GUILHERME BONÁCUL RODRIGUES

**State Immunity and Human Rights Before National and International
Courts**

Dissertação de Mestrado

Orientador: Professor Associado Dr. Alberto do Amaral Júnior

UNIVERSIDADE DE SÃO PAULO

FACULDADE DE DIREITO

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ABSTRACT

BONÁCUL RODRIGUES, Guilherme. **State Immunity and Human Rights Before National and International Courts**. 2016. 239 p. Master's Dissertation — Faculty of Law, University of São Paulo, São Paulo, 2016.

State immunity has undergone major changes over time and is still a highly controversial and hotly debated topic. This study aimed to investigate the relationship between human rights and the norms governing state immunity. Located in different *geological* strata of international law, the clashes between the law of state immunity and human rights drew attention to the struggle among competing conceptions of international law. On one hand, being commonly linked to the principle of sovereign equality and to the need for stability in international relations, state immunity operates when a domestic court cannot exercise jurisdiction over the subject matter of a dispute because one of the parties is a foreign state. On the other, human rights have a different logic and require change and the realization of justice. The development of the body of human rights law allowed to call into question the grant of state immunity in cases in which human rights norms were violated. Legal questions arising from the relationship between state immunity and human rights have been put before domestic and international courts. Having examined the various judgments dealing with these issues, this study contends that the answers to the technical and dogmatic questions originating from the encounter between state immunity and human rights reproduce theoretical conflicts which happen—to use Koskenniemi's expression—at a 'higher level of abstraction'. The ICJ's judgment in *Jurisdictional Immunities of the State* may have crystallized a consensus according to which state immunity trumps the individual's right to reparation for serious violations of human rights. This consensus, however, is contingent and can be questioned through the language of international law.

Keywords: state immunity; human rights; international legal argumentation; international legal theory.

RESUMO

BONÁCUL RODRIGUES, Guilherme. **Imunidade Estatal e Direitos Humanos Perante Cortes Nacionais e Internacionais**. 2016. 239 f. Dissertação (Mestrado) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2016.

A imunidade estatal passou por grandes mudanças através dos tempos e ainda é um tema controverso e bastante debatido. A proposta deste estudo foi investigar a relação entre os direitos humanos e as normas que governam a imunidade estatal. Estando em camadas *geológicas* diferentes do direito internacional, os choques entre o direito da imunidade estatal e os direitos humanos chamaram atenção para a disputa entre concepções conflitantes de direito internacional. De um lado, sendo comumente relacionada ao princípio da igualdade soberana e à necessidade de estabilidade nas relações internacionais, a imunidade estatal opera quando uma corte não pode exercer jurisdição sobre o objeto de uma disputa em razão de uma das partes ser um estado estrangeiro. De outro, os direitos humanos têm uma lógica diferente e requerem mudança e a realização da justiça. O desenvolvimento do corpo dos direitos humanos permitiu questionar a concessão de imunidade estatal em casos em que normas de direitos humanos foram violadas. Questões jurídicas originadas do relacionamento entre imunidade estatal e direitos humanos foram levadas a várias cortes domésticas e internacionais. Tendo sido realizado o exame dos vários casos lidando com esse assunto, este estudo argumenta que as respostas para as questões técnicas e dogmáticas originadas do encontro entre imunidade de jurisdição e direitos humanos reproduzem conflitos teóricos que ocorrem—na expressão de Koskenniemi—em um ‘nível mais elevado de abstração.’ O julgamento da Corte Internacional de Justiça em *Imunidades de Jurisdição do Estado* pode ter cristalizado um consenso segundo o qual as normas que se relacionam com a imunidade estatal prevalecem sobre o direito individual de reparação por sérias violações de direitos humanos. Tal consenso, no entanto, é contingente e pode ser questionado por meio da linguagem do direito internacional.

Palavras-chave: imunidade estatal; direitos humanos; argumentação em direito internacional; teoria do direito internacional.

List of Abbreviations

ACHR	American Convention on Human Rights 1969
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CFI	Court of First Instance of the European Communities
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001
EC	European Community/European Communities
ECJ	Court of Justice of the European Communities
ECHR	European Convention on Human Rights 1950
ECSI	European Convention on State Immunity 1972
ECtHR	European Court of Human Rights
EU	European Union
FSIA	The United States' Foreign Sovereign Immunities Act 1976
GA	General Assembly of the United Nations
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
PCIJ	Permanent Court of International Justice
SC	United Nations Security Council
SIA	The United Kingdom's State Immunity Act 1978
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNCJISP	United Nations Convention on Jurisdictional Immunities of States and their Property 2004
VCLT	Vienna Convention on the Law of Treaties 1969

Publications

AJIL	American Journal of International Law
ASILP	American Society of International Law Proceedings
BIICL	British Institute of International and Comparative Law
BYIL	British Yearbook of International Law
CanLII	Canadian Legal Information Institute
CETS	Council of Europe Treaty Series
CUP	Cambridge University Press
EJIL	European Journal of International Law
HILJ	Harvard International Law Journal
HRLR	Human Rights Law Review
ICLQ	International and Comparative Law Quarterly
ILDC	International Law in Domestic Courts (OUP)
ILM	International Legal Materials
ILR	International Law Reports
JIDS	Journal of International Dispute Settlement
LJIL	Leiden Journal of International Law
MichJIL	Michigan Journal of International Law
NILR	Netherlands International Law Review
NwULRev	Northwestern University Law Review
NYIL	Netherlands Yearbook of International Law
NYILR	New York International Law Review
OUP	Oxford University Press
PYIL	Polish Yearbook of International Law
RCADI	Recueil des cours de l'Académie de droit international de La Haye
RGDIP	Revue générale de droit international public
RHDI	Revue hellénique de droit international
UNTS	United Nations Treaty Series

VandJTL	Vanderbilt Journal of Transnational Law
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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1 — INTRODUCTION

‘... [Q]uite apart from the elucidation of the applicable rules of State immunity, the doctrine provides a valuable case study of the present nature of the international community ... A study of State immunity directs attention to the central issues of the international legal system.’

Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 7

1.1 Proposal: a case study in international legal argumentation focusing on the relationship between state immunity and human rights

The initial intuition that inspired this research was that the study of the discourses on the relationship between, on one side, state immunity, and, on the other, human rights and *jus cogens* could deepen the understanding of how international legal argumentation works. The encounter of these very different branches of international law sheds light on a tension that does not relate solely to the normative conflicts with which international law theorists and practitioners are very familiar, but also to the foundational discourses of the discipline.

State immunity is, of course, traditionally deemed a consequence of the principle of sovereign equality and an expression of the maxim *par in parem non habet imperium* and variations thereof.¹ Its aims are usually considered to be the promotion of stability, of

¹ Malcolm Shaw, *International Law* (6th edn, CUP 2011) 697-701 and 715-718; Martin Dixon, *Textbook on International Law* (6th edn, OUP 2007) 174-178 and 184-185.

comity and of good relations between states.² On the other hand, human rights and *jus cogens* operate with a different logic, by according priority to the realization of justice.³ When one may trump the operation of the other, choices have to be made. Technical legal discussions and dogmatics will often disguise these choices, which are related to the more crucial issue of foundations. The answers to seemingly technical legal question are dependent on the conception one has of international law—they hide theoretical conflicts about what international law is and about how to find it out.⁴ In other words, these questions do not have objectively ascertainable answers. These answers will have different degrees of persuasiveness, which depend not only on their intrinsic characteristics, such as internal coherence, but also on other factors, such as the biases and assumptions of the audience.⁵

This study, therefore, does not presuppose there are correct answers to the various legal questions arising from the relationship between state immunity and human rights.⁶ Accordingly, I will not try to point out allegedly correct solutions to these questions.

Legal dogmatics has a central role in the research I propose to undertake. Through an analysis of the various judicial decisions dealing with the relationship between state immunity and human rights, I will try to identify the argumentative patterns, strategies and approaches of this legal debate. My aim is to recognize the theoretical conceptions of international law upon which these arguments and doctrines are founded. By doing it, I seek to demonstrate that the hegemonic outcome privileging state immunity over human rights can be questioned through the language of international law. As Koskeniemi argued, the theories that justify different interpretative constructions are external to the rules and to the facts themselves: there is not a theory which could ultimately solve

² Shaw (n 1) 697-701 and 715-718; Dixon (n 1) 174-178 and 184-185.

³ Alberto do Amaral Júnior, *Curso de Direito Internacional Público* (2nd edn, Atlas 2011) 657-658:

‘O direito internacional de coexistência compreendia, essencialmente, normas negativas, de caráter proibitivo, como a que veda a intervenção em um Estado estrangeiro. Corolário da soberania, a não intervenção é um dos pilares da ordem internacional de Westfália, retrato da consolidação do poder estatal.

‘O direito internacional de cooperação e o direito internacional de solidariedade reúnem normas positivas, comandos que se resumem a prescrever ações ao invés de opor omissões. Desejam mudança mais do que a estabilidade ao definir comportamentos, estipular metas e ao distribuir custos e benefícios. ...’

⁴ More generally, see Martti Koskeniemi, ‘Theory: Implications for the Practitioner’ in P. Allott et al (eds), *Theory and International Law: An Introduction* (BIICL 1991) and Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

⁵ See Andrea Bianchi, ‘Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond Germany v Italy’ (2013) 4(3) JIDS 457, 467.

⁶ Andrea Bianchi, ‘On Certainty’ <<http://www.ejiltalk.org/on-certainty/>> accessed 26 November 2015.

interpretative problems, and that is a fundamental condition of international legal practice.⁷ And, indeed, as put by David Kennedy, international law is a ‘practice of interminable discourse’.⁸

The present study is concerned with the immunity *ratione personae* of the state itself. There are other types of immunities, such as the immunity *ratione materiae* of state officials, the immunity *ratione personae* of heads of state, heads of government and foreign ministers, diplomatic and consular immunities, the immunities of international organizations and their officials etc. All these other immunities are governed by their own rules and principles and may also raise human rights issues. Nevertheless, for the purposes of this monograph, it was decided to focus on the immunity of the state itself.

1.2 Problem statement

The main questions underlying the research I propose to undertake are the following:

- 1) What is the impact of human rights on the law of state immunity and how has this issue been dealt with dogmatically in domestic and international courts and in scholarly writings on the subject?
- 2) What do the different answers to the problems arising from the relationship between state immunity and human rights reveal about the current competing theoretical conceptions of international law and about the practice of international legal argumentation?

1.3 Argument

When dealing with questions arising from the relationship between state immunity and human rights, domestic and international courts are faced with numerous questions. They have to decide whether state immunity is enshrined in customary international law or is only an expression of comity. The basis of state immunity as a rule of law and the

⁷ Martti Koskenniemi, ‘Theory: Implications for the Practitioner’ in P. Allott et al (eds), *Theory and International Law: An Introduction* (BIICL 1991) 44.

⁸ David Kennedy, *International Legal Structures* (Nomos 1987) 294.

principles governing it have to be ascertained. The legal nature of acts performed by states has to be determined. Courts have to consider whether violations of international human rights law and international humanitarian law fit the dichotomy between *acta jure imperii* and *acta jure gestionis* or if it is the case that this distinction is immaterial in human rights cases. They have to decide whether an exception to state immunity in respect of torts committed in the forum state crystallized into a customary international rule. Courts will also have to determine how the law of state immunity interacts with *jus cogens* norms. They will have to investigate if the violation of a *jus cogens* norm may be interpreted as a tacit waiver of the right to immunity. Issues of normative hierarchy will also arise. The question of whether *jus cogens* norms take precedence over the rules relating to state immunity will have to be answered. The problem of conflicting norms will also appear and courts will have to determine whether the grant of state immunity can be considered a violation of the individual's right of access to court. The list goes on.

The answers to these problems depend on theoretical assumptions about the nature of international law. These theoretical assumptions incorporate choices, which will also lead to different attitudes towards the ascertainment of the law and towards the role of the interpreter and of the institution in charge of applying the law. The answers provided are contingent and remain open to contestation. Following the decision of the ICJ in *Jurisdictional Immunities of the State*, it seems that the hegemonic view of the relationship between state immunity and human rights privileges the former to the detriment of the latter. Nevertheless, this is an outcome open to contestation through the language of international law.⁹

As emphasized by Hazel Fox and Philippa Webb in the quotation that is the epigraph of this chapter, state immunity is a subject of study that draws attention to the fundamental issues of international law.

⁹ See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 614-615 (footnotes omitted):

‘If international law is indeterminate, then there is no limit to the extent it can be used to justify (and of course, to criticize) existing practices. If there is a structural bias, then international law is always already complicit in the actual system of distribution of material and spiritual values in the world. From this perspective, the task for lawyers would no longer be to seek to expand the scope of the law so as to grasp the dangers of politics but to widen the opportunity of political contestation of an always already legalized world.
‘And yet, such contestation may also be carried out through the grammar of international law.
...’

1.4 Structure of the monograph

After these introductory notes, chapter 2 presents the main conceptual elements of the law of state immunity and the framework in which issues arising from the relationship between state immunity and human rights are embedded. Chapter 3, which is the longest chapter of this monograph, deals with the judicial practice relating to state immunity and human rights. This chapter breaks down the main cases in which questions concerning state immunity and human rights appear and maps the argumentative strategies employed by national and international courts and the theoretical conceptions upon which these arguments are made. Chapter 4 is dedicated to proposals put forth by scholars to better accommodate state immunity and human rights. They are outlined and briefly assessed. Chapter 5 expounds the core argument of this monograph, namely that the answers to the questions arising from the relationship between state immunity and human rights hide conflicts among theoretical conceptions of international law, which happen at a—to use Koskenniemi’s expression—‘higher level of abstraction’¹⁰. As such, any consensus reached remains open to contestation through the language of international law. Some general concluding thoughts are then offered.

¹⁰ See Koskenniemi (n 9) 3 (emphasis added):

‘In crucial doctrinal areas, treaties, customary law, general principles, *jus cogens* and so on conflicting views are constantly presented as “correct” normative outcomes. Each general principle seems capable of being opposed with an equally valid counter-principle. Moreover, these conflicting views and principles are very familiar and attempts to overcome the conflicts they entail seem to require returning to “theory” which, however, merely reproduces the conflicts at a *higher level of abstraction*.’

2 — CONCEPTS AND FRAMEWORK

‘The origin of the absolute theory of state immunity is usually traced to the maxim *par in parem non habet imperium*. It has been convincingly shown that law-trained minds are acutely vulnerable to maxims, especially those in Latin.’

Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff 1984) 94 (footnote omitted)

This chapter presents the discourses and the framework which underlie the debate on the relationship between state immunity and human rights. It starts by introducing the notion of state immunity and the discussion surrounding whether the starting point of an analysis of state immunity should be the principle of sovereign equality or the principle of adjudicatory jurisdiction.

Subsequently, alternative views about the basis of the law of state immunity are analyzed. In an article published in 1911, Dionisio Anzilotti advanced a refreshing perspective on the subject. Although he is considered one of the proponents of absolute immunity, Anzilotti dismissed the understanding according to which immunity is a manifestation of the sovereign equality and the independence of states. Hersch Lauterpacht, in an article published in 1951, boldly stated that there was no rule of law obliging states to grant immunity to other states and proposed the abolition of state immunity subject to a few exceptions. James Crawford, upon considering that the assertion *par in parem non habet jurisdictionem*, traditionally understood to underlie state immunity, is question-begging, sought to rearticulate its basis. He found three international rules consistent with the grant of state immunity (the international dispute settlement rule, the

domestic jurisdiction rule and the exhaustion of local remedies rule) and contended that the distinction between *acta jure imperii* and *acta jure gestionis* did not exist as matter of positive international law.

The following section gives a brief panorama of the current law of state immunity. It is analyzed how the restricted rule of state immunity came to be accepted. Studies contesting the disseminated notion that absolute immunity existed as a rule of international law are also presented. Next, problems relating to the distinction between *acta jure imperii* and *acta jure gestionis* are discussed. A cursory overview of the sources of the law of state immunity and a few remarks on the different issue of immunity from execution are then offered.

Finally, referring to Wolfgang Friedmann's work about the changing structure of international law and Joseph Weiler's metaphor of the geology of international law to explain the changes undergone by international law, the context in which questions involving state immunity and human rights come about is framed.

2.1 Discourses on the foundations of the law of state immunity

2.1.1 Notion and functions

As codified by the ILC in Article 5 of the UNCJISP, state immunity is the immunity enjoyed by a state in respect of itself ('jurisdictional immunity') and its property ('enforcement immunity') from the jurisdiction of the courts of another state.¹ Regarding the *raison d'être* of immunities, the Resolution adopted in 2009 in Naples by the IDI stated that

‘... [i]mmunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.’²

¹ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force) (2005) 44 ILM 803. See also Peter-Tobias Stoll, ‘State Immunity’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012).

² Institut de Droit International, Napoli Session ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (2009) Third Commission (Rapporteur: Lady Fox).

Sompong Sucharitkul asserted that there is an elusiveness to the concept of immunity due to its relativity. According to the Thai Ambassador, this relativity has at least three strands.³ In the first place, ‘... it does not impose an obligation to grant immunity beyond the extent recognized by customary international law.’⁴ Sompong Sucharitkul mentions that to accord immunity beyond the legitimate extent is not a violation of a rule of law⁵, but that is open to debate since it can be argued that it may conflict with the individual’s right of access to justice as protected, for instance, in Articles 6.1 and 13 of the ECHR and Articles 8 and 25 of the ACHR. Secondly, it is relative in the sense that it has a connection to the consent of the state against which legal proceedings are initiated.⁶ As Sucharitkul emphasizes, said consent can only be implied by a positive conduct—and once it is given, immunity disappears without leaving any trace of impeding the operation of jurisdiction.⁷ Thirdly, the Thai Ambassador adds that state immunity is only from jurisdiction—and not from substantive law, which applies independently of the exercise of jurisdiction.⁸ The responsibility of the state for its wrongful acts is engaged automatically.

The concept of immunity is not in itself problematic—in simple terms, state immunity exempts one state from the adjudicatory jurisdiction of another state in certain situations.⁹ Furthermore, there is a consensus that immunity is now restricted. Nevertheless, the foundations and scope of state immunity are still a matter of debate.

³ Sompong Sucharitkul, ‘Development and Prospects of the Doctrine of State Immunity — Some Aspects of Codification and Progressive Development’ (1982) 29(2) NILR 252, 253-254.

⁴ *ibid* 253.

⁵ *ibid* 254.

⁶ *ibid*.

⁷ *ibid*.

⁸ *ibid*.

⁹ See David Kennedy, *International Legal Structures* (Nomos 1987) 153-154 (footnotes omitted):

‘Like other jurisdictional discourses, sovereign immunity doctrine resolves conflicting claims to authority without overt reference to norms of substance. Somewhat simplified, the doctrine of sovereign immunity exempts one sovereign from the municipal jurisdiction of another in certain situations. Both sovereigns might claim authority over the situation. In any dispute, only one can win. The discourse of immunity delimits the situations in which the territorial jurisdiction of one sovereignty gives away to the authority of another. Except in a very recent strand of the discourse, this is done without reference to the relative merits of the substantive rules each would apply.

‘Immunity doctrine resolves not only a clash between two sovereign authorities but also between two aspects of the sovereignty of the territorial state. Typically, the foreign state has gotten in a wrangle with the citizens of the home state who seek relief in their court system. The court must then choose between the municipal rights of the citizens whose protection defines sovereign authority and the international rights of the foreign sovereign whose reciprocal respect defines sovereignty as well. When made in the rhetoric of sovereign immunity, this choice does not present a material hierarchy among various rights—comparing, for example, what the foreign state and the citizen require.’

These debates matter because different understandings on these subjects lead to different normative consequences.

2.1.2 Sovereign equality or adjudicatory jurisdiction?

In 1812, the US Supreme Court delivered its judgment in *The Schooner Exchange v McFaddon*. This case concerned the seizure of a private ship, which was ‘violent and forcibly taken ... out of the custody of the libellants’ under the orders of the Emperor of France.¹⁰ When said ship anchored on the port of Philadelphia due to ‘great stress of weather upon the high seas’, its former owners filed a libel claiming ownership of the vessel.¹¹ The claim was ultimately dismissed based on the immunity of the warship of a foreign sovereign. Chief Justice Marshall delivered the opinion of the Supreme Court. He identified a conflict of principles that to this day govern the discourses on the foundations of the law of state immunity: the principles of territorial jurisdiction and sovereign equality.¹²

Chief Justice Marshall referred to the principle of territorial jurisdiction in the following way:

‘The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.

‘All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.’¹³

The principle of sovereign equality, in its turn, was presented in the following manner:

¹⁰ *The Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116 (Supreme Court of the United States) <<https://supreme.justia.com/cases/federal/us/11/116/case.html>> accessed 26 November 2015, 117.

¹¹ *ibid* 117-119.

¹² See Lee M. Caplan, ‘State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory’ (2003) 97(4) AJIL 741, 745-748.

¹³ *The Schooner Exchange* (n 10) 136.

‘The world [*is*] composed of distinct sovereignties, possessing equal rights and equal independence ...

‘[*The*] full and absolute territorial jurisdiction, being alike the attribute of every sovereign and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.’¹⁴

Prima facie, the principle of territorial jurisdiction granted authority for the United States to adjudicate the dispute, in the same way that the principle of sovereign equality demanded the United States to abstain from exercising jurisdiction over the dispute.¹⁵ Since these principles are not in a hierarchical relationship, choosing one over the other would amount to a violation of one of the parties’ rights. Chief Justice Marshall did away with the conflict by resorting to the notion of tacit consent:

‘... [*The*] mutual benefit [*of distinct sovereignties being*] promoted by intercourse with each other and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

‘This consent may in some instances be tested by common usage and by common opinion, growing out of that usage.

‘... This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.’¹⁶

Marshall gave three examples of exceptions to the exercise of territorial jurisdiction: the immunity of the person of the sovereign, of foreign ministers and of armed forces (‘troops of a foreign prince’) that are allowed to enter the territory of the state.¹⁷

In order to uphold France’s immunity without encroaching the United States’ right to territorial jurisdiction, Chief Justice Marshall had to rely on a fiction by asserting the United States had tacitly consented to abstain from the exercise of jurisdiction.¹⁸ With a

¹⁴ *The Schooner Exchange* (n 10) 136-137.

