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Non-Recognition of State Immunity as a Judicial Countermeasure to *Jus Cogens* Violations: The Human Rights Answer to the ICJ Decision on the *Ferrini* Case

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Abstract

This paper examines whether the non-recognition of State Immunity, as a response to jus cogens violations committed by the wrong-doing State against its own citizens, can be a valid countermeasure. First, the paper clarifies the hypothesis being examined. Second, the paper considers what the conditions the according countermeasures have to comply with, are. Finally, the paper examines whether the non-recognition of State Immunity can be a lawful solidarity countermeasure.

The paper concludes that non-recognition of State Immunity can also be lawful and valid. Nonetheless, it must comply with certain important conditions. Additionally, an opportunity for the victims to have a remedy as well as to maintain the most important values of the international community arises when the non-recognition of State Immunity is properly accomplished.

A. Introduction

Houshang Bouzari, an Iranian citizen, was forcibly abducted by Iranian agents from his apartment in Tehran.[1] He was imprisoned for thirteen months without due process and was subjected to torture several times.[2] After living in a number of different countries, Mr. Bouzari and his family finally settled in Ontario, Canada.[3] Once there, he filed a civil complaint against the Islamic Republic of Iran for the human rights violations described above.[4] The Ontario Superior Court of Justice held that Iran was entitled to State Immunity and dismissed the action.[5] Mr. Bouzari appealed, and the Ontario Court of Appeal confirmed the decision of the trial court.[6]

One year after the final decision, in 2005, during discussion on the Canadian periodic report in the Committee against Torture, Canada faced the question of whether or not removing State Immunity in torture cases

1 *Bouzari v. Iran*, Can. Ont. C.A, [2004] O.J. No. 2800, paras 8-11 [Bouzari v. Iran Case].
2 *Id.*, paras 11-14.
3 *Id.*, para. 4.
4 *Id.*
5 *Id.*
6 *Id.*, para. 104.

violated the *Convention against Torture*.[7] The discussion focused on Article 14 of the *Convention against Torture* which establishes the right of torture victims to adequate reparation.[8] The Chairperson of the Committee against Torture, Fernando Mariño Menéndez, suggested that "as a countermeasure permitted under international public law, a State could remove immunity from another State - a permitted action to respond to torture carried out by that State."[9]

The Chairperson's idea was based on the concept of countermeasures. Countermeasures are otherwise internationally unlawful measures that are not considered to be violations of international law when taken in response to a previous violation of international law by another State.[10] Considering the decentralized nature of international law, countermeasures are a key element in the enforcement of international law as well as a tool for the injured State to assure cessation of the violation and reparation of the harm caused.[11] Since countermeasures have this function, the responsibility of the State taking the countermeasure is precluded even though the act is by itself unlawful.[12]

7 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 [UNCAT]. Although the Committee did not expressively refer to the case of Bouzari it has been understood in that way see T. Rensmann, 'Impact on the Immunity of States and Their Officials', in M. T. Kamminga & M. Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2009), 151, 153.

8 See Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, UN Doc CAT/C/SR.646/Add.1, 1 May 2005, 8, paras 43-45. See also UNCAT, Art. 14, *supra* note 7, 116.

9 See Committee against Torture, *supra* note 8, 11, para. 67. Professor Fernando Mariño Menéndez was a member of the Committee against Torture from 2002 to 2009. He teaches Public International Law at Carlos II University, Madrid. Office of the High Commissioner for Human Rights, *Fernando Mariño Menendez*, available at http:// unhchr.ch/tbs/doc.nsf/0/d88c84298fa7f5dbc1256b440035c86e?OpenDocument (last visited 10 January 2013).

10 See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002), 281 [Crawford, International Law Commission's Articles on State Responsibility]; C. Tomuschat, *Human Rights Between Idealism and Realism*, 2nd ed. (2008), 271 [Tomuschat, Human Rights].

11 See E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), 4.

12 *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 30, GA Res. 56/83 annex, UN Doc A/RES/56/83, 28 January 2002, 2, 7 [Articles on State Responsibility].

Another important issue found in the case of Bouzari is the victim was not a national of the State that could have taken the countermeasure: Canada. Consequently, the possible countermeasure of not recognizing State Immunity would be taken by a State which was not directly injured by the violation of international law. Countermeasures were initially conceived within the framework of bilateral obligations between States; thus it was only the injured State who was entitled to take actions.[13] With the recognition of international human rights law and other community interests this conception of countermeasures began to change. International law began regulating State conduct where non-compliance did not clearly affect any particular State.[14] This lack of an injured State made the enforcement of these obligations more difficult.[15] It is from the combination of this inexistence of a clearly injured State together with the need to assure enforcement that the idea of using countermeasures for these cases came to the fore. The kind of countermeasure that Canada would have to have taken is referred as "solidarity measures" or "collective countermeasures."[16]

The lawfulness of solidarity countermeasures is broadly discussed,[17] particularly since the ILC decided not to specially include them in its *Articles on State Responsibility*.[18] International law includes no express

13 See J. A. Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994), 345, 353; E. Katselli, 'Countermeasures: Concept and Substance in the Protection of Collective Interests', in K. H. Kaikobad & M. Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (2009), 401, 402 [Katselli, Countermeasures].

14 See O. Schachter, *International Law in Theory and Practice* (1991), 196.

15 E. Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2010), 1 [Katselli Proukaki, Enforcement in International Law].

16 See Katselli, *Countermeasures, supra* note 13, 402; L.-A. Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in J. Crawford *et al.*, *The Law of International Responsibility* (2010) [Crawford *et al.*, International Responsibility], 1137, 1137.

17 See for example J. A. Frowein, 'Collective Enforcement of International Obligations', 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1987), 67, 77 (limiting to "persistent and gross violations".); O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988), 58 [Elagab, The Legality of Non-Forcible Counter-Measures]; Katselli Proukaki, *Enforcement in International Law*, *supra* note 15, 110; Tomuschat, *Human Rights*, *supra* note 10, 274.

18 See *Articles on State Responsibility*, Art. 54, *supra* note 12, 13; M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British*

prohibition on the possibility to take solidarity countermeasures. On the contrary, there is state practice supporting this possibility.[19] Additionally, the ICJ, in the case *Questions Relating to the Obligation to Prosecute and Extradite*, held that "the common interest in compliance [with an] obligation under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party"[20]. Even though the ICJ referred only to the possibility to bring claims for alleged violations of the Convention against Torture, the case endorsed the idea of a common interest existing among States to request cessation of a breach when *erga omnes* obligations are involved. Consequently, it is another argument in favor of the lawfulness of solidarity countermeasures. Nonetheless, this article will not develop further this discussion and will assume that solidarity countermeasures are permitted under international law.

The objective of this article is to examine whether the suggestion made by the Chairperson of the Committee against Torture is possible: whether the non-recognition of State Immunity, as a response to *jus cogens* violations committed by the wrong-doing State against its own citizens, can be a valid countermeasure. In order to accomplish this goal several questions must be resolved. First, it is necessary to clarify the hypothesis being examined. Second, it is necessary to consider what the conditions those countermeasures have to comply with are. Finally, this article will examine whether the non-recognition of State Immunity can be a lawful solidarity countermeasure.

It is also necessary to clarify that this article will only analyze the cases when there is a *jus cogens* violation, no State is directly injured, and no State is specially affected. This analysis leaves completely aside the cases of a violation of the *jus cogens* norm prohibiting aggression, since in

Yearbook of International Law (2001), 337, 341 [Koskenniemi, Solidarity Measures]; see also Katselli, *Countermeasures*, *supra* note 13, 410.

19 The practice included the actions of the United States against Uganda for genocide in 1978; the measures taken by the US and other western States against Poland and the Soviet Union for human rights violations in 1981; the action of the European Community, Australia, New Zealand and Canada in reaction to Argentine aggression in the Falkland islands; the suspension of the right of South African airlines to land in the US as a response to apartheid, and the embargos imposed on Iraq after the invasion of Kuwait, prior to the Security Council resolution. Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 302-304.

20 ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, 20 July 2012, para. 69 [ICJ, Belgium v. Senegal Case].

those cases there is always an injured State.[21] Additionally, the cases of *jus cogens* violations of one State against foreigners are not included since the State of which the victims are citizens from is considered the injured State.[22] Therefore, the main focus of this analysis will be violations of the fundamental rights of the human person that are recognized as *jus cogens* norms committed by a State against its own citizens.

This paper concludes that the non-recognition of State Immunity can be a lawful and valid countermeasure. Nonetheless, it must comply with certain important conditions. Additionally, when the non-recognition of State Immunity is properly accomplished as a countermeasure it represents an opportunity for the victims to have a remedy as well as an opportunity for the forum State to uphold the most important values of the international community.

B. Some Clarifications

An act amounting to a countermeasure would constitute an international wrongful act if viewed in isolation.[23] This is the main difference between countermeasures and retorsions, which are unfriendly but legal acts taken in response to the actions of another State.[24] Given that the question being examined is the removal of State Immunity as a countermeasure in response to *jus cogens* violations committed in another State, it is implied that the removal of State Immunity under these circumstances is an unlawful act.

The question of whether State Immunity applies or not in cases of *jus cogens* violations has been widely discussed of late.[25] Additionally, this

21 See G. Gaja, 'States Having an Interest in Compliance with the Obligation Breached', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 957, 958 [Gaja, Interest in Compliance].

22 *Id.*

23 This is possible to conclude from the fact that countermeasures are a circumstance precluding wrongfulness. See *Articles on State Responsibility*, Art. 22, *supra* note 12, 6. For a further explanation of this argument see D. Alland, 'Countermeasures of General Interest', 13 *European Journal of International Law* (2002) 5, 1221, 1233.

24 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 281; Zoller, *supra* note 11, 5-13.

25 See for example E. K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (2005), 34;

question was considered by the International Court of Justice (ICJ) in the *Ferrini case* (Germany v. Italy). The *Ferrini* case concerns the non-recognition of Germany's State Immunity by Italian courts. This non-recognition occurred in cases of violations of Italian citizens' human rights and international humanitarian law during Germany's occupation of Italy in WWII.[26] The ICJ concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[27] The ICJ explained that *jus cogens* norms and State Immunity are "two sets of rules [that] address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State", thus there is no conflict between these two sets of rules.[28] The same conclusion was reached in previous cases by the European Court of Human Rights,[29] the ILC,[30] and national

Rensmann, *supra* note 7, 151; A. Bianchi, 'Human Rights and the Magic of Jus Cogens', 19 *European Journal of International Law* (2008) 3, 491, 499-501.

