood for purpose of the restrictive theory as peculiarly sovereign in nature."[55] In other words, under a plain reading of the rules of state immunity, this conduct is immune from the jurisdiction of foreign domestic courts. According to the principles governing the identification of customary international law, an exception to the general rule of immunity can only be established if supported by "general practice accepted as law."[56] But discharging this burden is particularly difficult in the case of state-sponsored terrorism. The United States has long been the only state to recognize an exception for such conduct, as noted by the ICJ in the *Jurisdictional Immunities* case.[57] In 2012, the Canadian Parliament passed the Justice for Victims of Terrorism Act, which—similar to the AEDPA—introduced an exception to state immunity for foreign state supporters of terrorism.[58] 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

52. *See* Jörg Friedrichs, *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism*, 19 LEIDEN J. INT'L L. 69 (2006); BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 10 (2011).

53. *See, e.g.*, ROSALYN HIGGINS & MAURICE FLORY, TERRORISM AND INTERNATIONAL LAW 14 (1997); KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 14 (2011).*See also* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 17 (D.D.C. 1998) (noting the absence of a "fixed, universally accepted definition of international terrorism").

54. HIGGINS & FLORY, *supra* note 53, at 26, 27; TRAPP, *supra* note 53 at 25.

55. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 88 (D.C. Cir. 2002).

56. On the identification of custom, see *supra* text accompanying note 42.

57. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 88 (Feb. 3) ("[T]his provision . . . has no counterpart in the legislation of other States"). Some commentators have read into this an implicit finding that the United States is in violation of international law in this respect. *See* Riccardo Pavoni, *An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State*, 21 IT. Y.B. INT'L L. 143, 149 (2011).

58. Justice for Victims of Terrorism Act, S.C. 2012, c 1, s 2. *See* J.-G. Castel & Matthew E. Castel, *Canadian State Immunity Act and the Absolute Immunity of Foreign States Committing or Supporting Acts of Terrorism or Violating International Humanitarian Law*, 45 ADVOC. Q. 81 (2016); FOX & WEBB, *supra* note 25, at 473; *see also* René Provost, *Canada's Alien Tort Statute*, EJIL: TALK! (Mar. 29, 2012), http://www.ejiltalk.org/canadas-alien-tort-statute.

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unfavorable.[59] These negative opinions echo those voiced against the U.S. anti-terrorist measures. In a communiqué to the U.N. Secretary General, the Coordinating Bureau of the Non-Aligned Movement—representing 120 states—expressed its opposition to the AEDPA amendments. The Bureau, in particular, "object[ed] 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 of the United States and on a spurious legal ground that the international community does not recognize."[60] In a similar vein, various scholars expressed their doubts as to the compatibility of the exception with customary international law.[61] 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.[62] The relevant conventions are silent on the issue of immunity and exceptions cannot be inferred by the mere criminalization of certain conduct.[63] As stressed by the ICJ, the rules of state immunity are "procedural" in character and independent from the legality of the conduct.[64] In sum, the crystallization of an exception to immunity for terrorist-related activities has simply not occurred. On the contrary, the courts of various states reiterated that foreign sovereign immunity must be accorded even if the acts at the basis of the claims are prohibited by international law.[65] As a result, it is hard to maintain that the FSIA exception for state sponsors of terrorism is consistent with international law.[66]

Despite its failure to gather support from other states through the AEDPA amendments, U.S. Congress recently adopted a new exception to state immunity that appears to cover an even wider range of terrorism-related activities. In September 2016, JASTA introduced section 1605B FSIA.[67] The provision strips state immunity for claims "for physical injury

59. *See* Castel & Castel, *supra* note 58, at 89; Coombes, *supra* note 10, at 303.

60. Permanent Rep. of Iran to the U.N., Letter Dates May 5, 2016 From the Permanent Rep of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/861 (May 5, 2016). *See also* BORN & RUTLEDGE, *supra* note 12, at 359.

61. *See, e.g.*, Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. (Sept./Oct. 2000), https://www.foreignaffairs.com/articles/united-states/2000-09-01/plaintiffs-diplomacy; FOX & WEBB, *supra* note 25, at 415–416; VAN ALEBEEK, *supra* note 19 at 355; YANG, *supra* note 25 at 227; Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496 (2002).

62. *But see* Dodge, *supra* note 34.

63. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 91 (Feb. 3).

64. *Id.* ¶ 93.

65. *See* Princz v. Fed. Republic of Ger., 26 F.3d 1166 (D.C. Cir. 1994); Bouzari v. Iran, [2002] 71 O.J. No. 1624 (Can. Ont. Sup. Ct. J.) (QL); Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 26, 2003, III ZR 245/98, 42 ILM 1030 (Ger.); Germany v. Margellos, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002, 1 A.E.D. 11 (Greece); Jones v. Saudi Arabia [2006] UKHL 26 (appeal taken from Eng.).

66. *See* Dapo Akande, *Civil Remedies for International Crimes*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 265, 267 (Antonio Cassese ed., 2009); Hazel Fox, *In Defence of State Immunity: Why the UN Convention on State Immunity is Important*, 552 INT'L & COMP. L.Q. 399, 405 (2006).

67. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016).

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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.[68]

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. Secondly, JASTA is limited to acts "occurring in the United States," whilst the AEDPA exception is primarily directed at acts of terrorism committed abroad.[69] 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.[70] The State Department never listed Saudi Arabia as a "state sponsor of terrorism" and showed little interest in doing so.[71] Consequently, the AEDPA exception was of no use to these claimants. With JASTA, Congress sought to change this state of affairs and to open U.S. 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 with Congress overriding President Obama's veto in order to pass the Act.[72]

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68. 28 U.S.C. §1605B (2018).

69. *See* YANG, *supra* note 25, at 225. The territorial limitation of JASTA is a source of confusion considering that, unlike section 1605A, section 1605B does not list the specific acts of terrorism that are amenable to suit but refers to the notion of "international terrorism" provided in the Antiterrorism Act (ATA). The latter concerns terrorist activities "occur[ring] primarily outside the territorial jurisdiction of the United States" or "transcend[ing] national boundaries." 18 U.S.C. § 2331(1)(c) (2018). *See* Stephen J Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIAMI INT'L & COMP. L. REV. 285, 362–67 (2017) (considering this reference "infelicitous"); JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL34726, *IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001*: CLAIMS AGAINST SAUDI DEFENDANTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) (2012), https://fas.org/sgp/crs/misc/RL34726.pdf. Section 1605B(b)(2) refers to tortious acts of the state whose only link to the forum is the fact that the injury occurred in the United States; the tortious acts themselves do not need to qualify as "terrorist" in order to engage this provision. *See* Jack Goldsmith, *The New JASTA is Still Harmful Congressional Shirking*, LAWFARE (May 19, 2016), https://www.lawfareblog.com/new-jasta-still-harmful-congressional-shirking. In its final form, however, JASTA requires proof of *primary* liability on part of the foreign state. *See* Katherine Holcombe, *JASTA Straw Man? How the Justice Against Sponsors of Terrorism Act Undermines Our Security and Its Stated Purpose*, 25 AM. U. J. GENDER SOC. POL'Y & L. 359, 372 (2017).

70. Press Release, Sen. Charles E. Schumer, Schumer, Coornyn Announce 'Justice Against Sponsors of Terrorism Act' – Legislation, Long Sought By 9/11 Families, Will Allow Victims Of 9/11 & Other Terrorist Acts to Sue Foreign Countries & Others That Funded Al Qaeda, Isis (Sept. 17, 2015), https://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.

71. *See* Tom O'Connor, *Why Doesn't Saudi Arabia Join North Korea on U.S. State Terrorism List After 9/11?*, NEWSWEEK (Nov. 20, 2017), www.newsweek.com/why-saudi-arabia-join-north-korea-us-state-terrorism-list-911-717640.

72. *See* Daniella Diaz, *Obama says Congress Made a "Political Vote" Overriding his Veto of Saudi Lawsuit Bill*, CNN (Sept. 28, 2016), http://www.cnn.com/2016/09/28/politics/obama-override-veto-911-bill-cnn-presidential-town-hall/index.html.

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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."[73] Former Legal Adviser to the U.S. State Department John B. 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.[74]

Considering its troubled gestation, it is no surprise that JASTA became immediately controversial. Saudi Arabia issued a communiqué emphasizing that JASTA is of "great concern to the community of nations that object to the erosion of the principle of sovereign immunity."[75] 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."[76] 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."[77] 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

73. Press Release, White House Office of the Press Secretary, Veto Message from the President – S.2040 (Sept. 23, 2016).

74. *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 B. Bellinger, former Legal Advisor, U.S. Dep't of State). These concerns about retaliatory responses became all the more vocal when JASTA reached the House of Representatives. *See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 114th Cong., 19 (2016) (statement of Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs of the U.S. Dep't of State); *id.* at 25 (statement of Brian Egan, Legal Adviser of the U.S. Department of State); *id.* at 37 (statement of Michael B. Mukasey).

75. *Official at Ministry of Foreign Affairs: JASTA Great Concern to Community of Nations Objecting to Erosion of Principle of Sovereign Immunity*, SAUDI PRESS AGENCY (Sept. 29, 2016), http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1543953.

76. *Les Monarchies du Golfe s'élèvent Contre la Loi Américaine sur le 11-Septembre*, LE MONDE (Sept. 12, 2016), 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).

77. Ministry of Foreign Affairs of the Russian Federation, *Comment by the Information and Press Department on the U.S. passing the Justice Against Sponsors of Terrorism Act with extraterritorial jurisdiction* (Sept. 30, 2016), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479122.

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of state sovereign immunity."[78] In a letter addressed to the US House Judiciary Committee, the Parliament of the Netherlands had also expressed its opposition to JASTA, considering it "a gross and unwanted breach of Dutch sovereignty."[79] Members of the Parliament of France and the United Kingdom voiced similar concerns.[80]

If the AEDPA amendments cannot be deemed 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.

2. *The AEDPA and JASTA Amendments As Responses to Internationally Wrongful Acts*

While the AEDPA and JASTA do not correspond to exceptions to state immunity under customary international law, they both 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] are inapplicable."[81] 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 U.S. District Court for the D.C. Circuit stressed that this provision "creates no new responsibilities or obligations; it only creates a forum for the enforcement of pre-existing universally recognized rights under federal common law and international law."[82] In *Daliberti*, the District Court was even more explicit:

78. European Union Asks Obama to Stop 9/11 Saudi Bill, REUTERS (Sept. 21, 2016), https://www.reuters.com/article/us-usa-sept11-saudi-eu/european-union-asks-obama-to-stop-9-11-saudi-bill-idUSKCN11R26L.

79. 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, (July 12, 2016), https://www.al-monitor.com/pulse/files/live/sites/almonitor/files/documents/2016/JASTA_Motie%20Recourt_Unofficial_English_Translation.pdf.

80. Jennifer Steinhauer, *House Passes Bill Allowing 9/11 Lawsuits Against Saudi Arabia; White House Hints at Veto*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/us/politics/house-911-victims-saudi-arabia.html; Tom Tugendhat, *Hurting America's Friends in Pursuit of Its Enemies*, WALL ST. J., (Sept. 29, 2016), http://www.wsj.com/articles/hurting-americas-friends-in-pursuit-of-its-enemies-1475178578.

81. *Hearing on S.825 Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary,* 103d Cong., 81 (1994) (statement of Abraham D. Sofaer) [hereinafter *Hearing on S.825*].

82. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 13 (D.D.C. 1998).

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> 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.[83]

These authorities demonstrate that various U.S. organs believe that the exception for state-sponsored terrorism responds to a breach of international law. There is, however, 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 U.S. 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.[84] At a closer look, however, this interpretation is not particularly convincing. The terrorism exception 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.[85] Since—for obvious reasons—the executive 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.[86] However, the focus of U.S. 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.[87] Such support need not be connected with the acts at the basis of the claim,[88] nor amount to "direction or control", as the international law standard for

83. Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 52 (D.D.C. 2000).

84. *See infra* Section III.A.1.