¹⁵ See Caplan (n 12) 746-747 and Kennedy (n 9) 155-165.

¹⁶ *The Schooner Exchange* (n 10) 136-137.

¹⁷ *ibid* 137-140.

¹⁸ See also Kennedy (n 9) 155-165.

view to strengthening his argument, Chief Justice Marshall referred to an excerpt of Vattel's treatise on the law of nations. In the words of Vattel:

‘... it is impossible to conceive that the prince who sends an ambassador or any other minister, can have any intention of subjecting him to the authority of a foreign power: and this consideration furnishes an additional argument which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency: and thus there exists between the two princes a tacit convention which gives a new force to the natural obligation.’¹⁹

Chief Justice Marshall extended the same understanding to the situation of a foreign public armed ship that, in a situation of distress, is allowed to anchor in a foreign port:

‘[It is] impossible ... to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops or an asylum for his ships of war in distress should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

‘... [*A public armed ship*] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. *The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality.*’²⁰

Applying this understanding to the case at hand, Chief Justice Marshall concluded that

¹⁹ Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, edited and with an Introduction by Béla Kapossy and Richard Whitmore (Liberty Fund 2008) <<http://oll.libertyfund.org/titles/2246>> accessed 30 October 2015.

²⁰ *The Schooner Exchange* (n 10) 143-144 (emphasis added).

‘... the *Exchange*, being a public armed ship in the service of a foreign sovereign with whom the government of the United States is at peace, and having entered an American port open for her reception on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.’²¹

As pointed out by David Kennedy, the implications drawn out by Marshall could be reversed:

‘One could image the U.S. having consented to entry only upon the grounds that France submit to its jurisdiction and France having accepted this condition. The point is that the consensual rhetoric allows Marshall to make an argument which relies upon a view of the substantive limits of sovereignty seem independent of substantive choice.’²²

In *Schooner Exchange*, as previously analyzed, Chief Justice Marshall did away with the conflict between sovereign equality and territorial jurisdiction by resorting to implicit consent. As described by Caplan, these two principles gave rise to two different theoretical approaches to state immunity.²³ Adopting one approach or the other has great practical consequences, and more so as regards the relationship between state immunity and human rights. The first approach asserts that, since state immunity stems from the principle of sovereign equality, it is a fundamental right of the state, hence the maxim *par in parem non habet imperium*.²⁴ The second, that sovereign immunity is an exception to the principle of territorial jurisdiction.²⁵

Lee M. Caplan put forth the view that the second perspective is more compelling based on several grounds. Caplan makes the case that the true meaning of the principle of sovereign equality does not entail as a corollary the maxim *par in parem non habet imperium*. According to Caplan, sovereign equality means that states are equal in their *capacity* for rights.²⁶ Caplan argues that, in international law, there is a correspondence

²¹ *The Schooner Exchange* (n 10) 147.

²² David Kennedy (n 9) 164.

²³ Caplan (n 12) 748

²⁴ *ibid.*

²⁵ *ibid* 749.

²⁶ *ibid* 751-752.

between sovereign authority and national borders, ie ‘a state’s capacity for rights, like statehood itself, is linked to a defined geographical area’.²⁷ Accordingly,

‘... a state’s capacity for right stands at its apogee when applied in relation to its own territory and citizens.

‘... Conversely, by simple operation of the principle of sovereign equality, a state’s capacity for rights will diminish when in direct conflict with another state’s sphere of authority, i.e., the jurisdiction of that state over persons, property, and events in its national territory. ... [T]he same principle of sovereign equality that entitles the foreign sovereign to govern with respect to its own national territory now excludes it from exercising authority in another state’s territory. In such cases, the foreign state’s capacity for rights with respect to the forum state reaches its lowest ebb.’²⁸

This is why Caplan concludes that the maxim *par in parem non habet imperium* does not reflect properly how the international legal order works. Caplan contends that state immunity is a privilege, and not a right, and that the principle *par in parem non habet imperium* distorts the meaning of the principle of sovereign equality, which refers to a state’s capacity for rights.²⁹

Caplan also argues that the view of state immunity as a *fundamental state right* has been used to justify the absolute theory of state immunity. And absolute immunity is, on its turn, a myth. According to Caplan’s account, the exemption from jurisdiction generally accorded to states in the eighteenth and nineteenth century was not a result of the application of a blanket rule of state immunity, but of practical considerations:

‘In the eighteenth and nineteenth centuries, sovereigns interacted with one another in peacetime in a very limited way, predominantly through diplomatic intercourse or military cooperation. Consequently, inter-state disputes almost inevitably touched upon sensitive foreign policy matters. The law of state immunity reflected these sensitivities and the prevailing preference for resolving these disputes by diplomacy, rather than adjudication. Most likely, claims against states in respect of private conduct—though technically not barred from foreign adjudication—were also handled diplomatically in accordance with the prevailing state-centric paradigm. Thus, one cannot equate the fact that courts did not exercise jurisdiction

²⁷ Caplan (n 12) 752.

²⁸ *ibid* (footnotes omitted).

²⁹ *ibid* 753.

over foreign states in this early period with a general prohibition against doing so on account of the principle of sovereign equality.³⁰

Caplan considers that the advent of the restrictive theory of state immunity is also at odds with the *fundamental right* approach to state immunity. In Caplan's view, 'if state immunity were a fundamental state right, it would never be susceptible to theoretical division along public/private lines.'³¹

The perspective according to which adjudicatory jurisdiction ought to be the starting point—and state immunity, an exception derived from the forum state's waiver of adjudicatory jurisdiction—is, according to Caplan, not only a more 'persuasive and realistic' explanation of the doctrine of state immunity, but also a more 'sensible international policy'.³² As he explains:

'States understood to possess a fundamental right to immunity would be permitted to act with impunity. Carried to the logical extreme, this notion would mean that foreign states acting in their foreign capacity could never be held accountable by the forum state. On the other hand, if state immunity is considered a practical courtesy, capable of being modified (or even withdrawn, if need be), then a more balanced relationship is maintained between the foreign state and the forum state. A foreign state will be more cautious about treading on the interests of other states, fearing that unacceptable conduct will result in the withdrawal of immunity and, in turn, the review of such conduct by domestic courts.'³³

Although Caplan contends that state immunity ought to be seen as a 'practical courtesy' and as a privilege, later in his article he concedes that '... the practice by states of waiving adjudicatory jurisdiction to create immunity privileges has created binding norms through the development of international custom as to only a core body of state conduct.'³⁴ According to him these binding norms do not comprehend 'state conduct ... that undermines the aim and purpose of the international legal order.'³⁵ In sum, Caplan proposes a *functional* approach to state immunity, according to which immunity should be accorded only when it helps promoting the interests of the community of states.

Rosalyn Higgins is also one of the proponents that sovereign immunity should be

³⁰ Caplan (n 12) 754.

³¹ *ibid.*

³² *ibid* 754-755.

³³ *ibid* 755.

³⁴ *ibid* 771.

³⁵ *ibid.*

seen as an exception to the principle of jurisdiction.³⁶ She pointed out that the concepts that had been used to justify the absolute doctrine of state immunity (the equality and independence of states, the dignity of the sovereign, and the comity of nations), given the shift to the restrictive doctrine, do not make much sense any longer.³⁷ In her view, the equality of nations ‘... now requires that States should not, by choosing to involve themselves in the field of trade, unilaterally be entitled to extended immunities that other States, which leave trade to the commercial sector, do not claim.’³⁸ Accordingly, she maintains that the concept of the dignity of the sovereign has now changed and that it cannot be understood as contrary to the dignity of the sovereign to submit to the rule of law.³⁹ As regards the principle of the comity of nations, Rosalyn Higgins highlighted that it ‘... can only emphasize the important fact that the circumstances in which immunity will not be granted or withheld should be founded on international consensus, but cannot otherwise give guidance as to how the distinction is to be operated.’⁴⁰

Although the critiques presented by Caplan and Higgins are powerful, the orthodox view of state immunity still seems to consider it as a corollary of the principle of sovereign equality, which should then function as the starting point of analysis. As Lorna McGregor pointed out,

‘[i]n civil actions brought against a foreign state or its officials, courts tend either to focus on the availability of immunity without first addressing the jurisdictional basis for the case or to conflate both jurisdiction and immunity into a simultaneous and overlapping analysis. Such an approach suggests that immunity constitutes the primary rule instead of reflecting its exceptionality which, but for the foreign state’s involvement, would enable the courts of the forum state to exercise jurisdiction.’⁴¹

This is reflected in the approach adopted by most codifications of the law of state immunity (the UNCJISP 2004, the ECSI 1972, the FSIA 1976, the SIA 1978), which employed the technique of establishing a general rule of immunity and providing for the exceptions.

³⁶ Rosalyn Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’ in Rosalyn Higgins, *Themes and Theories; Selected Essays, Speeches and Writings in International Law* (Vol 1, OUP 2009) 376.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.* 377.

⁴¹ Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’ (2008) 18(5) EJIL 903, 914.

2.1.3 Other views

2.1.3.1 Dionisio Anzilotti

In an article published in 1911, Anzilotti contended that states had the right to jurisdictional immunity but for a few exceptions. He did so, however, by resorting to a different basis than that relied upon by most proponents of the absolute theory of state immunity.

Anzilotti's starting point is that there is a distinction between the recognition of a state as a subject of international law and the recognition of the domestic legal personality of a foreign state. The former is an act of international law, whilst the latter is an act of domestic law.⁴² The recognition of the legal personality of a foreign state under domestic law is, in Anzilotti's perspective, a manifestation of the power of *imperium* of the forum state. As such, the foreign state enters this relationship as a subject of the sovereign power of the forum state. As put by Anzilotti:

‘...[L]o Stato ... può entrare in rapporti di diritto che si svolgono nel seno di un'altra comunità giuridica statale solamente come un membro di questa comunità, sia pur temporaneo e a certi effetti soltanto; e quindi come sottoposto al potere che v'impera. Per tal via appunto diviene possibile che le leggi di uno Stato accordino diritti ed impongano doveri ad un altro Stato, comportandosi in confronto a lui come agli altri membri della comunità e si formano fra gli Stati medesimi delle relazioni giuridiche, che metton capo alla loro capacità di diritto pubblico o privato, e non sono quindi nè possono essere regolate dal diritto internazionale.’⁴³

Anzilotti posits that the question that has to be answered is whether a state, as a subject of legal relations under the domestic law of another state, has an international right to jurisdictional immunity:

‘Invece di discutere se lo Stato, per la natura sua e per le qualità di cui è investito, può andar sottoposto alla giurisdizione di un altro Stato, si deve partire dal principio che lo Stato può entrare in rapporti giuridici rispetto ai quali è sottoposto alla potestà di un altro Stato, e vedere

⁴² Dionisio Anzilotti, ‘L'esonazione degli Stati stranieri dalla giurisdizione (saggio di critica e di ricostruzione)’ in Dionisio Anzilotti, *Opere* (Vol 2, CEDAM 1960) 131.

⁴³ *ibid* 135 (footnotes omitted).

se, relativamente ad essi, esista un principio di diritto internazionale che obblighi gli Stati ad astenersi dall'esercitare quella giurisdizione che altrimenti avrebbero ...'⁴⁴

In Anzilotti's perspective, therefore, immunity is a right enjoyed by the foreign state as subject to the authority of another state, which grants immunity as a result of the duty to do so under international law. In other words, the claim a foreign state has to immunity is founded on customary international law, but the foreign state does not enjoy it as a subject of international law, but as a legal person under the domestic law of the forum state. In Anzilotti's words:

‘Il fatto che l'immunità di giurisdizione non è la conseguenza logica dell'eguaglianza degli Stati propria dei rapporti internazionali, ma una prerogativa concessa dall'autorità statale ad un ente subordinato, spiega l'esistenza di limiti dell'immunità stessa, ossia di casi nei quali uno Stato trovasi effettivamente sottoposto alla potestà giurisdizionale di un altro Stato: dove, per qualsiasi motivo, la concessione vien meno, rimane integro il rapporto di subordinazione caratteristico delle relazioni giuridiche di cui si parla, rapporto che la concessione restringe o modifica nelle sue pratiche conseguenze, ma non distrugge certamente né nega.

‘Sarebbero invece inesplicabili questi casi se l'esenzione dalla giurisdizione fosse conseguenza ed applicazione dei principi di eguaglianza ed indipendenza degli Stati, perché non è concepibile potestà d'impero sopra un ente perfettamente eguale e completamente autonome, qualunque sia l'indole e la natura del fatto per cui quella potestà dovrebbe esercitarsi. Si l'eguaglianza e l'indipendenza degli Stati escludono l'esercizio della giurisdizione dell'uno in confronto all'altro quando si tratta di rapporti contrattuali o da fatto illecito, non si può ammettere che lo stesso principio non valga anche per le controversie relative a beni immobili: ammettere la subordinazione anche in un sol caso vuol dire ammetterne la possibilità, ossia negare il significato attribuito un momento prima alla posizione reciproca degli Stati.’⁴⁵

Anzilotti, therefore, dismisses the understanding according to which state immunity is a manifestation of the equality and independence of states under international law. To Anzilotti, in matters of immunity, the equality and independence of states is immaterial, since immunity is granted to the foreign state when it appears as subject of legal relations under domestic law, and not under international law, although the concession of immunity is done to fulfill an obligation under international law: immunity is, then, ‘... un diritto che lo Stato accorda a subietti subordinati, per adempire un dovere impostogli dalle norme

⁴⁴ Anzilotti (n 42) 144-145 (footnotes omitted).

⁴⁵ *ibid* 165 (footnotes omitted).

giuridiche internazionali.’⁴⁶ At the time Anzilotti wrote his article, he found ‘... in modo non dubbio la persuasione che uno Stato non possa, fuori di certi casi eccezionali ben determinati, essere obbligato a sottostare alla giurisdizione di un altro Stato’⁴⁷, and this is the reason why he is considered one of the proponents of absolute immunity.

Anzilotti’s attempt to reconstruct the foundations of the law of state immunity is interesting because, although he found at the time there were few exceptions to the obligation states have to accord immunity to a foreign state, he did so on the basis of the existence of customary international law requiring it, and not on the basis of the sovereign equality and independence of states. If it was the case that state immunity derived from the sovereign equality and independence of states, then that would not account for the existence of some restrictions to the rule, as demonstrated by the widely recognized exception to state immunity as regards immovable property owned by the foreign state in the territory of the forum state.

2.1.3.2 Hersch Lauterpacht

Lauterpacht, in an article published in 1951, proposed that the position of foreign states should be assimilated to that of organs of the forum state before its courts.⁴⁸ He rejected the restrictive doctrine of state immunity because, according to him, the distinction between *acta jure imperii* and *acta jure gestionis* could not ‘... accurately or profitably be accepted as the basis of future law.’⁴⁹ A closer look will be taken at Lauterpacht’s critique of this distinction in a later section of this chapter.

Lauterpacht expressed the view according to which there was ‘no rule of international law which obliges states to grant jurisdictional immunity to other states’.⁵⁰ As put by Lauterpacht, assuming that the duty of municipal courts to abstain from exercising jurisdiction over foreign states stems from the independence and equality of nations,

‘[i]t is not explained why, if immunity from jurisdiction is a rule of international law, it should not apply to acts *jure gestionis*; or, assuming that absolute immunity from jurisdiction was originally a rule of international law, when and how states consented to a limitation of that rule

⁴⁶ Anzilotti (n 42) 185.

⁴⁷ *ibid* 154.

⁴⁸ Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 BYIL 220, 226

⁴⁹ *ibid* 227.

⁵⁰ *ibid* 228.

in matters *jure gestionis*.

‘... [N]o legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts concluded or torts committed in the territory of the state assuming jurisdiction. On the contrary the sovereignty, the independence, and the equality of the latter are denied if the foreign state claims as a matter of right—as a matter of international law—to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that state. The absence of any denial of independence or equality appears even more clearly when the state exercising jurisdiction over a foreign state submits itself, within the same sphere, to the full operation of its own law without claiming any privileged status or immunity.’⁵¹

Following Lauterpacht’s line of thought, considering that nowadays the state is subject to the full operation of its own law before its courts, it would actually be more consonant with the principles of equality and independence of states if domestic courts could exercise jurisdiction over foreign states,

‘... so long as the state exercising jurisdiction merely applies its ordinary law ... and so long as it applies it in an unobjectionable manner not open to the reproach of a denial of justice or of the disregard of the legislative and administrative sovereignty of the foreign state.’⁵²

Indeed, the *rationale* for attributing immunity to foreign sovereigns followed from the traditional immunity of the sovereign—considered *legibus solutus*—before his own courts. Now that the state is subject to the jurisdiction of its own courts, it appears illogical that foreign states are exempt from it.

As Lauterpacht articulated:

‘A state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards and on a footing of equality with the state within which it concludes a contract or commits a tort. The dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law. As English judges have occasionally observed, the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it.’⁵³

⁵¹ Lauterpacht (n 48) 228-229.

⁵² *ibid* 229.

⁵³ *ibid* 231-232 (footnotes omitted).

In the light of these considerations, Lauterpacht proposed the abolition, subject to some exceptions, of state immunity by an international agreement or unilateral legislative action of the states that subject their organs to the jurisdiction of their own courts.⁵⁴ Lauterpacht put forth four exceptions to his proposal of abolition of state immunity.⁵⁵ Firstly, he considered that immunity ought to be maintained as regards legislative acts of foreign states and measures taken in pursuance thereof. Secondly, Lauterpacht maintained that immunity should remain in respect of executive and administrative acts of the foreign state that take place in its territory. Thirdly, Lauterpacht stated that immunity should continue as regards contracts which, by virtue of the rules of private international law, are not within the jurisdiction of the courts of the forum state. Lastly, Lauterpacht considered that diplomatic immunities should be maintained and that vessels and aircrafts belonging to the armed forces of a foreign state should not be subject to an action *in rem*, seizure, or arrest.

2.1.3.3 James Crawford

In an article published in 1984, Crawford maintained that the ‘... simple assertion, *par in parem non habet jurisdictionem*, which is said to underlie the principle of jurisdictional immunity, is itself question-begging.’⁵⁶ He also asserted that the distinction between *acta jure imperii* and *acta jure gestionis* does not exist as a matter of positive international law, given the lack of consensus and of ‘inherent plausibility’.⁵⁷ He sought to rearticulate the basis of state immunity as a rule of international law with a view to differentiating between immune and non-immune transactions under international law. Crawford found three rules underlying the notion of state immunity: (i) the international dispute settlement rule; (ii) the existence of matters that international law refers exclusively or primarily to the competence of states (ie, the domestic jurisdiction rule); and (iii) the exhaustion of local remedies rule.⁵⁸

The international dispute settlement rule establishes that a state ‘... cannot be

⁵⁴ Lauterpacht (n 48) 237.

⁵⁵ *ibid* 236-241.

⁵⁶ James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1983) 54(1) BYIL 75, 77.

⁵⁷ *ibid* 88-89.

⁵⁸ *ibid* 78-85.

required to submit to international adjudication without its consent.’⁵⁹ As stated by the ICJ in *Monetary Gold Taken from Rome*: ‘... [there is] a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.’⁶⁰ Said rule obviously does not apply directly to municipal courts, but, as stated by James Crawford,

‘... [it] provides strong support by analogy, if not directly, for a rule of foreign State immunity in the rather limited areas governed by that jurisdictional rule.

‘... [A]t least in limited circumstances, the international dispute settlement rule indicates, if it does not require, the adoption of a rule of deference by a municipal court, and that this rule is most coherently treated as an immunity *ratione personae* of foreign States from adjudicatory jurisdiction.’⁶¹

In this perspective, as Crawford asserts, the domestic expression of the international dispute settlement rule is that, regarding transactions that are not within the jurisdiction of the forum state under international law, domestic courts are not in a position to assert jurisdiction over a state that did not consent to it.⁶² Crawford adds that the international dispute settlement rule does not cover matters left to the jurisdiction of the forum state, hence it has a limited scope.⁶³

Following Crawford’s line of thought, the translation of the international dispute settlement rule into a foreign state immunity rule is aided by the distinction between international and domestic jurisdiction and by the rule of exhaustion of local remedies.⁶⁴

Domestic jurisdiction refers to ‘... those transactions—typically, transactions within the community of a particular State—which international law refers primarily or exclusively to the competence of that State.’⁶⁵ Crawford highlights that states are therefore autonomous to matters under their domestic jurisdiction—and such autonomy would be

⁵⁹ Crawford (n 56) 80 (footnotes omitted).

⁶⁰ *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary question) [1954] ICJ Rep 19, 32.

⁶¹ Crawford (n 56) 81-82.

⁶² *ibid* 80-81.

⁶³ *ibid* 81.

⁶⁴ *ibid* 82-84.

⁶⁵ *ibid* 83. As added by him:

‘Examples include the conferment of nationality on persons sufficiently connected with the State, the disposition of armed forces within the jurisdiction, and the exercise of legislative power over nationals resident within the State. For the most part such matters involve special powers exercised by the State or special relationships of State nationals with the State.’

incompatible with the exercise of authority by foreign courts over these issues.⁶⁶

The exhaustion of local remedies rule establishes that parties aggrieved by a foreign state in its territory have to exhaust the local remedies available in the state in question before asking their own state to exercise diplomatic protection.⁶⁷ As added by Crawford, although it may seem excessively restrictive, the exhaustion of local remedies rule does not apply to all disputes between foreign states and private parties (eg, disputes arising outside the defendant state's jurisdiction, disputes in which a local remedy is unavailable or futile etc.).⁶⁸ According to Crawford,

‘... the exhaustion of local remedies rule is, to say the least, consistent with a restricted immunity rule allowing immunity to a defendant State with respect to transactions between that State and private persons in its territory. The analogy is reinforced by the fact that both rules can be waived.’⁶⁹

As previously discussed, in Crawford's view, there are three rules of the international legal system that are consistent with the attribution of immunity *ratione personae* to a foreign state and that may even require domestic courts to do so: the international dispute settlement rule, the existence of transactions that international law refers to the competence of the state (the domestic jurisdiction rule), and the exhaustion of local remedies rule. As adverted by Crawford, these rules do not require domestic courts to decline jurisdiction whenever a state is party to a dispute—on the contrary, they leave room for the assertion of domestic jurisdiction in many (or even most) cases.⁷⁰

In Crawford's analysis, the operation of these three rules does not support a distinction between *acta jure imperii* and *acta jure gestionis*. Also, lacking an international consensus in respect of the scope of *acta jure gestionis*, Crawford concludes that this distinction ‘... is radically defective and cannot claim to represent general international law.’⁷¹ As put by him

‘... [A]lthough there has been a tendency to assert the existence of a rule of restrictive immunity predicated on a distinction between ‘private’, ‘commercial’ or ‘non-governmental’

⁶⁶ Crawford (n 56) 83.