26 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Application Instituting Proceedings, 23 December 2008 [ICJ, Jurisdictional Immunities of the State, Application Instituting Proceedings]. See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim Order, ICJ Reports 2010, 310, 314-315, para. 11.

27 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 91 [ICJ, Jurisdictional Immunities of the State, Judgment].

28 *Id.*, para. 93.

29 *Al-Adsani v. United Kingdom*, ECHR, App. No. 35763/97, Judgment of 21 November 2001 [Al-Adsani v. United Kingdom Case]; *McElhinney v. Ireland*, ECHR, App. No. 31253/96, Judgment of 21 November 2001; *Kalogeropoulo et al. v. Greece & Germany*, ECHR, App. No. 59021/00, Judgment of 12 December 2002 (referring to Immunity of execution.).

30 The Working Group established that "this issue, although of current interest, did not really fit into the present draft articles. Furthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it. In any case, it would be up to the Sixth Committee itself, rather than the Working Group, to decide what course of action, if any, to take on the issue. In this connection, the view was also expressed that the issue […] rather than being a Sixth Committee matter, seemed to fall within the purview of the Third Committee of the General Assembly, particularly in connection with non-impunity issues dealt with by that Committee." ILC, *Convention on Jurisdictional Immunities of States and Their Property: Report of the Chairman of the Working Group*, UN Doc A/C.6/54/L.12, 12 November, 1999, paras 46-48.

courts of many other countries.[31] Following the aforementioned case law this article will assume the unlawfulness of not recognizing State Immunity in cases of *jus cogens* violations and consequently this article will examine the possibility of the non-recognition of State Immunity as a countermeasure.

It is also necessary to be clear that this article refers to immunity from jurisdiction and not to immunity from execution. The later concerns the immunity a State has from enforcement of judgments by the forum State against the assets of the respondent State.[32] This immunity is subject to fewer exceptions than immunity from jurisdiction due to the fact that it interferes more with State sovereignty.[33] Application of immunity from execution and application of immunity from jurisdiction are independent of each other. [34] The examination of immunity from execution is beyond the scope of this article.

C. Conditions for the Validity of Solidarity Countermeasure

Countermeasures are intrinsically unlawful acts. Therefore, to avoid being considered as wrongful, they must comply with certain conditions.[35]

31 In the US, see *Saudi Arabia v. Nelson*, [1993] 507 U.S. 349; *Siderman de Blake v. Republic of Argentina*, [1992] 965 F 2d 699 [Siderman de Blake v. Republic of Argentina Case]; *Princz v. Federal Republic of Germany*, [1994] 26 F.3d 1166. In Canada, see *Bouzari v. Iran* Case, *supra* note 1. In the U.K. see *Jones v. Saudi Arabia*, [2007] 1 A.C. 270 [Jones v. Saudi Arabia Case]; *Suleiman Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, Judgment of 12 March 1996, [1997] 107 I.L.R. 537.

32 See A. Reinisch, 'State Immunity From Enforcement Measures', in Council of Europe *et al.* (eds), *State Practice Regarding State Immunities* (2006), 151, 151.

33 See *id.*, 156; and ICJ, *Jurisdictional Immunities of the State,* Judgment, *supra* note 27, para. 118. See also M. N. Shaw, *International Law*, 6th ed. (2008), 744.

34 See *United Nations Convention on Jurisdictional Immunities of States and Their Property*, Art. 19, GA Res. 59/38 annex, UN Doc A/RES/59/38, 2 December 2004, 9-10 [Convention on Jurisdictional Immunities of States]; ICJ*, Jurisdictional Immunities of the State,* Judgment, *supra* note 27, para. 113. See also Reinisch, *supra* note 32, 158-166; H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 599-662.

35 See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 55-56, para. 83 [Gabčíkovo-Nagymaros Project Case]; Zoller, *supra* note 11, 103. It is important to mention that opposite to other circumstances that preclude wrongfulness, countermeasures are taken willingly. H. Lesaffre, 'Circumstances

If the countermeasure fails to meet these conditions the State taking the countermeasure will be responsible for any resulting violations.[36] The ICJ elaborated on the conditions that would be required such that the countermeasure would not be wrongful in the *Gabčíkovo-Nagymaros Project* case. These conditions were endorsed and elaborated further by the ILC in the *Articles on State Responsibility*.

The existing jurisprudence dealing with countermeasures has traditionally only concerned actions taken by injured States.[37] The *Articles on State Responsibility* also only regulated this kind of traditional countermeasures. Nonetheless, the conditions necessary for a traditional countermeasure can be applied to enforcement measures in general. Additionally, during the drafting of the Articles, when the solidarity countermeasures were included, the conditions of traditional countermeasures applied also to solidarity countermeasures.[38] Finally, there is no reason to believe that the requirements set for countermeasures taken by the injured State would be different from those applicable to solidarity countermeasures.[39] It would be contradictory if injured States would have to comply with more conditions than States acting in the name of a collective

Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 470, 470.

36 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

37 See for example *Gabčíkovo-Nagymaros Project Case*, *supra* note 35; *Air Service Agreement of 27 March 1946 between the United States of America and France*, 27 March 1946, 18 R.I.A.A. 417 [Air Service Case]; *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Portugal v. Germany)*, 31 July 1928, 2 R.I.A.A. 1011 [Naulilaa Case].

38 See Special Rapporteur on State Responsibility, *Sixth Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles); and "Implementation" (mise en oeuvre) of International Responsibility and the Settlement of Disputes (Part Three of the Draft Articles)*, Yearbook of the International Law Commission (1985), Vol. II (1), Art. 14 (I), 3, 13-14, UN Doc A/CN.4/389 and Corr. 1 & Corr. 2 [Special Rapporteur on State Responsibility, Sixth Report]; *id.*, *Fourth Report on State Responsibility*, Yearbook of the International Law Commission (1992), Vol. II (1), 1, 47-48, para. 146, UN Doc A/CN.4/444 and Add.1-3 (1992) [Special Rapporteur on State Responsibility, *Fourth Report*]; *id.*, *Third Report on State Responsibility*, Yearbook of the International Law Commission (2000), Vol. II (1), 3, 106, para. 406, UN Doc A/CN.4/507 and Add 1-4. Please notice that some draft articles included other additional conditions.

39 See Alland, *supra* note 23, 1225.

interest.[40] Therefore, this article will examine the existing conditions for countermeasures taken by an injured State as applicable to solidarity countermeasures, making special considerations where appropriate.

Countermeasures are a tool for the enforcement of international law. Consequently, the first condition for a countermeasure to be valid is that it must be a response to a previous wrongful act that has already occurred and must be directed at the State responsible for that previous violation.[41] The previous wrong must have already occurred.[42] As stated in the *Naulilaa* case, "the first condition – sine qua non – of the right to exercise reprisals is a motive created by a preceding act which is contrary to the law of nations."[43] Thus, it is not possible to take a preventative countermeasure.[44] Furthermore, it is enough that the determination of whether an international wrongful act has occurred is done by the State resorting to countermeasures. No previous assessment by a Court or special agreement between the States is needed.[45]

The second condition is related to the object of the countermeasure. Countermeasures must be taken to persuade the wrong-doing State to cease the violation and/or make reparations.[46] The object of the countermeasure cannot be to punish the wrong-doing State.[47] If the wrong-doing State has already ceased the violation and repaired the harm, countermeasures cannot be taken.[48] Additionally, the ILC explains "[c]ountermeasures shall, as far

40 R. Omura, 'Chasing Hamlet's Ghost: State Responsibility and the Use of Countermeasures to Compel Compliance with Multilateral Environmental Agreements', 15 *Appeal: Review of Current Law and Law Reform* (2010) 1, 86, 106.

41 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 55-56, para. 83.

42 *Id.*

43 *Naulilaa Case*, *supra* note 37, 1027.

44 See M. Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (2005), 55-56; Elagab, *The Legality of Non-Forcible Counter-Measures*, *supra* note 17, 52-55.

45 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 6, para. 2.

46 See *Articles on State Responsibility*, Art. 49 (1), *supra* note 12, 11. Please note that the *Articles on State Responsibility* referred to the obligations under Part II of the articles that include the obligation to cease the act and to make reparations. *Id.*, Arts 28-41, 7-9.

47 Crawford, *supra* note 10, 284.

48 See *Articles on State Responsibility*, Arts 49 (2) & 52 (3) (a), *supra* note 12, 11-12; Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[49] Thus, countermeasures should be reversible and allow the State taking the countermeasure to return to the prior situation and continue complaint with its international obligations. As showed by the use of the expression "as far as possible", this requirement is not absolute.[50]

In the case of solidarity countermeasures, the countermeasure should have the same object. The difference is that the State taking countermeasures cannot request reparation for itself.[51] Normally there is neither moral nor material damage that affects the State, thus there cannot be a right to compensation when no damage has occurred.[52] Instead, the State may demand reparations in the name of those injured: the victims.[53] This issue will be explained further in Part III of this article.

The third condition is that the State must request the wrong-doing State to cease or to repair before taking any countermeasure.[54] The *Articles on State Responsibility* added that the State must notify "of any decision to take countermeasures and offer to negotiate with that State."[55] Even though this requirement was not mentioned by the ICJ in the *Gabčíkovo-Nagymaros Project* case, the facts of that case showed that the wrong-doing State knew that the other State was going to take countermeasures.[56]

The State resorting to countermeasures has the right whether or not to specify what the countermeasures may be.[57] Furthermore, there is no specific timing for the notification; in fact, the State could notify and take

49 See *Articles on State Responsibility*, Art. 49 (3), *supra* note 12, 12.

50 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 286.

51 C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat & J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006), 265, 269.

52 Gaja, *Interest in Compliance*, *supra* note 21, 961.

53 Institute of International Law, 'Resolution: Obligations Erga Omnes in International Law', Arts 2 & 5 (c)' (2005), available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf (last visited 28 January 2013), 2.

54 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 84; *Articles on State Responsibility*, Art. 52 (1), *supra* note 12, 12.

55 *Id.*, Art. 52 (1) (b), 12. See also the general provision regarding the obligation to give notice by an injured State: *id.*, Art. 43, 10.

56 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35.

57 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 13, para. 21.

the countermeasure at the same time.[58] It is important to mention one exception where prior notice is not necessary. This is when, if notified, the countermeasure would become ineffective;[59] for example, when the countermeasure is to freeze the financial assets of one State.[60] This is because, if the wrong-doing State is previously notified, then the wrong-doing State would withdraw all of those financial assets.