85. 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (2018). However, the practice of the courts is at times inconsistent with this requirement; *see* Andrew Lyubarsky, *Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments to Ensure Normalization of Relations Between the United States and Cuba*, 91 N.Y.U. L. REV. 458, 467-68 (2016).

86. *See* ARSIWA and Commentary, *supra* note 13, at 38.

87. *See* Taylor v. Islamic Republic of Iran, 811 F. Supp. 2d 1, 11 (D.D.C. 2011); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 68 (D.D.C. 1998); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 7 (D.D.C. 2000); *But see* Estate of Hirshfeld v. Islamic Republic of Iran, 330 F. Supp. 3d 107, 134 (D.D.C. 2018) ("Iran provided material support to Hamas by, among other things, being the major source of financial assistance totaling millions of dollars in funding for the organization, providing weapons and training for its members, and encouraging Hamas terrorist attacks against Israel. Moreover, individuals associated with the Iranian regime played direct roles in meeting with Hamas officials in Tehran and the relationship between Iran and Hamas was openly acknowledged."); Anderson v. The Islamic Republic of Iran, 753 F. Supp. 2d 68, 79–80 (D.D.C. 2010).

88. The D.C. Circuit rejected this claim because it would make the provision "ineffectual": Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1130 (D.C. Cir. 2004); Chad Marzen, *Liability for Terrorism in American Courts: Aiding-and-Abetting Liability Under the FSIA State Sponsor of Terrorism Exception and the Alien Tort Statute*, 25 T.M. COOLEY L. REV. 503, 512 (2008).

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attributing the acts of a group of persons to the state requires.[89] The mere "routine provision of financial assistance" was regarded to be sufficient to meet this test.[90]

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 U.S. government considers unlawful. To be sure, this reading of section 1605A is not devoid of complications.[91] To begin with, it is unclear what the United States regards as terrorism for the purpose of this provision.[92] As mentioned above, what the U.S. 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,"[93] "largely secretive," and often "based on confidential information,"[94] it is impossible to point with precision to the acts that triggered the inclusion of the state in the list. On various occasions, the U.S. government has defended its listings by providing a variety of grounds.[95] In its pleadings before the ICJ, the United States identified the following categories of international wrongs attributable to Iran: terrorist bombings, airline hijacking, breaches of non-proliferation and arms trafficking obligations, and a miscellany of human rights violations.[96] The ICJ did not address these allegations and it is far from established that all of

89. Or even less so, in terms of dependence, so that the group could be considered a *de facto* State organ. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109, 115 (June 27); ARSIWA and Commentary, *supra* note 13, at art. 8.

90. U.S. 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 F. Supp. 1, 18 (D.D.C. 1998); Cicippio 18 F. Supp. 2d at 68 (D.D.C. 1998); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997). *See also* Wyatt v. Syrian Arab Republic, 736 F. Supp. 2d 106, 112 (D.D.C. 2010) ("[T]he plaintiffs must 'alleg[e] facts sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damage arising out of a terrorist attack.'") (quoting Rux v. Republic of Sudan, 461 F.3d 461, 473 (4th Cir. 2006)); s*ee also* Sean K. Mangan, *Compensation for Certain Victims of Terrorism under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2002: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1043 (2002).

91. Sealing, *supra* note 49, at 134–135.

92. 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 a number of 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 U.S. federal law. *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249 (2004).

93. Sean Hennessy, *In Re the Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism*, 42 GEO. J. INT'L L. 855, 868 (2011).

94. Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 85 (2004).

95. *See* Lyubarsky, *supra* note 85, at 478–79; Sealing, *supra* note 49, at 136–38; Matthew Peed, *Blacklisting as Foreign Policy: The Politics and Law of Listing Terror States*, 54 DUKE L.J. 1321, 1346 (2005).

96. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections Submitted by the United States, at 11–29 (Mar. 1, 2017), https://www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf.

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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 this purpose, is that the United States views such conduct as internationally wrongful.[97]

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. During the hearings that preceded the adoption of the AEDPA, the choice was made to move away from the traditional system of espousal of claims because the State Department's decision in this respect was deemed "likely to be influenced, not only by the merits of the case, but by the Department's preoccupation with offending a foreign state and creating a potential irritant in its dealings with that state."[98] Nevertheless, neither Congress nor courts retain any significant control over the mechanism as finally approved with the AEDPA. The decision on whether and for how long a state is denied immunity before U.S. 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.[99] The nature of non-recognition of immunity as a "sanction" was also acknowledged by the U.S. Supreme Court.[100]

The State Department has great discretion in making these determinations.[101] Still, non-recognition of immunity seems to be primarily used as an instrument to ensure compensation to the victims and deter states from sponsoring future terrorist acts.[102] This aspect is particularly evident at the moment of de-listing. The relevant statute requires effective cessation of the wrongful activities and assurances of non-repetition.[103] Prior to de-listing, it is common for the U.S. Government to negotiate an agreement with the targeted state concerning the settlement of all pending claims.[104] For example, when Libya and Iraq were removed from the list, compensation schemes were established for the victims of terrorist attacks on both occasions.[105] De-listing has consistently accompanied critical moments in the settlement of disputes between the United States and other

97. This is consistent with the decentralized nature of international law. *See infra* Section III.C.2.

98. *Hearing on S.825*, *supra* note 81, at 83 (statement of Abraham D. Sofaer).

99. *See* Hennessy, *supra* note 93, at 864; Peed, *supra* note 95, at 1326.

100. Republic of Iraq v. Beaty, 556 U.S. 848, 859 (2009).

101. Hennessy, *supra* note 93, at 862. The State Department has at times been accused of "hijacking" the list for other goals, such as promotion of human rights or nuclear disarmament, although this would still be compatible with the interpretation advanced in this paper. *See* Peed, *supra* note 95, at 1346.

102. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 88-89 (D.C. Cir. 2002); *see also* Lamberth, *supra* note 48, at 19. Following a 1996 amendment, which introduced the possibility of awarding punitive damages, an element of "punishment" was also associated with this measure; this does not exclude that what is deemed to be "punitive" under domestic law may qualify as "merely" coercive under international law. *See also* Murphy, *supra* note 29, at 41.

103. Export Administration Act of 1979 § 6(j)(4)(A)(i)-(iii), 50 U.S.C. § 4605 (2018) (repealed 2018).

104. Lyubarsky, *supra* note 85, at 462.

105. Claims Settlement Agreement, Iraq-U.S., Sept. 2, 2010, T.I.A.S. No. 11-522; Claims Settlement Agreement , Libya-U.S., Aug. 14, 2008, T.I.A.S. No. 08-814.

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states.[106] Upon de-listing, all pending cases against the state brought under the terrorism exception were terminated.[107] These characteristics show that the construction of section 1605A FSIA as a measure for the implementation of state responsibility is particularly fitting.

With regard to JASTA, establishing a link with the implementation of international responsibility is more complicated. As mentioned above, JASTA was conceived as a means for the 9/11 victims to obtain justice against those who promoted the attacks.[108] Clearly, attacks of such scale and magnitude are breaches of international obligations concerning the use of force and human rights; if these breaches were attributable to a state, the latter would be unquestionably under a duty to provide reparations.[109] It is unclear, however, whether JASTA is as an instrument to achieve this goal. Even leaving aside difficult questions concerning the nexus between the government of Saudi Arabia and the 9/11 attacks,[110] JASTA is a much more erratic tool compared to the AEDPA amendments. Under the AEDPA system, the establishment of a link between the terrorist activities and their sponsorship by foreign states is subject to a "careful[] review [of] all available information" by the Department of State.[111] Pursuant to JASTA, this decision is left entirely to the discretion of judicial organs. This raises serious concerns regarding the propriety and consistency of these judgments and the legality of the process as a whole.

In its current form, the only means 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 resolution of the claims against the foreign state."[112] This provision, which echoes the structure of the AEDPA exception,[113] reintroduces an element of executive control over the denial of state immunity. This could ensure that litigation proceeds only

106. North Korea, for example, was de-listed in 2008 in the midst of nuclear deal negotiations. *See* Hennessy, *supra* note 93, at 865. Cuba has been recently removed in an attempt to normalize diplomatic relations that had been severed for more than 50 years. *See* Lyubarsky, *supra* note 85, at 460.

107. *See* Republic of Iraq v. Beaty, 556 U.S. 848 (2009).

108. This consensus is best demonstrated by the bipartisan approval with which JASTA was passed. *See* Kristina Daugirdas & Julian Davis Mortenson, *Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act.*, 111 AM. J. INT'L L. 156 (2017).

109. See discussion *infra* Part III.

110. In its Final Report, the 9/11 Commission "found no evidence that the Saudi government as an institution, or senior Saudi officials individually funded" Al Qaeda. *See* NAT'LCOMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 171 (2004). The 28 pages previously redacted from the Congressional Inquiry Report—disclosed in July 2016—shed no further light on this aspect. *See also* Mark Mazzetti, *In 9/11 Document, View of a Saudi Effort to Thwart U.S. Action on Al Qaeda*, N.Y. TIMES, (July 15, 2016), https://www.nytimes.com/2016/07/16/us/28-pages-saudi-arabia-september-11.html.

111. White House Office of the Press Secretary, *supra* note 73.

112. Justice Against Sponsors of Terrorism Act, 28 U.S.C. § 1605B(c)(1) (2018).

113. In this sense, JASTA does not represent an innovation; there is ample precedent to support the President's power to settle claims relating to pending cases. *See* Holcombe, *supra* note 69, at 373; Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAWFARE (Sept. 29, 2016), https://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis.

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when the Executive has established that the relevant foreign state committed an internationally wrongful act and is unwilling to provide reparations. As things stand, however, there is no guarantee that immunity will be denied only in these exceptional circumstances—the power of stay is purely discretionary.

Individual Members of Congress showed some willingness to mitigate the most exorbitant aspects of JASTA.[114] Proposals in this sense include vesting the President with the authority to waive JASTA with respect to certain countries.[115] Alternatively, it has been argued that Congress should limit the effects of JASTA to a number of pre-designated states.[116] It is no coincidence that these fixes would reintroduce a form of executive or legislative oversight of the decision concerning the denial of immunity. As Part III of this paper argues, these measures have the strongest claim to being instruments for the implementation of international responsibility of other states.

B. *The "international taking" exception*

1. *The immune character of expropriation under international law*

Since its enactment, the FSIA has contained an exception to state immunity concerning "rights in property taken in violation of international law."[117] The "international taking" exception, as it is frequently referred to, is another peculiar provision of the FSIA. For starters, it is the only provision of the FSIA whose very own wording openly mentions "international law" as the benchmark against which the legality of the acts at the basis of non-recognition of immunity must be assessed.[118] In addition, a similar exception does not appear in any other codification of state immunity, whether at the international or national level. The absence of a similar provision in other jurisdictions is sometimes justified in the light of the "controversial nature of what constitutes a "taking" of property contrary to international law."[119] This explanation, however, is not satisfactory. Over the past decades, considerable practice has contributed to elucidating fundamental notions concerning the taking of property of aliens. There is no serious objection to the fact that these expropriations must comply with

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114. Schnably, *supra* note 69, at 379; *Instant Senate Remorse*, WALL ST. J. (Sept. 30, 2016), http://www.wsj.com/articles/instant-senate-remorse-1475276162.

115. John B. Bellinger, *How Congress Could Fix JASTA: Give the President Waiver Authority*, LAWFARE (Oct. 5, 2016), https://www.lawfareblog.com/how-congress-could-fix-jasta-give-president-waiver-authority.

116. Curtis Bradley & Jack Goldsmith, *How to Limit JASTA's Adverse Impact*, LAWFARE (June 3, 2016), https://www.lawfareblog.com/how-limit-jastas-adverse-impact.

117. 28 U.S.C. § 1605(a)(3) (2018).

118. In particular, international law on the protection of aliens and their property. *See* Alice Ruzza, *Expropriation and Nationalization*, in 3 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 10 (Rüdiger Wolfrum ed., 2015).