⁶⁷ *ibid* 84

⁶⁸ *ibid*

⁶⁹ *ibid*.

⁷⁰ *ibid*.

⁷¹ *ibid* 89.

acts of States and their ‘public’, ‘non-commercial’ or ‘governmental’ acts there is in international practice no consensus on any such distinction. Indeed, the better view is that, in the absence of a worked-out distinction between ‘public’ and ‘private’ law as part of the *lex fori*, such a distinction is incoherent. Nor does it reflect the actual distinctions drawn between immune and non-immune transactions in any of the recent international texts or municipal Acts. The better approach is to deal with the specific categories or classes of case that have arisen in practice and to elaborate specific rules for each such category, taking into account the reasons for extending immunity or asserting jurisdiction in that context. This is essentially the approach adopted in the United Kingdom Act and its counterparts, in the European Convention and (though to a rather lesser extent) in the United States and Canadian Acts. In this process it is necessary to have regard to the underlying reasons for extending immunity *ratione personae* to foreign States: in particular, the immunity from local jurisdiction of States with respect to transactions essentially within their domestic jurisdiction, or governed directly by the international dispute settlement rule. Of course it is also necessary to respect specific immunities established in international practice: in particular, the immunities of diplomatic and consular personnel and premises and of foreign public ships from arrest. Considerations of comity and reciprocity are also relevant, though the specific guidance they provide is, as usual, limited.

‘... Despite statements to the effect that international law does not allow local jurisdiction to be exercised over foreign States in respect of their acts of sovereign authority, it is suggested that this is not an accurate or comprehensive statement of the relevant principles. It has already been suggested that the various distinctions drawn between immune and non-immune transactions are the result not of a single rule or principle but of a balance of principles and considerations. It follows that, provided local legislation reasonably reflects that balance, no further safeguard or prohibition is required.’⁷²

2.2 The current scenario of the law of state immunity

2.2.1 The acceptance of the restrictive theory

The standard textbook narrative on the history of the law of state immunity, as exemplified by Peter-Tobias Stoll, links its development with that of sovereignty and the territorial state.⁷³ In the Absolutist state, sovereignty was embodied in a person.⁷⁴ As Malcolm Shaw describes, as a result of this ‘mystique’, sovereigns could not be subject to suits in the courts of their countries and, accordingly, they could also not be made subject

⁷² Crawford (n 56) 114-115 (footnotes omitted).

⁷³ Stoll (n 1) para 4.

⁷⁴ *ibid* para 5; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 697-698.

to the jurisdiction of foreign courts.⁷⁵ Stoll explains that, with the end of Absolutism and the emergence of states as separate entities (in the sense that the state and sovereignty are no longer embodied in a person), state immunity starts to be considered separately.⁷⁶

The increasing engagement of the state in economic activities would have then started a movement from the absolute immunity approach, ‘... whereby the sovereign was complete immune from foreign jurisdiction in all cases regardless of circumstances’⁷⁷, to the restrictive approach, ‘... under which immunity was available as regards governmental activity but not where the state was engaging in commercial activity.’⁷⁸

The idea that at some point absolute state immunity was a binding rule of international law has been contested. Byers sustains that, in international law, there was no binding rule as regards state immunity before the acceptance of the restricted rule of state immunity. As explained by him:

‘... history suggests that there was no general rule regulating State immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law, and that a mistaken belief in such a pre-existing rule served to retard that later development.

‘Belgian courts were applying restrictive immunity as early as 1857, while Italian courts were doing so in 1886, Swiss courts in 1918 and Austrian courts in 1919. Argentine and French courts distinguished between acts *jure imperii* (of government) and acts *jure gestionis* (of a commercial character) from 1924, Egyptian courts from 1926, Greek courts from 1928, Irish courts from 1941 and German courts from 1949.

‘During this period, courts in common law States were applying absolute immunity and continued to do so until legislative changes were introduced during the 1970s and 1980s. In the United Kingdom, for example, it was not until 1977 that Lord Denning and Justice Shaw controversially applied restrictive immunity in direct contradiction to clear precedents in English common law.’⁷⁹

Byers’ findings that in some jurisdictions there was a mistaken belief in the existence of an absolute rule of state immunity in international law is consistent with the conclusions arrived at by Gamal Moursi Badr, who, upon a close analysis of the early case-law in the United States and the United Kingdom, stated the following:

⁷⁵ Shaw (n 74) 698.

⁷⁶ Stoll (n 1) paras 4, 5 and 6.

⁷⁷ Shaw (n 74) 701.

⁷⁸ *ibid.*

⁷⁹ Michael Byers, *Custom, Power and the Power of Rules* (CUP 2004) 111-112 (footnotes omitted).

‘... [T]he early decisions from the nineteenth century often cited in connection with state immunity do not really relate to the subject as we know it today but rather to the particular immunities of those physically transposed elements of the power structure of the foreign state [*foreign ships and the person of the foreign sovereign*], immunities which are distinguishable from what is now being debated in certain forums and being regulated by domestic legislation in certain countries under the heading of state immunity. It is nevertheless interesting to note that the said early decisions did distinguish ... between a foreign sovereign’s public acts on the one hand and his private acts on the other, stating in no uncertain terms that the latter enjoyed no immunity from the jurisdiction of the local courts. The continued citation of those early decisions in support of the absolute theory of state immunity is therefore a curious phenomenon, due perhaps to a hasty perusal of those decisions or to second hand knowledge of them.’⁸⁰

As pointed out by Byers, in the United Kingdom, there were judicial expressions of dissatisfaction with absolute immunity and the restrictive rule was already being applied in some instances when the SIA came about in 1978, codifying the restrictive rule of state immunity.⁸¹

In the United States, the process towards the adoption of restricted immunity was different. In *Altmann v Republic of Austria*, Justice Stevens, who delivered the opinion of the Court, took the opportunity to contextualize the evolution of the application of state immunity in the US until the enactment of the FSIA in 1976.⁸² Justice Stevens considered that the main source of sovereign immunity jurisprudence in the US was Chief Justice Marshall’s opinion in *Schooner Exchange*.⁸³ He added that the practice of the Supreme Court, in the light of ‘... Chief Justice Marshall’s observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement’, was to consistently defer to the decisions of the Executive on whether to exercise jurisdiction over actions against foreign states and their instrumentalities.⁸⁴ In 1952, there was a change of policy in the State Department, which decided to adopt, as enunciated in the ‘Tate letter’,

⁸⁰ Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff 1984) 18-19.

⁸¹ Byers (n 79) 111-112.

⁸² Byers also presents an account of the practice regarding state immunity in the United States. See Byers (n 79) 112-113.

⁸³ *Republic of Austria v Altmann* (2004) (03-13) 541 US 677; 327 F.3d 1246 (Supreme Court of the United States) <www.law.cornell.edu/supct/html/03-13.ZO.html> accessed 30 October 2015.

⁸⁴ *ibid.* It is interesting to note that Chief Justice Marshall did not employ the words ‘grace’ or ‘comity’ in the opinion he delivered for the Supreme Court in *Schooner Exchange*. See *Schooner Exchange* (n 10).

the restrictive theory of state immunity.⁸⁵ Justice Stevens added that the ‘Tate letter’ had little impact on federal courts: they continued to defer to the Executive’s opinion, which, on its turn, was inconsistent in respect of the restrictive theory of immunity due to political considerations.⁸⁶ At the same time, when courts had to determine whether state immunity existed without relying on a suggestion of the State Department, they did not apply uniformly the existing criteria.⁸⁷ It was for these reasons that Congress adopted the FSIA in 1976, which ‘[codified], as a matter of federal law, the restrictive theory of sovereign immunity ... and [transferred] primary responsibility for immunity determinations from the Executive to the Judicial Branch’.⁸⁸ The FSIA was meant to be a ‘comprehensive statute containing a “set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.”’⁸⁹

Byers points out the following reasons that justify the difference of attitude between common law and civil law countries as regards openness to the restrictive theory of state immunity:

‘First, common law courts remained bound by the doctrine of crown immunity (‘sovereign immunity’ in the United States) long after civil law courts began to distinguish between immune and non-immune acts of their own sovereigns. Secondly, courts in common law

⁸⁵ *Republic of Austria v Altmann* (n 83). The ‘Tate letter’ (‘Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments’, Letter to US Acting Attorney-General, 19 May 1952 (1952) 26 *US Department of State Bulletin* 984) posited the following:

‘It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. ... The reasons which obviously motivate State trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity. ‘It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.’

⁸⁶ *Republic of Austria v Altmann* (n 83).

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid* (footnotes omitted).

systems felt bound by the doctrine of *stare decisis* not to abandon their earlier applications of absolute immunity. Thirdly, common law States had a less acute interest in the development of the doctrine of restrictive immunity than most civil law States. The common law States were either large, such as the United States, or part of the former British Empire—with its internal cohesion and historic, political and commercial ties. By contrast, the smaller civil law trading States of continental Europe, such as the Netherlands and Belgium, were dependent to a far greater extent on trade between fully sovereign States.

‘However, it seems that the principle of legitimate expectation also played a role. In every common law jurisdiction, absolute immunity was viewed as the previously applicable rule of customary international law. Consequently, the changes in national laws were regarded as responses to a change in the existing customary rule rather than as responses to the development of a new rule, even though it is apparent, from the earlier developments in civil law jurisdictions, that a customary rule of absolute State immunity could not have existed at any date after the very early twentieth century.’⁹⁰

2.2.2 Problems related to the distinction between *acta jure imperii* and *acta jure gestionis*

According to Jasper Finke, the distinction between acts *jure imperii* and acts *jure gestionis* embodies the ‘capitalist conception of the liberal state’ and its ‘inherent distinction between private and public’: economic transactions would have a private character, thus they would not be protected by the veil of state immunity.⁹¹

As posited by James Crawford, what is clear regarding state immunity is that it is not absolute—it is restricted. At the same time,

‘... we lack a rationale, a connected explanation, for this state of affairs, an articulated set of criteria which would enable us to draw the distinction between cases in which States or their transactions are entitled to immunity from the jurisdiction of other States as a matter of international law and cases in which they are not.’⁹²

Indeed, this lack of rationale for the distinction between acts *jure imperii* and *jure gestionis* resulted in inconsistent state practice. Lauterpacht, in 1951, made the following observations:

⁹⁰ Byers (n 79) 114 (footnotes omitted).

⁹¹ Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2011) 21(4) EJIL 853, 865.

⁹² Crawford (n 56) 75.

‘Courts of different countries—and occasionally courts of the same country—have treated the same kind of activity in different ways. Thus the operation of railways by the state has been considered by some courts to be an activity of a public-law character; it has been regarded by others as partaking of the nature of an undertaking of a private-law nature.

‘... Moreover, it is no longer generally accepted that the economic activities of the state—such as state management of industry, state buying, and state selling—are necessarily of a purely ‘private-law nature’; that they are ‘*jure gestionis*’; and that in engaging in them a state acts like a private person. In these and similar cases ostensibly removed from the normal field of its political and administrative activities, the state nevertheless acts as a public person for the general purposes of the community as a whole.’⁹³

Having analyzed the practice of many state on many different issues, Lauterpacht concluded that ‘... the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis.’⁹⁴ Jasper Fink, in an article published in 2011, maintained that there is still a lack of consistency in state practice.⁹⁵ This is why he concluded that foreign state immunity as a rule of customary law is characterized by an agreement between states concerning the concept itself and by substantial disagreement on detail and substance, ie states are bound to respect foreign sovereign immunity, but on a high level of abstraction.⁹⁶

The most common criteria for distinguishing between acts *jure imperii* and *jure gestionis* refer either to the purpose or to the nature of the act in question. The purpose test, as pointed out by Rosalyn Higgins, has been generally rejected.⁹⁷ It is unsatisfactory precisely because of the reason indicated by Lauterpacht: all acts of a state ultimately have a public purpose of some sort.⁹⁸ The nature test is not entirely satisfactory either. A classical formulation of the nature test is found on a course André Weiss, a former judge at the extinct PCIJ, taught at the Hague Academy in 1923. The excerpt where he explains it is long but worth reproducing:

‘Il paraît beaucoup plus sûr d’admettre que la nature des actes accomplis par l’État étranger doit seule être prise en considération, lorsqu’il s’agit d’accorder ou de dénier aux tribunaux des autres pays le pouvoir d’en connaître. Par là, nous rendons inutiles les distinctions que je signalais tout à l’heure; le juge n’a à se livrer à aucune recherche d’intention; et sa tâche

⁹³ Lauterpacht (n 48) 222 and 224.

⁹⁴ *ibid* 224.

⁹⁵ Finke (n 91) 871.

⁹⁶ *ibid* 871.

⁹⁷ Higgins (n 36) 372.

⁹⁸ Lauterpacht (n 48) 224.

devient extrêmement facile, puisqu'elle se ramène à une simple constatation de fait : Un acte émané d'un gouvernement étranger vient-il à lui être présenté ? Pour savoir s'il doit en retenir l'examen, il n'a qu'une chose à se demander : l'acte litigieux est-il, par sa nature, tel qu'en aucun cas il ne puisse être fait par d'autres que par l'État ou au nom de l'État : dans ce cas, c'est un acte de puissance publique, c'est un acte politique, qui ne pourrait, sans atteinte à la souveraineté de cet État, être soumis au contrôle d'une autorité étrangère. L'incompétence s'impose. Au contraire, l'acte est-il de la nature de ceux que toute personne privée pourrait accomplir, tel qu'un contrat, tel qu'un emprunt, cet acte, quel que soit le but qui lui a été assigné, quel que soit le dessein qu'il poursuit, est un acte privé, et le tribunal étranger saisi sera compétent pour en connaître. Et nous en concluons que la compétence de ce tribunal ne pourra être déclinée, même si le contrat litigieux affecte un caractère administratif, s'il réalise par exemple l'acquisition d'un navire de guerre pour le compte de l'État ou encore la commande de munitions et d'armes pour les arsenaux.⁹⁹

The test proposed by Weiss is, therefore, whether an individual could participate or not in a given transaction, regardless of its object. The test is simple, but it raises many difficulties. As Lauterpacht criticizes, following the nature test, contracts made by the state for the purchase of shoes for the army, or of a warship, or of foodstuff necessary for the maintenance of the national economy would be held not immune from jurisdiction because they are contracts and individuals can conclude contracts.¹⁰⁰ In Lauterpacht's view, the application of the nature test as proposed by Weiss would ignore the reality that individuals, after all, do not purchase shoes for their armies and do not buy warships either.

Gamal Moursi Badr criticized the approach according to which the test to differentiate between public and private acts is whether an individual could also perform the foreign state's disputed act. According to him, differences among legal orders make this test impracticable.¹⁰¹ Badr considers the employment of the *lex fori* to the characterization of the act in question as public or private is also not ideal for the same reasons.¹⁰² Nevertheless, he maintains there are four 'intrinsic, objective and readily applicable' criteria to make the distinction between public and private acts: the formation of the act, the parties, the contents and the sanctions attaching to it.¹⁰³ As regards the formation, he contends that a public act can be performed by the state alone, without any

⁹⁹ André Weiss, 'Compétence ou incompétence des tribunaux à l'égard des états étrangers' (1923) 1 RCADI 521, 546.

¹⁰⁰ Lauterpacht (n 48) 225.

¹⁰¹ Moursi Badr (n 80) 64.

¹⁰² *ibid* 63-64.

¹⁰³ *ibid* 63-69.

further collaboration, whilst private acts will normally depend on more than one person, like contracts and torts. In respect of the parties, a public act will always affect individuals and entities within the territorial jurisdiction of the state, while a private act, for the purposes of state immunity, will involve a party not subject to the state's jurisdiction. As regards the content, public acts regulate aspects of public interest and are determined by deliberation and decision-making, while private acts accommodate two antagonistic interests towards a common goal and are the result of negotiation and compromise. Finally, in respect of public acts, states have a coercive machinery to impose sanctions, while in respect of private acts the state can only employ legal remedies which are also open to the other party. Gamal Moursi Badr's proposal is indeed interesting, but, lacking an international consensus in respect of it, it cannot solve the problem of inconsistency in the distinction between *acta jure imperii* and *acta jure gestionis*.

In *I Congreso del Partido*, Lord Wilberforce proposed a so-called 'two-stage' or 'contextual' test in order to establish whether immunity should be granted or not.¹⁰⁴ The facts of the case occurred prior to the passing of the SIA 1978, which was not applied. Lord Wilberforce made a summary of the facts of the case. The claim was brought against the vessel *I Congreso del Partido*, owned by Cuba, but related to two sister ships: *Marble Islands* and *Playa Larga*.¹⁰⁵ It related to a contract for a sale of sugar concluded in February 1973 between a Cuban state trading enterprise ('Cubazucar') and a Chilean company ('Iansa').¹⁰⁶ One shipment was carried on *Playa Larga* and another on *Marble Islands*.¹⁰⁷ *Playa Larga* was owned by Cuba and operated by a state enterprise ('Mambisa'), whilst the *Marble Islands* was a vessel owned by a Liechtenstein corporation.¹⁰⁸ In September 1973, when the government of President Allende was overthrown by Pinochet, Cuba and Chile severed diplomatic relations. *Playa Larga* was already discharging its cargo when it received orders from Cuba to leave Chile and meet *Marble Islands*, which was at sea.¹⁰⁹ *Playa Larga* ultimately returned to Cuba with a great part of the cargo, which was sold by *Mambisa*.¹¹⁰ *Marble Islands*, on its turn, was ordered to discharge the cargo in North Vietnam and had its ownership acquired by Cuba while on the high seas. The cargo was

¹⁰⁴ *Iº Congreso del Partido* [1983] 1 AC 244 (House of Lords)

<<http://www.uniset.ca/other/css/19831AC244.html>> accessed 26 November 2015; Shaw (n 74) 710-713; Martin Dixon, Textbook on International Law (6th edn, OUP 2007) 182-185.

¹⁰⁵ *Iº Congreso del Partido* (n 104) 257.

¹⁰⁶ *ibid* 258.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid* 258-259.

¹⁰⁹ *ibid* 259.

¹¹⁰ *ibid*.

sold to a Cuban state enterprise ('Alimport') and later donated to the people of North Vietnam.¹¹¹ The owners of the cargo laden on Playa Larga and Marble Islands brought actions against the owner of I Congreso del Partido, which was arrested at Sunderland. The Republic of Cuba invoked its right to immunity.

Lord Wilberforce considered that the restrictive doctrine of state immunity applied.¹¹² One of the problems of the case was that, although the initial act was a commercial transaction (the sale of sugar), the acts upon which the claims were based could be considered to have been done *jure imperii*, since Cuba ordered the ships not to proceed with the discharge of the cargo due to political reasons. Lord Wilberforce considered the following:

'Under the "restrictive" theory the court has first to characterise the activity into which the defendant state has entered. Having done this, and (assumedly) found it to be of a commercial, or private law, character, it may take the view that contractual breaches, or torts, prima facie fall within the same sphere of activity. It should then be for the defendant state to make a case ... that the act complained of is outside that sphere, and within that of sovereign action.'¹¹³

'...

'... in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.'¹¹⁴

As regards the Playa Larga, which was at the relevant time owned by Cuba, Lord Wilberforce considered that both the initial act and the act which gave rise to the claim did not involve exercise of sovereign powers and were done by Cuba as owners of the ship.¹¹⁵ He highlighted that the appellants were '... certainly able to show, as a starting point, that this vessel [*the Playa Larga*] was engaged in trade with the consent, if not with the active participation, of the Republic of Cuba.'¹¹⁶ As regards the Marble Islands, Lord Wilberforce

¹¹¹ *Iº Congreso del Partido* (n 104) 259.

¹¹² *ibid* 261-262.

¹¹³ *ibid* 265.

¹¹⁴ *ibid* 267.

¹¹⁵ *ibid* 267-269.

¹¹⁶ *ibid* 267.

considered there were some difficulties. In the first place, this vessel was initially not owned by Cuba. He underscored the following:

‘... the Republic of Cuba had no concern with, interest in, or responsibility for the cargo or for the operation of the ship or for the actions of the master or the crew. It was, of course, in a position to control the acts of Mambisa, but the commercial venture was exclusively that of Mambisa. The cargo owners did not do any business with a sovereign state.’¹¹⁷

Lord Wilberforce considered that, in the case of *Marble Islands*, by ordering the vessel to transfer the sugar to North Vietnam, Cuba acted in a governmental capacity, since it ‘never entered’ the ‘operations of carriage, deposit and sale of the cargo’, which were done by Mambisa, and it only intervened to direct the transfer of the sugar.¹¹⁸ All their Lordships agreed with Lord Wilberforce in respect of the Playa Larga, but the majority disagreed with him regarding the *Marble Islands*. Lord Diplock, in respect of the *Marble Islands*, asserted that the act of discharging and selling the perishable cargo in North Vietnam was ‘... fairly and squarely based on private law (*jus gestionis*)’¹¹⁹ He added that ‘... the discharge and sale of the cargo to Alimport at Haiphong was ... deliberately treated by the Cuban government as being effected under private and not in the exercise of any sovereign powers’ and that these acts could be considered *prima facie* a tort of conversion.¹²⁰ Lord Keith of Kinkel and Lord Bridge of Harwich concurred with Lord Diplock. Lord Bridge added that ‘... assuming a conversion of the cargo by the Republic of Cuba (an assumption necessarily to be made at this stage), this was a breach of a private law obligation previously assumed when the *Marble Islands* was acquired.’¹²¹ Lord Edmund-Davies was the only one to agree with Lord Wilberforce that Cuba could rely on state immunity as regards the *Marble Islands* cargo.¹²²

As can be seen from the case, the ‘two-stage’ or ‘contextual’ approach posited by Lord Wilberforce did not solve the difficulties relating to the distinction between *acta jure imperii* and *acta juri gestionis*. Furthermore, as mentioned earlier, there is also no international consensus on the distinction between *acta jure imperii* and *acta jure gestionis*. Crawford goes further and asserts that the lack of a clear guidance on this matter

¹¹⁷ *Iº Congreso del Partido* (n 104) 269.