The ILC also included also as a condition that there is no "dispute […] pending before a court or tribunal which has the authority to make decisions binding on the parties."[61] The ILC clarified that this condition does not apply "if the responsible State fails to implement the dispute settlement procedures in good faith."[62] Similarly, the *Articles on State Responsibility* also require that a State taking countermeasure complies with any obligations arising from "any dispute settlement procedure applicable between it and the responsible State."[63] The objective of these provisions is to ensure that recourse to countermeasures do not weaken any dispute settlement, which, after all, is a more civilized manner of resolving controversies.

In addition there are certain norms that cannot be affected by countermeasures.[64] Firstly, considering that *jus cogens* norms prevail over other norms, a countermeasure may not affect norms with *jus cogens* character.[65] Along the same lines, the ILC specified that a State cannot use force or threaten to use force as a countermeasure beyond the scope of self-

58 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 298.

59 *Articles on State Responsibility*, Art. 52 (2), *supra* note 12, 12.

60 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 11-12, para. 16; J. Crawford, 'Counter-Measures as Interim Measures', 5 *European Journal of International Law* (1994) 1, 65, 73-74 [Crawford, Interim Measures]; Y. Iwasawa & N. Iwatsuki, 'Procedural Conditions', in Crawford, *International Responsibility*, *supra* note 16, 1149, 1154.

61 *Articles on State Responsibility*, Art. 52 (3) (b), *supra* note 12, 12. See also *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, 503, para. 103; and *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order, P.C.I.J. Series A/B, No. 79 (1939), 193, 199.

62 *Articles on State Responsibility*, Art. 52 (4), *supra* note 12, 12. To determine whether the negotiation is not being done in good faith see generally *Affaire du Lac Lanoux (Spain v. France)*, 16 November 1957, 12 R.I.A.A. 281.

63 *Articles on State Responsibility*, 50 (2) (a), *supra* note 12, 12.

64 *Id.*, Art. 50, 12.

65 *Id.*, Art. 50 (1) (d), 12.

defense under the *Charter of the United Nations*.[66] Additionally, the State must continue "to respect the inviolability of diplomatic or consular agents, premises, archives and documents."[67]

Considering the special nature of human rights and international humanitarian law, countermeasures may not affect them either.[68] Furthermore, Professor Antonio Cassese suggests that this prohibition "also extends its reach to rules protecting the interests of needs of human beings."[69] For example, a countermeasure may not terminate a treaty of economic aid, if this would have an impact on human rights.[70] This idea is similar to the new conception taken by the United Nations and its use of economic sanctions, where it is taken into account the effect the sanction would have on the population and its needs.[71] In the case of solidarity countermeasures taken in response to human rights violations, this prohibition of affecting human rights eliminates the possibility of responding strictly reciprocally as to do so would be a violation of international human rights law.[72]

The final and more controversial condition is the proportionality of the countermeasure. This requirement gives countermeasures some

66 *Id.*, Art. 50 (1) (a), 12. Before the UN Charter entered into force, the use of other countermeasures beside the use of force or the threat of use of force was not as common as today. Zoller, *supra* note 11, 4-5.

67 *Articles on State Responsibility*, Art. 50 (2) (b), *supra* note 12, 12. See also O. Y. Elagab, 'The Place of Non-Forcible Counter-Measures in Contemporary International Law', in G. S. Goodwin-Gill & S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 125, 138-140 [Elagab, The Place of Non-Forcible Counter-Measures]; similarly see *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 38, paras 82 & 83.

68 See *Naulilaa Case*, *supra* note 37, 1026; *Articles on State Responsibility*, Art. 50 (1) (b & c), *supra* note 12, 12.

69 A. Cassese, *International Law in a Divided World* (1994), 243.

70 *Id.*

71 See W. M. Reisman & D. L. Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', 9 *European Journal of International Law* (1998) 1, 86.

72 See G. Gaja, 'Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts', in J. H. H. Weiler, A. Cassese & M. Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), 151, 156.

predictability, which is necessary in all acts of enforcement.[73] If a State is entitled to take countermeasures but the methods chosen are disproportionate, then the countermeasure becomes unlawful.[74]

In the arbitration awards of *Nauililaa* in 1928 and of *Air Service Agreement* in 1978, it was stated that countermeasures could not be disproportional.[75] The ILC, while drafting the *Articles on State Responsibility*, included this conception.[76] This was changed in 1997 when the ICJ rendered its judgment in the *Gabčíkovo-Nagymaros Project* case. The ICJ required the countermeasure to be proportional instead of not being disproportional.[77] This change of words made the proportionality standard a stricter one. Not every non-disproportional measure is necessarily a proportional measure, just as not every non-tall person is a short person.

Furthermore, the ICJ established that the measure must be "commensurate with the injury suffered, taking account of the rights in question."[78] The *Articles on State Responsibility* endorsed the approach of the ICJ, but added a new consideration. Specifically, Article 51 establishes: "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[79] From this explanation it is possible to conclude that the primary relationship that must be analyzed for proportionality is that of the countermeasure and the injury suffered, but without leaving aside the

73 E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *European Journal of International Law* (2001) 5, 889, 889-890.

74 See T. M. Franck, 'On Proportionality of Countermeasures in International Law', 102 *American Journal of International Law* (2008) 4, 715, 716.

75 See *Air Service Case*, *supra* note 37, 483; *Naulilaa Case*, *supra* note 37, 1028.

76 See for example Special Rapporteur on State Responsibility, *Sixth Report*, Art. 9 (2), *supra* note 38, 11; *id.*, *Fourth Report*, *supra* note 38, 47, para. 146; *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Art. 49, Yearbook of the International Law Commission (1996), Vol. II (2), 1, 64, UN Doc A/CN.4/L.528/Add 2.

77 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 85. Please note that the language used in the French version of the judgment makes this assertion clearer.

78 *Id*.

79 *Articles on State Responsibility*, Art. 51, *supra* note 12, 12. For a critique of the definition used by the ILC, see D. J. Bederman, 'Counterintuiting Countermeasures', 96 *American Journal of International Law* (2002) 4, 817, 821-822.

gravity of the wrongful act and the rights involved. This definition given by the ILC is now considered customary international law.[80]

The final *Articles on State Responsibility* made the measure of proportionality less broad than its previous drafts.[81] The commentaries to the Articles specified that there are factors besides the quantitative ones that must also be taken into account to assess proportionality.[82] This was done to avoid inequitable results.[83] To understand the definition the four elements it includes must be analyzed: the word commensurate, as well as the phrases "the injury suffered", "gravity of the internationally wrongful act", and "the rights in question."

First, the meaning of the word 'commensurate', used in the *Gabčíkovo-Nagymaros Project* case and in the *Articles on State Responsibility*, was given neither by the Court nor by the ILC. The ordinary meaning of the word is "equal in measure or extent."[84] Nonetheless, since the assessment of proportionality also takes into account qualitative factors, it is impossible to find strict equality. There is no mathematical formula; the objective should be to find harmony.[85]

The second element has to do with the meaning of the phrase "the injury suffered." The idea is to make sure the damage caused by the countermeasure is not greater than the previous damage caused by the wrong-doing State.[86] In cases where the rights of people are involved, the question becomes whether the injury suffered by the State is the one that should be taken into account or the injury suffered by its citizens. To answer this question, the case of the *Air Service Agreement* becomes relevant. The case concerned the measures taken by the United States "prohibiting flights by French designated carriers to the US west coast from Paris via Montreal."[87] This action was a countermeasure to the refusal of French authorities to allow the passengers of a Pan American flight to disembark in

80 R. O'Keefe, 'Proportionality', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 1157, 1157.

81 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 296.

82 *Id.*, 295.

83 *Id.*, 296.

84 Merriam Webster Inc. (ed.), *Webster's Third New International Dictionary on the English Language Unabridged* (1986), 456.

85 Zoller, *supra* note 11, 128 & 131.

86 O'Keefe, *supra* note 80, 1160.

87 *Air Service Case*, *supra* note 37, 417-421.

Paris.[88] While assessing the proportionality of the measure the Arbitration Tribunal stated that, "in a dispute between States, [it is important] to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach."[89] Therefore, if in countermeasures taken by injured States the injured individuals become relevant; in cases of solidarity countermeasures, when there is no injured State, the injury suffered must refer to the injury suffered by the victims of the human rights violations.

When dealing with the issue of the injury suffered, the injury caused by the countermeasure to the wrong-doing State is not taken into account. This can be concluded from the fact that the countermeasure is commensurate with the injury suffered. If this injury suffered includes the injury caused by the countermeasure it would mean that the countermeasure would have to be measured against something that has not yet occurred. Additionally, the fact that the ILC did not refer to "the injuries suffered" but instead used the singular form, also shows that it is only the injury of one of the States involved that must be considered.

Furthermore, the meaning of "gravity of the internationally wrongful act" is indicative as well. The commentaries of the ILC made no reference to the meaning of this phrase. The Special Rapporteur Gaetano Arangio-Ruiz who proposed this phrasing on an earlier draft stated:

> "The degree of gravity of an internationally wrongful act should be determined by reference to a number of factors, including the objective importance and subjective scope of the breached rule, the dimension of the infringement, the subjective element, inclusive of the degree of involvement of the wrongdoing State's organizational structure and of the degree of fault (ranging from *culpa levis* or *levissima* to negligence, gross negligence and wilful intent) and, ultimately, the effects of the breach upon both the injured State and the "object of the protection" afforded by the infringed rule."[90]

88 *Id.*, 420.

89 *Id.*, 483.

90 Special Rapporteur on State Responsibility, *Seventh Report on State Responsibility*, Yearbook of the International Law Commission (1995), Vol. II (1), 3, 13, para. 47, UN Doc A/CN.4/469 and Add.1-2.

The footnote to this statement explains that the "object of the protection" includes "the damage, injury or harm suffered by individuals as a consequence of the violation of human rights obligations."[91] Gaetano Arangio-Ruiz explains that, even if the degree of fault is not taken into account for regular international wrongful acts, it has to be taken into account for international crimes since it is a "sine qua non feature of a crime."[92] Although the concept of an international crime was finally rejected by the ILC,[93] the ILC still accepts that the intent can be taken into account to differentiate between violations of peremptory norms and serious violations of peremptory norms.[94] Consequently, the intent should be taken into account when assessing the gravity of the violation.