119. FOX & WEBB, *supra* note 25, at 270.

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certain requirements under international law and, in particular, must be accompanied by some degree of compensation.[120]

If international law does offer minimum standards against which the legality of expropriation of foreign property can be assessed, the fact that no other country provides for a similar exception must be sought elsewhere. In this regard, an analysis of state practice reveals that states do not recognize such exception because acts of expropriation are deemed to be immune by virtue of their eminently sovereign character.[121] There is no shortage of domestic courts declining jurisdiction upon qualifying foreign expropriations as *acta jure imperii*.[122] 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.[123]

The sovereign character of acts of expropriation and their exemption from the jurisdiction of domestic courts were reaffirmed, among others, by the Federal Tribunal of Switzerland.[124] 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.[125] Finally, it is worth recalling that states strongly resisted any inclusion of a reference to the issue of expropriation of foreign property in the International Law Commission's Draft Articles on State Immunity (DASI).[126]

The "quintessentially sovereign" character of such acts is also widely acknowledged in the United States,[127] despite some sporadic indications to the contrary.[128] Section 1605(a)(3) FSIA might generate some confusion in this sense, as it requires that the expropriated property "or any property exchanged for such property" must either: (1) be "present in the United

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120. Disagreement remains as to the exact nature of such compensation. *See infra* text accompanying note 141.

121. YANG, *supra* note 25, at 298.

122. *See* CHRISTOPH SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 55 (1988); YANG, *supra* note 25, at 299–300.

123. Campione v. Peti-Nitrogenmuvek NV, 65 I.L.R. 287, 288 (Cass. 1972) (It.).

124. S v. Socialist Republic of Romania, 82 I.L.R. 45, 46 (Fed. Trib. 1987) (Switz.).

125. The sovereign character of the power exercised in the expropriating activity is the standard criterion relied upon by arbitral tribunals to distinguish ordinary breaches of contracts from expropriations relevant under international law. *See* Phillips Petroleum Co. v. Iran, 21 Iran-U.S. Cl. Trib. Rep. 79, ¶ 76 (1989); Jalapa Railroad and Power Co, *in* 8 Dig. Int'l L. 906, 909 (1967). *See also* August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 418 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

126. The provision would have excluded questions pertaining to "extraterritorial effects of measures of nationalization taken by a State" from the scope of the Articles. *Report of the International Law Commission on the Work of Its Thirty-Eighth Session*, 41 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. No. A/41/10 (1986), *reprinted in* [1986], 2 Y.B. Int'l L. Comm'n, 11, 17, U.N. Doc. A/CN.4/SER.A/1986/Add.l. Due to its negative reception by the states, the proposal was deleted. *See* YANG, *supra* note 25, at 303.

127. DELLAPENNA, *supra* note 27, at 399.

128. *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002) (qualifying violations of international law as non-sovereign acts).

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States in connection with a commercial activity carried on in the United States by the foreign state"; or (2) be "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[129] It is clear however that, while these two alternative jurisdictional links reinstate a commercial element in the equation, they do not relate to the subject-matter of the dispute.[130] The removal of state immunity remains completely dependent upon the legality under international law of the sovereign acts of expropriation. If this is the case, 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. It is worth recalling that, as the U.S. Supreme Court itself acknowledged, a sovereign act neither ceases to be sovereign, nor loses its immune character for the simple fact of being unlawful.[131] 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.

2. The exception as a response to internationally wrongful acts

The international taking exception concerns takings of property "in violation of international law."[132] While this does little to ground the provision in the international law of state immunity, it is very important to establish 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. As is known, the act of state doctrine is a common law doctrine by which national courts avoid reviewing, among others, the validity of acts of a foreign government within that government's own territory.[133] In these broad terms, the doctrine goes beyond what international law requires;[134] 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.[135] Following a landmark decision in which the Supreme Court held that the act of state doctrine excluded foreign expropriations from the competence of U.S. courts "even if the

129. 28 U.S.C. § 1605(a)(3) (2018).

130. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 941 (D.C. Cir. 2008) ("The alternative 'commercial activity' requirements are purely factual predicates independent of the plaintiff's claim.").

131. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435-36 (1989) (holding that violations of international law do not constitute exceptions to the general rule of immunity unless explicitly prescribed by the FSIA) *See also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-9 (9th Cir. 1992).

132. 28 U.S.C. § 1605(a)(3) (2018).

133. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443(1) (1987); FOX & WEBB, *supra* note 25, at 54.

134. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918).

135. *See Agudas Chasidei Chabad of U.S.*, 528 F.3d at 934; Nemariam v. Fed. Democratic Republic of Ethiopia, 491 F.3d 470 (D.C. Cir. 2007).

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complaint alleges that the taking violates customary international law,"[136] Congress passed the "Second Hickenlooper Amendment."[137] 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 the proceedings halted by the Supreme Court to resume.[138]

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 displace any bar to the judicial review of takings performed in violation of international law, despite their eminently sovereign nature.[139] This policy decision is in line with the United States' long-held protective stance towards aliens and their property, especially in the context of foreign investments.[140] 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.[141] The United States, together with a number of Western countries, has consistently defended the so-called "Hull formula," according to which compensation should be "prompt, adequate, and effective."[142] 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.[143] The approach taken by US courts in the application of section 1605(a)(3) FSIA confirms this. According to them, 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."[144] Of the three alternative aspects, the latter is often the decisive one: if plaintiffs succeed in proving that no compensation has been given, U.S. courts are satisfied that their jurisdiction is not barred by state

136. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1961).

137. Hickenlooper Amendment, Pub. L. 88-633, 78 Stat. 1013 (codified at 22 U.S.C. § 2370(e)(2) (2018)).

138. *See, e.g.*, De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985). *See also* Lori Fisler Damrosch, *Enforcing International Law Through Non-forcible Measures*, *in* 1997 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9–250, 67 (1998); Frances X. Hogan, *The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company as a Test Case*, 11 B.C. INDUS. & COM. L. REV. 77, 84 (1969).

139. *See* Damrosch, *supra* note 138, at 71 (calling this a "principled approach").

140. *See* BORN & RUTLEDGE, *supra* note 12, at 329; Davis Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176–78 (1984).

141. 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 W. Wälde and Borzu Sabahi, *Compensation, Damages, and Valuation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1068-69 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Hollin Dickerson, *Minimum Standards*, in 7 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 15 (Rüdiger Wolfrum ed., 2015).

142. *See* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121–30 (1984).

143. *See* SCHREUER, *supra* note 122, at 56.

144. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 712 (9th Cir. 1992).

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immunity.[145] Outside these cases, the standard for determining when compensation is "just" is (unsurprisingly) the Hull formula: "prompt, adequate, and effective" compensation.[146]

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.[147] According to U.S. courts, such expropriations "[do] not implicate settled principles of international law."[148] The relevance of this limitation emerged following the "resurrection" of the international taking exception—which, until then, had remained dormant for decades—by the Supreme Court judgment in *Republic of Austria v. Altmann*.[149] The Supreme Court held that the taking exception applied retroactively, that is to acts of expropriations that pre-dated the entry into force of the FSIA.[150] This resulted in a stream of litigation concerning expropriations carried out by the Nazi regime during WWII.[151] The problem with these cases is that they frequently did not classify as "international" takings, since they occurred against German nationals belonging to Jewish and other minorities. U.S. courts dealt with this issue in two alternative ways. In certain cases, they downplayed the nationality requirement and allowed nationals of the taking state to bring their claims in the United States.[152] 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 recognized 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.[153] But the judges held that such expropriations "should be viewed . . . as an integral part of the genocidal plan to depopulate Hungary of its Jews,"[154] which in turn was identified "as a violation of customary international law."[155] This development suggests

145. *See* Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 524 (D.D.C. 1980).

146. *Id.*

147. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209 (N.D. Ill. 1982).

148. Abelesz v. Magyar Nemzeti Bank*,* 692 F.3d 661, 674 (7th Cir. 2012); Altmann v. Republic of Austria, 317 F.3d 954, 968 (9th Cir. 2002); Siderman de Blake v. Republic of Argentina*,* 965 F.2d at 711.

149. 541 U.S. 677, 700 (2004) (declaring the FSIA applicable retroactively); *see also* Riccardo Pavoni, *Sovereign Immunity and the Enforcement of International Cultural Property Law*, *in* ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 79, 87 (Francesco Francioni & James Gordley eds., 2013).

150. *Altmann*, 541 U.S. at 700.

151. *See, e.g.*, *Abelesz*, 692 F.3d at 675 (stressing that these takings were carried out pursuant to campaigns of looting and displacement, with the intent to discriminate against ethnic and religious minorities, and in the absence of any form of compensation).

152. Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1165-66 (C.D. Cal. 2010); Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 943 (D.C. Cir. 2008) (relying on the fact that Nazi Germany had stripped Jewish citizens of their rights and therefore deprived them of their nationality in any meaningful sense).

153. *Abelesz*, 692 F.3d at 674.

154. *Id.* at 675.

155. *Id.*

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that the taking exception is a tool through which U.S. courts can assess (and remedy) the (il)legality of a wide range of sovereign activities—including genocidal acts—to the extent that they materialize through the taking of property.[156]

Another element that plays in favor of recognizing such exception as a measure of last resort against internationally wrongful acts is the requirement, upheld by some courts, that local remedies must be exhausted before submitting the relevant claims. This is particularly significant considering that section 1605(a)(3) does not contain an explicit obligation in this sense. According to the international rules of jurisdiction, claimants are not generally obliged to exhaust the remedies available in one jurisdiction before engaging the courts of another state; "[t]he international system of jurisdiction is one of concurrent jurisdiction."[157] The exhaustion of local remedy is, however, a fundamental part of the system of international responsibility, being a pre-condition of the well-known mechanism of diplomatic protection.[158] U.S. courts found that exhaustion of local remedies was an (implicit) requirement of the international taking exception precisely by reason of the "international" character of the unlawfulness. 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.[159]

In *Abelesz*, 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."[160]

To be sure, other courts have been less inclined to uphold the local remedies rule. In *Chabad v. Russia*, the D.C. Circuit held against the existence of such requirement and proceeded only to a "prudential" assessment of the remedies available in Russia.[161] More recently, the D.C. Circuit refused

156. The somewhat paradoxical result is that claims concerning unlawful acts of more serious gravity cannot be addressed by US courts, while State immunity is denied for "mere" takings of property. *Id.* at 677.

157. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 5 (2d ed. 2015).

158. *See infra* Section III.A.1.

159. Republic of Austria v. Altmann, 541 U.S. 677, 714-15 (2004) (Breyer, J., concurring) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 cmt. f (1987)).

160. *Abelesz*, 692 F.3d at 684 (holding that such extraordinary step should be taken only when the remedy provided by the foreign state is "inadequate," such as "an alternative forum in which the plaintiff can recover nothing for a valid claim"); *see also* Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 307 (D.D.C. 2005) (considering that a statute of limitations barring the plaintiff's claims would make the alternative forum inadequate).

161. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 949 (D.C. Cir. 2008) ("[T]here is no apparent reason for systematically preferring the courts of the defendant state.").

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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."[162] Similarly, the Ninth Circuit did not recognize the existence of such rule in *Cassirer v. Spain*.[163] Yet, it acknowledged that the takings were in violation of international law because they were "part of Germany's genocide against Jews."[164] One can therefore speculate that a violation of an *erga omnes* obligation, such as the prohibition on genocide, may trigger different rules on standing for the invocation of state responsibility.[165] The outcome does not change: the international taking exception has been consistently used as a tool to respond to internationally wrongful acts of foreign states. The more interesting question is what organ(s) should decide on the international responsibility of foreign states. The U.S. government objected, for example, to the use of the exception in *Simon* "because of the United States' 'strong support for international agreements with Austria involving Holocaust claims against Austrian companies—agreements that have provided nearly one billion dollars to Nazi victims.'"[166] The question of competence, however, is distinct from the nature of the exception as a tool for the implementation of international responsibility; this aspect will be further explored in Part III.