¹¹⁸ *ibid* 270-271.

¹¹⁹ *ibid* 274-275.

¹²⁰ *ibid* 275.

¹²¹ *ibid* 279.

¹²² *ibid* 276-277.

facilitates manipulation with a view to achieving a particular outcome and it can result in immunity being accorded to ‘public’ acts even though there are good reasons for the exercise of jurisdiction by a domestic court.¹²³ Given these difficulties, Crawford contends that ‘... it cannot seriously be argued that a distinction between “public” or “governmental” and “private” or “non-governmental” transactions exists as a matter of positive international law.’¹²⁴ This is why he tried to rearticulate the basis of state immunity, as analyzed in a previous section of this chapter.

There is also another problem as regards the distinction between *acta jure imperii* and *acta jure gestionis*. The main statutes and treaties codifying the law of state immunity were inspired by it, but did not incorporate it.¹²⁵ As a result, some states may entertain jurisdiction over acts that are not *jure gestionis*. This can be exemplified by the case *Letelier v Republic of Chile*.¹²⁶ The claim was brought by, among others, the widow and sons of Chilean Ambassador Orlando Letelier, following his assassination, which took place in Washington, D.C. on 21 September 1976. The plaintiffs sought damages for tortious injuries suffered as a result of the assassination, which was allegedly committed by people under the direction of Chile’s intelligence organ.¹²⁷ Section 1605.5 of the FSIA provides that a foreign state is not immune for torts committed in the forum state.¹²⁸ Section 1605.a.5.A, however, establishes that the ‘tort exception’ is not applicable to ‘any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’.¹²⁹ The District Court found that, for the purposes of Section 1605.a.5.A, the order of the Chilean Republic for its organs to perpetrate the conducts that culminated in the assassination of Orlando

¹²³ Crawford (n 56) 90.

¹²⁴ *ibid* 90-91.

¹²⁵ See Finke (n 91) 858-861. The ECSI does mention the expression ‘*jure imperii*’ in two provisions. Article 24 of the ECSI allows any state ‘... to declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention’, but ‘without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).’ Article 27.1, on its turn, provides that certain state agencies that possess separate personality and are ‘capable of suing or being sued’ are not entitled to immunity even if they have been ‘entrusted with public functions.’ Nevertheless Article 27.2 provides that these state agencies are entitled to immunity ‘in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*).’ See also Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 118-125.

¹²⁶ *Letelier v Republic of Chile* (1980) 488 F Supp 665 (District Court for the District of Columbia) <<http://law.justia.com/cases/federal/district-courts/FSupp/488/665/1400196/>> accessed 26 November 2015, 670-674.

¹²⁷ *ibid* 665-666.

¹²⁸ US Code, Section 1605 <<https://www.law.cornell.edu/uscode/text/28/1605>> accessed 26 November 2015.

¹²⁹ *ibid*.

Letelier could not be understood as a ‘discretionary act’—the tort exception, therefore, applied. In the words of the District Judge Joyce Hens Green,

‘[w]hile it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act ... there is no discretion to commit, or to have one’s officers or agents commit, an illegal act.’¹³⁰

The District Court also dismissed Chile’s contention that the FSIA applied only in respect of *acta jure gestionis*, stating that the distinction between *acta jure imperii* and *acta juri gestionis* was not incorporated in the FSIA, which was meant ‘to govern all claims of sovereign immunity by foreign states’.¹³¹ Lastly, the District Court held that, although the acts undertaken directly by the Republic of Chile were carried out in the territory of that country, Chile could not rely on the act of state doctrine because the actions of its agents resulted in torts committed in the territory of the US—as put by District Judge Joyce Hens Green,

‘[t]o hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act “through the back door, under the guise of the act of state doctrine.”’¹³²

It is unclear whether, under international law, states are entitled to immunity in respect of *all* acts *jure imperii*. In *Jurisdictional Immunities of the State*, the ICJ avoided making a finding on the matter by restricting the issue submitted to it. The ICJ considered it had not been called upon to ‘... to resolve the question whether there is in customary international law a “tort exception” to State immunity applicable to *acta jure imperii* in general’ and that the issue before the Court was confined to ‘... acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.’¹³³

¹³⁰ *Letelier v Republic of Chile* (n 126) 673.

¹³¹ *ibid* 671.

¹³² *ibid* 674.

¹³³ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [65].

2.2.3 Sources of the law of state immunity

Rosanne van Alebeek emphasized that immunity issues arise by definition before domestic courts and are a ‘... textbook example of domestic courts playing a role in the application and development of international law’.¹³⁴ As such, the customary and conventional regimes of state immunity feed on domestic law and domestic court decisions. The law of state immunity involves, indeed, an intricate interplay between the domestic and the international levels.

Christopher Schreuer made the following remarks in respect of the heterogeneity of the sources of the law of state immunity:

‘Today, it has become difficult to say whether State immunity is a question of customary international law, of treaty law or of domestic law. But perhaps this is just as well, in order to remind us that we cannot compartmentalize international legal problems neatly by sources but have to take a more synoptic view which takes into account of a variety of types of legal authority.

‘An obvious irony in this development is the fact that common law countries have found it necessary to pass legislation in order to adjust their practice, while the civil law countries have been quite content at developing the law on a case by case basis. This reversal of the traditional patterns may at least partly be explained by the fact that *stare decisis* has led the common law judiciaries into dead ends, from which only formal legislation could free them.’¹³⁵

As examined in a previous section of this chapter, in a seminal article published by Lauterpacht in 1951, it was proposed the abolition of state immunity, subject to a few exceptions. Christoph Schreuer remarked that the codifications of the law of state immunity followed the opposite approach:

‘Professor Lauterpacht’s solution would have been generally to do away with State immunity except for a few specific areas of public activity. The more recent attempts at codification have all adopted the opposite method. They start from a general rule of immunity, which is subsequently modified by a list of non-immune activities. ... [T]his technique has undeniable advantages over the traditional dichotomy between public and private acts. The idea is to break up the somewhat unwieldy concept of *acta jure gestionis* into several categories and thereby

¹³⁴ Rosanne van Alebeek, ‘Domestic Courts as Agents of Development of International Immunity Rules’ (2013) 26(3) LJIL 559.

¹³⁵ Christoph Schreuer, *State Immunity: Some Recent Developments* (CUP 1995) 4.

get a more manageable list of non-immune activities. ... No inferences should be drawn from this technique as to the existence of a general rule of international law requiring immunity. Also, this method has by no means dropped the old distinction between public and private acts. It has merely differentiated and in some areas expanded the area of non-immune activities. For instance, the provision in the United States Foreign Sovereign Immunities Act withdrawing immunity in case of expropriation in violation of international law is not a specification but clearly a deviation from the old distinction.¹³⁶

Indeed, the main existing codifications (the UNCJISP 2004, the ECSI 1972, the SIA 1978, and the FSIA 1976) on the law of state immunity adopted a cautious approach. State immunity is adopted as the general rule and exceptions are laid out. The most important exception in these codifications is the commercial exception, which is a more 'reduced' and precise version of the distinction between private and public acts.¹³⁷ As summarized by Schreuer,

'[t]he typical exceptions to immunity under this method are commercial transactions employment contracts, personal injuries and damage to property, ownership and possession of property, intellectual property, shareholdings in companies, arbitration and ships in commercial service.'¹³⁸

The exception to immunity for torts committed in the territory of the forum state has been especially debated given its potential to help address human rights violations that took place in the forum state.

The two international treaties on the law of state immunity were not ratified by many states (at the date of the submission of this monograph, the UNCJISP, which is not yet in force, counts 19 parties and the ECSI, 8). Also, few states have legislations contemplating state immunity (eg, the US, the UK, Singapore, Japan, Pakistan, South Africa, Canada, Australia, Argentina, Israel).¹³⁹ This means that most states have to rely on customary international law and the murkiness that comes with it when faced with a question of state immunity. In a comparative study of three European countries (the UK, Germany and France), Joseph Dellapenna concluded that there is a scenario of fragmentation:

¹³⁶ Schreuer (n 135) 7.

¹³⁷ See Finke (n 91) 858-861. Article 7 ECSI; Article 10 UNCJISP; Section 1605.a.2 FSIA 1976; Section 3 SIA 1978.

¹³⁸ Schreuer (n 135) 8.

¹³⁹ Alebeek (n 134) 566-567.

‘All these countries [*United Kingdom, France, Germany*], in grappling with the needs to constrain the acts of foreign sovereigns by the rule of law, have developed roughly similar responses that are collectively described by the rubric of the “restrictive theory of state immunity.” A closer examination of the details of the several approaches to foreign state immunity described here demonstrates, however, that consensus exist only at a higher level of abstraction.

‘... [T]he details of foreign state immunity in the law of any state still bear a greater resemblance to that state’s law of domestic sovereign immunity than they do to any supposed international consensus on the rules of foreign state immunity ... [H]owever precisely the law of foreign immunity of a state—whether legislatively or judicially created—might appear, courts have exhibited, at times, an inescapable need to fashion vague exceptions, permitting them to avoid hearing politically sensitive cases. Likewise, one should not be surprised that multinational treaties are no more definitive on the details of state immunity than is state practice.’¹⁴⁰

Dellapenna’s conclusions are indeed consistent with what one would expect in the light of the historical development of the law of state immunity, a process in which domestic courts and domestic law had a central role.¹⁴¹

2.2.4 Immunity from execution

Suffice it to say for the purposes of this monograph that immunity from execution is a separate issue and is governed by different principles and rules than immunity from jurisdiction. The ICJ in *Jurisdictional Immunities of the State* stated that ‘... the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts.’¹⁴² The ILC’s Commentaries on the Draft Articles on Jurisdictional Immunities of States and Their Property summarized the subject in the following way:

‘The practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction. Whatever the theories ... the question of immunity from execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgment in favour

¹⁴⁰ Joseph W. Dellapenna, ‘Foreign State Immunity in Europe’ (1992) 5 NYILR 51, 61-62.

¹⁴¹ See Byers (n 79) 110-111 and Alebeek (n 134).

¹⁴² *Jurisdictional Immunities of the State* (n 133) [113].

of the plaintiff. Immunity from execution may be viewed, therefore, as the last bastion of State immunity.’¹⁴³

2.3 The impact of human rights on the law of state immunity

It goes without saying that law feeds on societal changes. This was precisely the premise of one of Wolfgang Friedmann’s major works, ie ‘... that the extent of the structural changes in international relations in our times requires a far more basic reorientation of our thinking in international law.’¹⁴⁴ What Friedmann had in mind was that changes in the nature and in the structure of international society reflected on international law. Friedmann described that parallel to the international law of coexistence, an international law of cooperation had developed. The former aims at the ‘... the regulation of the conditions of mutual diplomatic intercourse and, in particular, of the rules of mutual respect for national sovereignty’¹⁴⁵; whilst the latter represents ‘... [a] move of international society, from an essentially negative code of rules of abstention to positive rules of co-operation, however fragmentary in the present state of world politics...’, resulting from the ever growing ‘range of universal human concerns calling for international regulation’¹⁴⁶. Friedmann stressed that the emergence of an international law of cooperation affected the international law of coexistence, but that it did not mean that the international law of coexistence had lost its relevance and validity.

Joseph Weiler explained the changes undergone by international law through his metaphor of the geology of international law. According to him, these changes could be captured by the analysis of the different ‘layers’ of international law in the same fashion as geology folds.¹⁴⁷ Weiler stresses that, in contrast to the classical historical method that

¹⁴³ ILC, ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries’ in ‘Report of the International Law Commission on the work of its forty-third session’ (29 April-19 July 1991) UN Doc A/46/10 (1991) II(2) YILC 13-62, 56.

¹⁴⁴ Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 3.

¹⁴⁵ *ibid* 60.

¹⁴⁶ *ibid* 62.

¹⁴⁷ Joseph Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 *ZaöRV* 548, 549-550. Weiler further explain his metaphor by describing the ‘evolution’ of treaty making in the twentieth century:

‘In the first decade of the 20th century one discovers a predominance of bilateral, contractual treaties and a very limited number of multilateral law making treaties. One also discovers, in that earlier part of the century, a very sedate, almost “magisterial”, and backward looking practice of customary law ... In mid-century one discovers a huge enterprise of actual and in-the-making multilateral law making treaties ranging from the Law of the Sea to Human Rights and even what may be called “constitutional” treaties. Customary law reincarnates itself into

privileges periodization and linearity, geology underscores accretion and the interaction between different strata.¹⁴⁸ The geological perspective is a very useful lens through which one can examine the changes undergone by international law. As highlighted by Weiler, ‘... geology allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside’¹⁴⁹.

Being, according to Friedmann, one of the examples of the law of coexistence, the law of state immunity—traditionally understood as a corollary of the sovereign equality of states—would be located in the lower strata of international law.¹⁵⁰

Indeed, the principle *par in parem non habet imperium* has old roots: Bartolus de Saxoferrato’s *Tractatus de regimine civitatis*, which dates from the fourteenth century, mentions it.¹⁵¹ It was employed by him in a different context and only later it would receive a different interpretation in the context of the doctrine of state immunity, which gained proper form and content from the nineteenth century onwards.¹⁵² Although it may

the so-called New Sources. ... Towards the end of the century ... one detects the emergence, or thickening, of a fourth layer, which has perhaps been less, discussed. This is a regulatory layer. It is notable in the fields of trade with the explosion of Regional Economic Agreements (whose numbers are in the hundred) as well as the new WTO and associated agreements, and in other similar fields: Environment, Asylum, Finance.’

¹⁴⁸ Weiler (n 147) 549.

¹⁴⁹ *ibid* 551.

¹⁵⁰ Christian Djeflal also employed the metaphor of the geology of international law to discuss the ICJ’s judgment in *Jurisdictional Immunities of the State* and the relationship between state immunity and human rights. See Christian Djeflal, ‘Constitutional paths not taken: Germany vs. Italy before the ICJ’ <<http://verfassungsblog.de/constitutional-paths-germany-italy-icj/>> accessed 29 April 2016:

‘Using Joe Weiler’s metaphor of the geology of international law, one could say that the law of state immunity is rooted deep in the lower layers of public international law where maxims like *par in parem non habet imperium* of Bartolus de Saxoferrato played an important role in justifying that one state has no jurisdiction over the other.

‘Have new strata changed the nature of the law on state immunity? ...’

¹⁵¹ Stoll (n 1) para 4 and Moursi Badr (n 80) 94.

¹⁵² As explained by Gamal Moursi Badr (n 80) 94 (footnotes omitted):

‘[The maxim *par in parem non habet imperium*] comes from the pen of the fourteenth century Italian jurist Bartolus. Cited in full it reads “*Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*”. The mention of *civitas* would indicate that what Bartolus had in mind were state-to-state relationships, probably the only kind of a state’s transnational relations which was of any importance in his time. Every state is doubtless the peer of every other state at the level of the interaction of supreme political authorities, not to say sovereignties, and no jurisdiction may, or indeed can, be exercised by one state over another at that level. When, however, a state enters into private law relations with individuals or corporations in another state, it is no longer acting in the rarefied atmosphere of the acephalous pseudo-society of states. ... To say that *par in parem non habet imperium* and to mean thereby that the foreign state should be immune from the jurisdiction of the local courts

seem to the casual observer that it has frozen, the law of state immunity, to use the expression of Sompong Sucharitkul, is a 'living reality'.¹⁵³ At the time Friedmann wrote his book, which was first published in 1964, he noted the developments in the law of state immunity related to the assumption of new economic responsibilities by states:

'... certain rules, notably those dealing with the immunity of foreign governments from jurisdiction, have been considerably affected by the assumption of governments of economic responsibilities not contemplated when these rules were evolved. But the need to qualify the rule of absolute immunity with respect to commercial enterprises conducted by governments or governmental institutions was first acknowledged by the Belgian Cour de Cassation in 1903. State ownership and control of commercial enterprises, notably in shipping and other means of international transport, is spread throughout the world and a vast variety of states and political systems.'¹⁵⁴

According to Rosalyn Higgins, more recently, transformations in the law of state immunity have been caused by developments linked to the changing character of international law from a system providing benefits only for states to a system increasingly concerned with the protection of individuals.¹⁵⁵ Bruno Simma referred to the movement from the classical, 'horizontal' and bilateral, conception of international law towards a more 'vertical' one, driven by community values and more hierarchical and densely institutionalized, ie a movement from 'bilateralism to community interest'.¹⁵⁶ Important elements in this regard are the concepts of *jus cogens* (enshrined in Articles 53, 64, and 71 of the VCLT) and obligations *erga omnes*, and Article 103 of the UN Charter. According to Antônio Augusto Cançado Trindade, these elements point towards the construction of an international *ordre public* and a new *jus gentium* for the twenty-first century.¹⁵⁷ Bröhmer summarized this process in the following way:

in respect of those relationships shifts the focus of the problem and ignores its true nature to the detriment of a juridically correct solution.'

¹⁵³ Sucharitkul (n 3) 257.

¹⁵⁴ Friedmann (n 144) 61 (footnotes omitted).

¹⁵⁵ Higgins (n 36) 377.

¹⁵⁶ See Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RCADI 217 and Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) EJIL 483.

¹⁵⁷ Antônio Augusto Cançado Trindade, 'Os rumos do Direito Internacional Contemporâneo: de um *jus inter gentes* a um novo *jus gentium* no século XXI' in Antônio Augusto Cançado Trindade, *O direito internacional em um mundo em transformação* (Renovar 2002), 1081-83.

‘... international law has developed from a set of rules governing (only) the relationship of states to one that attempts to increase the protection of the individual as well, directly by giving more weight to human rights and indirectly by establishing rules which are considered peremptory (*jus cogens*) and which go beyond the bilateral relations of states to constitute “obligations *erga omnes*”, meaning that these “are concerns of all states”, and that all states “have a legal interest in their protection”.’¹⁵⁸

The development of the body of human rights law has been remarkable. In the well-known formulation of Norberto Bobbio regarding the evolution of the discipline, besides the increase in the number of rights deemed worthy of protection and the emergence of new subjects, individuals started to be perceived in the light of the special characteristics they possess.¹⁵⁹ This is why, following the conclusion of the UN Charter in 1945, the adoption of the UDHR in 1948 and of the two International Covenants of 1966 on Civil and Political Rights and on Economic, Social and Cultural Rights, which, together, are the keystones of the international architecture of human rights at the universal level, more human rights treaties were concluded setting up special systems of protection, with the scope of safeguarding the rights of specific groups of people, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1989 Convention on the Rights of the Child, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the 2007 Convention on the Rights of Persons with Disabilities. Regional developments, like the ACHR, the ECHR, and other regional treaties and protocols, went even further with the establishment of international tribunals with jurisdiction over cases in which the contracting state has breached human rights provisions set out in each system of protection. Most notably, Protocol 11 to the ECHR abolished the European Commission of

¹⁵⁸ Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff 1997) 190 (footnotes omitted).

¹⁵⁹ Norberto Bobbio, *L'età dei diritti* (12nd edn, Einaudi 2014) 61-62:

‘Oltre ai processi di positivizzazione, generalizzazione, internazionalizzazione ... si è manifestata in questi ultimi anni una nuova linea di tendenza che si può chiamare di *specificazione*, consistente nel passaggio graduale ma sempre più accentuato verso un’ulteriore determinazione dei soggetti titolari di diritti.

‘...

‘Così rispetto all’astratto soggetto uomo, che aveva già trovato una specificazione nel « cittadino » (nel senso che al cittadino potevano essere attribuiti diritti ulteriori rispetto all’uomo in generale), si è fatta valere l’esigenza di rispondere con ulteriore specificazione alla domanda: quale uomo, quale cittadino?’

Questa specificazione è avvenuta sia rispetto al genere, sia rispetto alle varie fasi della vita, sia tenendo conto della differenza tra stato normale e stati eccezionali nell’esistenza umana.’

Human Rights and allowed individuals to bring claims directly to the ECtHR, further empowering the position of the human being vis-à-vis the state. Within the framework of the Inter-American system, individuals have to petition the Inter-American Commission on Human Rights, which may refer the case to the IACtHR.

In the light of the geological perspective, these phenomena would better be described as the accretion and thickening of the legislative and constitutional strata of international law. Said strata, as described by Weiler, have as a distinctive feature the appropriation of common assets, be it material (eg, the deep bed of the high sea) or, in the case of the international law of human rights, *spiritual*.¹⁶⁰ The pressures exerted by ‘the common spiritual asset’ of human rights and *jus cogens* on the law of state immunity have been felt and have called into question its legitimacy. Ian Brownlie, in 1978, famously compared *jus cogens* to ‘... [a] vehicle [*that*] does not often leave the garage’, adding that ‘... the concept does not seem to have a lot of obvious relevance.’¹⁶¹ Lately, though, said vehicle has been leaving the garage and bumping into state immunity quite often, as can be demonstrated by numerous cases in which there has been an opposition between, on one hand, state immunity and, on the other, human rights and *jus cogens*, and by numerous articles and book chapters that have been published on the subject.

2.4 Concluding remarks

It is generally accepted that state immunity is required in some cases as a matter of customary international law and that it is now restricted. There have been many different attempts to reconceptualize state immunity and to provide a more solid theoretical basis for it, and the foundations of the law of state immunity remain a contentious issue. The expansion of the human rights regime is a development that impacted and posed new challenges to the traditional domain of the law of state immunity.