Fourth is the significance of "the rights in question." The commentaries to the Articles on States Responsibility states that this phrase "has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration."[95] In other words, the rights violated by the wrongful act and by the countermeasure, as well as the rights of any other State that might be affected, must be taken into account. This explanation, however, must be adapted to apply to solidarity countermeasures, where it would be necessary to consider, as proposed by Roger O'Keefe, "the internationally-guaranteed rights of individuals, be they victims of the responsible State's breach or persons likely to be affected by the countermeasure."[96] For example, where economic sanctions would endanger the wrong-doing State's compliance with its obligations regarding economic, social, and cultural rights, it would be important to take the rights of individuals into account.

Some contend that this definition of proportionality proposed by the ILC is contrary to the object of a countermeasure.[97] As mentioned previously, the object of a countermeasure is to pressure the wrong-doing

91 *Id.*, 13 (note 15).
92 *Id.*, 14, para. 49.
93 See *Articles on State Responsibility*, *supra* note 12. This rejection was due to the lack of penal consequences to States in current international law. See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 243.
94 *Id.*, 247.
95 *Id.*, 296.
96 O'Keefe, *supra* note 80, 1164.
97 Cannizzaro, *supra* note 73, 892.

State to comply with its obligations.[98] Consequently, the proportionality of any countermeasures used should be equivalent to what is needed to accomplish that goal.[99] However, this could mean countermeasures might be disproportionate to the injury suffered.[100] Certainly the contradiction exists. Nevertheless, the ILC article concerning proportionality shall be interpreted as the *lex specialis* in the subject of proportionality. Consequently, the measures needed to ensure compliance need not be taken into account when determining the proportionality of the action.[101] Instead, the requirements established in ILC Article 51 are the applicable ones.

In the case of solidarity countermeasures, scholars have discussed whether the proportionality must be measured taking into account the actions of all the States taking countermeasures as a whole or of each State individually, regardless of the actions of other States.[102] In this respect, the Special Rapporteur, James Crawford, suggested that "it could become chaotic if a number of States began demanding different things under the rubric of State responsibility."[103] He thus proposed as a solution that "where more than one State takes countermeasures […] those States shall cooperate in order to ensure that the conditions […] for the taking of countermeasures are fulfilled."[104] Other members of the ILC proposed that "the principle *non bis in idem* could be applied by analogy [to the case of several States taking countermeasures as a response to the same violation] so as to prevent the possibility of multiple sanctions for the breach."[105] Regardless of whether the *non bis in idem* principle is applicable or not, to consider proportionality individually and not collectively would be against the whole idea underlying the requirement of proportionality. The requirement of proportionality does not aim at measuring how far the State taking the measures can go. Instead,

98 *Articles on State Responsibility*, Art. 49 (1), *supra* note 12, 11.

99 Cannizzaro, *supra* note 73, 892.

100 *Id.*

101 See Bederman, *supra* note 79, 822; J. Calamita, 'Sanctions, Countermeasures and the Iranian Nuclear Issue', 42 *Vanderbilt Journal of Transnational Law* (2009) 5, 1393, 1420.

102 See Crawford, *Interim Measures*, *supra* note 60, 66; Katselli, *Countermeasures*, *supra* note 13, 416.

103 *Report of the International Law Commission on the Work of its Fifty-Second Session*, Yearbook of the International Law Commission (2000), Vol. II (2), 1, 57, para. 352, UN Doc A/55/10 [Report Invocation of Responsibility].

104 Special Rapporteur on State Responsibility, *Third Report*, *supra* note 38, 108, para. 413.

105 *Report Invocation of Responsibility*, *supra* note 103, 60, para. 369.

what is being measured is what is lawful, such that it is an enforcement measure and not a punishment. Consequently, States taking solidarity countermeasures have the additional burden of making sure their measures, together with all the other measures responding to the same violation, are proportional.[106] This idea is supported by the inclusion on the Articles of State Responsibility of a duty of cooperation in bringing "to an end through lawful means any serious breach [of a peremptory norm of general international law]."[107]

All of this should be taken into account when dealing with the main question regarding proportionality of countermeasures: how to measure it? The judgments normally do not explain the reasons behind their decisions.[108] As Professor Mary Ellen O'Connell states, "[t]here seems to be unanimity about the requirement for proportionality, but also agreement that no formula exists for demanding what actually is proportional."[109]

D. Non Recognition of State Immunity as a Judicial Countermeasure

In cases where States have taken solidarity countermeasures the measures have generally been economic sanctions, suspension of landing rights for planes, and the freezing of State assets.[110] This author was unable to find any cases where the countermeasure was the non-recognition of State Immunity, not even where the measure was taken by an injured State. Nonetheless, this does not mean that such a hypothetical situation is not possible.

106 See Special Rapporteur on State Responsibility, *Third Report*, *supra* note 38, 106, para. 406.

107 *Articles on State Responsibility*, Art. 41 (1), *supra* note 12, 9. It must be noted that the ILC in its commentaries stated that "It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 [of Article 41] in that respect may reflect the progressive development of international law". Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 249.

108 See for example, *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 85.

109 See M. E. O'Connell, *The Power and Purpose of International Law* (2008), 253. See also Cannizzaro, *supra* note 73, 889-890.

110 See N. White & A. Abass, 'Countermeasures and Sanctions', in M. D. Evans (ed.) *International Law*, 3rd ed. (2010), 531, 535.

The case for the non-recognition of State Immunity has been supported not only by the Chairperson of the Committee against Torture, Fernando Mariño Menéndez, but also by other scholars.[111] This article will examine the peculiarities of State Immunity to determine whether its non-recognition is feasible as a countermeasure.

First, it is necessary to examine the nature of State Immunity to determine whether its non-recognition could constitute a countermeasure. Particularly, since a countermeasure necessarily involves the breach of an international norm, it is necessary to determine whether or not State Immunity is a norm in international law such that failure to recognize it could constitute a countermeasure.

Currently, there is no universal treaty in force that covers the topic of State Immunity. In 2004, the General Assembly adopted the UN State Immunity Convention. This convention will come into force pending sufficient State ratifications.[112] Europe has a convention that is already in force and regulating the subject, called the *European Convention on State Immunity*.[113] The significance of this is that State Immunity is a norm under international law for those State parties to the European Convention on State Immunity. For the other States, the obligation to recognize State Immunity is found in customary international law. In this respect, the ICJ recognized in the *Ferrini* case that State Immunity was customary international law.[114]

111 See C. Forcese, 'De-Immunizing Torture: Reconciling Human Rights and State Immunity', 52 *McGill Law Journal* (2007) 1, 127, 167; A. Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years', 19 *Italian Yearbook of International Law* (2009), 33, 36; A. Gattini, 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?', 1 *Journal of International Criminal Justice* (2003) 2, 348.

112 See *Convention on Jurisdictional Immunities of States*, *supra* note 34.

113 *European Convention on State Immunity*, 16 May 1972, 1495 U.N.T.S. 182.

114 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 55. Likewise the UN *State Immunity Convention* recognizes State Immunity as a principle of customary international law. See *Convention on Jurisdictional Immunities of States*, *supra* note 34, Preamble, 2-3. Sir Lauterpacht argued in 1951 that it could not be a binding rule of international law since it depended on reciprocity. H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Yearbook of International Law* (1951), 220, 228. Although this might have been true in 1951, it is not true anymore as the recognition of Immunity does not depend on reciprocity. See Bankas, *supra* note 25, 327-338. Jasper Finke describes State Immunity as a principle instead of a rule since States agree on the general idea of State Immunity but have not agreed on the particularities. See J. Finke, 'Sovereign Immunity: Rule, Comity or Something Else?', 21 *European Journal of International Law* (2010) 4, 853. Even if

Additionally, many States have recognized State Immunity as a principle of customary international law in national courts or by enacting legislation.[115] Regardless of whether a particular State is bound by customary international law or by treaty law to recognize State Immunity, the status of State Immunity as a binding norm of international law signifies that a State could violate this norm, and in turn signifies that the violation of this norm could constitute a countermeasure.[116] The exception would be if international law prohibited State Immunity from being subjected to countermeasures. In this respect, the existing treaties on the subject do not include any provision regarding countermeasures.[117] Additionally, as described in Part II, countermeasures may not affect *jus cogens* norms, human rights law, or diplomatic law. However, State Immunity relates to none of these types of law. It is clear that State Immunity is not a *jus cogens* norm and that it does not exist to protect human rights.

Regarding diplomatic law, the scope of this prohibition was progressively limited during the drafting of the *Articles on State Responsibility*. In 1992, the Special Rapporteur Gaetano Arangio-Ruiz, first proposed including among the prohibited countermeasures those posing "serious prejudice to the normal operation of bilateral or multilateral diplomacy."[118] Although this argument could be used to justify any countermeasure, it can be debatable whether the non-recognition of State Immunity could damage bilateral or multilateral relations, therefore becoming a prohibited countermeasure. The Special Rapporteur later

this is the case, the principle of State Immunity would be part of international law and as such it can be subjected to countermeasures.

115 For example, United States, United Kingdom, and Singapore. For a list of domestic legislation regarding State Immunity, as of 2005, see Bankas, *supra* note 25, 328.

116 In this respect, see *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 73, 1155 U.N.T.S. 331, 350 (stating that it does not regulate issues of State Responsibility). Additionally the ILC while drafting the convention clarified that the right to invoke termination or suspension of a treaty arises "independently of any right of reprisal". *Report of the International Law Commission to the General Assembly,* Yearbook of the International Law Commission (1966), Vol. II, 169, 255, UN Doc A/CN.4/191.

117 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, 77-78, para. 146. See also *European Convention on State Immunity*, *supra* note 113; *Convention on Jurisdictional Immunities of States*, Preamble, *supra* note 34, 2-3.

118 Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 35, para. 96.

clarified that this prohibition only included those countermeasures violating the rights of diplomats.[119] To avoid further confusions, this was specified in the subsequent drafts and it now reads "[a] State taking countermeasures is not relieved from fulfilling its obligations [….] [t]o respect the inviolability of diplomatic or consular agents, premises, archives and documents."[120] The commentaries to the Articles explained that this prohibition "is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including during armed conflicts. The same applies, *mutatis mutandis,* to consular officials."[121] Since State Immunity does not relate to the rights of diplomatic or consular agents but of the State itself, State Immunity is not affected by this prohibition.