C. *The "territorial tort" exception*

1. *Does the territorial tort exception de-immunize sovereign acts?*

The so-called "territorial tort" exception is codified in section 1605(a)(5) FSIA as follows:

> A foreign state shall not be immune . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .[167]

On a plain reading, 1605(a)(5) is another FSIA provision that discounts the restrictive doctrine of state immunity; the exception is defined exclusively on the basis of the territorial connection between the United States and the tortious conduct, regardless of the sovereign character of the latter. However, unlike other FSIA exceptions, the territorial tort exception

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162. Simon v. Republic of Hungary, 911 F.3d 1172, 1180 (D.C. Cir. 2018).
163. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034-35 (9th Cir. 2010) ("[Nothing] in the legislative history . . . clearly indicates Congress meant to impose any such obligation.").
164. *Id.* at 1035.
165. *See infra* Section III.A.3.
166. Simon v. Republic of Hungary, 911 F.3d 1172, 1178 (D.C. Cir. 2018) (quoting Statement of Interest of the United States of America at 1, Simon v. Republic of Hungary, No. 10-1770 (D.D.C. July 15, 2011), ECF No. 42).
167. 28 U.S.C. § 1605(a)(5) (2018).

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is not a unique feature of the U.S. legal system. With only slight differences, this exception appears in almost all existing codifications of state immunity, including Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property (UNCSI).[168] This has led various commentators to conclude that 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.[169]

Notwithstanding this widespread opinion, it is not completely clear whether customary international law supports the existence of a 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 against this argument. As to the first category, it should be noted that 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.[170] Should the exception mirror the commercial activities exception in the area of torts, the case for extending it to acts *jure imperii* would be seriously undermined.[171] 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 characterized the rules of immunity since the seminal *Schooner Exchange* judgment,[172] and the establishment of an equilibrium in implementation of sovereign equality has always been the guiding principle behind state immunity.[173] 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 its acts.[174] But the recognition of an exception that extends to

168. *See* UNCSI, *supra* note 22, at art. 12. A similar exception is codified in the legislation of Canada, United Kingdom, South Africa, Australia, Singapore, Argentina, and Israel. *See* Joanne Foakes & Roger O'Keefe, *Article 12*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES, *supra* note 22, at 210.

169. *See, e.g.*, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 498 (2012); Foakes & O'Keefe, *supra* note 168, at 218; FOX & WEBB, *supra* note 25, at 468; Kimberley N. Trapp & Alex Mills, *Smooth Runs the Water Where the Brook is Deep: The Obscured Complexities of* Germany v. Italy, 1 CAMBRIDGE J. INT'L & COMP. L. 153, 156 (2012).

170. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 64 (Feb. 3).

171. *See* Andrew Dickinson, Germany v. Italy *and the Territorial Tort Exception: Walking the Tightrope*, 11 J. INT'L CRIM. JUST. 147, 151 (2013).

172. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

173. Jurisdictional Immunities of the State, 2012 I.C.J. Rep.at 123-24 ¶ 57; FOX & WEBB, *supra* note 25, at 767.

174. *See* VAN ALEBEEK, *supra* note 19, at 49; Roger O'Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT'L L. 999, 1030 (2011).

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sovereign acts would necessarily require a rethinking of these foundations.[175]

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 unbounded exercise of jurisdiction.[176] That territorial jurisdiction is not absolute is beyond controversy and the activities of armed forces are a case in point. While some codifications explicitly exempt them from the territorial jurisdiction of the forum state,[177] 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.[178] If we accept 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? Various commentators have attempted to provide an answer based on the *lex specialis* character of the law of armed conflict;[179] this justification, however, fails to fully convince. Nothing more than a "thin line" separates these cases from other manifestations of sovereignty that are instead considered to fall within the scope of the territorial tort exception, such as political assassination.[180] 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.[181] 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.[182]

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175. This is one of the main critiques against an exception to state immunity for violations of *jus cogens*. *See* O'Keefe, *supra* note 174, at 1030 ("The recognition of an exception to state immunity . . . in respect of alleged violations of relevant norms of international law cuts across the logic of the sovereign equality of states"); Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 18 AUSTL. Y.B. INT'L L. 97, 124 (1997).

176. *See* Dickinson, *supra* note 171, at 152.

177. *See* European Convention on State Immunity, art. 31, May 16, 1972, 1495 U.N.T.S. 182. 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* Trapp & Mills, *supra* note 169, at 156–57.

178. Jurisdictional Immunities of the State, 2012 I.C.J. Rep. at 134-35 ¶ 77.

179. *See, e.g.*, FOX & WEBB, *supra* note 25, at 480; Trapp & Mills, *supra* note 169, at 157; VAN ALEBEEK, *supra* note 19, at 78. A similar view was advanced in Jurisdictional Immunities of the State, 2012 I.C.J. Rep. at 161 ¶ 18 (separate opinion by Keith, J.).

180. Pavoni, *supra* note 57, at 155.

181. FOX & WEBB, *supra* note 25, at 478. *See also* Jurisdictional Immunities of the State, 2012 I.C.J. Rep. at 318 ¶ 9 (dissenting opinion by Gaia, J.) ("The rationale of the suggested restriction to the 'tort exception' concerning military activities is not clear.").

182. Some authors recognise that the finding of the ICJ ultimately undermines the "legal validity" of the territorial tort exception. FOX & WEBB, *supra* note 25, at 469; VAN ALEBEEK, *supra* note 19, at 77.

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For the avoidance of doubt, it should be stressed that, 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";[183] 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 this is the second set of 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.

The territorial tort exception, as codified by the ILC in DASI (and later UNCSI), arose from a practice that the ILC Special Rapporteur Sucharitkul found to be "neither uniform nor consistent."[184] Before various states enacted immunity legislation, there was "very little evidence" of an exception in this regard;[185] support could be found exclusively in relation to personal injuries resulting from car accidents caused by representatives of foreign governments.[186] 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 U.S. courts seemed to have actively embraced this new competence.[187]

As a result, when the ILC Special Rapporteur Sucharitkul suggested that DASI 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."[188] 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."[189] 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 the deed is determined by the rules of international law, with the help of international proceedings, and cannot be established by national courts."[190]

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183. Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 750 (2004).

184. Sompong Suchartikul, *Fifth Report on Jurisdictional Immunities of States and Their Property*, [1983] 2 Y.B. Int'l L. Comm'n, pt. 1 at 41, ¶ 76.

185. *Id.*

186. *See* Collision with a Foreign Government-Owned Motor Car, 40 I.L.R. 73, 74 (Super. Ct. 1961) (Austria).

187. *See infra* Section II.C.2.

188. Sucharitkul, *supra* note 184, at 39, 45, ¶¶ 68, 99.

189. *Summary Records of the 1768th Meeting*, [1983] 1 Y.B. Int'l L. Comm'n, pt. 1 at 82, 84.

190. *Comments from Governments*, [1988] 2 Y.B. Int'l L. Comm'n, pt. 1 at 83, ¶ 13. This stance was echoed by Byelorussia, *id.* at 61 ¶ 12, and by the German Democratic Republic, *id.* at 69 ¶ 21.

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Despite this, the provision made its way into the final version of DASI by virtue of a "general[] . . . preference" for its retention.[191] 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 then adds, abruptly, 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."[192] Nonetheless, a more accurate description is that the actual scope of Article 12 remains uncertain.[193] Many states continue to object to such an over-inclusive exception, including the United States itself.[194] States without immunity legislation have almost uniformly applied the territorial tort exception within the limits of *acta iure gestionis*;[195] the European Court of Human Rights ratified this practice in *McElhinney v. Ireland*.[196] Perhaps the ultimate acknowledgement of the unsettled state of the matter came from the ICJ, which in the *Jurisdictional Immunities* case very cautiously 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."[197] Some read into this statement an implicit admission that customary international law might contain such an exception;[198] but the opposite can equally be argued. The most likely explanation for the Court's reticence is that the Judges recognized the developing state of the law in this area and decided not to take a position in order to avoid influencing such evolution.[199]

2. The use of the exception in the implementation of state responsibility

If we accept that domestic courts exercising jurisdiction over sovereign acts under the territorial tort exception may be at risk of violating international law, the not particularly conspicuous U.S. practice on the topic takes on an entirely new meaning. The *locus classicus* is the decision of the District Court for the D.C. Circuit in *Letelier*, which notoriously dealt with the political assassination of the Chilean dissident leader on U.S. soil under

191. *Reports of the International Law Commission on the Work of Its Forty-First Session*, [1989] 2 Y.B. Int'l L. Comm'n, pt. 2 at 111, ¶¶ 523-24.

192. *Draft Articles on Jurisdictional Immunities of States and Their Property, With Commentaries*, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2 at 45 (Article 12(4)). *See also* Foakes & O'Keefe, *supra* note 168, at 219.

193. *See* Riccardo Pavoni, *How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?*, 14 J. INT'L CRIM. JUST. 573, 581 (2016).

194. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 64 (Feb. 3) (quoting the U.S. 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.").

195. *See* GERHARD HAFNER, MARCELO G. KOHEN & SUSAN CAROLYN BREAU, STATE PRACTICE REGARDING STATE IMMUNITIES 97–112 (2006).

196. McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, 47 ¶ 38 (2001) (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").

197. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 65 (Feb. 3).

198. FOX & WEBB, *supra* note 25 at 478.

199. *See* Dickinson, *supra* note 171, at 161-63.

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the instruction of the Pinochet regime. The Court used both the letter and history of the FSIA to conclude that the tortious acts to which the Act makes reference are not only those classified as "private."[200] Unlike other immunity codifications, however, the FSIA contains a peculiar clause that seems to reintroduce the *jure imperii/jure gestionis* distinction "through the back door":[201] acts consisting in an exercise of a "discretionary function"—a formula that hints precisely at certain sovereign powers—remain covered by immunity.[202] 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.[203]

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; less attention has been paid to the fact that the Court effectively denied immunity because it found that Chile had acted in a manner "clearly contrary to . . . international law."[204] 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 US.[205] 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 U.S. $5 million damages award had a fundamental role in exerting pressure on Chile to adhere to peaceful means of dispute resolution over the assassination; following the establishment of a commission of enquiry, Chile agreed to pay compensation to the individual claimants.[206] It cannot be doubted that the denial of immunity had an instrumental role in implementing Chile's international responsibility.

In both these cases, the territorial connection between the tortious activities and the forum state was not the only element that triggered the denial of immunity. Courts were prompted to assert their jurisdiction because they simultaneously found that the international responsibility of the defendant state was engaged. Failure to acknowledge this important aspect, however, generated some ambiguities. In *Liu*, for example, the Ninth

200. Letelier v. Republic of Chile, 488 F. Supp. 665, 671-72 (D.D.C. 1980).
201. VAN ALEBEEK, *supra* note 19, at 70.
202. *See* 28 U.S.C. § 1605(a)(5) (2018); DELLAPENNA, *supra* note 27, at 254.
203. Letelier, 488 F. Supp. at 673.
204. *Id.*
205. Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989).
206. *See* Stefanie Schmahl, *Letelier and Moffitt Claim*, in 6 MAX PLANCK ENCYCLOPEDIA PUB. INT'L LAW ¶ 7 (Rüdiger Wolfrum ed., 2015); J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 52 (2011).

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Circuit determined the responsibility of the ROC not by employing the international rules on attribution, but by applying the Californian law of *respondeat superior*.[207] However, if the acts of the defendant state are deemed to be inconsistent with international law, the rules of the latter system should be the point of reference at each and every stage of the judicial review.[208] Most importantly, only if the enquiry on the international responsibility of the foreign state is carried out rigorously can the denial of immunity be considered a response to the prior wrongful act and be potentially justified according to the mechanism illustrated in Part III.