In the following chapter of this monograph, I shall consider how national and international courts dealt with cases relating to state immunity and the protection of human rights, ie how courts perceived and understood the pressures exerted by human rights on the law of state immunity.

¹⁶⁰ Weiler (n 147) 556. See also Djeflal (n 150).

¹⁶¹ Ian Brownlie, ‘Comments’ in Antonio Cassese and J.H.H. Weiler (eds), *Change and Stability in International Law-making* (Walter de Gruyter 1988) 110.

3 — THE JUDICIAL PRACTICE

‘In the international rule system, as in most national legal systems, the law accords a particular veneration to rules which have withstood the test of time. Age is respected in laws even more than in persons, in both cases not always deservedly. Even unjust old rules, however, have a high degree of compliance pull just because, being old, they are thought to be like the beams of an old house. Their legitimacy may be what holds up the whole structure and to remove them may jeopardize that structure.’

Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998) 37

‘Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.’

Lord Denning, *Trendtex Trading Corp. v Central Bank of Nigeria* [1977] 1 QB 529 (Court of Appeal), 556

In this chapter, I shall take a close look at the judicial decisions dealing with state immunity, human rights and *jus cogens*. The main goal was to identify the reasoning processes employed to reach the decisions. Although all the cases selected deal with the same subject-matter, each court is immersed in a different normative environment. I tried to be careful not to adopt a *quantitative* approach in the analyses of the cases, merely taking account of the outcomes without doing justice to the peculiarities of each case. It is important to keep in mind that not only technical questions of jurisdiction and applicable

law differ among the courts, but also the environment in which their practices are embedded. They do not address the same audiences, nor do their concerns necessarily coincide.

The reference point adopted to structure this chapter was the decision of the ICJ in *Jurisdictional Immunities of the State*, due to the authoritativeness, prestige and influence accorded to its pronouncements. I begin by examining the judgments of domestic courts (Greece, Italy, Germany, France, Poland, the United States, the United Kingdom and Canada) and international courts (the ECtHR) rendered before *Jurisdictional Immunities of the State*. The chapter moves next to the decision of the ICJ in *Jurisdictional Immunities of the State*, and then to the national (Italy) and international (the ECtHR) decisions rendered after it. It ends with a brief assessment of the panorama revealed by the discussions engaged in by the courts in the various judgments.

The judgment of the ICJ was the main guide to select the cases I discuss in this chapter. Nevertheless, not all cases mentioned by the ICJ in *Jurisdictional Immunities of the State* are individually considered here. Taking as reference this judgment, I tried to select a sample of cases that is representative of the main different argumentative patterns, strategies and approaches of the legal debate surrounding the relationship between state immunity and human rights.¹ An article written by Filippo Fontanelli was useful to locate the relevant decisions rendered by the Italian Court of Cassation after the judgment of the ICJ.²

Attention is devoted not only to the final decisions adopted by the courts, but also to some dissenting and separate opinions which were appended to them. Furthermore, as regards cases from domestic jurisdictions, emphasis was given to the pronouncements of the higher courts of each judicial system. Decisions from lower courts were also included when I had access to them and they were deemed to be significant to the debate (for

¹ The following references provide an overview of the debate regarding the relationship between state immunity and human rights. Also, they were useful in the process of selecting the relevant cases to be discussed in this chapter. See Giorgio Gaja, 'The Protection of General Interests in the International Community' (2012) 364 RCADI 9, 137-151; Lorna McGregor, 'Addressing the Relationship between State Immunity and Jus Cogens Norms: A Comparative Assessment' in Wolfgang Kaleck et al (eds), *International Prosecution of Human Rights Crimes* (Springer 2007); Thomas Giegerich, 'Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order—Jus Cogens and Obligations Erga Omnes* (Brill 2005).

² Filippo Fontanelli, 'I know it's wrong but I just can't do right. First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court' <<http://www.diritticomparati.it/2014/10/i-know-its-wrong-but-i-just-cant-do-right-first-impressions-on-judgment-no-238-of-2014-of-the-italian-constitutional.html#sthash.W70Kak9m.dpuf>> accessed 26 November 2015.

instance, when the reasoning and result they reached contrasted with those adopted by higher courts or when they inspired in a significant manner other decisions).

Jones v Kingdom of Saudi Arabia (decided by English courts) and *Jones v United Kingdom* (decided by the ECtHR) deal not only with the subject of the immunity *ratione personae* of the state itself, but also with the immunity *ratione materiae* of state officials. Nevertheless, it was decided to include in the analyses of these cases the parts of these judgments that deal with the immunity *ratione materiae* of state officials due to the treatment the English courts and the ECtHR gave to this issue, operating what could be called an *alignment* of the immunity *ratione materiae* of state officials with the immunity *ratione personae* of the state itself.³

3.1 Decisions rendered by domestic courts prior to *Jurisdictional Immunities of the State*

3.1.1 Greece

3.1.1.1 The *Distomo massacre case (Prefecture of Voiotia v Federal Republic of Germany)*

3.1.1.1.1 *Judgment No 137 of the Multi-Member Court of Levadia (1997)*

In this case, the plaintiff sought to have recognized the obligation of Germany to pay compensation for the injuries and psychological distress suffered as a result of the torts committed by the Armed forces of Germany during the occupation of Greece on 10 June 1944 in the village of Distomo.⁴

The Multi-Member Court of Levadia started its judgment by stating that, under international law, immunity is not absolute, extending only to the ‘public law relations of

³ As regards the issue of immunity *ratione materiae* of state officials, see Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21(4) EJIL 815. On the issue of the alignment of the immunity *ratione personae* of the state with the immunity *ratione materiae* of state officials, see Philippa Webb, ‘Jones v UK: The Re-Integration Of State And Official Immunity?’ <<http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>> accessed 26 November 2015 and William S. Dodge, ‘Is Torture An “Official Act”? Reflections On Jones v. United Kingdom’ <<http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/>> accessed 26 November 2015.

⁴ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 137/1997)* [1997] 50 RHDI 595 (Multi-Member Court of Levadia) (translated by Maria Gavouneli), 600.

states', and not to 'private law (contractual) acts or activities of the foreign state'.⁵ The qualification of an act as *jure imperii* or as *jure gestionis*, in the view of Court, was left to the *lex fori*, ie '... by the courts of the state considering the relevant dispute, pursuant to its domestic law as influenced by international conventions and the international context, subject to the condition of reciprocity.'⁶ The Court of Levadia added that, even for *acta jure gestionis*, '... if the relevant judicial acts may impinge upon the sovereign acts of the defendant state ... the state immunity privilege is also extended to them'.⁷

The Court proceeded to examine whether the peculiarities of the case impacted on the application of the law of state immunity. It found that the fact the territory where the events took place was occupied by Germany did not affect sovereignty, but meant only '... a temporary change in the subject exercising sovereignty, namely the occupier, who is obligated to respect, during the occupation, both the domestic legislation of the occupied state ... and the rules of international law ...'.⁸ In a bold move inspired by the case law of the Nuremberg International Military Tribunal, the Multi-Member Court of Levadia found that, as regards the relationship between state immunity and *jus cogens*,

'... [a]ccording to the prevailing in contemporary theory and practice of international law opinion, to which this Court also subscribes, it is accepted that the state cannot invoke immunity when the act attributed to it has been perpetrated in breach of a *ius cogens* rule. In this case it is also accepted that the defendant state has indirectly waived immunity...'.⁹

The Court summarized its understanding in the following way:

'a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principles *ex iniuria ius non oritur*); d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public

⁵ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 137/1997)* (n 4) 598.

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid* 599.

⁹ *ibid.*

order; e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibly invoke the principle of immunity for acts committed during such illegal military occupation ...¹⁰

The Multi-Member Court of Levadia concluded that the acts perpetrated by Germany could not be qualified as sovereign acts because they were allegedly in breach of international peremptory rules—in particular, the rule enshrined in Article 46 of the Regulations on the Laws and Customs of War on Land attached to the 1907 Hague IV Convention, which provides that

‘[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

‘Private property cannot be confiscated.’¹¹

The Court found the suit to be lawful grounded on Article 3 of the 1907 Hague Convention (IV), according to which ‘[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’¹² Although Greece had not ratified the 1907 Hague Convention (IV), the Court found that it was opposable to Germany because its norms were binding on the basis of customary international law.¹³

3.1.1.1.2 Judgment No 11 of the Greek Court of Cassation (Areios Pagos) (2000)

Germany appealed the decision of the Multi-Member Court of Levadia. The Greek Court of Cassation (Areios Pagos) delivered its judgment on 4 May 2000 and the appeal was ultimately dismissed by seven votes to four.

¹⁰ *Prefecture of Voiotia v Federal Republic of Germany* (n 4) 599-600.

¹¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) <http://avalon.law.yale.edu/20th_century/hague04.asp> accessed 26 November 2015.

¹² *ibid.*

¹³ *Prefecture of Voiotia v Federal Republic of Germany* (n 4) 601.

The Areios Pagos began its decision by recalling Article 38 of the Statute of the ICJ and by referencing the traditional understanding of custom, according to which customary international law is composed of two elements: ‘constant and uniform’ practice and the conviction that this practice corresponds to a legal obligation (*opinio jure sive necessitatis*).¹⁴ It also recalled Article 28.1 of the Greek Constitution, according to which

‘[t]he generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.’¹⁵

By means of this provision, customary international law is part of the Greek legal order. Having established the relationship between international law and Greek domestic law, the Areios Pagos proceeded to ascertain customary international law on the subject of state immunity. It considered that ‘sovereign immunity constitutes a consequence of the sovereignty, independence and equality of nations, whilst its aim is to avoid the disturbance of international relations’¹⁶.

Like the Multi-Member Court of Levadia, it stated that the international community accepted the restrictive theory of state immunity and that the distinction between acts *jure imperii* and *jure gestionis* ‘... is made on the basis of the law of the forum State and the criterion for making this distinction is the nature of the act of the foreign State, meaning whether the act itself involves the exercise of sovereign power.’¹⁷

The Areios Pagos went a step further than the Multi-Member Court of Levadia and examined what it called the tendency to further limit the immunity of foreign states. To do so, it firstly examined the ECSI 1972. The low number of ratifications, in the Areios Pagos’ view, should not be understood as a sign there was disagreement on its basic principles.¹⁸ The Areios Pagos considered the ECSI a ‘codifying convention’¹⁹. Article 11 of the ECSI, as is known, lays down the tort exception to state immunity.²⁰

¹⁴ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* [2003] 129 ILR 513 (Greek Court of Cassation), 515.

¹⁵ The Constitution of Greece—As revised by the parliamentary resolution of May 27th 2008 of the VIIIth Revisionary Parliament (Hellenic Parliament’s Publication Department 2008) (translated by Xenophon Paparrigopoulos and Stavroula Vassilouni).

¹⁶ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 516.

¹⁷ *ibid.*

¹⁸ *ibid* 517.

The tort exception, according to the Areios Pagos, applied irrespective of whether the tort was committed by a state acting *jure imperii* or *jure gestionis* and was part of customary international law, ‘... which, in accordance with Article 28(1) of the Constitution, constitutes an integral part of national [*Greek*] law with superior rank.’²¹

The Areios Pagos came to this conclusion by ascertaining customary international law in a very conventional fashion. After the reference to Article 11 of the ECSI, it verified that the domestic legislations of states that had codified the law of state immunity provided for said exception.²² In the same way, it found that the ILC’s Draft Articles on Jurisdictional Immunities of States and their Property enshrined in its Article 12 an exception from immunity with respect to the tortious liability of foreign states.²³ The interpretative comments attached to the ILC’s Draft Articles added that the exception proposed did not make a distinction between *acta jure imperii* and *jure gestionis*, but noted that it was not meant to apply to ‘situations involving armed conflicts.’²⁴ The Areios Pagos then mentioned the Resolution adopted by the IDI in 1991 in Basel (‘Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and

¹⁹ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 517.

²⁰ European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) CETS No 74, Article 11:

‘A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.’

²¹ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 519.

²² *ibid* 517:

‘Such an exception from immunity is provided for by the legislation of the United States (Foreign Sovereign Immunities Act (FSIA) of 1976, Article 1605(a)(5)), the United Kingdom (Sovereign Immunity Act (SIA) of 1978, Article 5), Canada (SIA of 1982, Article 6), Australia (FSIA of 1985, Article 13), South Africa (FSIA of 1981, Article 6) and Singapore (SIA of 1979, Article 7).’

²³ *ibid* 518. ILC, ‘Draft Articles on Jurisdictional Immunities of States and their Property’ in ‘Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991)’ UN Doc A/46/10 (1991) II(2) YILC 13-62:

‘Article 12—Personal injuries and damage to property—Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.’

²⁴ ILC, ‘Draft Articles on Jurisdictional Immunities of States and their Property’ (n 23) 45-46.

Enforcement’) also provided for the tort exception in Article 2.2.e.²⁵ Lastly, it referenced the case-law of the United States courts²⁶, which also provided a basis for the conclusion that the tort exception was part of customary international law. In any case, the Areios Pagos held the tort exception was not applicable

‘... in relation to claims for damages arising [*from military action*] in situations of armed conflict, which generally involve conflict between States where harm to civilians necessarily results and where resultant claims are normally dealt with through inter-State agreements after the war has ended.’²⁷

In the next step of the argument, and basing itself on Article 43 of the Regulations on the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907, according to which, in case of military occupation, sovereignty is not transferred to the occupying state, which must respect the laws in force in the country, the Areios Pagos noted that

‘... the [*tort*] exception to the immunity rule should apply where the offences for which compensation is sought (especially crimes against humanity) did not target civilians generally, but specific individuals in a given place who were neither directly nor indirectly connected with the military operations.

‘... [E]xtraterritoriality (State immunity) does not cover the criminal acts of the organs of such an occupying force, where they are committed as an abuse of sovereign power, in retaliation for acts of sabotage by resistance groups, against a specific and relatively limited number of completely uninvolved and innocent civilians, something which is anyway contrary to the principle, generally accepted by civilized nations, that no one should be punished for the acts of someone else...’²⁸

²⁵ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 518. Institut de Droit International, Basel Session ‘Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement’ (1991) Fourteenth Commission (Rapporteur: Ian Brownlie), Article 2.2.e:

‘The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State.’

²⁶ *Letelier v Republic of Chile* (1980) 488 F Supp 665 (District Court for the District of Columbia) and *Liu v Republic of China* (1986) 642 F Supp 297 (District Court for the Northern District of California).

²⁷ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 519.

²⁸ *ibid.*

Although acts of armed forces in situations of armed conflict were considered to be covered by state immunity, the Areios Pagos found that in the case in question this was not applicable because

‘... these crimes (of murder which, at the same time, constituted crimes against humanity) were committed against specific persons of relatively limited number, living in a specific place, who had absolutely no connection to the resistance group which, within the framework of its resistance action, was responsible for the killing of the disguised German soldiers participating in the operation to terrify the local population. These cruel murders were objectively in any case not necessary for the conservation of the military occupation or to reduce the resistance action and were carried out on the territory of the State of the forum, by organs of the Third Reich, in excess of their sovereign powers.’²⁹

Finally, as a further argument to deny state immunity to Germany, the Areios Pagos mentioned the argument employed by the Multi-Member Court of Levadia, according to which the breach of *jus cogens* norms could be understood as a tacit waiver of the right of immunity.³⁰

3.1.1.1.2.1 The dissenting opinions appended to the judgment of the Greek Court of Cassation (Areios Pagos) in *Judgment No 11* (2000)

Five out of the eleven judges of the Areios Pagos appended a dissenting opinion to the judgment.

The dissenting judges called into question the ascertainment of customary international law by the majority of the Areios Pagos. Firstly, unlike the majority, which treated the ECSI as a ‘codifying Convention’, the dissenting judges took the position that the ECSI ‘... [*did*] not constitute in all its provisions a codification of previously formulated customary international law.’³¹ They highlighted the tort exception to state immunity, as embodied in the ECSI, did not apply to torts arising from armed conflicts and that the ILC’s Commentaries on the Draft Articles noted Article 12 also did not apply to ‘situations involving armed conflicts’.³² The dissenting judges questioned the use of

²⁹ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (n 14) 520-521.

³⁰ *ibid* 521.

³¹ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (Dissenting Opinions) [2003] 129 ILR 513 (Greek Court of Cassation), 521.

³² *ibid* 522.

domestic law in the process of deducing customary international law—in their view, the fact that some states had codified the tort exception to state immunity was of no consequence in this respect.³³ Consequently, they deemed the decisions of the courts of the United States invoked by the majority to be irrelevant, since they were grounded on domestic legislation.³⁴

The dissenting judges also pointed out that the ILC's Draft Articles on Jurisdictional Immunities of States and their Property and the resolution adopted by the IDI in 1991 in Basel ('Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement') could not be used as evidence of a customary norm establishing an exception to state immunity for torts committed *jure imperii* in the territory of the forum state—quite to the contrary, they pointed to the lack of state consent regarding the subject, since there did not exist at the time a treaty embodying their provisions.³⁵

The dissenting judges referenced the Draft Articles on Sovereign Immunity for American States (1983), which did not extend the tort exception to *acta jure imperii*.³⁶ Finally, the dissenting judges indicated the practice of the English courts in *I Congresso del Partido* (1983) and in *Kuwait Airways Corporation v. Iraqi Airways* (1995) as examples in which it was recognized state immunity should be granted with respect to torts committed *jure imperii*.³⁷

Four out of the five dissenting judges also disagreed with respect to the majority's interpretation of the armed conflict clause. According to them, the armed conflict clause should be applicable to the case, since

'... [a]ttempts to break down armed conflicts into different phases, some considered as falling within and some as falling outside the notion of armed conflict, are artificial and do not correspond to reality ... [I]t should be accepted that States enjoy immunity from all claims arising from a situation of general conflict between countries. This interpretation is supported by the fact that, despite the many recent wars and many atrocities carried out during them, there do not appear to have been any successful judicial claims for damages anywhere in the world and, in particular, relying on an exception to the rule of immunity.'³⁸

³³ *Prefecture of Voiotia v Federal Republic of Germany (Judgment No 11/2000)* (Dissenting Opinions) (n 31) 522.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid* 523.

They also added that they disagreed the infringement of a *jus cogens* norm could be understood as a tacit waiver of the right of immunity, ‘... given that there [was] no customary rule establishing that such an infringement [constituted] a tacit waiver of State immunity.’³⁹

3.1.1.2 Judgment of the Greek Special Supreme Court (Anotato Eidiko Dikastirio) in *Germany v Margellos and Others* (2002)

In *Germany v Margellos and others*, the Areios Pagos referred to the Anotato Eidiko Dikastirio (AED) two questions dealing with the issue of state immunity and individual claims for torts committed *jure imperii* in the territory of the forum state: (i) whether Article 11 of the ECSI could be qualified as a generally accepted rule of international law; and (ii) whether the exception provided for in said article ‘... [covered], according to international custom, claims for compensation for torts arising from situations of armed conflict yet encompassing only certain persons at a certain location having nothing to do with the armed conflict and not involved in the war activity’⁴⁰.

Article 100.1.f of the Greek Constitution gives the AED jurisdiction for ‘... [t]he settlement of controversies related to the designation of rules of international law as generally acknowledged in accordance with article 28 paragraph 1.’⁴¹ Article 28.1 of the Greek Constitution, as referred before, establishes that ‘[t]he generally recognised rules of international law ... shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.’⁴² The AED followed a textbook approach to the ascertainment of customary rules. It referenced Article 38.1 of the ICJ Statute and stated that, to conclude whether a rule of customary international law existed, it could use as evidence

‘[i]nternational conventions, records and correspondence of international organizations, the case-law of international and domestic courts, state legislation, diplomatic correspondence and

³⁹ *Prefecture of Voiotia v Federal Republic of Germany* (Judgment No 11/2000) (Dissenting Opinions) (n 31) 524.

⁴⁰ *Federal Republic of Germany v Margellos and Others* (Judgment No 6/2002) [2003] 56 RHDI 199 (Greek Special Supreme Court) (translated by Maria Panezi), 199.

⁴¹ The Constitution of Greece (n 15).

⁴² *ibid.*

advisory opinions of international organizations and States counsel as well as codification workings by international organizations, committees and international law institutes...'.⁴³

The AED emphasized that its task was to '... demonstrate the existence of a rule with the complete and specific meaning that this rule has within the international legal order' and that 'any further power ... to interpret this rule is limited and is exercised in terms of the aforementioned meaning.'⁴⁴ In other words, the AED expressed the understanding that its task was not creative in nature.

The AED began the analysis of the legal questions submitted to it by analyzing Article 3⁴⁵ of the 1907 Hague Convention (IV) and Articles 46⁴⁶ and 50⁴⁷ of the Regulations attached to this Convention. Greece was not a party to said treaty, but the AED accepted the provisions contained therein codified customary international law. The aforementioned Articles read together, according to the AED, established '... an obligation for compensation when acts of the occupying army took place in the territory of that State in violation of the laws of war upon the population of the occupied belligerent.'⁴⁸ What was being discussed, however, was not state responsibility itself. As the AED pointed out, the rules enshrined in the 1907 Hague Convention (IV) and in the Regulations attached to it did not discipline '... the means of paying such compensation, nor whether it [*would*] be paid following an international agreement or directly to the injured, nor even [*regulated*] the issue of the competent court for the adjudication of such compensation, adjudicating individual law-suits by the injured addressed to the State responsible.'⁴⁹

⁴³ *Federal Republic of Germany v Margellos and Others* (n 40) 200.

⁴⁴ *ibid.*

⁴⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (n 11):

'Art. 3—A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

⁴⁶ *ibid.*

'Art. 46—Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.'

⁴⁷ *ibid.*

'Art. 50—No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.'

⁴⁸ *Federal Republic of Germany v Margellos and Others* (n 40) 201.