Additionally, it is necessary to mention that during the drafting of the *Articles on State Responsibility*, Gaetano Arangio-Ruiz also suggested that countermeasures could not affect "the independence, sovereignty or domestic jurisdiction of the wrongdoer."[122] He gave as an example "the submission to the jurisdiction *ratione personae* [of the injured State] of responsible officials of the target State, who would otherwise be protected by immunity."[123] This suggestion could have meant the prohibition of the non-recognition of State Immunity as a countermeasure. Nonetheless, the Drafting Committee decided that this proposal was too broad and it amounted "to a quasi-prohibition of countermeasures."[124] Thus, the Committee limited it by stating that the countermeasure could not be an "extreme economic coercion designed to endanger the territorial integrity or political independence of the State which has committed an international wrongful act."[125] Unfortunately, no further reference was made to the

119 *Report of the International Law Commission on the Work of its Forty-Fourth Session*, Yearbook of the International Law Commission (1992), Vol. II (2), 1, 32, para. 220, UN Doc A/47/10.

120 *Articles on State Responsibility*, Art. 50 (2) (b), *supra* note 12, 12.

121 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 294.

122 Special Rapporteur on State Responsibility, *Fifth Report on State Responsibility*, Yearbook of the International Law Commission (1993), Vol. II (1), 1, 51, para. 230 (b), UN Doc A/CN.4/453 and Add.1-3.

123 *Id.*, 51-52, paras 233 & 234.

124 ILC, *Summary Records of the 2318th Meeting*, Yearbook of the International Law Commission (1993) Vol. 1, 140, 144, para. 27, UN Doc A/CN.4/SER.A/1993.

125 *Id.*, 140, para. 3, (Art. 14 (b)).

example given by the Special Rapporteur. This provision was not included in the final draft, but without doubt the effect the non-recognition of State Immunity may have in the sovereignty of the wrong-doing State must be taken into account when assessing the proportionality.

The other issue that may be argued against the non-recognition of State Immunity as a countermeasure is that, since State Immunity is a procedural norm applied by States, it cannot be subject to countermeasures. In order to analyze this issue it is necessary to distinguish procedural norms from substantive norms. In this respect, a substantive norm imposes duties by regulating actions human beings or States are "required to do or abstain from [doing] whether they wish to or not".[126] A procedural norm "define[s] the procedure to be followed" when determining if a substantive norm has been violated.[127]

The ICJ in the *Ferrini* case held that "[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State."[128] The same has been determined by the European Court of Human Rights.[129] Nonetheless, some scholars have argued that State Immunity is both a substantive and procedural norm.[130]

This article proposes to compare State Immunity with the principle of equality in domestic law, which is a substantive norm, but has procedural effects. The procedural effects of the equality principle are no longer the equality principle itself but an expression of it. For example, the equality of arms is no longer the equality principle but a procedural rule expressing, within a procedure, the equality principle. The same is true of State Immunity; it is not a substantive norm but a procedural expression of a substantive norm, the sovereign equality principle. Therefore, as held by the

126 H. L. A. Hart, *The Concept of Law* (1961), 78-79. Hart refers to substantive rules as primary rules and procedural rules as one kind of secondary norm. This author uses the terms substantive and procedural rules to be in accordance with the terms used by the ICJ *infra.*

127 *Id.*, 92 & 94.

128 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, paras 58 & 93. See also *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 25, para. 60 [Arrest Warrant Case].

129 *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 48. See also *Jones v. Saudi Arabia Case*, *supra* note 29, para. 24.

130 See Dissenting Opinion of Judge Al-Khasawneh, *Arrest Warrant Case*, *supra* note 128, 97, para. 5; Atteritano, *supra* note 111, 37.

ICJ and the European Court of Human Rights, State Immunity is a procedural norm.

Consequently, the question becomes whether the fact that State Immunity is a procedural norm, thus preventing States from using it as a countermeasure. To answer this question, we must look to see whether there is a prohibition against taking countermeasures that affect procedural norms.[131] It must be remembered that, apart from the exceptions already mentioned, there are no other established restrictions that delimit which norms may be affected by countermeasures. Also, there is no provision stating that countermeasures can only affect substantive norms.[132] Thus, there is nothing in the nature of State Immunity that prevents the potential of its non-recognition as a countermeasure.

I. Legality of Judicial Countermeasures

Traditionally, the executive branch decides when to take a countermeasure. There have also been cases of countermeasures taken by the legislative branch.[133] In the case of State Immunity, domestic courts are

131 It is necessary to mention, however, that State Immunity is probably the only example whereby a State could affect a procedural norm as a countermeasure. Other procedural norms within a domestic trial are not part of international law, and thus its non-recognition would not constitute a countermeasure. See *Articles on State Responsibility*, Arts 3 & 22, *supra* note 12, 2, 6. Moreover, a suspension of other procedural norms, as for example, the right to contest evidence, may render the judicial procedure unfair. As explained *infra* a judgment against a State for *jus cogens* violations is an enforcement of international law. As such, it must comply with basic fairness rules. See O'Connell, *supra* note 109, 363. With respect to the other secondary norms regulating remedies within international law, the International Court of Justice may impose a procedural sanction to a State that did not comply with an interlocutory decision. See *id.*, 310. Whether this is a countermeasure or not depends on whether the ICJ is a subject of international law, and whether the procedural rules can be considered as international law norms. The examination of this statement is beyond the scope of this article.

132 See for example L. Oppenheim, *International Law: A Treatise*, Vol. II, 7th ed. (1952), 308; C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 20-21.

133 For example, in 2010, the US Congress approved sanctions against Iran that went beyond a Security Council Resolution. This sanction had to be signed by the President, but that is part of the general procedure for the approbation of a law in the US. See P. Baker, 'Obama Signs Into Law Tighter Sanctions on Iran', *The New York*

the ones normally in charge of recognizing immunity or denying it when appropriate.[134] There may be some States where the executive branch decides whether immunity should apply or not and the domestic court must follow the executive's decision. In those cases, the decision to non-recognize immunity as a countermeasure would be taken by the executive branch, which is not different from what usually happens. However, in the majority of the domestic jurisdiction that is not the case, since the domestic courts are the ones deciding when immunity applies, and thus the decision not to recognize State Immunity as a countermeasure would be taken by the judicial branch. An argument that might be posed against the non-recognition of State Immunity as a countermeasure is that countermeasures cannot be taken by the judicial branch.[135] Therefore it is necessary to analyze whether the judicial branch can also take countermeasures.

The executive branch is usually responsible for employing countermeasures probably because it is in charge of conducting foreign policy. This special position of the executive branch is recognized by international law.[136] For example, unilateral declarations are only binding upon States when made by the Head of State, Heads of Government, Ministers for Foreign Affairs, or when made by other representatives of the State on specific cases.[137]

Notwithstanding this special position of the executive for certain matters, this special position has no application on questions of state responsibility.[138] The *Articles on State Responsibility* established that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions. […] An organ includes any person or entity which

Times (1 July 2010), available at http://www.nytimes.com/2010/07/02/world/middleeast/02sanctions.html?_r=1 (last visited 10 January 2013).

134 See Bankas, *supra* note 25, 13. See also Rensmann, *supra* note 7, 157.

135 See Atteritano, *supra* note 111, 36 (arguing, without further explanation, that the non-recognition of State Immunity as a countermeasure "it is a problem for countries in which the denial of Immunity is usually decided by the courts rather than by governments").

136 See A. Peters, 'Treaty Making Power', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 56, 71, para. 81.

137 ILC, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, UN Doc A/61/10, 367, 368, para. 4.

138 *Report of the International Law Commission on the Work of its Forty-Ninth Session*, Yearbook of the International Law Commission (1997), Vol. II (2), 1, 65, para. 200, UN Doc A/52/10.

has that status in accordance with the internal law of the State."[139] The domestic independence of the branches have no impact on whether the conduct is attributable to the State or not. This is referred to as the principle of the unity of the State for international law.[140] This principle is related to the general rule that a State cannot invoke its domestic law to justify a violation of international law.[141] Taking all of this into account, it is possible to conclude that the actions and omissions of courts are attributable to the State, thus they may entail the State's international responsibility.[142] For example, when a domestic court wrongly lifts the immunity of another State, the forum State is internationally responsible for that wrongful act.[143]

With regard to countermeasures, the *Articles on State Responsibility* do not appear to limit who can take them. Therefore, presumably any individual whose acts are attributable to the State is capable of taking countermeasures. This idea is reinforced by the fact that countermeasures are included within the set of articles that regulate circumstances precluding wrongfulness. Presumably, the *Articles on State Responsibility* set forth the full set of circumstances under which countermeasures may be taken and the Articles do not limit the possibility to take countermeasures to any particular set of individuals or organs. Consequently, one can assume that any organ whose acts are attributable to the State is capable of taking countermeasures, no matter their hierarchical position or state function. Just as is the case with a violation that is committed out of necessity, the responsibility of the State is precluded regardless of which entity within the State committed the wrongful act. There is no reason to believe that the situation is different with respect to countermeasures. The responsibility of the State is precluded when the action is taken as a countermeasure and complies with the special conditions, regardless of who committed the act. Consequently, although in principle a policeman acting in his official capacity could also take countermeasures, since his actions are attributable to the State, it is unlikely

139 *Articles on State Responsibility*, Art. 4, *supra* note 12, 2-3.

140 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 95.

141 *Vienna Convention on the Law of Treaties*, Art. 27, *supra* note 116, 339. For an explanation see Shaw, *supra* note 33, 133-134.

142 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62, 87-88, para. 62.

143 See A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', 101 *American Journal of International Law* (2007) 4, 760, 764.

that his actions would comply with the required special conditions, for example that of prior notification.

Accordingly, under international law, countermeasures can also be taken by domestic courts. The status of the court is also not relevant. However, it must be taken into account that, if the decision is taken by a lower court, it is not a final decision until all the possible remedies are exhausted.[144] Furthermore, domestic courts play an important role in the enforcement of international law in general.[145] For example, courts enforce arbitral awards and judge persons that have committed crimes regulated by international law, *i.e.* piracy.[146] Countermeasures are just a different enforcement tool.

To differentiate between countermeasures taken by the executive, the countermeasures taken by the judicial branch will be referred to as judicial countermeasures. Although this article only analyzes the possibility of domestic courts to take countermeasures under international law, it must be noted that the scope of judicial countermeasures is very limited due to constraints imposed by domestic law, including the rules of jurisdiction and procedure. First of all, there must be a lawsuit against another State. In most jurisdictions, a court cannot start a proceeding against a State *motu propio.* As a consequence, a decision to take a judicial countermeasure is not only based on political will but also on the pre-existence of a lawsuit. Moreover, the fact that the decision is taken by an impartial and independent organ brings some additional legitimacy not present when the decision is taken by the executive.

Consequently, there is nothing that *a priori* eliminates the possibility to non-recognize State Immunity as a countermeasure.