III. NON-RECOGNITION OF STATE IMMUNITY AS A COUNTERMEASURE

The previous sections showed that various purported "exceptions" to state immunity under the FSIA have been adopted in the absence of a permissive rule of customary international law. They are, in other words, breaches of international law. At the same time, the analysis above demonstrated that these exceptions are often means by which the United States responds to perceived violations of international law. As mentioned at the outset, this element plays an important role in the context of implementation of international responsibility. In the decentralized system of international law, the instruments through which states may seek to unilaterally vindicate their rights are countermeasures. These are, in essence, breaches of certain rules of international law ("primary rules") committed in response to prior wrongful acts with a view to inducing the wrongdoing state to comply with its obligations of cessation and reparation.[209] Because of their instrumental and temporary nature, the wrongfulness of these measures is precluded by virtue of "secondary rules" governing the international responsibility of states.[210] FSIA "exceptions" to state immunity that are in fact breaches of these (primary) rules may thus be "justified" if a case can be made that they amount to countermeasures.[211]

In this regard, the first obstacle is that the United States—or any other state, for what matters[212]—has never *expressly* qualified its practice on state immunity as countermeasures. While some doctrinal proposals have been

207. Liu, 892 F.2d at 1426-31. *See also supra* text accompanying note 87.

208. DELLAPENNA, *supra* note 27, at 432.

209. *See* ARSIWA and Commentary, *supra* note 13, at arts. 47, 49(2) ("Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State."); Air Services Agreement of 27 March 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, ¶¶ 81-82 (Perm Ct. Arb. 1978); Gabčíkovo-Nagymaros Project (Hung. V. Slovk.), Judgment, 1997 I.C.J. Rep. 56, ¶ 87; Alland, *supra* note 16, at 1127-1132.

210. *See* ARSIWA and Commentary, *supra* note 13, at art. 22. The distinction between "primary" and "secondary" rules is one of the pillars of the law of state responsibility. *See* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 876 (2002).

211. The classification of countermeasures as "justifications" is disputed. *See* FEDERICA PADDEU, JUSTIFICATION AND EXCUSE IN INTERNATIONAL LAW 225 (2018).

212. *But see* Moser, *supra* note 20, at 827 (arguing that Italy came very close to this in its oral pleadings before the ICJ).

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made in this sense,[213] it is no trivial question to ask whether a mechanism that the United States never suggested can explain and potentially justify its conduct. To answer this question some context is necessary. Non-recognition of state immunity is by no means the only instance where discerning whether a state is resorting to countermeasures is difficult. While it is true that states frequently adopt countermeasures in the conduct of international relations, they rarely do so in explicit terms.[214] Since terms like "sanctions," "reprisals," and even the more neutral "countermeasures" carry a negative connotation, states tend to avoid labelling their acts as such.[215] To this, it may be added that a state explicitly adopting a countermeasure is essentially conceding a breach of international law. Countermeasures are by definition violations of international obligations whose justification depends on the existence of a prior wrongful act. States are generally reluctant to admit being in breach of international obligations, regardless of how convincing their judgement on the justified nature of the breach may be. As a result, identifying countermeasures frequently requires a certain degree of interpretation. This is also the reason why the place *par excellence* where countermeasures are debated is before international courts and tribunals;[216] in these settings, countermeasures can be advanced as an alternative argument failing the first line of defense according to which the conduct under scrutiny has not breached international law.

In the light of this, the fact that the United States has never explicitly justified its non-recognition of state immunity as a countermeasure is not dispositive of the issue. Had the ICJ decided to hear arguments on the merits of this issue in *Certain Iranian Assets*, the United States could (and in all likelihood would) have built an argument based on countermeasures to defend its approach to state immunity. What matters, for this purpose, is not whether the United States advanced this justification in the past, but whether the *substance* of its measures complies with the requirements of countermeasures under international law. The next sections will turn to this issue.

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213. *See* Committee Against Torture, *Summary Record of the Second Part of the 646t*h *Meeting*, at 11-12 ¶ 67, U.N. Doc. CAT/C/SR.646/Add.1 (May 6, 2005) (supporting non-recognition of state immunity as a countermeasure). *See also* Vezzani, *supra* note 20, at 87; Moser, *supra* note 20, at 809; Trapp & Mills, *supra* note 169, at 163; Andrea Atteritano, *Immunity of States and Their Organs: the Contribution of Italian Jurisprudence Over the Past Ten Years*, 19 IT. Y.B. INT'L L. 33–56 (2010); Craig Forcese, *De-Immunizing Torture: Reconciling Human Rights and State Immunity*, 52 MCGILL L.J. 127 (2007); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903–19 (2007).

214. *See* ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL 188 (2011). *See also* 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*, 77 BRIT. Y.B. INT'L L. 333, 413 (2007) (noting the same attitude in relation to third-party countermeasures).

215. *See* TZANAKOPOULOS, *supra* note 214, at 188.

216. *See* Air Services Agreement of Mar. 27, 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417 (Perm. Ct. Arb. 1978); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 56 (Sept. 25); Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Naulilaa Case) (Port. v. Ger.), 2 R.I.A.A. 1011 (1928).

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A. Standing to implement international responsibility

The implementation of state responsibility logically, if not chronologically, involves two steps. First, a state deeming another state responsible for a breach of international law (determination of state responsibility) must call out said state to comply with its international obligations (invocation of state responsibility). Secondly, if the state determines that its requests have not been met and wishes to take the matter in its hands, it may proceed to adopt countermeasures. Both stages are subject to various conditions under customary international law which the ILC has attempted to codify (and partially develop) in Part III of its Articles on State Responsibility.[217]

Not all states are entitled to react to all internationally wrongful acts at all times. Customary international law contains special rules to determine which states have standing to invoke the responsibility of the wrongdoing state depending on their legal position with regard to the obligation breached. The ILC codified these rules by reference to the notion of 'injured state'.[218] A state injured by the wrongful act has standing to invoke the responsibility of the wrongdoing state and take countermeasures.[219] On certain conditions, even non-injured states have standing to invoke the international responsibility of the wrongdoing state, provided they have a special interest in compliance with the obligation breached.[220] It is far less clear, however, whether non-injured states are also entitled to adopt measures for the implementation of such responsibility ("third-party countermeasures").[221] The ILC notoriously avoided to take a clear stance in this regard due to the "limited and rather embryonic" practice on the subject.[222]

Countermeasures in the form of non-recognition of state immunity add a layer of complexity to this picture. Admittedly, these measures take place in a rather peculiar setting. Regardless of the organ that sanctions them, they require that private individuals or entities bring a claim against a foreign state before domestic courts in order for the forum state to respond to the wrongful act of the latter by denying its immunity. This interaction between international and national levels may generate confusion. In particular, some

217. *See* ARSIWA and Commentary, *supra* note 13, at 116.

218. *Id. See also* Giorgio Gaja, *The Concept of an Injured State*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY *supra* note 16, at 941.

219. *See* ARSIWA and Commentary, *supra* note 13, at arts. 42, 49(1).

220. *See id.* at art. 48. *See also* Giorgio Gaja, *States Having an Interest in Compliance with the Obligation Breached*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 957.

221. *See* Denis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT'L L. 1221 (2002); MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 11-12 (2017); Dawidowicz, *supra* note 214, at 333; Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 1137; CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 241 (2005). *See also* Michael Schmitt, *Estonia Speaks Out on Key Rules for Cyberspace*, JUST SECURITY (June 10, 2019), https://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 . . . .").

222. ARSIWA and Commentary, *supra* note 13, at art. 54.

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clarifications on the relationship between private claims and internationally wrongful acts are necessary to clarify the conditions on which the United States has standing to implement the international responsibility of foreign states in these cases.

1. *Indirect Injury*

Under certain circumstances, the substance of the claims brought by the plaintiffs might be the very wrongful act for which the countermeasure is adopted. To be sure, in order for U.S. courts to be able to hear these claims, the latter must be formulated according to the domestic law of the United States, which invariably results in the wrongful act being treated as a private law tort.[223] Nonetheless, in many circumstances there might be a considerable overlap between these two concepts.[224] When the wrongful act at the basis of the countermeasure coincides with the tortious act suffered by the plaintiff, the United States has standing to invoke the responsibility of the wrongdoing state if the injury caused to the plaintiff is also an (indirect) injury against the United States itself. These are cases where the United States can exercise diplomatic protection in the interest of its nationals.[225] Coincidentally, in the vast majority of cases analyzed above, plaintiffs were required to exhibit one of the two fundamental pre-requisites for the exercise of diplomatic protection by the United States: U.S. nationality. This is true both for cases brought under FSIA exceptions that explicitly prescribe this requirement—such as the AEDPA amendment[226]—but, more strikingly, even where the FSIA contains no mention of nationality, such as under the international taking exception.[227] Some of these cases are also remarkable for complying with the second condition for the exercise of diplomatic protection: the exhaustion of local remedies.[228]

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223. CHITTHARANJAN FELIX AMERASINGHE, DIPLOMATIC PROTECTION 37 (2008) (pointing out that the remedies available will "inevitably vary from State to State" and there can be "no . . . absolute rule governing all situations"). *See also Report of the International Law Commission on the Work of its Fifty-Eighth Session*, 61 U.N. GAOR Supp. No. 10 at 1, 23, U.N. Doc. No. A/61/10 (2006), *reprinted in* [2006] 2 Y.B. Int'l L. Comm'n 1, 23, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (containing the Commission's Draft Articles on Diplomatic Protection) [hereinafter DADP and Commentary].

224. Hazel Fox, *State Responsibility and Tort Proceedings Against a Foreign State in Municipal Courts*, 20 NETHERLANDS Y.B. INT'L L. 3, 6, 13 (1989) (arguing that the *Amerada Hess* case was a tort law case "entirely governed by international law"). *See also* André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 770 (2007).

225. *See* Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. Rep. (ser. A) No. 2, at 12 (Aug. 30); *see also* John Dugard, *Diplomatic Protection*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 1051.

226. 28 U.S.C. § 1605A(2)(A)(ii)(I) (2018). JASTA contains a similar requirement. 28 U.S.C. § 1605B(c) (2018).

227. *See supra* text accompanying note 147.

228. *See* DADP and Commentary, *supra* note 223, at 71. *See also supra* text accompanying notes 159-160.

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2. Direct Injury

The claim presented by the plaintiffs may also allow courts to determine that the defendant state is responsible for a breach of international law that directly injures the United States. The practical implication of this is that the rule of local remedies would not apply and U.S. courts would be able to adopt countermeasures even in the context of claims brought by non-nationals.[229] An important indication to distinguish between cases of direct and indirect injury[230] might be derived from the jurisdictional connection between the dispute and the United States.[231] When the only jurisdictional link is the nationality of the plaintiff, there might be a strong presumption that U.S. courts are acting for the protection of U.S. nationals. However, things are different when courts act on the basis of territorial jurisdiction. Besides providing the most widely accepted head of jurisdiction under international law,[232] the fact that the wrongful act has occurred in the territory of the United States significantly increases the possibility that the act contextually, if not primarily, constitutes an injury against the United States itself—particularly when force is involved.[233] The cases brought under the territorial tort exception lend themselves well to this interpretation. In *Letelier* and *Liu*, despite the applicants lacking U.S. nationality, state immunity was denied in relation to acts of political assassination carried out on U.S. soil which unambiguously constituted unlawful uses of force directly injuring the United States.[234]

3. Collective Interests

When the United States is neither directly nor indirectly injured by the wrongful act raised in the claim, it might still be entitled to take measures against the wrongdoing state if acting for the protection of collective interests.[235] As mentioned above, third-party countermeasures are a controversial topic in international law and there is no definitive answer as to whether they are permissible at the current stage of development.[236] The

229. *See* DADP and Commentary, *supra* note 223, at 74; Air Services Agreement of Mar. 27, 1946 between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 431 ¶ 30 (1978); CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 145 (2004); IAN BROWNLIE, STATE RESPONSIBILITY 236 (1983); Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y.B. INT'L L. 83, 84 (1959).

230. *See* John R. Dugard (Special Rapporteur), *Second Rep. on Diplomatic Protection*, U.N. Doc. A/CN.4/514, at 104 (Feb. 28, 2001); DADP and Commentary, *supra* note 223, at 74.

231. *Cf.* BRÖHMER, *supra* note 19 at 193 (questioning whether the links between the state and the international wrong correspond to the links establishing jurisdiction).

232. *See* S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 17).