⁴⁹ *ibid.*

In order to investigate the relationship between state immunity and individual tort claims, the AED produced a summary of the sources of law it had to take into account:

‘Legal information by the Hellenic Institute of International and Foreign Law, the judgment of the European Court of Human Rights (ECHR) *McElhinney v. Ireland* and *Al-Adsani v. United Kingdom* issued on 21 November 2002; the judgment of the International Court of Justice issued on 14 February 2002; documents of international conventions, such as the ... Basle Convention and its preparatory workings; the text and preparatory workings of the draft Convention on State Immunity, adopted by the United Nations International Law Committee in 1991, which has not been adopted as yet; the workings and comments by international law experts being reported in the decisions of the International Law Institute in its Conference in Basle in 1991; legislation of foreign states and mostly the relevant laws of the United States of America, United Kingdom and the laws of other States with similar content; the case-law of foreign courts; textbooks, studies and advisory opinions of experts from various States and types of legal order.’⁵⁰

The AED did not undertake a discussion of the international jurisprudence it mentioned. Following the ECtHR in *McElhinney v Ireland*, it accepted that there was no exception for immunity in cases in which the foreign state is being sued for torts committed *jure imperii* by its organs in the territory of the forum state.⁵¹ It also did not question the position taken by the ECHR in *Al-Adsani v United Kingdom* according to which a foreign state has the right to immunity even for acts committed in violation of *jus cogens*. In the same manner, it took note of the ICJ judgment in *Arrest Warrant*, in which it was upheld that, under customary international law, an incumbent Foreign Minister enjoyed immunity from criminal jurisdiction even where they are suspected of having committed war crimes and crimes against humanity.⁵²

The AED added that, regardless of the cases mentioned, by analyzing the other sources of law available, it would arrive at the same conclusion, namely

‘... that at the present stage of international law development a generally acknowledged rule of international law, that allows, in exemption to immunity, to admissibly bring an action against a State before the courts of another State for compensation from any type of tort that took place in the territory of the forum and in which the armed forces of the defendant State are involved

⁵⁰ *Federal Republic of Germany v Margellos and Others* (n 40) 202.

⁵¹ *ibid* 202.

⁵² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits: Judgment) [2002] ICJ Rep 3, [58].

in any way, either in peace or in time of war, has not yet emerged ... the Court reaches the conclusion that the foreign State is still enjoying the privilege of immunity, when sued for actions that took place in the territory of the forum and in which its armed forces were in any way implicated, without a further distinction as to whether these acts violate *ius cogens* or its armed forces were or not involved in an armed conflict with other armed parties.

‘... Since a rule that allows for the lifting of immunity in cases of civil responsibility of states deriving from armed conflicts has been formulated neither in a legal text nor as a fact, it is not allowed to the Court, as set out in a previous thought, either to formulate such a rule for the first time or to deduce its existence, without invoking specific evidence from international practice; nor can the Court derive the existence of such a rule by interpreting solely the principle of the State’s obligation to pay compensation in case of breach of the laws of war on land.’⁵³

In the AED’s view, Article 31 of ECSI, according to which no provision of it ‘... shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State’⁵⁴, was justified ‘... from the necessity to respect the sovereignty of the foreign State, the main expression of which are acts carried out by its armed forces.’⁵⁵ The Court further stressed that respect to sovereignty was ‘... the foundation of equality between States and consequently of the harmonious international relations, which is the goal of all principles of international law.’⁵⁶

Much like the ICJ in *Arrest Warrant*, when it emphasized that the immunity from jurisdiction enjoyed by an incumbent Foreign Minister did not equal impunity in respect of crimes they may have committed,⁵⁷ the AED also underlined that the recognition of immunity in favor of a foreign state did not mean the preclusion of the international responsibility of the state.⁵⁸

⁵³ *Federal Republic of Germany v Margellos and Others* (n 40) 203-204.

⁵⁴ European Convention on State Immunity (n 20).

⁵⁵ *Federal Republic of Germany v Margellos and Others* (n 40) 204.

⁵⁶ *ibid.*

⁵⁷ *Arrest Warrant of 11 April 2000* (n 52) [60].

⁵⁸ *Federal Republic of Germany v Margellos and Others* (n 40) 204.

3.1.1.2.1 The dissenting opinion appended to the judgment of the Greek Special Supreme Court (Anotato Eidiko Dikastirio) in *Germany v Margellos and Others* (2002)

Four out of the eleven judges of the AED appended a joint dissenting opinion to the judgment. By examining the same materials, the dissenting judges arrived at the conclusion it had emerged in international law a rule according to which a state is not under an international obligation to grant immunity to a foreign state for torts committed in the territory of the forum state by an author present in that territory, regardless of whether these torts were committed *jure imperii* or not.

They articulated four arguments in support of their view. Firstly, they argued that Article 11 of the ECSI, Article 12 of the ILC's Draft Convention on State Immunity, Article 2.2.e of the Resolution adopted by the IDI in 1991 in Basel ('Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement') and Article III of the International Law Association's Revised Draft Articles for a Convention on State Immunity all provided for a 'tort exception' clause.⁵⁹ Secondly, they pointed out that the same rule could be found in the statutes of states that codified the law of state immunity.⁶⁰ Thirdly, they asserted that their understanding was backed up by the ECtHR's *McElhinney* case and the Areios Pagos' judgment in the *Distomo Massacre* case. According to the dissenting judges, both the majority and the dissenting judges in *McElhinney* recognized '... sovereign immunity of States does not prevail over the respective rights of persons both in international law and comparative law in case of material damages due to an act or omission that took place in the State of the forum by either the State or persons for which the State is responsible.'⁶¹

The dissenting judges did perhaps a very generous reading of the position taken by the majority of the ECtHR, since the ECtHR in *McElhinney* referred to 'a trend in international and comparative law towards limiting State immunity in respect of personal

⁵⁹ *Federal Republic of Germany v Margellos and Others (Judgment No 6/2002)* (Dissenting Opinions) [2003] 56 RHDI 205 (Greek Special Supreme Court) (translated by Maria Panezi), 205.

⁶⁰ *ibid.*

'... the United States (Foreign Sovereign Immunities Act (FSIA) of 1976, Article 1605(a)(5)), the United Kingdom (Sovereign Immunity Act (SIA) of 1978, Article 5), Canada (SIA of 1982, Article 6), Australia (FSIA of 1985, Article 13), South Africa (FSIA of 1981, Article 6) and Singapore (SIA of 1979, Article 7).'

⁶¹ *ibid* 205-206.

injury caused by an act or omission within the forum State’ and remarked that ‘... this practice is by no means universal.’⁶² The majority of the ECHR also noted that ‘... this trend may primarily refer to “insurable” personal injury’ and that it could not be said that ‘... Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards.’⁶³

Lastly, the dissenting judges did a different reading of Article 31 of the ECSI, which reinstates the rule of state immunity ‘... in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.’⁶⁴ According to the dissenting judges, this provision ‘... refers to the presence of armed forces of a contracting State in the territory of another contracting State under regular circumstances tolerated by the latter’, thus it would not include a situation as the one presented to the Court, in which the territory of the forum state was illegally occupied and war crimes were perpetrated by the armed forces of a foreign state.⁶⁵ The dissenting judges added, as a side argument, that war crimes were forbidden by the rules of the 1907 Hague Convention (IV), which, in their view, have the character of *jus cogens* and created a direct obligation for the responsible state to pay compensation for injured individuals.⁶⁶

In sum, the main argument of the dissenting judges was that the tort exception was a rule of customary international law which could be applied regardless of whether the acts in question were categorized or not as *jure imperii*. They also considered it irrelevant that the acts discussed were committed by armed forces because they were war crimes and could not fall under the meaning of ‘armed conflict’.⁶⁷

⁶² *McElhinney v Ireland* [GC] (Application No 31253/96) (Merits: Judgment) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59887>> accessed 26 November 2015, [38].

⁶³ *ibid.*

⁶⁴ European Convention on State Immunity (n 20).

⁶⁵ *Federal Republic of Germany v Margellos and Others (Judgment No 6/2002)* (Dissenting Opinions) (n 59) 206.

⁶⁶ *ibid* 206-207.

⁶⁷ *ibid.*

3.1.2 Italy⁶⁸

3.1.2.1 Judgment of the Italian Court of Cassation in *Ferrini v Germany* (2004)

On 23 September 1998, Mr Luigi Ferrini initiated civil proceedings against Germany before the Tribunale di Arezzo.⁶⁹ Mr Ferrini demanded reparations due to the damages he suffered for having been captured by the German Armed Forces on 4 August 1944 and subsequently deported to Germany, where he was submitted to forced labor until 20 April 1945.⁷⁰ The Tribunale di Arezzo decided it had no jurisdiction because Germany had practiced those acts in its capacity as a sovereign, having as a consequence the right to immunity as established in customary international law.⁷¹ Mr Ferrini appealed to the Corte d'appello di Firenze, which confirmed the judgment of the Tribunale di Arezzo. Subsequently, he appealed to the Court of Cassation.⁷²

The Court of Cassation held that there could be no doubt regarding the existence of a norm of customary international providing for an obligation to abstain from exercising jurisdiction over foreign states and that this rule was given effect in the Italian legal system by virtue of Article 10.1 of the Italian Constitution, which establishes that '[l']ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute.'⁷³ At the same time, the Court recognized the scope of this principle was being progressively restricted.⁷⁴

The Court took the position the acts upon which the claim was based were undoubtedly an expression of Germany's 'potestà d'imperi'. However, in the Court's view, these acts separated this case from others it had considered—due to their 'estrema gravità', the acts under consideration were 'in forza di norme consuetudinarie di diritto

⁶⁸ I had access to the cases of the Italian Court of Cassation through the ILDC database, which publishes not only the original contents of the decisions in full, but also summaries and analyses of the cases written by specialists. For the purposes of this monograph, I produced my own analyses of the judgments having as reference their original contents.

⁶⁹ *Ferrini v Germany* (Judgment No 5044/2004) (11 March 2004) ILDC 19 (Italian Court of Cassation), [1]. The ILDC database includes a summary and an analysis of *Ferrini* written by Simonetta Stirling-Zanda.

⁷⁰ *ibid.*

⁷¹ *ibid* [1.1].

⁷² *ibid* [1.2]-[1.3].

⁷³ *ibid* [5]; Costituzione della Repubblica Italiana

<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:costituzione>> accessed 26 November 2015.

⁷⁴ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [5].

internazionale, quali crimini internazionali, in quanto lesivi di valori universali che trascendono gli interessi delle singole comunità statali.⁷⁵

The next step the Court took was to establish what justified the position it adopted in *Markovic v Presidenza del Consiglio dei Ministri et al.* (2002) and what justified a different treatment for the case at hand. In *Marcovic v Presidenza del Consiglio dei Ministri et al.*, the Court adjudicated a claim for compensation due to damages suffered as a result of a deliberate air strike by NATO forces in Yugoslav against the facilities of the RTS (Radio Television of Serbia), which resulted in the death of relatives of the applicants. The applicants argued Italy was liable for the damages because, as a member of NATO, it had taken part in the decision concerning the airstrike and because the actions had started in its territory.⁷⁶ The Court of Cassation declined jurisdiction because, among other reasons, it considered the choice of a particular way of conducting hostilities was the manifestation of a political function against which the situation of an individual's protected interests could not be opposed and therefore it could not be subjected to judicial review: 'alle funzioni di tipo politico non si contrappongono situazioni soggettive protette'.⁷⁷

It is clear *Markovic v Presidenza del Consiglio dei Ministri et al.*, insofar as it dealt with a claim brought against the Italian State before an Italian Court, is not a case dealing with state immunity, but with the inadmissibility of judicial review of certain acts considered as political. In *Ferrini v Germany*, the Court pointed out said inadmissibility is not an obstacle to finding a crime has been committed nor to the determination of both criminal and civil responsibility.⁷⁸ It seems, nevertheless, that in *Markovic v Presidenza del Consiglio dei Ministri et al.*, the employment of the 'political-acts' doctrine coupled with the understanding there was no provision under domestic law of a right to seek reparation for injuries suffered as a result of the breach of certain international norms had this exact effect.⁷⁹

⁷⁵ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [7].

⁷⁶ *Markovic v Presidenza del Consiglio dei Ministri e altri* (Decision No 8157/2002) (5 June 2002) 85 RDI 799 (Italian Court of Cassation).

⁷⁷ *ibid.*

⁷⁸ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [7.1].

⁷⁹ See *Markovic v Presidenza del Consiglio dei Ministri e altri* (Decision No 8157/2002) (n 76):

'La scelta di una modalità di conduzione delle ostilità rientra tra gli atti di Governo.

'...

'Rispetto ad atti di questo tipo nessun giudice ha potere di sindacato circa il modo in cui la funzione è stata esercitata.

'...

'Le norme del Protocollo di Ginevra del 1977 (artt. 35.2, 48, 49, 51, 52 e 57) e della Convenzione europea dei diritti dell'uomo (artt. 2 e 15.2), che disciplinano la condotta delle

The Court also observed that, by virtue of article 10.1 of the Italian Constitution, ‘generally recognized’ international norms which protect liberty and human dignity and consider as ‘international crimes’ behaviors that seriously attempt against the integrity of these values are ‘automatically’ part of the Italian legal system and provide a standard whereby international and negligent ‘acts’ may be assessed.⁸⁰

The Court then proceeded to consider the status of deportation and forced labor under international law and it found various sources consistently considering it to be an international crimes, thus concluding that it was beyond doubt that, under general customary law binding on all components of the international community, deportation and forced labor were international crimes.⁸¹ The Court of Cassation added Germany recognized the gravity of these crimes by creating, with the assistance of the German companies that benefitted from forced labor, the ‘Remembrance, Responsibility and Future’ Foundation (2000 Federal Law), which has the scope of keeping the memory of what happened and of providing the victims with compensation, as long as they meet the requirements established by the law.⁸²

Before stating its position, the Court of Cassation established an interesting dialogue with the decision rendered by the Greek Court of Cassation in the *Distomo Massacre* case (4 May 2000). In its decision, the Greek Court of Cassation employed the ‘tacit waiver’ theory, according to which, by violating peremptory norms, Germany had

ostilità, hanno bensì come oggetto la protezione dei civili in caso di attacchi, ma in quanto norme di diritto internazionale regolano rapporti tra Stati.

‘Gli stessi trattati strutturano i procedimenti per accertare le violazioni, prevedono le sanzioni in caso di responsabilità (art. 91 del Protocollo; art. 41 della Convenzione), indicano le Corti internazionali competenti ad affermarla.

‘Le leggi che vi hanno dato applicazione nello Stato italiano non contengono per contro norme espresse che consentano alle persone offese di chiedere allo Stato riparazione dei danni loro derivati dalla violazione delle norme internazionali.

‘Che disposizioni con questo contenuto siano implicitamente risultate introdotte nell’ordinamento per effetto della esecuzione data alle norme di diritto internazionale è principio che trova poi ostacolo in quello contrario, di cui si è fatto cenno, per cui alle funzioni di tipo politico non si contrappongono situazioni soggettive protette.

‘....’

See also the judgment of the ECtHR in respect of this case: *Markovic and others v Italy* [Grand Chamber] (Application No 1398/03) (Merits: Judgment) (2006) <<http://hudoc.echr.coe.int/eng?i=001-78623>> accessed 15 May 2016. The ECtHR found Italy did not violate Article 6 of the ECHR.

⁸⁰ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [7.1].

⁸¹ *ibid* [7.1]-[7.4]. The Italian Court of Cassation referred to the following sources: UNGA Resolution 95-I of 11 December 1946; Article 6.b of the Charter of the International Military Tribunal in Nuremberg; a decision of the Nuremberg Tribunal of 30 September 1946 noting that this conduct was a violation of Article 52 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex 1907; the Statute of the International Criminal Tribunal for the former Yugoslavia (Articles 2 and 5); the Statute of the International Criminal Tribunal for Rwanda (Article 3); the Rome Statute of the ICC (Articles 7 and 8).

⁸² *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [7.3].

waived any benefits accorded by international law. The Court of Cassation did not consider this argument persuasive, because, in its understanding, it could not be implied from the serious breaches committed by Germany an intention to waive its jurisdictional immunity—in the words of the Court of Cassation: ‘... non vi è atto il quale presupponga necessariamente una determinata volontà. Una rinuncia non può quindi essere ipotizzata in astratto, ma solo riscontrata in concreto, se i fatti accertati consentono di qualificare un determinato contegno come “abdicativo”.’⁸³

The Court of Cassation pointed out the international crimes committed by Germany were ‘serious breaches’ of obligations arising under peremptory norms of general international law, in the sense given by Article 40.1 of the DARSIVA 2001, according to which ‘[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.’⁸⁴ The Court stressed peremptory norms prevail over other norms regardless of their conventional or customary nature:

‘... È ricorrente l’affermazione che i crimini internazionali « minacciano l’umanità intera e minano le fondamenta stesse della coesistenza internazionale » ... Si tratta, infatti, di delitti che si concretano nella violazione, particolarmente grave per intensità o sistematicità ..., dei diritti fondamentali della persona umana, la cui tutela è affidata a norme inderogabili che si collocano al vertice dell’ordinamento internazionale, prevalendo su ogni altra norma, sia di carattere convenzionale che consuetudinario ... e, quindi, anche su quelle in tema di immunità.’⁸⁵

Before concluding its reasoning, the Court of Cassation mentioned other elements to be taken into account.⁸⁶ (i) the non-applicability of statutory limitation to war crimes and crimes against humanity (European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes 1974 and Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968); (ii) the existence of universal jurisdiction in regard to criminal and civil proceedings arisen out of these crimes, whose exercise may be compulsory (eg, Article 146 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949); (iii) and the duty, enshrined in Article 41 of the DARSIVA, not to ‘... recognize as lawful a

⁸³ *Ferrini v Germany (Judgment No 5044/2004)* (n 69) [8.2]-[8.3].

⁸⁴ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 26 November 2015.

⁸⁵ *Ferrini v Germany (Judgment No 5044/2004)* (n 69) [9].

⁸⁶ *ibid.*

situation created by a serious breach ... nor render aid or assistance in maintaining that situation' and to '... cooperate to bring to an end through lawful means any serious breach...'.⁸⁷

The Court of Cassation stated that recognizing immunity for states that are responsible for such breaches would be in contrast with the normative data it laid out—it would amount to an obstacle to the protection of essential values for the whole international community.⁸⁸

The Court of Cassation recognized the existence of an antinomy, which, in its view, should be solved by giving precedence to the hierarchically superior norms.⁸⁹ It highlighted the dissenting opinions annexed to the judgment of the ECtHR in *Al-Adsani v United Kingdom* concurred with this reasoning.⁹⁰ The Court also mentioned in this regard an excerpt of the judgment of the ICTY in *Prosecutor v Anto Furundzija*, according to which, as a consequence of a state adopting a measure in violation of *jus cogens*,

'[p]roceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act.'⁹¹

Unlike what was found in *Al-Adsani v United Kingdom* (ECtHR) and *Bouzari v Islamic Republic of Iran* (Ontario Superior Court of Justice), the Court of Cassation opposed the idea immunity had to be recognized insofar as the exception in question to it is not specifically provided by a legal norm.⁹² The Court of Cassation based this reasoning on the idea that legal norms cannot be interpreted in a vacuum, separately from one another:

'Il rispetto dei diritti inviolabili della persona umana ha invero assunto, ormai, il valore di principio fondamentale dell'ordinamento internazionale ... [e] l'emersione di tale principio non può non riflettersi sulla portata degli altri principi ai quali tale ordinamento è

⁸⁷ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) (n 84).

⁸⁸ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [9.1].

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*; *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1-T (10 December 1998), [155] (footnotes omitted).

⁹² *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [9.2].

tradizionalmente ispirato e, in particolare, di quello sulla “sovrana uguaglianza” degli Stati, cui si ricollega il riconoscimento della immunità statale dalla giurisdizione civile straniera.

‘Le norme giuridiche non vanno infatti interpretate le une separatamente dalle altre, poiché si completano e si integrano a vicenda, condizionandosi reciprocamente nella loro applicazione, (sentenze Al-Adsani, cit. 55; McElhinney, cit. 36). Queste decisioni fanno specifico riferimento alle norme convenzionali. Ma non vi è dubbio che criteri analoghi valgono per l’interpretazione di quelle consuetudinarie, che, non diversamente dalle altre, sono inserite in un sistema e possono, pertanto, essere correttamente intese solo se poste in relazione alle altre norme che fanno parte integrante dello stesso ordine giuridico (così ad. Es., Dichiarazione Universale dei diritti dell’uomo, adottata dall’Assemblea ONU il 10 dicembre 1948, articolo 30).’⁹³

As a result of that, and of the status of the respect for inviolable human rights as a fundamental principle of the international legal system, the Court of Cassation concluded this principle impacted upon the scope of other legal principles, such as the principle of sovereign equality, which is linked to the recognition of state immunity from foreign civil jurisdiction.⁹⁴

The Court of Cassation remarked that in *Al-Adsani v United Kingdom* (ECtHR), in *Bouzari v Islamic Republic of Iran* (Ontario Supreme Court of Justice), and also in the opinion of Lord Hutton in *Ex parte Pinochet* (House of Lords)⁹⁵, it was contended foreign states had the right to jurisdictional immunity with regard to claims for damages derived from the commission of international crimes, but added that these cases had an important distinction from the case at hand: they dealt with crimes that were not committed in the forum state.⁹⁶ Indeed, these decisions were based on the assumption that any exception for state immunity had to be provided for in a specific legal norm, and both the United Kingdom’s SIA 1978 and Canada’s SIA 1985 did not provide for the possibility of removing immunity for torts committed outside the forum state.

As stated before, the Court of Cassation did not share the view only a specific legal provision could justify a derogation from state immunity. The Court also noted that the practice pointed towards the overcoming of the distinction between *acta jure imperii* and *acta jure gestionis* (ie, the restrictive approach to state immunity), as was, in its view,

⁹³ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [9.2] (emphasis added).

⁹⁴ *ibid.*

⁹⁵ *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No 3) [2000] 1 AC 147 (House of Lords). Lord Hutton stated the following: ‘... I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom.’