II. Compliance With the Conditions of Validity of Countermeasures

As explained in Part II of this article, countermeasures must comply with certain conditions to be valid. This part of the article will therefore analyze if the judicial countermeasure of non-recognition of State Immunity

144 See *id.*, 766.
145 See O'Connell, *supra* note 109, 328.
146 *Id.*, 329.

could comply with such conditions. It would also try to give some guidance on how this could be done.

Prior to analyzing these conditions, it is necessary to mention that, for a State to have the possibility to take the judicial countermeasure of non-recognizing State Immunity, it is necessary that there be the initiation of a complaint by an individual and that the domestic court has the jurisdiction to hear such a complaint.

The application of State Immunity depends first on the prior ascertainment of jurisdiction.[147] International law provides for four bases under which a State is entitled to exercise jurisdiction: territorial, nationality (of the victim or of the perpetrator), protective, and universal.[148] Unless other links exist in the specific cases, in case of *jus cogens* violation, the domestic court could base its jurisdiction on the universality principle.

It is widely accepted that most, if not all, substantive rules which possess *jus cogens* status are also the ones that, when violated, give ground to States to claim universal jurisdiction.[149] Nonetheless, traditionally the jurisdiction being analyzed is criminal. The cases where State Immunity may come into play are civil proceedings. Alexander Orakhelashvili proposes that, "if an act attracts universal criminal jurisdiction, it is unclear why it cannot attract universal civil jurisdiction."[150] Following this line of thought, it is possible to conclude that international law does not prevent States from exercising this kind of jurisdiction, but it would also be necessary that the national laws of the State allow the court to do so, too.[151]

147 See A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 340-341.

148 For an explanation see J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 458-462.

149 J. T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta & J. R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 667, 668. In this respect, it must be noted that universal jurisdiction does not arise from the concept of *jus cogens* but from international legal rules on jurisdiction. See ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 95.

150 Orakhelashvili, *supra* note 147, 308.

151 See *id.*; J.-F. Flauss, 'Compétence civile universelle et droit international général', in Tomuschat & Thouvenin *supra* note 51, 385, 392-394; D. F. Donovan & A. Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', 100 *American Journal of International Law* (2006) 1, 142, 163; B. Stephens, 'Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?', 60 *Albany Law Review* (1997) 3, 579, 601. See also, *D. M. E. Filartiga & J. Filartiga v. Americo Noberto Pena-Irala*, [1980] 630 F.2d 876 (exercising universal civil jurisdiction in a case of torture).

In addition, domestic law may restrain courts from non-recognizing State Immunity as a countermeasure.[152] For example, many States have enacted national laws regulating the exceptions to State Immunity.[153] For the courts of these States it might be more difficult to take countermeasure involving State Immunity. However, if the court decides to do so in contravention of national law, this fact does not affect the validity of the countermeasure.[154]

There are certain conditions a judicial countermeasure of non-recognition of State Immunity would need to comply with to be valid. The first one is that it must be a response to a prior wrongful act and it must be directed at the State responsible for that previous violation.[155] In the situation at hand, the judicial countermeasure is in response to a *jus cogens* violation. However, whether the violation in fact occurred is yet to be established by the domestic court. The question is whether a domestic court can take a countermeasure, particularly the non-recognition of State Immunity, for an alleged violation of international law before establishing that the violation of international law actually occurred.

The ICJ analyzed a similar situation in the *Ferrini* case when examining whether the gravity of an alleged violation could affect State Immunity:

> "the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious

152 See Rensmann, *supra* note 7, 157.

153 For example, United States, United Kingdom and Singapore. For a list of domestic legislation regarding State Immunity as of 2005 see Bankas, *supra* note 25, 328. See also *Argentine Republic v. Amerada Hess Shipping Corp.*, [1989] 488 U.S. 428, 434 and *Jones v. Saudi Arabia Case*, *supra* note 31, 287-288, para. 22.

154 Regarding *ultra vires* acts see *Articles on State Responsibility*, Art. 7, *supra* note 12, 3.

155 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 55-56, para. 83.

> violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim."[156]

The ICJ's analysis was in response to Italy's argument that "international law [does not accord] immunity to a State, or at least restricts its immunity, when that State has committed serious violations of the law of armed conflict".[157] In that case, and according to Italy's argument, the non-application of State Immunity could only have occurred where it was established that serious violations of international law had in fact occurred. Thus, it was impossible to resolve this preliminary issue of state immunity without analyzing the merits of the claim

The situation in the *Ferrini* case must be distinguished from the hypothesis at hand. It must be recalled that, when a State is taking a countermeasure, it is knowingly acting against international law, and it is also illegally subjecting the wrong-doing State to the trial process. The existence of a previous violation by the wrong-doing State is assumed by the State taking the countermeasure. If afterwards it is established that the violations that brought about the countermeasure did not exist, then the countermeasure becomes unlawful. Consequently, the national court, in deciding to take the judicial countermeasure of non-recognition of State Immunity would be presuming that the alleged violation of international law occurred.

Therefore, in this hypothetical, just like with other issues of admissibility, the court must do a *prima facie* assessment of the existence of the violation. If it finds *fumus boni iuris* of the existence of the violation and its attribution to the State it would assume it for admissibility purposes and the Court may take the judicial countermeasure. This analysis needs some degree of evidence; the "skilful construction of the claim" is not enough. Then if, while examining the merits, it is established that the violation did

156 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 82.
157 *Id.*, para. 81.

not occur, the countermeasure taken loses its basis and becomes unlawful.[158] In that situation, the responsibility of the forum State is not precluded and the victim State should be compensated.[159] This compensation could be ordered by the court to be paid by the plaintiff. Evidently, since the assessment that a violation of *jus cogens* occurred was made by a domestic court and not an international court, it is not final in international law. The States concerned may, for example, bring the manner before an international court.

The second difficulty is posed by the object of the judicial countermeasure. Countermeasures should be taken to persuade the wrong-doing State to cease the violation and make reparations.[160] Nonetheless, it is necessary to examine whether the forum State has the right to exercise pressure through a judgment against the wrong-doing State to make reparations to the victims. When States have taken solidarity countermeasures the object has been only to request cessation; this, however, does not mean that it is not possible for States to request reparations for individuals.[161] This is related to the fact of whether international law recognizes an obligation to make reparations to individuals.

In the *Chorzow Factory* case the Permanent Court of International Justice recognized that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[162] It is never mentioned that the duty does not exist if the injury is suffered by individuals.[163] This idea was welcomed by the ICJ in its advisory opinion regarding the *Legality of the Wall*, where

158 See Elagab, *The Place of Non-Forcible Counter-Measures*, *supra* note 67, 52-55; Special Rapporteur on State Responsibility, *Fourth Report, supra* note 38, 6, para. 2.

159 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

160 See *Articles on State Responsibility*, Art 49 (1), *supra* note 12, 11. Please note that the *Articles on State Responsibility* referred to the obligations under Part II of the articles that include the obligation to cease the act and to make reparations. *Id.*, Arts 28-41, 7-9.

161 C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in A. Randelzhofer & C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (1999), 1, 5 & 6. See also Frowein, *supra* note 13, 431.

162 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, P.C.I.J. Series A, No. 17, 29 (1928).

163 See Orakhelashvili, *supra* note 147, 246.

it declared that Israel "has the obligation to make reparation for the damage cause to all the natural or legal persons concerned."[164] Unfortunately, the ICJ only considered material damage.[165] Furthermore, in the recent case *Ahmadou Sadio Diallo* the ICJ examined the damages suffered by one individual while assessing the reparations owed to the State[166].

The United Nations General Assembly has also recognized "the victims' right to benefit from remedies and reparation."[167] Additionally, this principle is included in human rights treaties, such as the *European Convention on Human Rights* and the *American Convention on Human Rights*.[168] It is not explicitly included in the *International Convention for Civil and Political Rights*, but the Human Rights Committee has declared the existence of this right.[169]

The *Articles on State Responsibility* established that "[t]he obligations of the responsible State […] may be owed to another State, to several States, or to the international community as a whole."[170] However, this stipulation does not affect "any right, arising from the international responsibility of a State, which may accrue directly to any person."[171] The commentaries exemplified the case of violation of human rights treaties, in which the individual victims should be "the ultimate beneficiaries [and] the holder of the relevant rights."[172] By analogy the same applies in cases of violations of *jus cogens* related to basic human rights.[173]

164 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 198, para. 152.

165 *Id.*, 198, para. 153.

166 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 19 June 2012.

167 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Preamble, GA Res. 60/147 annex, UN Doc A/Res/60/147, 16 December 2005, 2, 2-4 [Basic Principles].

168 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 50, 213 U.N.T.S. 221, 248; *American Convention on Human Rights*, 22 November 1969, Art. 63, 1144 U.N.T.S. 123, 159.

169 *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 2 (3), 999 U.N.T.S. 171, 174; Human Rights Committee, *General comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, 6, para. 16.

170 See *Articles on State Responsibility*, Art. 33 (1), *supra* note 12, 8.

171 *Id.*, Art. 33 (2), 8.

172 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 209. See also R. Pisillo-Mazzeschi, 'Impact on the Law of Diplomatic

Once the existence of the duty to repair is established, it is necessary to determine whether a State can claim the duty of the wrong-doing State to make these reparations. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights allow the possibility of a State bringing a case against another State for human rights violations committed to its own citizens.[174] Also, the *Articles on State Responsibility* in its provision concerning the invocation of responsibility by a State other than an injured State establishes that the State is entitled to demand reparation "in the interest […] of the beneficiaries of the obligation breached."[175]

Since the *Articles on State Responsibility* do not regulate solidarity countermeasures, they do not clarify whether a State can take countermeasures to demand reparations owed to the individuals. Nonetheless, considering that it was already established that States can take solidarity countermeasures, and that it is recognized that non-injured States may claim reparations for the victims, it is possible to conclude that a solidarity countermeasure can demand reparations for the victims. Therefore, the non-recognition of State Immunity as a countermeasure would comply with the object of the countermeasure.

It is also necessary to clarify that since countermeasures cannot be aimed at punishing the wrong-doing States, in the jurisdictions where it is possible, courts must refrain from ordering punitive damage. Doing so would transform the countermeasure into a punishment.

Another requirement for the validity of a countermeasure is the prior notification to the wrong-doing State. In the case of judicial countermeasures this can be easily accomplished, for example by a notification issued by the court to the State's embassy in that country. This notification must be done before the countermeasure is actually taken. Therefore, the court must notify the respondent State of its willingness to

Protection', in Kamminga & Scheinin, *supra* note 7, 211, 218 [Pisillo-Mazzeschi, Diplomatic Protection].