233. Arguably, any coercive action carried out in the territory of another State constitutes a violation of the sovereignty and territorial integrity of the latter State contrary to Article 2 paragraphs 1 and 4 of the U.N. Charter.

234. *See supra* Section II.C.2.

235. *See* ARSIWA and Commentary, *supra* note 13, at art. 48); Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5). *See also* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 241 (2008); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 198 (2005).

236 .*See supra* text accompanying note 221.

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issue falls outside the scope of the present analysis. However, if one accepted that non-injured states may be entitled to take measures for the implementation of international responsibility, some of the cases examined above would perfectly fit this framework. Cases such as *Cassirer* and *Abelesz*, brought under the international taking exception, were in fact based on the assumption that Germany was responsible for violations of *erga omens* obligations (prohibition of genocide).[237] This would explain the inconsistencies concerning the nationality requirement and the exhaustion of local remedies highlighted above.[238]

B. The relevance of the state organ denying immunity

Compliance with the international law of state immunity ultimately depends on the decisions that courts make when proceedings are brought against sovereign subjects. In this sense, non-recognition of state immunity is always, strictly speaking, a "judicial" measure.[239] It can thus be questioned whether the taking of countermeasures, which are essentially a tool of foreign policy, may be delegated to judicial organs.

From an international law standpoint,[240] this objection is unfounded. Neither the ILC Articles nor customary international law contain rules specifying which organs of the state are entrusted with the determination/invocation of state responsibility and the adoption of countermeasures. This is in line with the basic idea that international law is not directed at specific organs of the State; it is binding on the State as a whole.[241] For the same reason, countermeasures are not specially reserved for certain organs of the state. In fact, the ILC Articles seem to suggest the opposite: Article 4 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.[242] If any state organ can breach international law by wrongfully denying immunity, there is no reason to exclude *a priori* that the wrongfulness of such acts may be precluded by the

237. Abelesz v. Magyar Nemzeti Bank*,* 692 F.3d 661, 675 (7th Cir. 2012); Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1035 (9th Cir. 2010).

238. *See supra* text accompanying notes 152-156 and 161-166.

239. *Cf.* Anne Peters, *Immune Against Constitutionalisation?*, *in* IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM 1, 6 (Anne Peters et al. eds., 2014) ("A striking feature of the law of immunities is that it is driven by courts, not by the governments (the executive branch) of states.").

240. Thus, excluding any consideration on separation of powers under municipal law.

241. *Cf.* Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 87 (1957) (affirming this principle with regard to treaty obligations).

242. The so-called principle of unity of the State. *See* ARSIWA and Commentary, *supra* note 13, at 40; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep 62, 62-63 (Apr. 29). *See also* Djamchid Momtaz, *Attribution of Conduct to the State*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 239. The fact that domestic courts may engage the international responsibility of the forum State is virtually uncontroversial. *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*, 26 LEIDEN J. INT'L L. 615, 619 (2013).

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virtue of the rules governing countermeasures. This does not necessarily imply that *in practice* countermeasures are viable tools for all organs of the state (and particularly for domestic courts). It is possible that some organs of the state might be better placed than others to comply with the conditions necessary to determine/invoke the responsibility of foreign states and adopt countermeasures. Hence, it is crucial to identify how exactly different organs of the states may be involved in the taking of countermeasures denying state immunity.

From this perspective, not all exceptions under the FSIA are identical. The major difference between the exception for state sponsors of terrorism under the AEDPA and the international taking exception, for example, is that in the former the executive is always necessarily involved in the decision concerning the grant of immunity by virtue of the listing procedure.[243] Depending on the organs that participate and ultimately have control over the measures denying immunity, the following four categories can be identified.

First, there are measures that, despite being "taken" by a judge, are completely in the hands of the executive. These can be called "*executive measures*." In these measures, non-recognition of state immunity is mandated by the government on the basis of its own assessment (determination) that a state is responsible for an internationally wrongful act; the role of courts consists merely in giving effect to this directive. Proceedings brought under the AEDPA exception for state sponsors of terrorism fall within this category.[244] Any objections concerning the judicial nature of non-recognition of state immunity clearly do not apply to these measures, which are not in fact "judicial."[245]

Complications arise with regard to a second category which may be called "*inchoate measures*."[246] These are those provisions such as the international taking exception which prescribe non-recognition of immunity at the occurrence of an internationally wrongful act without identifying the target of the measure but in abstract terms. The problem with these measures seems to be that the determination and invocation of the responsibility of the wrongdoing state are left to the courts tasked with denying immunity. And yet, this is not the case for all measures within this category; two further sub-species can be distinguished.

Most cases fall within a category that may described as "*mixed measures*." In these situations, the measure *stricto sensu*—the denial of state immunity—is taken by judicial organs. However, the decision is based on a pre-existing determination/invocation of state responsibility made by executive or

243. *See* discussion *supra* Section II.A.2.

244. *See* Andrea Gattini, *The Dispute on Jurisdictional Immunities of the State before the ICJ*, 24 LEIDEN J. INT'L L. 173, 183 (2011).

245. Similar considerations apply to "sanctions" (i.e. countermeasures) directly mandated by Congress. *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. § 5001 (2018)) (repealed 1993); Iran Sanctions Act, Pub. L. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (2018)).

246. I thank Julian Davis Mortenson for this definition.

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legislative organs. All decisions that refer to a pre-existing dispute between the United States and the defendant state fall within this category.[247] As shown in the next sections, these cases are comparatively less problematic because some of the most burdensome preliminary steps to the adoption of countermeasures are taken by organs that are well placed to do so.

The category that encounters stronger objections is that of (purely) "*judicial measures*." These occur when courts are presented with a claim which allows them to recognize a breach of international law on part of the defendant state. On the basis of their own independent determination of the responsibility of the defendant state, they proceed to deny state immunity (adoption of the measures). In taking these measures, judicial organs may struggle to comply with the requirements prescribed for the implementation of state responsibility. It is however important to understand where these limitations lie in order to avoid discounting the whole system as unfeasible. The next two sections will assess these limits by addressing potential obstacles stemming, first, from the nature of the rules of state immunity and, secondly, from the substantive and procedural requirements of (lawful) countermeasures.

C. Objections to the availability of countermeasures based on the nature of state immunity

1. Procedural nature of the rules of immunity

The availability of countermeasures would be excluded at the outset if the rules of state immunity were, due to their nature, incompatible with such mechanism. In this regard, it should be reminded that the ICJ, when addressing the question of whether *jus cogens* violations justify an exception to the rules of immunity, held that the latter are "procedural in character" and thus "do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[248] This point was later reinforced in the judgment:

> whether a state is entitled to immunity before the courts of another state is a question entirely separate from whether the international responsibility of that state is engaged and whether it has an obligation to make reparation.[249]

The language used by the Court, however, should not mislead. The ICJ was tasked with solving an alleged norm conflict, which it found to be non-existent by virtue of the different nature of the norms involved. In this regard, the Court's reasoning is indisputable: the question as to the *existence* of a specific rule of immunity (or an exception to it) is unaffected by the

247. A clear-cut example, though outside the FSIA categories analysed above, is Princz v. Fed. Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992).

248. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 93 (Feb 3).

249. *Id.* ¶ 100.

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fact that the state has committed an internationally wrongful act. However, whether a state should *effectively be granted* immunity is not necessarily a question independent from its international responsibility. Countermeasures assume that a rule of international law (in this case, state immunity) is in place, but can be temporarily breached in order to induce compliance with other norms. Even if the rules of immunity are procedural in character, there is nothing in the law of state responsibility prescribing that countermeasures can only affect substantive rules.[250]

2. Preliminary character of the immunity plea and determination of state responsibility

As a "corollary" to their procedural character,[251] questions of immunity are preliminary matters that must be "expeditiously decided *in limine litis*,"[252] that is, at a stage where the merits of the case have not yet been considered. Stemming from this, the ICJ held that immunity cannot "be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed."[253] One may therefore question whether domestic courts are in a position to make determinations on the international responsibility of a state at a stage where they have not yet heard the merits of the case.[254]

The problem of determination of state responsibility as a preliminary step to the denial of state immunity as a countermeasure has different implications depending on the organs that concretely perform it. The objection concerning the preliminary character of the immunity plea, in particular, does not affect those cases where the determination is not made by the judge *in limine litis*, but by the executive organs. Executive and mixed measures are premised on the "ordinary" assessment that the U.S. Government makes concerning the international responsibility of other states when they engage in disputes with the latter. When a court denies immunity in these cases, the decision on the international responsibility of the foreign defendant is not made by the court on the basis of the claim(s) before it, but it has already been made by other organs of the state that are normally entrusted with foreign policy decisions.

With regard to judicial measures where the responsibility of foreign states is determined exclusively by the judiciary, things may be more complicated. In these scenarios, a court must be able to reach a verdict on the international responsibility of the foreign state in order to proceed to deny immunity as a countermeasure. This would seem barred by the very

250. *See* Moser, *supra* note 20, at 832.

251. Roger O'Keefe, *Jurisdictional Immunities*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 107, 110 (Christian J. Tams & James Sloan eds., 2013).

252. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, ¶¶ 63, 67 (Apr. 29).

253. Jurisdictional Immunities of the State, 2012 I.C.J. Rep. at 49-50 ¶ 106.

254. *Cf.* BRÖHMER, *supra* note 19, at 193 (considering the use of reprisal against state immunity a "circular argument," since it is very often the object of the proceedings to determine a breach of international law).

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nature of the inquiry that a court is meant to perform at the jurisdictional stage, which should not deal with the substance of the claim. Yet, things are not so clear cut in practice. Various exceptions to immunity are based on elements that straddle the divide between jurisdiction and merits.[255] When the jurisdiction of a domestic court depends on factors that also belong to the merits of the claim (e.g. the commission of a tortious activity), judges are required to make an assessment of these factors at the preliminary stage.[256] This is because, if courts were to establish their jurisdiction exclusively on the basis of the plaintiff's allegations, plaintiffs would be able to bring their suits before forums lacking jurisdiction on the basis of manifestly spurious claims. On the other hand, courts were to undertake a full investigation of these factors at the preliminary stage, defendants would be forced to litigate the merits of every case with none of the advantages of succeeding at the merits stage. The analysis that courts perform must be somewhere between these two extremes.[257]

Thus, the question is not whether courts can perform an assessment of the responsibility of the defendant state at the jurisdictional stage, but how deep they can go into such determinations. The issue, in other words, is one of standard of proof.[258] This goes to the very heart of the prerogative on which countermeasures are built: the power of auto-interpretation, that is the power of each state to determine for itself its legal situations and those of other subjects.[259] This power does not equate to the ability of unilaterally

255. Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, STAN. L. REV. 385, 414 (1982) (analyzing whether sovereign immunity should be treated as a "jurisdictional prerequisite or as an affirmative defense").

256. *See* ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS § 4-2 (3d ed. 1998) ("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 a tort has been committed without jurisdiction, but it cannot determine whether jurisdiction exists without deciding whether there was a tort."). *See also* Massimo Iovane, *The Italian Constitutional Court Judgment No. 238 and the Myth of the 'Constitutionalization' of International Law*, 14 J. INT'L CRIM. JUST. 595, 599 (2016) (agreeing with the Italian Constitutional Court's finding that jurisdictional objections necessarily require an examination of the arguments put forward by the parties).

257. The "inextricable merits" problem has been identified in various instances of personal and subject-matter jurisdiction. *See* Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1305 (2012) (examining "how the inextricable merits problem interacts specifically with the effects test" in personal jurisdiction). *See also* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234, 247 (1983) (analyzing the same issue in conspiracy-based jurisdiction); Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 977 (2005) (arguing that the problem arises in "all factual and legal questions of forum authority, from venue to subject-matter jurisdiction").

258. *See* Clermont, *supra* note 257, at 974.

259. This power derives from the absence of a mechanism of compulsory, third-party determination of international law. *See* Georges Abi-Saab, *"Interprétation" et "auto-interprétation" : quelques réflexions sur leur rôle dans la formation et la résolution du différend international*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 9–21, 15 (Beyerlin, U. et al. eds., 1995). *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 268 (June 27); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 28, ¶ 53 (May 24). *See also* TZANAKOPOULOS, *supra* note 214, at 114.