⁹⁶ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [10].

confirmed by domestic legislations on the subject, by Article 11 of the ECSI and by Article 12 of the Draft Articles on Jurisdictional Immunities of States and Their Property.⁹⁷

The Court of Cassation understood that, for the purposes of tortious liability, the distinction between *acta jure imperii* and *acta jure gestionis* could be no longer considered as generally applicable.⁹⁸

As a further element to confirm the overcoming of that distinction, the Court of Cassation mentioned the Antiterrorism and Effective Death Penalty Act 1996, which amended the FSIA 1976 of the USA. This amendment added a new exception to the grant of immunity in cases in which ‘... money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act...’.⁹⁹ The derogation provided for by this amendment applies only to states designated as ‘sponsors of terrorism’ by the United States. The Court of Cassation considered the Antiterrorism and Effective Death Penalty Act 1996 provided a good example of the priority attributed to the protection of fundamental human rights over the interest of the state in having its immunity recognized.¹⁰⁰

The Court mentioned that, being a corollary of state immunity, the functional immunity of foreign state organs could not be invoked for international crimes.¹⁰¹ It considered that this point was undisputed and referred to treaty and domestic case law to support this statement.¹⁰² The Court of Cassation reasoned that, if functional immunity

⁹⁷ *Ferrini v Germany (Judgment No 5044/2004)* (n 69) [10.1].

⁹⁸ *ibid.*

⁹⁹ US Code, Section 1605A <<https://www.law.cornell.edu/uscode/text/28/1605A>> accessed 26 November 2015.

¹⁰⁰ *Ferrini v Germany (Judgment No 5044/2004)* (n 69) [10.2].

¹⁰¹ *ibid* [11].

¹⁰² *ibid*:

‘È ormai pacifico che, in presenza di crimini internazionali, l’immunità funzionale degli organi dello Stato estero non può essere invocata. La normativa convenzionale è, a tale riguardo, in equivoca (così, da ultimo, l’articolo 27 dello Statuto della Corte penale internazionale, che ribadisce un principio già presente nello Statuto del Tribunale di Norimberga e in quelli del Tribunale penale per la ex Jugoslavia e per il Ruanda, retro § 6.3.). Per quel che riguarda la prassi giudiziaria è sufficiente richiamare la sentenza della Corte Suprema di Israele 29 maggio 1962, sul caso Eichmann, quelle pronunziate negli U.S.A., il 30 maggio 1980, dalla Corte d’appello federale del secondo Circuito nel caso *Filartiga v. Pena-Irala*, il 12 aprile 1995 dalla Corte distrettuale del Massachusset nel caso *Xuncax v. Gramajo* e il 18 aprile 1998 dalla Corte distrettuale di New York nel caso *Cabiri v. Assasie Gymah*, tutte concordi nell’escludere che detta immunità possa assumere rilievo quando siano stati commessi crimini internazionali.’

could not be granted in respect of international crimes, it should follow that there was no reason to grant immunity to the state itself in respect of these acts.¹⁰³

After all these considerations, the Court of Cassation declared Italian courts had jurisdiction to entertain the matter. Finally, the Court asserted that, although the facts on which the suit was based occurred in Italy, the ‘principles of universal jurisdiction’ over international crimes would suffice as a head of jurisdiction.¹⁰⁴ The House of Lords in the *Jones* case discussed the matter and reached the opposite conclusion.

3.1.2.2 Judgment of the Italian Court of Cassation in *Mantelli and Others v Germany* (2008)

The decision rendered by the Court of Cassation in *Mantelli and Others v Germany* is part of a group of decisions with identical content, which denied immunity to Germany with respect to international crimes committed during the Second World War.¹⁰⁵ The facts of this case are similar to those presented before the Court of Cassation in *Ferrini v Germany*. After 8 September 1943, Mr Giovanni Mantelli and other Italian citizens were deported to Germany, where they were forced to work for German industries.¹⁰⁶ The plaintiffs initiated proceedings seeking compensation against Germany and the company for which they were forced to work, Daimlerchrysler.

¹⁰³ *Ferrini v Germany* (Judgment No 5044/2004) (n 69) [11]:

‘L’immunità funzionale, secondo l’opinione prevalente, costituisce specificazione di quella che compete agli Stati, poiché risponde all’esigenza di impedire che il divieto di convenire in giudizio lo Stato straniero possa essere vanificato agendo nei confronti della persona mediante la quale la sua attività si è esternata. Ma se il rilievo è esatto, come sembra a questa Corte, deve allora convenirsi con quanti affermano che se l’immunità funzionale non può trovare applicazione, perché l’atto compiuto si configura quale crimine internazionale, non vi è alcuna valida ragione per tener ferma l’immunità dello Stato e per negare, conseguentemente, che la sua responsabilità possa essere fatta valere davanti all’autorità giudiziaria di uno Stato straniero.’

¹⁰⁴ *ibid* [12]:

‘Si è posto in evidenza che i fatti sui quali si fonda la domanda si sono verificati anche in Italia. Ma è appena il caso di rilevare che, essendo essi qualificabili come crimini internazionali, la giurisdizione andrebbe comunque individuata secondo i principi della giurisdizione universale ...’

¹⁰⁵ Judgments Nos 14201/2008, 14202/2008, 14203/2008, 14204/2008, 14205/2008, 14206/2008, 14207/2008, 14208/2008, 14209/2008, 14210/2008, 14211/2008, 14212/2008, and 14213/2008.

¹⁰⁶ *Germany v Mantelli and Others* (Case No 14201/2008) (29 May 2008) ILDC 1037 (Italian Court of Cassation), [7]. The ILDC database includes a summary and an analysis of *Mantelli* written by Alessandro Chechi and Riccardo Pavoni.

Germany contended Italian courts had no jurisdiction over the claim. It did so based on conventional and customary law. Firstly, it argued Italy could not exercise jurisdiction over the matter due to Article 77.4 of the Peace Treaty of 1947, according to which Italy waived ‘... on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.’¹⁰⁷ The waiver provided for in this article included ‘... debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.’¹⁰⁸ Forecasting the Court of Cassation would deem the Peace Treaty inapplicable, due to Germany not being a party to it, it was put forward the Bonn Agreement between Germany and Italy concluded on 2 June 1961 had settled the matter.

Article 1 of the Bonn Agreement established that ‘[I]a Repubblica Federale di Germania versa alla Repubblica italiana, a definizione delle questioni economiche pendenti, la somma di 40 milioni di marchi tedeschi.’¹⁰⁹ According to Article 2.1 of the same treaty,

‘... sono definite tutte le rivendicazioni e richieste della Repubblica italiana, o di persone fisiche o giuridiche italiane, ancora pendenti nei confronti della Repubblica Federale di Germania o nei confronti di persone fisiche o giuridiche tedesche, purché derivanti da diritti o ragioni sorti nel periodo tra il 1 settembre 1939 e l’8 maggio 1945.’¹¹⁰

Article 2.2 provided that Italy would consider indemnified ‘... la Repubblica Federale di Germania e le persone fisiche e giuridiche tedesche da ogni eventuale azione o altra pretesa legale da parte di persone fisiche o giuridiche italiane per le rivendicazioni e richieste suddette.’¹¹¹ In other words, the Bonn Agreement was a lump sum agreement by which Germany accepted to pay pecuniary compensation to settle pending claims against Germany and German natural and legal persons deriving from rights which had emerged

¹⁰⁷ Treaty of Peace with Italy (adopted 10 February 1947, entered into force 15 September 1947) <<https://treaties.un.org/doc/Publication/UNTS/Volume%2049/v49.pdf>> accessed 26 November 2015.

¹⁰⁸ *ibid.*

¹⁰⁹ Accordo tra la Repubblica italiana e la Repubblica Federale di Germania per il regolamento di alcune questioni di carattere patrimoniale, economico e finanziario con scambi di Note, concluso a Bonn il 2 giugno 1961 (adopted 2 June 1961, entered into force 16 September 1963)

<<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1962-08-25&atto.codiceRedazionale=062U1263¤tPage=1>> accessed 26 November 2015.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

between 11 September 1939 and 8 May 1945. The compensation paid by Germani was split between the victims in accordance with the terms of a Presidential Decree.¹¹² Lastly, Germany contended the Court of Cassation had erred in law in *Ferrini v Germany*, insofar as states enjoyed immunity with regard to acts which are an expression of their sovereignty.¹¹³ Germany grounded this argument on numerous judicial decisions which were in contradiction with the ruling of the Court of Cassation in the *Ferrini* case.¹¹⁴

The Court of Cassation asserted the provisions contained in the Peace Treaty of 1947 and in the Bonn Agreement of 1961 referred to substantive rights, and not to jurisdictional issues, and they could not exclude the jurisdiction of Italian judges.¹¹⁵

The Court reaffirmed the soundness of its decision in *Ferrini v Germany*. It asserted that, whilst the judicial decisions cited by Germany could not confirm support for the existence of a ‘secure and explicit’ customary international norm providing for an exception to the principle of state immunity for *acta jure imperii* amounting to international crimes, they also could not support the existence of a customary norm expressing the opposite.¹¹⁶ In this sense, the Court emphasized that the joint dissenting opinion annexed to the judgment of the ECtHR in *Al-Adsani v United Kingdom* and that the *obiter dictum* of the ECtHR’s decision in *Kalogeropoulou and others v Greece and Germany* pointed out that this exception to the principle of state immunity may be *in statu*

¹¹² Decreto del Presidente Della Repubblica No 2043, 6 ottobre 1963 (‘Norme per la ripartizione della somma versata dal Governo della Repubblica Federale di Germania, in base all’Accordo di Bonn del 2 giugno 1961, per indennizzi a cittadini italiani colpiti da misure di persecuzione nazionalsocialiste’)
<<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1964-01-21&atto.codiceRedazionale=063U2043¤tPage=1>> accessed 26 November 2015.

¹¹³ *Germany v Mantelli and Others (Case No 14201/2008)* (n 106) [9].

¹¹⁴ *ibid* [10]:

‘... si richiamano recenti pronunzie di altre corti supreme europee. Quali, in particolare, le decisioni 17 settembre 2002 della Corte Suprema greca, 26 giugno 2003 della Corte Federale di Cassazione tedesca, 16 dicembre 2003 della Corte di Cassazione francese, 14 giugno 2006 della House of Lords (in causa *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya and others*); si riporta una sentenza del 2002 della Superior Court of Justice dell’Ontario (in causa *Houshang Bouzari*); si richiamano pure arresti della CEDU (21 novembre 2001 *Al-Adsani c. Governo Regno Unito Gran Bretagna e Irlanda del Nord*; 12 dicembre 2002 *Kalogeropoulou c. Grecia e Germania*; 14 dicembre 2006 *Markovic c. Italia*); si precisa, inoltre, che le decisioni delle Corti degli Stati Uniti citate nella sentenza n. 5044/04, in quanto fondate su un’espressa previsione normativa (emendamento del 1996 al Foreign Sovereign Immunities Act del 1976) riguardano esclusivamente gli stati “sponsor” del terrorismo, mentre in numerose altre decisioni statunitensi è stato riaffermato il tradizionale principio di immunità.’

¹¹⁵ *Germany v Mantelli and Others (Case No 14201/2008)* (n 106) [11].

¹¹⁶ *ibid*.

nascendi.¹¹⁷ The Court of Cassation then focused on reconstructing the argument it had previously laid out in *Ferrini v Germany*. It asserted that, in the international legal system, the principle of state immunity for *acta jure imperii*, which has the scope of favoring international relations with respect to each other's sovereignty, coexists with the principle according to which international crimes threaten mankind as whole.¹¹⁸ As stated by the Court, deportation and forced labor are undeniably international crimes.¹¹⁹ There is, then, an antinomy between two competing principles which entered the Italian legal system by means of Article 10.1 of the Italian Constitution—and, at the systematic level, this antinomy is solved by giving precedence to the higher ranked norm.¹²⁰ The Court made this move conscious that it was acting as an agent of the development of international law by contributing to the emergence of an international rule *already implicit in the international legal system*:

‘[I]nfatti, come già sottolineato nella sentenza n. 5044 del 2004 [*Ferrini*] di questa corte, il rispetto dei diritti inviolabili della persona ha assunto, anche nell’ordinamento internazionale, il ruolo di principio fondamentale per il suo contenuto assiologico di metavalore ... nel ribadire ora le conclusioni cui sono già pervenute con il ricordato proprio precedente, queste Sezioni unite sono consapevoli di contribuire così alla emersione di una regola conformativa della immunità dello Stato estero, che si ritiene comunque già insita nel sistema dell’ordinamento internazionale...’¹²¹

The Court used as a supporting argument the incongruity that would result in the law by upholding the immunity exception for commercial transactions and at the same time not recognizing an exception for international crimes.¹²² Finally, the Court mentioned the fact the wrongful acts were committed in the territory of the forum state as a further argument to exercise jurisdiction over the matter.¹²³

¹¹⁷ *Germany v Mantelli and Others* (Case No 14201/2008) (n 106) [11].

¹¹⁸ *ibid.*

¹¹⁹ The Court of Cassation referred to the following sources: Article 6 (b) of the London Agreement of August 8th 1945; General Assembly Resolution 95-I of 11 December 1946; ILC's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950; the Statute of the International Criminal Tribunal for the former Yugoslavia (Articles 2 and 5); the Statute of the International Criminal Tribunal for Rwanda (Article 3); the Rome Statute of the ICC (articles 7 and 8).

¹²⁰ *Germany v Mantelli and Others* (Case No 14201/2008) (n 106) [11].

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

3.1.2.3 Judgment of the Italian Court of Cassation in the *Milde* case (2009)

On 29 June 1944, a massacre against civilians took place in the municipalities of Civitella, Cornia and S. Pancrazio as a response to the killing of four German soldiers.¹²⁴ Two hundred and three people were killed, amongst them elderly people, women and children.¹²⁵ Sexual violence against women was committed and corpses were dismembered.¹²⁶ Decades later, on 10 October 2006, one of the participants of the massacre, Max Josef Milde, was sentenced to life imprisonment for having violated Article 185 of the Codice penale militare di guerra, which prohibited the killing of civilian enemies. In the same sentence, the Court held Germany liable and ordered it to pay compensation to the parties.¹²⁷ The judgment was unsuccessfully challenged before the Corte Militare di Appello and before the Court of Cassation.

Germany argued the Italian courts had no jurisdiction due to the obligations Italy assumed in Article 77.4¹²⁸ of the Treaty of Peace of 1947 and Article 2¹²⁹ of the Bonn Agreement, concluded by Germany and Italy on 2 June 1961.¹³⁰ Germany put forth that the right to obtain civil compensation was not a peremptory norm of international law and that Italy had validly waived on its behalf and on behalf of its nationals the right to seek

¹²⁴ *Milde (Case No 1072/2009)* (13 January 2009) ILDC 1224 (Italian Court of Cassation), [Svolgimento del Processo]. The ILDC database includes a summary and an analysis of *Milde* written by Massimo Iovane.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Treaty of Peace with Italy (n 107):

‘Article 77.4—Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.’

¹²⁹ Accordo tra la Repubblica italiana e la Repubblica Federale di Germania per il regolamento di alcune questioni di carattere patrimoniale, economico e finanziario con scambi di Note (n 109):

‘Articolo 2. — 1. Il Governo italiano dichiara che sono definite tutte le rivendicazioni e richieste della Repubblica italiana, o di persone fisiche o giuridiche italiane, ancora pendenti nei confronti della Repubblica Federale di Germania o nei confronti di persone fisiche o giuridiche tedesche, purché derivanti da diritti o ragioni sorti nel periodo tra il 1 settembre 1939 e l’8 maggio 1945. 2. Il Governo italiano terrà indenne la Repubblica Federale di Germania e le persone fisiche e giuridiche tedesche da ogni eventuale azione o altra pretesa legale da parte di persone fisiche o giuridiche italiane per le rivendicazioni e richieste suddette.’

¹³⁰ *Milde (Case No 1072/2009)* (n 124) [Svolgimento del Processo].

compensation in cases like the one under consideration.¹³¹ Germany also contended that the decision of the Court of Cassation in *Ferrini v Germany* was not in accordance with international law and that state immunity continued to extend for *acta jure imperii* in violation of *jus cogens*.¹³²

As asserted by Germany, international law rested on the practice of states, and the decisions of numerous domestic courts recognized states enjoyed jurisdictional immunity with respect to *acta jure imperii* even for cases arising from breaches of *jus cogens* norms, what was confirmed by the judgments of the ECtHR on the subject.¹³³ Contradictorily, Germany also criticized the reference the Court of Cassation made in *Ferrini v Germany* to the terrorism exception to state immunity under the Anti-Terrorism and Effective Death Penalty Act, which amended the FSIA 1976: according to Germany, the decisions of the US courts based on this derogation to state immunity could not be used as evidence of international law because they were based solely on domestic legislation and this ‘new derogation’ was not provided for in the UNCJISP 2004.¹³⁴

The Court of Cassation, in its judgment, highlighted Germany only questioned the jurisdiction of the Italian courts to entertain the compensation claims—it was not contested Germany committed wrongful acts.¹³⁵ The Court of Cassation reiterated it considered sound the jurisprudential turn established in *Ferrini v Germany* and reproduced in other decisions of the Italian courts. The Court then focused on justifying logically and systematically that the principle of jurisdictional immunity was not absolute and without exception and that it did not operate when confronted with the customary international principle which legitimizes remedies to obtain compensation for damages caused by international crimes.¹³⁶

When confronted with the argument espoused by Germany that the decision of the Court of Cassation in *Ferrini v Germany* was isolated and did not correspond to international law, the Court of Cassation took a very interesting approach to the problem: it asserted that the legal question posed by the relationship between state immunity and *jus cogens* could not be solved by a *quantitative approach* and that the answer to the problem

¹³¹ *Milde (Case No 1072/2009)* (n 124) [Svolgimento del Processo].

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid* [2].

¹³⁶ *ibid* [4].

could not depend on the number of decisions adhering to one solution or the other.¹³⁷ The Court highlighted that the examination of the practice of tribunals was important to ascertain customary international law, but that there were other elements to be taken into account:

‘... il punto che soprattutto preme di sottolineare è intimamente collegato alla convinzione che la soluzione della questione dibattuta non possa corrispondere ad un esito di tipo meramente quantitativo e non possa dipendere, perciò, soltanto dal numero, maggiore o minore, delle decisioni che aderiscono all’una o all’altra posizione. ... se è vera che l’esame della prassi dei tribunali dei vari Stati costituisce uno strumento importante per l’accertamento del vigore delle norme consuetudinarie di diritto internazionale, è non di meno certo che il compito dell’interprete non può ridursi ad un computo aritmetico dei dati desunti dalla prassi, dovendo tenersi conto, oltre che delle difficoltà di verifica della reale esistenza delle consuetudini, anche della *consistenza qualitativa di esse*, delle *interrelazioni riscontrabili tra le stesse*, dell’*operatività dei nessi di interdipendenza e di collocazione gerarchica operanti in diretta funzione del rango attribuito a ciascuna di quelle norme rispetto alla scala dei valori generalmente accolta dall’ordinamento internazionale*.’¹³⁸

Echoing *Ferrini*, the Court of Cassation asserted that it could only provide a solution to the legal problem before it by *coordinating* the coexisting customary international norms in question and assessing whether their respective spheres of application were compatible or if one norm should prevail over the other: on one side, the principle of the jurisdictional immunity of states recognized with respect to *acta jure imperii*; on the other, the customary rules protecting fundamental human rights, which also were codified in numerous treaties.¹³⁹

The next step of the judgment is perhaps the most important: the Court acknowledged that ‘... [i]l coordinamento non può che essere realizzato sulla base di giudizi di valore che risultino in perfetta sintonia con le opzioni accolte nell’ordinamento internazionale.’¹⁴⁰ In other words, the Court stated it was necessary to make a *value-oriented* choice in consonance with the option embodied in international law. And in the Court of Cassation’s view, this option was to give precedence to the hierarchically superior principles.¹⁴¹ Given the ‘parallela e antinomica coesistenza nell’ordinamento

¹³⁷ *Milde (Case No 1072/2009)* (n 124) [4].

¹³⁸ *ibid* (emphasis added).

¹³⁹ *ibid* [5].

¹⁴⁰ *ibid* [6].

¹⁴¹ *ibid*.

internazionale dei due principi, entrambi di portata generale', it was necessary to solve this conflict 'sul piano sistematico del coordinamento e sulla base del criterio del bilanciamento degli interessi, dandosi prevalenza al principio di rango più elevato e di *ius cogens*, quindi alla garanzia che non resteranno impuniti i più gravi crimini dei diritti inviolabili di libertà e dignità della persona umana.'¹⁴² The Court remembered there was a 'qualitative difference' between customary international norms: customary principles on jurisdictional immunity, remembered the Court, admit derogation by conventional norms, whilst customary norms safeguarding inviolable human rights have the nature of *jus cogens* and do not admit derogation.¹⁴³ The Court added Article 53 of the VCLT postulated unequivocally the pre-eminence of *jus cogens* norms.

The Court of Cassation concluded that, *on the systematic level*, precedence should be given to the norms belonging to *jus cogens* since they have a hierarchically higher rank in the international legal system.¹⁴⁴

The Court of Cassation then proceeded to analyze the issue *on the logical level*. It considered that the norms protecting freedom and human dignity were founded on 'principi universali ed inderogabili, percepiti come tali dall'intera comunità internazionale'¹⁴⁵ and that the internal coherence of the international legal system demanded a reaction to the breach of these rules: it would not make sense to proclaim their primacy and at the same time to deprive individuals from the right of access to court, which provides the means to guarantee the effectiveness and preeminence of fundamental rights.¹⁴⁶

The Court of Cassation added an argument concerning the reception of customary international law in the domestic legal system that would be later developed in *Judgment No 238/2014*. Although the Court conceded the hierarchical status of international norms incorporated in the domestic legal order by means of Article 10.1 of the Italian constitution was still a controversial issue, the Court argued that even the authors who considered these norms enjoyed the same rank as constitutional law agreed that this reception could only operate provided that the international norms in question were in accordance with the

¹⁴² *Milde (Case No 1072/2009)* (n 124) [6].

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid* [7].