173 See Tomuschat, *Human Rights, supra* note 10, 274; Orakhelashvili, *supra* note 147, 248. See also R. Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims', in Randelzhofer & Tomuschat, *supra* note 161, 149, 172.

174 *International Covenant on Civil and Political Rights*, Art. 41, *supra* note 169, 182-183; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 24, *supra* note 168, 236; *American Convention on Human Rights*, Art. 45, *supra* note 168, 155; *African Charter on Human and People's Rights*, 27 June 1989, Art. 49, [1982] 21 I.L.M. 58, 66, OAU Doc CAB/LEG/67/e rev. 5.

175 See *Articles on State Responsibility*, Art 49 (2), *supra* note 12, 11.

non-recognize the State's immunity as a countermeasure at the same time it notifies it of the civil complaint pending against it in the national courts.

The last requirement is whether the non-recognition of State Immunity as a response to a *jus cogens* violation is proportional. As stated in Part B, international law does not provide any formula for this calculation. The only guidance given by the ILC is that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[176] To facilitate the explanation, this article will use the facts of the case of Bouzari v. Iran described in the introduction. Prior to analyzing the proportionality of the countermeasure, it is necessary to examine what is behind each of these elements.

Firstly, with respect to the injury suffered, the relevant one is the injury suffered by Mr. Bouzari. Bouzari alleged he was tortured, starting that he was:

> "blindfolded, beaten with fists, whipped with steel cables and subjected to electric shocks to his genitals. He was deprived of food, sleep and sanitation. His head was forced into a bowl full of excrement and held there. He was subjected to several fake executions by hanging. He was suspended by the shoulders for lengthy periods. His ears were beaten until his hearing was damaged."[177]

The Court in that case decided to assume the veracity of these allegations to determine the admissibility of the case.[178] The same assumption must be made while determining the proportionality of the judicial countermeasure.

Secondly, within the gravity of the international wrongful act, it must be recalled that international law has long attached a special stigma to

176 *Id.*, Art. 51, 12.

177 *Bouzari v. Iran Case*, *supra* note 1, para. 12.

178 This assumption is normally made during the admissibility phase of procedure; it would also have to be made when assessing the injury suffered to apply a countermeasure. *Id.*

torture.[179] The General Assembly declared in 1975 that "[a]ny act of torture […] is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."[180] Furthermore, the State's obligation not to torture is considered *jus cogens*.[181]

Lastly, the rights in question include the rights of all the parties involved. On one side, there is Iran's right to immunity from jurisdiction. As explained above, this right is a procedural consequence of State equality. This principle of sovereign equality is essential to international law and it is so recognized in the United Nations Charter.[182] The existence of its procedural consequence, State Immunity, facilitates the diplomatic relations between States since it is a demonstration that no State has power over any other State.[183]

On the other side, there is Canada's right to enforce the *erga omnes* obligations arising out of the *jus cogens* character of torture. All *jus cogens* norms create *erga omnes* obligations.[184] The main procedural consequence of an *erga omnes* obligation is "that all states are entitled to invoke State responsibility in case of breach,"[185] and, if the legality of solidarity countermeasures is accepted, all States are able to enforce *jus cogens* norms through countermeasures. In the case of human rights obligations with *jus*

179 See for example *Ireland v. United Kingdom*, ECHR, App. No. 5310/71, Judgment of 18 January 1978, para. 167; *Selmouni v. France*, ECHR, App. No. 25803/94, Judgment of 28 July 1999, para. 96.

180 *Declaration on the Protection of all Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 2, GA Res. 3452 (XXX) annex, UN Doc A/RES/3452 (XXX), 9 December 1975, 2, 2.

181 *Belgium v. Senegal Case, supra* note 20, para. 99; *Prosecutor v. Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998, para. 144; *Siderman de Blake v. Republic of Argentina Case*, *supra* note 31, 717; and Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 246.

182 Art. 2 (1) Charter of the United Nations.

183 The ICJ, when determining the existence or not of Immunity to a sitting Minister of Foreign Affairs, took into account the impact the non-recognition of his Immunity could have upon Congo's international relations. *Arrest Warrant Case*, *supra* note 128, 21-22, para. 53-55. See Bankas, *supra* note 25, 255.

184 ILC, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702, 18 July 2006, 22-23, para. 38. See also M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 190-194.

185 *Id.*

cogens character, this enforcement entails the request by the State to repair the injury to the victim. The enforcement of any *erga omnes* obligations is an embracement of the fundamental values it represents for the international community. The recognition of torture as a *jus cogens* norm creating *erga omnes* obligation is a recognition that the obligation exists beyond State-individual relations. The international community is concerned with its compliance. Consequently, it can be concluded that Canada has a right to protect and enforce the freedom from torture.

Additionally, there are the rights of Mr. Bouzari. He had the right not to be tortured, which was presumably violated by Iran. He also has the right to obtain adequate reparations. The UNCAT in its article 14 establishes that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation".[186] Whether this right exists in a situation like the one Mr. Bouzari was in, when the torture was committed by a State and the victim is demanding redress in another State, is a discussed question. The UNCAT did not specify the applicability of this article. The object and purpose of the Convention, ratified by its *travaux preparatoires*, might be interpreted as obliging Canada to ensure the existence of a civil remedy for Bouzari even outside the country where he was subjected to torture.[187] Nonetheless, the majority of States have not endorsed this position.[188] In any case, as stated above, international law recognizes in general the right to reparations by the State responsible for the violation. According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, these reparations should include "verification of the facts and public disclosure of the truth to the extent that such disclosure does not cause further harm"[189] and "[i]udicial and administrative sanctions against persons liable for the violations."[190] This latter obligation is included in the UNCAT and is applicable also when a

186 UNCAT, Art. 14, *supra* note 8, 116.

187 See D. F. Donovan & A. Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', 100 *American Journal of International Law* (2006) 1, 142, 148.

188 See *id.* (referring to the United States as the only exception). See also M. Nowak & E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), 492-502.

189 *Basic Principles*, *supra* note 167, 8, para. 22 (b). See also UNCAT, Art. 13, *supra* note 7, 116; and *Jones v. Saudi Arabia Case*, *supra* note 31, 286 *et seq.*, 293, para. 20 *et seq.* & 46.

190 *Basic Principles*, *supra* note 167, 8, para. 22 (f).

State is aware that a person who allegedly has committed torture in another State is now within its territory.[191] Thus, Mr. Bouzari's right to remedy, justice, truth, and reparation must also be taken into account.

With all these elements in mind, it is now possible to put them into practice and measure the proportionality of the judicial countermeasure of non-recognizing State Immunity. As previously stated, the formula to measure proportionality does not provide a conclusive answer on how it should be done. Nonetheless, proportionality is not a requirement exclusive to countermeasure or to international law. It comes into play each time it is necessary to balance two contrasting principles. Therefore, it is possible to look elsewhere for formulas to determine the proportionality of a measure.[192] For example, the Human Rights Committee has pointed out three specific elements that must be taken into account. The restrictions on rights "must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[193] Similar explanations are used by the Inter-American Court of Human Rights and the European Court of Human Rights.[194] Although these theories are used to determine the proportionality of a restriction imposed on a human right, its applicability to countermeasures will become obvious once each of these elements is analyzed.

First, it is necessary to analyze the suitability of the measure, in this case non-recognizing State Immunity, so as to determine whether this countermeasure is able to protect the rights of Canada to enforce *erga*

191 See UNCAT, Art. 7, *supra* note 7, 115. See also *Belgium v. Senegal Case*, *supra* note 20, paras 89-117.

192 For an example of a comprehensive formula to measure the proportionality of an act see R. Alexy, *A Theory of Constitutional Rights* (2002), 397-410.

193 Human Rights Committee, *General Comment No. 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, 3, para. 14 [Human Rights Committee, General Comment No. 27].

194 The Inter-American Court of Human Rights takes into account whether the measure affects "the strict legality" necessary for restrictions; whether it "serves a legitimate purpose;" "whether such measure is necessary," and whether it is strictly proportional. See *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H. R., Series C, No. 177 (2008), para. 58. The European Court of Human Rights considers that "the limitations applied [cannot] restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation [must] pursue a legitimate aim and [there must be a] reasonable relationship of proportionality between the means employed and the aim sought to be achieved." See *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 53.

omnes obligations and the rights of Mr. Bouzari to have a remedy, as well as his right to truth, to justice, and to receive compensation. As stated by Professor Michael Ewing-Chow, "[i]f the measure does not or is unlikely to achieve the results it is intended to achieve it should be seen as a measure lacking in proportionality."[195]

The non-recognition of State Immunity can mean that the national court renders a subsequent judgment in favor of the victim, which will recognize their right and the possibility of obtaining reparations. Regarding the rights of Bouzari, the judgment this is by itself a form of reparation, since it helps to reveal the truth of the facts and brings some justice to the case.[196] The judicial recognition of the violation is also "an important form of recognition and closure to victims."[197] Regarding compensation, it is true that this does not necessarily mean that he will effectively receive compensation, since Iran will have immunity from execution. Nonetheless, considering that it is impossible to actually enforce judgments against States even with judgments rendered by international tribunals, this possibility is not enough to jeopardize the suitability of the countermeasure.

Regarding the rights of Canada in enforcing the *erga omnes* obligations emerging from the torture prohibition, a judgment of this kind will affirm the "interest manifested in the norms that the community is prepared to enforce."[198] Additionally, the judgment will serve as a tool against impunity and as a guarantee of non-repetition. This in turn would reinforce the importance of *jus cogens* norms. Consequently, the non-recognition of State Immunity is also suitable toward this end.

The second step is to compare the measure with other equally suitable measures and ensure the one selected is the least intrusive one.[199] Thus, it is necessary to examine other suitable measures to realize the same goals mentioned above.

Among these measures may be, for example, a diplomatic complaint by Canada to Iran to request reparation for Bouzari. This would be less

195 M. Ewing-Chow, 'First Do no Harm: Myanmar Trade Sanctions and Human Rights', 5 *Northwestern University Journal of International Human Rights* (2007) 2, 153, 169.

196 See *Almonacid Arellano et al. v. Chile*, Judgment, Inter-Am. Ct. H. R., Series C, No. 154 (2006), para. 161; *Ximenes Lopes v. Brazil*, Judgment, Inter-Am. Ct. H. R., Series C, No. 149 (2006), para. 236.