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creating the law, nor imposing their determinations on others.[260] If, on the basis of their self-assessment of the legal situation, states decide to take action, including resort to countermeasures, they do so at their own risk.[261] This means that a competent third party may at a later stage find that the state's assessment was in fact erroneous and that in acting on its basis the state engaged its own international responsibility.[262]

In this sense, judicial measures are in no meaningful way different from measures adopted by any other organ of the state.[263] When U.S. courts make their own (preliminary) findings on the existence of a breach of international law and its attribution to the defendant state, these courts are unilaterally assessing the legality of a given situation in their capacity as organs of the United States. International law does not set a bar or a threshold that a state needs to meet in order to make its unilateral determinations. 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.[264] 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.[265] This is not a logical inconsistency; it is simply an exercise 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, no apparent limitations stem from the stage at which countermeasures dealing with immunity are taken.

3. *Temporary character and reversibility of the countermeasure*

Countermeasures aim to elicit compliance with the secondary obligations that stem from the commission of an internationally wrongful act and cannot be directed at punishing the wrongdoing state.[266] For this reason, their character is inherently temporary; once the circumstances that legitimized them have ceased, they should be terminated and the prior situation restored.[267] In the light of this, it might be questioned whether a

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260. Leo Gross, *States as Organs of International Law and the Problem of Auto-Interpretation*, *in* LAW AND POLITICS IN THE WORLD COMMUNITY: ESSAYS ON HANS KELSEN'S PURE THEORY AND RELATED PROBLEMS IN INTERNATIONAL LAW 77 (George A. Lipsky ed., 1953).

261. ARSIWA and Commentary, *supra* note 13, at 130.

262. OMER YOUSIF ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 52–55 (1988); TZANAKOPOULOS, *supra* note 214, at 117.

263. *Cf.* Alland, *supra* note 16, at 1127, 1129.

264. *See* Moser, *supra* note 20, at 838 ("[I]n this hypothetical, just like with other issues of admissibility, the court must do a prima facie assessment of the existence of the violation."). *See also* Clermont, *supra* note 257, at 978 (explaining that U.S. courts adopt a *prima facie* standard of proof in the assessment of all jurisdictional facts).

265. *See* Moser, *supra* note 20, at 838 ("In that situation, the responsibility of the forum State is not precluded and the victim State should be compensated. This compensation could be ordered by the court to be paid by the plaintiff.").

266. ARSIWA and Commentary, *supra* note 13, at 131. This is an evolution from the concept of reprisals, which were eminently punitive in character. *See* Alland, *supra* note 16, at 1130.

267. Maurice Kamto, *The Time Factor in the Application of Countermeasures*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 1174.

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breach of state immunity possesses the provisional character required to fit this condition. As the ICJ noted, the substance of the rules of immunity is not (solely) to protect the state from the adverse consequences of a judgment, but "from being subjected to the trial process" in the first place.[268] Thus, it may be argued, once immunity is denied and proceedings are carried out against a foreign state, the breach is permanent and there is no actual "returning" to the prior situation.

This argument, however, fails to consider that, while the regime of countermeasures discourages countermeasures which cause irreversible harm, "what is irreversibility for this purpose needs to be viewed broadly."[269] Under Article 49 of the ILC Articles on State Responsibility, countermeasures should not be reversible in absolute terms, but only "as far as possible."[270] The ILC 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 if the goal remains coercive and not punitive.[271] Indeed, according to certain authorities even irreversible countermeasures are permissible in "exceptional circumstances."[272]

In addition to that, the extent to which the breach of the rules of immunity is a completely irreversible measure can be called into questioned. There are steps that a state can take in order to reverse a countermeasure in the form of non-recognition of state immunity once the target state has complied with its obligations. If such compliance occurs when proceedings against the foreign state are ongoing—and thus the breach of state immunity is continuing[273]—these must be immediately terminated.[274] This occurs in proceedings under the AEDPA amendment through the

268. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 82 (Feb. 3).

269. James Crawford, *Counter-measures as Interim Measures*, 5 EUR. J. INT'L L. 65, 68 (1994).

270. The ILC Commentary to the Articles on State Responsibility might be misleading in stating that this provision was "inspired" by article 72(2) of the 1969 Vienna Convention, which deals with the consequences of the 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—particularly those of a continuing character—might be the subject of countermeasures, with the exclusion of obligations "requiring the achievement of a specific result". *See* Draft Articles on State Responsibility, First Reading, in Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 67 (1996). 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." Crawford, *supra* note 269, at 74.

271. *See* ARSIWA and Commentary, *supra* note 13, at 131 (providing the example of an activity undertaken without complying with a requirement of prior notification).

272. *See* LINOS-ALEXANDRE SICILIANOS, LES REACTIONS DECENTRALISEES A L'ILLICITE 268-71 (1990); ELAGAB, *supra* note 262, at 87.

273. A breach of immunity is not confined to the judicial decision rejecting the immunity plea; every subsequent step in the proceedings is arguably a continuation of that breach. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, 59 ¶ 5 (Feb. 14) (separate opinion of Koroma, J.) ("[State immunity is] an exemption from the jurisdiction or competence of the courts and tribunals of a foreign State."); ARSIWA and Commentary, *supra* note 13, at art. 14(2); Jean Salmon, *Duration of the Breach*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 384.

274. ARSIWA and Commentary, *supra* note 13, at art. 53.

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procedure of de-listing of a state as sponsor of terrorism.[275] In other types of cases, courts may declare the proceedings moot in light of the fact that reparation has been "spontaneously" offered *pendente lite*. On the other hand, when cessation and/or reparation are given only after proceedings have ended, the breach of immunity is completed.[276] In these cases, while the countermeasure itself cannot be eliminated, its effects can be removed by halting the execution of the judgment that resulted from it. There is a strong case for considering that similar steps may be sufficient to satisfy the reversibility requirement under Article 49 of the ILC Articles.[277]

4. *Other limitations*

Countermeasures encroaching upon the rules of immunity would not be contrary to any of the rules explicitly exempted from this mechanism pursuant to Article 50 of the ILC Articles. With regard to the obligations concerning use of force, protection of fundamental human rights, international humanitarian law, and other peremptory norms, the reason is self-explanatory.[278] Similarly, a breach of the rules of immunity does not in itself say anything on the state's conduct in the context of an existing system of dispute settlement.[279] Finally, diplomatic inviolabilities under Article 50(2)(b) of the ILC Articles are not engaged, as they are primarily concerned with measures directed against the physical person of diplomats and the diplomatic mission.[280]

D. *Assessing the legality of the countermeasure denying state immunity*

That non-recognition of state immunity may qualify as a countermeasure does not mean that the concrete taking of a countermeasure of this kind is automatically lawful. Countermeasures are conditional upon the fulfilment of substantive and procedural requirements which seek to prevent their unrestrained use and the escalation of international disputes.[281] While the legality assessment can only be made having regard to the specific circumstances of each case, this section will consider some general issues that non-recognition of state immunity as a countermeasure raises in this respect.

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275. As noted above, de-listing involves the settlement of all pending claims. *See supra* text accompanying notes 103-107.

276. ARSIWA and Commentary, *supra* note 13, at 60 ("A continuing wrongful act itself can cease . . . . Where a continuing wrongful act has ceased . . . the act is considered for the future as no longer having a continuing character.").

277. *See* Vezzani, *supra* note 20, at 58.

278. *See* Moser, *supra* note 20, at 820-21.

279. Although a system may explicit limit recourse to countermeasures, as in the case of WTO or the EU. *See* Peter-Tobias Stoll, *World Trade Organization, Dispute Settlement*, in 10 MAX PLANCK ENCYCLOPEDIA OF PUB. INTERNATIONAL LAW, ¶ 42–54 (Rüdiger Wolfrum ed., 2015).

280. These cannot be subjected to reprisals by the hosting State "since they have placed themselves and their possessions under its protection in good faith." Laurence Boisson de Chazournes, *Other Non-Derogable Obligations*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 1207.

281. CRAWFORD, *supra* note 169, at 587.

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1. Proportionality

Proportionality provides a "safeguard against abuse"[282] 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.[283] Yet, the concept of proportionality is rather indeterminate,[284] particularly in the context of countermeasures.[285] As the *Air Services* Tribunal held, "judging the 'proportionality' of countermeasures . . . can at best be accomplished by approximation."[286] To compound this difficulty, different tribunals at different times seem to have employed distinct concepts of proportionality.[287] Earlier decisions employed a negative standard ("not . . . clearly disproportionate") which allowed wide latitude to the state taking the measure.[288] The ICJ (and later the ILC) adopted a more restrictive test according to which "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question."[289]

This does not mean that proportionality requires perfect equivalence between the wrongful act and the response. Certainly, countermeasures are more likely to satisfy this requirement if they are taken in relation to the same or closely related obligations,[290] but issues of state immunity frequently arise when breaches of different obligations are at stake. Excessive insistence on a strict comparison between injuries would emphasize the retributive aspect of countermeasures, which is incompatible with their coercive nature.[291] If countermeasures seek to produce compliance with international law, certain circumstances may require reactions that are quantitatively disproportionate in order to achieve this

282. ARSIWA and Commentary, *supra* note 13, at 129, 135.

283. Roger O'Keefe, *Proportionality*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 16, at 1157, 1160; Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 763 (2008).

284. ROSALYN HIGGINS, PROBLEMS AND PROCESS 236 (1994); Franck, *supra* note 283, at 716.

285. ARSIWA and Commentary, *supra* note 13, at 135; SICILIANOS, *supra* note 272, at 273; Crawford, *supra* note 269, at 66; O'Keefe, *supra* note 283, at 1165.

286. Air Services Agreement of 27 March 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 443 (Perm. Ct. Arb. 1978).

287. *See generally* MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 33 (2014).

288. Air Services Agreement, 18 R.I.A.A. at 444 ¶ 83). This position seems consistent with the "out of all proportion" test used in Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Naulilaa Case) (Port. v. Ger.), 2 R.I.A.A. 1011, 1028 (1928). *See also* SICILIANOS, *supra* note 272, at 275.

289. *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 56, ¶ 85 (Sept. 25); ARSIWA and Commentary, *supra* note 13, at 135 (adding that the gravity of the breach must also be taken into account). *See also* O'Keefe, *supra* note 283, at 1166.

290. ARSIWA and Commentary, *supra* note 13, at 129. *See also* SICILIANOS, *supra* note 272, at 274; ELAGAB, *supra* note 262, at 88.

291. SICILIANOS, *supra* note 272, at 276. *See also supra* text accompanying note 102.

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aim.[292] The ILC explicitly recognized that the proportionality test should also take into account "qualitative" factors.[293]

In the light of the complexity of this assessment, it is pointless to attempt to strike a balance between non-recognition of state immunity and other breaches of international law in the abstract. All that can be said at this level is that the interest protected by the rules of state immunity—sovereign equality—is "one of the fundamental principles of the international legal order,"[294] but this does not imply that it cannot be balanced out by other, equally central interests protected under international law.[295] Each countermeasure must thus be assessed on a case-by-case basis, primarily considering the injury caused by the wrongful act, but also taking into account the gravity of the breach and other rights involved.[296]

A more interesting question is how the proportionality assessment is carried out in practice by different organs taking countermeasures. In the context of executive measures, the assessment of proportionality is—or should be—part of the process through which the government resolves to deny immunity in relation to specific foreign states. This means that the assessment of proportionality in a mechanism such as the listing of a state as sponsor of terrorism is completely in the hands of the executive.[297] Some authors have challenged the legality of the AEDPA exception on the basis of the asserted disproportionate character of opening domestic courts to a potentially indefinite number of claims.[298] Nothing, however, makes this reaction inherently disproportionate. The ultimate assessment must be made *in concreto* and will depend on the reasons advanced by the State Department to justify each listing.

With regard to inchoate measures, the proportionality assessment is partly carried out by Congress; measures such as the international taking exception impose a specific course of action in terms of non-recognition of immunity each time U.S. courts find that a violation of international law (unlawful expropriation) has occurred. It can be questioned whether similar provisions are sufficiently flexible so as to allow courts to take into account the circumstances of each case and moderate the response accordingly. As seen above, the international taking exception has been successfully invoked to date in relation to expropriations that were part of large-scale and

292. *See* Gaetano Arangio-Ruiz, Fourth Report, [1992] 2 Y.B. Int'l L. Comm'n, pt. 1 at 23, ¶ 55 ("[P]roportionality should be assessed by taking into account not only the purely 'quantitative' element of damage caused, but also what might be called 'qualitative' factors, such as the importance of the interest protected by the rule infringed and the seriousness of the breach."). *See also* Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT'L L. 889, 908 (2001).

293. ARSIWA and Commentary, *supra* note 13, at art. 51. *See also* Air Services Agreement, 18 R.I.A.A. at 443 ¶ 83.

294. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3).

295. *See* O'Keefe, *supra* note 283, at 1163.

296. ARSIWA and Commentary, *supra* note 13, at art.51. *See also* O'Keefe, *supra* note 283, at 1162.

297. The downside is that this assessment remains largely secretive, at least until challenged by another State. *See* Chase, *supra* note 94, at 84-85.

298. Paul Stephan, *Sovereign Immunity and the International Court of Justice: The State System Triumphant*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS, *supra* note 48, at 67, 81; Vezzani, *supra* note 20, at 74.

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discriminatory—if not flat-out genocidal—campaigns.[299] It is not clear whether non-recognition of immunity would be a proportionate response to one-time takings of relatively small scale.

In this sense, even if grounded in legislative acts, mixed and judicial measures require courts to perform a proportionality assessment before denying immunity. In practice, courts very rarely employ an explicit language of proportionality in this context. This, however, does not mean that no proportionality assessment is made at this stage. It is common also among international courts to present the outcome of the proportionality test as self-evident, or as Franck puts it, "as if the thing explained itself."[300] U.S. courts often follow the same pattern: upon considering—at times at great length—the unlawful character of the breach, they introduce the denial of immunity as a necessary or "particularly just" conclusion,[301] whose alternative "would make little sense"[302] and "would create a severe imbalance in the reciprocity . . . between nations."[303] On various occasions, they also assess whether alternative remedies exist outside the United States.[304] All these considerations point to the conclusion that U.S. courts can, and very often do, perform an assessment of proportionality before denying state immunity.

2. Procedural Conditions

In order to serve their goal and bring wrongdoing states into line with international law, countermeasures must be adopted by following certain procedural steps.[305] According to the ILC Articles, which seek to strike a balance between the views of different states on the issue,[306] the injured state must: first, call upon the wrongdoing state to comply with the obligations of cessation and reparation; and secondly, notify the latter of the intention of taking countermeasures and offer to negotiate.[307] Both conditions are relatively accessible when countermeasures are adopted by executive organs. When the State Department lists a state as sponsor of terrorism, it is normally because claims have been unsuccessfully brought against the latter in relation to those acts. Moreover, the threat of being included in the list arguably gives the target states sufficient notice as to the adverse consequence of the latter's inaction.[308] In the case of mixed

299. *See supra* Section II.B.2.
300. Franck, *supra* note 283, at 739.
301. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 255 (D.D.C. 1985), *vacated*, 736 F. Supp. 1, 8 (D.D.C. 1990).
302. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426 (2d Cir. 1987), *rev'd*, 488 U.S. 428, 430 (1989).
303. Princz v. Fed. Republic of Germany, 813 F. Supp. 22, 26 (1992).
304. *See*, *e.g.*, Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 674 (7th Cir. 2012); Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1165-1166 (C.D. Cal. 2010); Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 941 (D.C. Cir. 2008); *Princz*, 813 F. Supp. 22, 26 (D.D.C. 1992).
305. ARSIWA and Commentary, *supra* note 13, at 136; *see also* Kamto, *supra* note 267, at 1170.
306. *See* Laurence Boisson de Chazournes, *The State of State Responsibility*, 96 AM. SOC'Y OF INT'L L. 168, 169 (2002).
307. ARSIWA and Commentary, *supra* note 13, at art. 52(1).
308. Stephan, *supra* note 298, at 81.

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measures, U.S. courts can still rely on the action of the executive in order to fulfil, at least in part, these conditions. In certain cases brought under the international taking exception, for example, it was stressed that the U.S. Government had manifested its "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by [Nazi Germany]" and invoked the responsibility of the latter through the Tate letter.[309]

The only requirement that is arguably lacking in these cases is the notification of the prospective countermeasure to the target state before its adoption. In this regard, it is unclear the extent to which Article 51(1)(b) is reflective of customary international law.[310] It is improbable that the requirement of prior notice consists in disclosing the exact nature of the measure the state is contemplating, lest giving the target state a chance to shield itself.[311] There is also no agreement as to 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,[312] but when the request is likely to be met with inaction or when urgent countermeasures are necessary to preserve the state's rights, countermeasures may be taken immediately.[313] In sum, countermeasures denying state immunity might still be compatible with the procedural requirements when taken in the context of an ongoing dispute between the United States and the defendant state.

Conversely, judicial measures encounter an additional obstacle before meeting the procedural requirements prescribed under Article 51(1) of the ILC Articles. The basic problem that affects these measures is that the judicial decision through which immunity is denied—which contains the determination on the international responsibility of the latter state—represents the first occasion on which the United States formally raises its claim against the defendant state. This means that, prior to the decisions denying immunity, there arguably is no dispute between the United States and the defendant state on the matter.[314] Even assuming that the international responsibility of the defendant state can be invoked through a domestic judicial decision, if a countermeasure is adopted at the same time, the state is being deprived not so much of the prior notification, but of the

309. *See* Altmann v. Republic of Austria, 317 F.3d 954, 965 (9th Cir. 2002); Bernstein v. N.V. Nederlandsche–Amerikaansche*,* 210 F.2d 375, 376 (2d Cir. 1954).

310. *See* Linos-Alexandre Sicilianos, *La Codification des Contre-mesures par la Commission du Droit International*, 38 REVUE BELGE DE DROIT INTERNATIONAL 447, 479 (2005) (considering this requirement an innovation of the ILC).

311. ELAGAB, *supra* note 262, at 71.

312. ARSIWA and Commentary, *supra* note 13, at 136.

313. *See id.* at 135 art. 52(2); ELAGAB, *supra* note 262, at 71.

314. The failure to comply with these procedural requirements is likely at the basis of Italy's much criticized choice to not build a defence on the basis of countermeasures in the *Jurisdictional Immunities* case. *See* Trapp & Mills, *supra* note 169, at 166; Vezzani, *supra* note 20, at 38; *see also* Jurisdictional Immunities of the State (Ger. v. It.), Verbatim Record, 28 ¶ 14 (Sept. 12, 2011, 10 a.m.), https://www.icj-cij.org/files/case-related/143/143-20110912-ORA-01-00-BI.pdf (Statement by C. Tomuschat) (dismissing a potential defence based on countermeasures due to Italy's failure to fulfil these conditions).

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"*sommation*"—the duty to "call upon the responsible state . . . to fulfil its obligations under Part Two" pursuant to Article 51(1)(a).[315] This condition is well-established in customary international law[316] and its importance cannot be easily dismissed. It might be 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.[317] In sum, when U.S. courts act in isolation from other state organs, they are confronted with *practical* difficulties that make it challenging to justify the denial of state immunity as a countermeasure. These difficulties, however, pertain primarily to the need of giving the wrongdoing state an opportunity to reconsider its position before being deprived of its immunity. Thus, though a matter of speculation for the time being, it is possible to conceive mechanisms capable of satisfying this requirement.[318] These mechanisms should in all likelihood involve the executive, which is the organ better placed to interact with other states at the international level. Regardless, the main point is that much can be done to tap the potential of this underexplored area of international law.

IV. CONCLUSION: OPENING PANDORA'S BOX?

The judgment on the preliminary objections in *Certain Iranian Assets* is, to some extent, a missed opportunity. As this article showed, a sizeable amount of U.S. practice sits uncomfortably with the current state of the international law on state immunity. An authoritative statement by the ICJ on the matter would have dispelled doubts concerning the legality of the U.S. approach. At the same time, if this practice is not to be brushed away as the product of U.S. exceptionalism or, worse, a form of judicially driven gunboat diplomacy, considerable rethinking and reframing of the U.S. approach to state immunity is necessary. This contribution sought to shed new light upon this area of the law by proposing an alternative to assessing the legality of the U.S. experience under the narrow lenses of the law of state immunity. This alternative accepts that the United States may be willing to take enforcement action against states that are deemed to have violated international law even at the expenses of certain rules on immunity. And yet, this alternative does not give the United States carte blanche to do away with some of the most fundamental principles of international law. On the contrary, it seeks to root this practice in firmly established rules governing the implementation of international responsibility. If non-recognition of state immunity is recast as a countermeasure, international

315. *See also* ARSIWA and Commentary, *supra* note 13, at 135-36.

316. *See* Air Services Agreement of 27 March 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 444 ¶¶ 84-87 (Perm. Ct. Arb. 1978); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 56, ¶ 84 (Sept. 25); Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Naulilaa Case) (Port. v. Ger.), 2 R.I.A.A. 1011, 1027 (1928).

317. Kamto, *supra* note 267, at 1170.

318. *See* Moser, *supra* note 20, at 841-42 (proposing a mechanism of notification through the embassy of the foreign state).

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law provides a set of rules against which the legality of such enforcement action can be tested. As the analysis above demonstrated, any objection concerning the unfeasibility of countermeasures affecting state immunity is actually directed at a fairly limited number of measures that are purely "judicial." Various measures denying state immunity that can be classified as "executive" or "mixed" present none of the obstacles that seem to hinder the former category of countermeasures. There is no reason to exclude the latter from the toolbox of (lawful) measures that states can take to advance their foreign policy goals.

The framework proposed in this article also responds to another concern. A frequent objection against "turning municipal courts into enforcement agents" is the asserted floodgates risk resulting from allowing an indefinite number of claims against foreign sovereigns to be litigated before national courts.[319] This would undoubtedly cause serious detriment to the rules of immunity and the stability of the system of inter-state relations as a whole. However, these concerns are overstated. The system of international responsibility is a system built on centuries of state practice that provides for adequate restraints. Some of these have been analyzed in detail above: the caution required in the self-assessment of wrongful acts, proportionality, and the procedural conditions that precede the taking of countermeasures. Alongside this, the most effective deterrent against abuse remains the likelihood of being exposed to reciprocal measures. Sovereign immunities are particularly sensitive to this kind of balancing exercise, as Lauterpacht aptly noted in one of his seminal works on the topic: the threat of retaliation "may provide in most cases a substantial safeguard against . . . the flood of petty and vexatious actions and extortions in foreign countries."[320] When assessing whether countermeasures affecting state immunity are the appropriate means to respond to wrongful acts, the United States must take into account the risk of exposing itself to similar measures in other states and modulate its action accordingly.[321] As seen in the discussion that preceded the adoption of JASTA, these considerations are very much present in the minds of legal experts and policy makers alike.[322]

Far from being a Pandora's box giving states unfettered discretion to withhold the immunities of other sovereigns, the law of state responsibility governing countermeasures provides a rules-based framework that could prove particularly effective in restraining state behavior compared to the current no man's land in which the United States is operating at the international law level. Similarly, if the United States is serious about providing satisfaction to the victims of state sponsored terrorism and other violations of international, it is only in the rules of international law that it

319. Hazel Fox, *Private Law Damages as a Method of State Accountability: The Tort Exception to State Immunity*, 12 THIRD WORLD LEGAL STUD. 107, 113 (1993). *See also* Damrosch, *supra* note 138, at 191.

320. Lauterpacht, *supra* note 26, at 248.

321. *See* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 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.").

322. *See supra* text accompanying notes 73-74.

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will find the legitimacy required to turn its "sanctions" into an instrument of justice.

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