197 See Donovan & Roberts, *supra* note 187, 154.

198 *Id.*

199 For an application of this factor within countermeasures see Elagab, *The Legality of Non-Forcible Counter-Measures*, *supra* note 17, 90.

intrusive, but it could not achieve the same goal of embracing the international importance given to freedom from torture. On the other hand, Canada could seize some of Iran's assets within its jurisdiction and grant them to Bouzari. This measure would be more intrusive than that proposed in this article, since the measure of non-recognition of State Immunity only concerns immunity from jurisdiction and does not have this impact. Compliance with the judgment will depend on Iran's will to do so. Consequently, by not being able to find other equally suitable measures less intrusive, the point is proven.

The last element is that it "must be proportionate to the interest to be protected."[200] The injury that is caused by the countermeasure cannot be greater that the injury it seeks to protect. On one side, there is the torture suffered by Mr. Bouzari, which constituted a *jus cogens* violation. This demonstrates that the international community deems its compliance extremely important, so important that no State can derogate from it.[201] Nonetheless, within the violations of *jus cogens* norms, the ILC in the *Articles on State Responsibility* recognized special consequences for serious violations of *jus cogens* norms, recognizing therefore that some violations of *jus cogens* are more serious than others.[202] Article 40 (2) defined a serious breach as one "involv[ing] a gross or systematic failure by the responsible State to fulfil the obligation."[203] The commentaries clarified that

> "[t]o be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term 'gross' refers to the intensity of the violation or its effects, it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule."[204]

200 Human Rights Committee, *General Comment No. 27*, *supra* note 193, 3, para. 14.

201 See *Vienna Convention on the Law of Treaties*, Art. 53, *supra* note 116, 344. See ILC, *Draft Articles on State Responsibility: Comments to Article 19*, Yearbook of the International Law Commission (1976), Vol. 2 (2), 95, 102, para. 17 [ILC, Comments to Article 19].

202 *Articles on State Responsibility*, Art. 40, *supra* note 12, 9. The commentaries said that aggression and genocide "by their very nature require an international violation on a large scale". Therefore, their breaches are always serious. Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 248.

203 *Articles on State Responsibility*, Art. 40 (2), *supra* note 12, 9.

204 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 247. *S*ee ILC, Comments to Article 19, *supra* note 201, 110, para. 34. Although, this reference concerns when the serious violations were called

Bouzari did not argue that his case was an example of the systematic torture applied by Iran, although this might have been the case.[205] Regardless of whether this case constitutes a serious breach to a *jus cogens* norm, the mere fact that it is a *jus cogens* violation is objectively serious *per se.*

On the other hand, there is the injury that Iran might suffer if the countermeasure is applied. The recognition of State Immunity allows States to perform their public function and international relations without the interference of any other State.[206] In this sense, the European Court of Human Rights stated that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[207]

Nonetheless, State Immunity and State sovereignty are not absolute. There are cases when a State can be judged by another State, for example when the claim concerns a commercial activity or a tort committed in the territory of the forum State.[208] Even though State Immunity is a procedural consequence of the sovereign equality principle, its non-recognition in those cases does not mean the perpetual inequality between the forum State and the State subjected to its jurisdiction. In fact, States can themselves decide to be subject to the jurisdiction of another State by waiving its immunity.[209] This, however, does not mean it is a minor interference. For example, the Supreme Court of France recognized in 1849 that "the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without

international crimes, the differentiation between *jus cogens* violations and serious breaches of *jus cogens* norms already exited. See E. Wyler, 'From 'State Crimes' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norm of General International Law'', 13 *European Journal of International Law* (2002) 5, 1147, 1158.

205 Regarding the state of human rights protection in 1992 see Human Rights Watch, *World Report 1993: Iran*, available at http://www.hrw.org/legacy/reports/1993/WR93/Mew-03.htm#P178_84839 (last visited 10 January 2013).

206 See Fox, *supra* note 34, 477.

207 This was stated while analyzing whether the restriction imposed to the right to remedy by State Immunity was legitimate. See *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 54.

208 See for example *Convention on Jurisdictional Immunities of States*, Arts 10-12, *supra* note 34, 6-7.

209 See *id.*, Art. 7, 5.

impairing their mutual relations."[210] In more recent times, the fact that Italian courts were exercising jurisdiction against Germany disturbed Germany so much that it decided to initiate a complaint before the ICJ.[211] That case, however, has to be distinguished from the measure proposed in this article since the Italian courts were not only disregarding Germany's immunity from jurisdiction but also its immunity from executions, which creates a strong interference with sovereign equality. Therefore, although the non-recognition of State Immunity affects sovereign equality, it is not an extremely harsh affectation.

The importance given to *jus cogens* norms and violations that cause in detriment to human dignity outweighs the harm the wrong-doing State would suffer due to the non-recognition of its State Immunity. Consequently, by commensurating both injuries suffered and taking into account the gravity of the violation together with the rights of Iran, Canada, and Mr. Bouzari it is possible to conclude that the non-recognition of State Immunity as a countermeasure to torture is proportional.

E. Conclusion

The non-recognition of State Immunity as a countermeasure to violations of *jus cogens* represents a solution for victims of *jus cogens* violations. Many victims around the world have no possibility of having a court sit in judgment against their own State. Of the victims who lack a remedy in their country, the possibility of an internationally binding judgment is limited to the States that are party to the relevant systems of human rights protection. There are systems of protection available to all the citizens of State members of the United Nations as for example, the request for action to the Special Rapporteur. However, these procedures cannot be used to find a judicial remedy and States are not obliged to comply with them. Accordingly, national courts of other States are their only choice left if they want to have a binding judgment against their State.

210 French Supreme Court, *Spanish Government v. Lambège et Pujol*, [1849] Recueil Dalloz, Part 1, 5, 9, cited in J. M. Sweeney, *The International Law of Sovereign Immunity* (1963), 20.

211 ICJ, *Jurisdictional Immunities of the State*, Application Instituting Proceedings, *supra* note 26.

Although the non-recognition of State Immunity can be employed as a countermeasure, this does not necessarily mean that victims will effectively receive reparations. Nonetheless, it is still beneficial for them. The judgment will confirm the existence of a violation and uphold the victim's claim. This in turn will have an important impact on the protection of the victim's right to truth. In instances where the case being decided by the court takes into account the potential to employ countermeasures, the judgment will also contribute to the collective right to truth. Additionally, a judgment against a State could influence civil society to demand justice in the State against which the judgment was rendered.

The importance of this option for the victims does not mean that States are obliged to offer it in every case; States are not obliged to take countermeasures in general.[212] Thus, they are also not obliged to refuse to recognize State Immunity in cases of *jus cogens* violations. In this respect, the situation is similar to the principle of diplomatic protection. States have the right to represent their citizens when their citizens' rights are violated by other States; however, States are not obliged to do so,[213] and their citizens have no right to be represented by them.[214] Countermeasures, like diplomatic protection, are left to the discretion of the State. In the case of judicial countermeasures, the exercise of this discretion given to the States by international law would depend on the national laws the national courts are obliged to apply.

This discussion of whether the non-recognition of State Immunity as a countermeasure is a right or a duty becomes extremely relevant when analyzing the decisions of the European Court of Human Rights. In these decisions, the issue was whether the forum State was violating the right to a remedy by recognizing immunity in cases of *jus cogens* violations.[215] Rights are the other side of obligations, but not of discretions. Accordingly, accepting the lawfulness of the non-recognition of State Immunity as a countermeasure does not contradict these precedents of the European Court,

212 See Koskenniemi, *Solidarity Measures*, *supra* note 18, 344.

213 *Articles on Diplomatic Protection*, Art. 2, GA Res. 62/67 annex, UN Doc A/RES/62/67, 8 January 2008, 2. See also Tomuschat, *Human Rights*, *supra* note 10, 266-267.

214 See Pisillo-Mazzeschi, *Diplomatic Protection*, *supra* note 172, 224. Nonetheless he argues that this might be changing. *Id.*, 221. On this respect see also P. Okowa, 'Issues of Admissibility and the Law on International Responsibility', in Evans, *supra* note 110, 472, 477-478.

215 *Al-Adsani v. United Kingdom Case*, *supra* note 29. See also Finke, *supra* note 114, 855.

instead it confirms them. The non-recognition of State Immunity as a countermeasure confirms the existing exceptions to State Immunity and the unlawfulness of its non-recognition if it is based solely on the *jus cogens* character of the norm violated. It also confirms that States have no obligation to grant the judicial remedy when State Immunity applies; it is a matter of discretion to revoke recognition as a countermeasure.

The same reasoning applies to all the national cases that have refused to lift immunity in cases of *jus cogens* violations. Additionally, in the case of national courts, it must be considered that they have decided in accordance with their domestic law. A court taking a countermeasure has to first admit that what it is doing is unlawful. If a court does not recognize immunity, thinking that its actions are lawful in international law like the Greek and the Italian courts, the chances are that the court is not complying with its obligation to prior notification necessary for the validity of the countermeasure.

The non-recognition of State Immunity as a countermeasure does not go against what the ICJ decided in the *Ferrini* case, but instead it reaffirms it by assuming the illegality of non-recognizing State Immunity. Neither Italy nor Greece presented the argument of precluding their responsibility for the non-recognition of State Immunity as a countermeasure. Thus, the ICJ did not analyze this possibility.

The ICJ did analyze, however, whether "the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed".[216] The ICJ held that customary international law does not condition State Immunity "upon the existence of effective alternative means of securing redress [for the victims]."[217] Nonetheless, the possibility of not recognizing State Immunity as a solidarity countermeasure does not require that international law set any conditions to State Immunity law, as Italy's argument of last resort would. Additionally, the ICJ determined that, if the such a condition "indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the [Ferrini] case, when claims have been the subject of extensive intergovernmental discussion" and agreements.[218] The same can be said about not recognizing State Immunity

[216] ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 98.
[217] *Id.*, para. 101.
[218] *Id.*, para. 102.

as a judicial countermeasure. If the wrong-doing State has already taken measures to repair the damage caused or settled with other States regarding the reparations, the countermeasure would not be unlawful.

As explained throughout this article, the non-recognition of State Immunity as a countermeasure is not contrary to international law. This judicial countermeasure can be a valid one. Also, its application does not contradict the international decisions examining the consequences of State Immunity and *jus cogens* violations. Even though it may be considered an unorthodox strategy,[219] it provides a method of enforcing human rights norms that is essential in cases of *jus cogens* violations.

[219] Professor Christian Tomuschat argues that "[o]nly one thing is certain: there will be many attempts in the future to use unorthodox strategies with a view to enforcing rights which are not capable of being enforced in the country of origin." Tomuschat, *Human Rights*, *supra* note 10, 386.