¹⁴⁶ *ibid.*

constitutional principles considered to be non-derogable, which comprise, of course, fundamental human rights.¹⁴⁷

Finally, the Court of Cassation addressed the argument that Italy would be in breach of its treaty obligations if it exercised jurisdiction over the claim in question. The Court of Cassation asserted the Peace Treaty of 1947 could not be invoked because Germany was not a party to it and because the relevant provision of this treaty, Article 77.4, only refers to rights related to material damages ('diritti di natura reale relativi a danni materiali'), and not to moral damages.¹⁴⁸ The Court decided that the Bonn Agreement between Germany and Italy concluded on 2 June 1961 was not applicable to the situation at hand because, in its interpretation, Article 2 of the treaty circumscribed its scope to claims pending on the date the treaty was concluded, and not to claims that had not been started at the time the Bonn Agreement was concluded between the two states.¹⁴⁹ Also, the Court considered that the Bonn Agreement did not include moral damages ('danni morali cagionati da crimini internazionali commessi attraverso la grave lesione dei diritti inviolabili dell'uomo').¹⁵⁰

3.1.2.4 Judgment of the Italian Court of Cassation in *Germany v Prefecture of Vojotia* (2011)

This is, to my knowledge, the last pronouncement of the Italian Court of Cassation on the issue of state immunity and grave violations of international human rights law and international humanitarian law before the judgment of the ICJ in *Jurisdictional Immunities of the State*.

This judgment has a direct link with the judgment of the Multi-Member Court of Levadia in the *Distomo massacre* case. As previously analyzed, the Greek Court of Cassation confirmed the decision of the Court of Levadia. The complainants unsuccessfully tried to enforce these decisions in Greece—Article 923 of the Greek Code

¹⁴⁷ *Milde (Case No 1072/2009)* (n 124) [7].

¹⁴⁸ *ibid* [8].

¹⁴⁹ *ibid*:

'Pertanto, va riconosciuto che è munita di solida base giustificativa l'opinione accolta nella sentenza impugnata secondo cui è da escludere che possa applicarsi l'Accordo del 1961 ad una controversia, come quella dedotta nel presente processo, non ancora pendente, perché neppure iniziata alla data di stipulazione della convenzione tra i due Stati ...'

¹⁵⁰ *ibid*.

of Civil Procedure prescribes that the enforcement of decisions against foreign states is subject to the prior consent of the Minister of Justice, which the complainants did not obtain. This refusal of the Greek courts to grant enforcement was questioned before the ECtHR in *Kalogeropoulou and Others v Greece and Germany*. Furthermore, the complainants sought to have the judgments enforced in Germany, but they were unsuccessful before both the German Federal Court of Justice and before the German Constitutional Court.

In Italy, however, the Court of Appeal of Florence, in *Judgment No 1696/2008*, declared enforceable the decision of the Multi-Member Court of Levadia to pay compensation to the Prefecture of Vojotia, which was the legal representative of the victims.¹⁵¹

Germany challenged this decision before the Court of Cassation, which rendered judgment on 20 May 2011. The Court of Cassation rejected Germany's request to stay proceedings pending the ICJ's judgment in *Jurisdictional Immunities of the State* on the grounds that the proceedings before the ICJ concerned the relations between states¹⁵². Accordingly, the Court of Cassation reasoned that, if Italy eventually had to give effect to the judgment of the ICJ, it would have to do so by adopting legislative and administrative measures—in the absence of such measures, the right of action of individuals who obtained a judgment enforceable in Italy remained intact.¹⁵³

Out of the seven grounds of appeal raised by Germany, only one related to international law, which was meticulously examined by the Court of Cassation. The ground of appeal in question was based on Article 64.1.g of Law No 218/1995 ('Riforma del sistema italiano di diritto internazionale privato')¹⁵⁴ and on Article 34.1 of Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments

¹⁵¹ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (20 May 2011) ILDC 1815 (Italian Court of Cassation), [1]-[2]. The ILDC database includes a summary and an analysis of *Germany v Prefecture of Vojotia* written by Daniele Amoroso.

¹⁵² *ibid* [5].

¹⁵³ *ibid*.

¹⁵⁴ Legge No 218/1995 ('Riforma del sistema italiano di diritto internazionale privato') <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1995-05-31;218!vig=>>> accessed 26 November 2015:

'Art. 64—Riconoscimento di sentenze straniere.—1. La sentenza straniera è riconosciuta in Italia senza che sia necessario il ricorso ad alcun procedimento quando: ... g) le sue disposizioni non producono effetti contrari all'ordine pubblico.'

in civil and commercial matters.¹⁵⁵ Both provisions relate to the exception of public policy. Germany's argument was that, after the judgment of the Court of Cassation, it had been established by the international community that state immunity still applied even in cases of grave breaches of human rights. Insofar as, by means of Article 10.1 of the Italian Constitution, '[l]'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute', Germany contended that the enforcement of the judgments of the Greek courts in question would amount to a violation of the principle of public policy.¹⁵⁶

The Court of Cassation took this opportunity to reaffirm the case-law it developed in *Ferrini*, *Milde* and *Mantelli* and to frame it in a theoretical account of the law of state immunity.

The Court began by recalling the hierarchical argument it had employed in *Ferrini*: the international crimes committed violated rights from which no derogation is permitted. Given the existence of an antinomy between the international norms protecting those rights and those relating to state immunity, priority has to be accorded to the norms of higher rank—in the words of the Court of Cassation: '[i]t follows from this hierarchical relationship that the immunity States enjoy with regard to their *acts jure imperii* ... is not an absolute immunity but rather an immunity conditional on the respect for norms that protect human rights.'¹⁵⁷

The Court of Cassation then referred to one of the arguments employed in *Mantelli*, which was part of a group of decisions (Orders 14201/2008 to 14213/2008) with identical content. In *Mantelli*, the Court of Cassation considered that human rights protection has the role of a fundamental principle due to its 'axiological content of "meta-value"' and that, by giving priority to this principle when confronted with the principle of jurisdictional immunity of states, it was self-consciously contributing to the emergence of a 'formative

¹⁵⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML>> accessed 26 November 2015:

'Article 34—A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought ...'

¹⁵⁶ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [27].

¹⁵⁷ *ibid* [29].

rule concerning state immunity’ which was ‘already implicit in the international legal system’.¹⁵⁸

The Court of Cassation then sought to demonstrate that Germany erred when it contended that the Court of Cassation was isolated in respect of its approach. Germany referred to the *Jones* case, in which the House of Lords emphatically criticized the *Ferrini* judgment. In the House of Lords, Lord Bingham expressed its disapproval with the contention that the principle of universal jurisdiction was applicable to civil actions arising from international crimes. The Court of Cassation tried to dismiss this criticism by stating that

‘... the 2006 judgment of the House of Lords [*the Jones case*] ... relied on the principle of *locus commissi delicti*, and they opposed the part of the *Ferrini* judgment which referred to the universal character of jurisdiction in cases relating to the protection of inviolable rights of the person... [T]he references in *Ferrini* to the literature on universal jurisdiction (and to the non-applicability of statutes of limitations) are made merely to corroborate the greater importance, in the international context, of the protection of inviolable rights as compared to State immunity. ... [W]hen the limiting principle of *locus commissi delicti* is taken into account, the *Ferrini* judgment is by no means out of step with the international jurisprudence. ... [W]e decline to attribute to the *Ferrini* judgment a meaning which—if the specific circumstances of that case are taken into account—it plainly does not have, namely, that it upholds the principle of universal jurisdiction to decide human rights cases and gives priority to that principle over the customary principle of State immunity.’¹⁵⁹

The Court of Cassation did not address, however, Lord Hoffmann’s critique that the ordering of competing principles was a technique of adjudication unacceptable in international law.

In *Ferrini* the Court of Cassation criticized the ‘tacit waiver’ theory, which was employed by the Multi-Member Court of Levadia (and mentioned by the Areios Pagos), on the grounds that it could not be implied from the violations of peremptory norms by Germany its intent to waive its jurisdictional immunity. In this judgment, the Court of Cassation merely mentioned that

¹⁵⁸ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [30].

¹⁵⁹ *ibid* [32]-[33].

‘the tribunal [*of Levadia*] made explicit reference to the prevalence, in legal literature and in international practice, of the opinion according to which a State is precluded from invoking immunity where the act imputed to it violates a rule of *jus cogens*.’¹⁶⁰

Continuing its analysis, the Court of Cassation closed examined two cases decided by US Courts: *Letelier v Republic of Chile* (1980) and *Liu v Republic of China* (1989). The *Letelier* and *Liu* cases dealt with political assassinations committed in the territory of the United States by agents of foreign states. In both cases, the ‘tort exception’ to state immunity enshrined in the FSIA was applied. The FSIA did not incorporate the distinction between *acta jure imperii* and *jure gestionis*, which was immaterial to the outcome of the cases. In the *Letelier* case, the District Court found that, for the purposes of Section 1605.a.5.A, according to which the tort exception is not applicable to ‘any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’¹⁶¹, the order of the Chilean Republic for its organs to perpetrate the conducts that culminated in the assassination of Orlando Letelier could not be understood as a ‘discretionary act’—the ‘tort exception’, therefore, applied. The same understanding was applied in the *Liu* case. According to the Court of Cassation, the *Letelier* case was important because ‘it [*highlighted*] the inadequacy of the theory of acts *jure imperii* as a means to resolve the issue of immunity in cases of violations of important norms such as those protecting human rights.’¹⁶²

The Court of Cassation also referred to *Altmann v Republic of Austria* (2004), in which the US Supreme Court detailed the historical background of the codification of the FSIA.¹⁶³ The Court of Cassation underlined the *Altmann* case showed that,

‘... in American common law, the principle of State immunity had an “internal” origin, since, before the enactment of the FSIA, it was applied in a case-by-case basis and consistency often gave way to political considerations.’¹⁶⁴

¹⁶⁰ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [35].

¹⁶¹ US Code, Section 1605 <<https://www.law.cornell.edu/uscode/text/28/1605>> accessed 26 November 2015.

¹⁶² *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [37]; *Letelier v Republic of Chile* (1980) 488 F Supp 665 (District Court for the District of Columbia) and *Liu v Republic of China* (1986) 642 F Supp 297 (District Court for the Northern District of California).

¹⁶³ *Republic of Austria v Altmann* (2004) (03-13) 541 US 677; 327 F.3d 1246 (Supreme Court of the United States) <www.law.cornell.edu/supct/html/03-13.ZO.html> accessed 10 November 2015.

¹⁶⁴ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [39].

In the *Arrest Warrant* case, the ICJ considered that ‘... in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.’¹⁶⁵ After an examination of the functions exercised by Foreign Ministers, the ICJ concluded that ‘... the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.’¹⁶⁶ The Court of Cassation inferred that these considerations of the ICJ were made pursuant certain theoretical premises. According to the Court of Cassation, the ICJ adopted a view of immunity that differed from the conception according to which immunity is founded on the principle of sovereign equality of states:

‘According to the Court [*the ICJ*], an international customary rule required immunity for Foreign Ministers to ensure the effective fulfillment of their duties and to protect them from any act by another State that could impair the performance of their tasks. In essence, such a norm precluding the exercise of jurisdiction made it possible to discharge duties that promote the reciprocal interests of States and the interests of the Community of nations. This definition of the international customary norm expresses a conception of immunity altogether different from the notion of a dichotomy between *acta jure imperii* and *acta jure gestionis*, the latter vision being linked to a principle of equality among States, according to the maxim of *par in parem non habet imperium*. The theories that justify immunity on the basis of the principle of equality among States envisage an absolute shield of immunity which in reality ... never existed. This absolute vision is an abstract one that depicts the international space as a space that is empty, rather than as one of cooperation. But in recent decades, we have witnessed an ever-advancing construction of supranational norms designed to respect and protect human rights.’¹⁶⁷

In my view, it is very doubtful that, underlying the ICJ’s argument, there was a rejection of the theory that links state immunity and the principle of sovereign equality of states. In any case, ten years later, in *Jurisdictional Immunities of the State*, the ICJ stated that ‘the rule of State immunity ... derives from the principle of sovereign equality of States’.¹⁶⁸ Nevertheless, the Court of Cassation’s efforts to develop a theoretical

¹⁶⁵ *Arrest Warrant of 11 April 2000* (n 52) [53].

¹⁶⁶ *ibid* [54].

¹⁶⁷ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [40].

¹⁶⁸ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [57].

framework to support its case-law are notable. In the Court of Cassation's view, state immunity is not founded on the principle of sovereign equality of states—it is 'functional' because it is accorded to 'promote the reciprocal interests of States and the interests of the Community of nations'.

Another point added by the Court of Cassation was that the UNCJISP and the ECSI were not relevant to the dispute, since they do not take into account situations in which a state practiced acts in violation of *jus cogens* norms.¹⁶⁹

Lastly, the Court of Cassation made a more general argument as regards the current state of international law by highlighting three developments in the post-Second World War international legal order: (i) the impact of the UN and the establishment of international *ad hoc* criminal tribunals and of the ICC; (ii) the continuous process of European integration and the creation of the ECtHR; and (iii) the rise of democratic regimes, specifically in Europe.¹⁷⁰ The Court of Cassation highlighted the Italian constitution was '... designed to fully implement the new order within the national territory'.¹⁷¹

As a result, the Court of Cassation held that the execution in Italy of the relevant Greek judgments could not be considered to be in violation of the Italian public order:

'... it must therefore be excluded that the execution in Italy of a judgment of a foreign State, which requires a third State (each of these States, in this case, being a signatory to the European Convention of Human Rights and a member of the European Union) to compensate victims (and their heirs) of very serious war crimes—denied of their inviolable rights, including above all the right to life—can be held contrary to the Italian public order under Article 64(1)(g) of Law 218/1995.'¹⁷²

3.1.3 Germany

The judicial decisions discussed here also have a link with the *Distomo Massacre* case. The claimants in that case (previously discussed in this chapter) initiated parallel proceedings before the German courts seeking a declaration of Germany's liability in

¹⁶⁹ *Germany v Prefecture of Vojotia (Case No 11163/2011)* (n 151) [47].

¹⁷⁰ *ibid* [48].

¹⁷¹ *ibid* [49].

¹⁷² *ibid*.

damages in respect of those events.¹⁷³ Their claim was dismissed by the Oberlandesgericht (OLG) (Regional Court) of Cologne.¹⁷⁴ They appealed to the Federal Supreme Court.¹⁷⁵ On appeal, the claimants asked for recognition and enforcement of *Judgment No 137/1997* rendered by the Multi-Member Court of Leviaia. The Federal Supreme Court asserted that there would be legal basis to recognize the judgment of the Multi-Member Court of Leviaia only if it had been rendered ‘within the jurisdiction of the Greek State’.¹⁷⁶ This requirement, however, was not met in the view of the Federal Supreme Court, which found that Greece did not have international jurisdiction over the claims. According to the Federal Supreme Court, the acts of German forces in the occupied Greek territory were of a sovereign nature and, under international law, immunity is available for *acta jure imperii*.¹⁷⁷ The Federal Supreme Court added that the attempt to restrict immunity in respect of violations of *jus cogens* was not accepted by the majoritarian view.¹⁷⁸ The Federal Supreme Court also did not accept the tort exception could be used to lift Germany’s jurisdiction.¹⁷⁹ The Federal Supreme Court highlighted the tort exception was provided for in Article 11 of the ECSI, Article 31 of which excludes acts of armed forces from the scope of the convention. The Federal Supreme Court added it was questionable whether the tort exception was an expression of a rule of customary international law and, assuming it were, it could not have retroactive effect reaching the events of the Second World War.¹⁸⁰ As a further argument, the Federal Supreme Court mentioned the judgment of the Greek Special Supreme Court in *Germany v Margellos* and the ECtHR’s judgment in *Kalogeropoulou* confirmed this interpretation of international law.¹⁸¹ The other part of the judgment concerned the claim for damages and compensation itself and is not relevant for the purposes of this monograph, since it deals with Germany’s liability, and not with state immunity.

An appeal was lodged before the Federal Constitutional Court, which held that the refusal of the Federal Supreme Court to recognize *Judgment No 137/1997* of the Multi-Member Court of Leviaia did not violate Germany’s Constitution:

¹⁷³ *Greek Citizens v Federal Republic of Germany (Case No III ZR 245/98)* [2007] 129 ILR 556 (Federal Supreme Court), 557.

¹⁷⁴ *ibid* 558.

¹⁷⁵ *ibid*.

¹⁷⁶ *ibid* 559.

¹⁷⁷ *ibid* 559-560.

¹⁷⁸ *ibid* 560.

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid* 560-561.

¹⁸¹ *ibid* 561-562.

‘The refusal of the *Bundesgerichtshof* [the *Federal Supreme Court*] to be bound by the judgment of the court in Livadia of 30 October 1997 is not objectionable under the Constitution. Under current international law, a State may claim exemption from the jurisdiction of another State if and in so far as an appraisal of its sovereign conduct is concerned—so called *acta jure imperii* ... As the SS unit that took part in the events in Distomo was incorporated into the armed forces of the German *Reich*, the attacks, irrespective of the question of their infringement of international law, are to be classed as sovereign acts. The *Bundesgerichtshof* therefore correctly held it was not bound by the judgment of the Greek court in Livadia.’¹⁸²

3.1.4 France

The French Court of Cassation has consistently held that Germany is entitled to immunity in proceedings brought by French citizens seeking damages for injuries suffered as a result of deportation to Germany and forced labor during the Second World War. The French Court of Cassation has justified the grant of immunity due to the *jure imperii* nature of the acts perpetrated by the Third Reich.¹⁸³

In *GIE La Réunion Aérienne v La Jamahiriya Arabe Libyenne*¹⁸⁴, the French Court of Cassation had to pronounce itself on whether Libya was entitled to state immunity. The case was related to the explosion, on 19 September 1989, of an aircraft of the French Airline UTA, which was operating a flight from Brazzaville to Paris.¹⁸⁵ The event, which led to the death of 170 people, was the result of a bomb planted in the aircraft. Six Libyan nationals were held civilly and criminally liable *in absentia* (‘par contumace’) for it by the Cour d’assises de Paris.¹⁸⁶ In another proceeding, other beneficiaries of the victims pursued claims against the six Libyan nationals who had been found liable by the Cour

¹⁸² *Greek Citizens v Federal Republic of Germany* (Case No 2 BvR 1476/03) [2009] 135 ILR 186 (Federal Constitutional Court), 191-192.

¹⁸³ See the following cases: *Bucheron* (Case No 02-45.961) (16 December 2003) <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007047249>> accessed 26 November 2015; *X* (Case No 03-41.851) (2 June 2004) (Cour de Cassation, Chambre Civile 1) <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007048876>> accessed 26 November 2015 (Cour de Cassation, Chambre Civile 1); *Grosz* (Case No 04-47504) (3 January 2006) <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007494943>> accessed 26 November 2015 (Cour de Cassation, Chambre Civile 1).

¹⁸⁴ *GIE La Réunion Aérienne v La Jamahiriya Arabe Libyenne* (Case No 09-14743) (9 March 2011) <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023694014&fastReqId=918656892&fastPos=1>> accessed 26 November 2015.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

d'assises de Paris, the Libyan state and the Fonds de garantie des victimes des actes de terrorisme et d'autres infractions.¹⁸⁷ The GIE La Réunion Aérienne and other entities that had sold insurance policies to the French Airline UTA voluntarily intervened in the proceedings before the Tribunal de grande instance de Paris.¹⁸⁸ They asked the Tribunal to condemn the six Libyan nationals and the Libyan state to reimburse the indemnities allocated.¹⁸⁹ The Tribunal de grande instance de Paris declared Libya was entitled to immunity—except as regards the French claimants vis-à-vis which the foreign state had renounced its right to immunity.¹⁹⁰

The French Court of Cassation upheld the grant of immunity. The French Court of Cassation highlighted Libya had not committed the acts of terrorism—its responsibility was called into question because it had allegedly failed to repress and to disavow them, and allegedly had even approved and supported them.¹⁹¹ The Court of Cassation quoted with approval the decision of the Cour d'Appel according to which Libya could rely on state immunity because '... la nature criminelle d'un acte de terrorisme ne permet pas, à elle seule, d'écarter une prérogative de souveraineté'.¹⁹²

The Court of Cassation also remarked that, if the prohibition of acts of terrorism had the nature of *jus cogens*, which may constitute a legitimate restriction on state immunity, in the case at hand, such a restriction would be disproportionate in respect of the aim pursued because Libya was not being questioned for the commission of acts of terrorism, but for its moral responsibility. In the words of the Court:

'... à supposer que l'interdiction des actes de terrorisme puisse être mise au rang de norme de *jus cogens* du droit international, laquelle prime les autres règles du droit international et peut constituer une restriction légitime à l'immunité de juridiction, une telle restriction serait en l'espèce disproportionnée au regard du but poursuivi dès lors que la mise en cause de l'État étranger n'est pas fondée sur la commission des actes de terrorisme mais sur sa responsabilité moral.'¹⁹³

According to a commentator, this passage 'pointed ... to the existence of a possible restriction to immunity when a claim concerns the reparation of the breach of an obligation

¹⁸⁷ *GIE La Réunion Aérienne v La Jamahiriya Arabe Libyenne (Case No 09-14743)* (n 184).

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ *ibid.*

under *jus cogens* wherever committed, provided that the breach results from a positive conduct of the foreign State.’¹⁹⁴ In *Jurisdictional Immunities of the State*, the ICJ rejected that this excerpt could imply the existence of such a restriction. In the view of the ICJ, ‘[t]he *Cour de cassation* in [*GIE La Réunion Aérienne v La Jamahiriya Arabe Libyenne*] stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case.’¹⁹⁵

The Court of Cassation also considered that the risk of denial of justice could not ‘...fléchir une règle par laquelle le droit français interdit aux tribunaux français de connaître d’un litige.’¹⁹⁶ Lastly, the Court of Cassation asserted that a waiver to immunity must be ‘... certaine, expresse et non équivoque’.¹⁹⁷ Accordingly, Libya’s renunciation of immunity in favor of some claimants could not be extended to the others. The Court of Cassation rejected the appeal and upheld the grant of immunity to Libya.

3.1.5 Poland

3.1.5.1 Judgment of the Polish Supreme Court in *Natoniewski v Germany* (2010)

Mr Natoniewski brought a claim against Germany for damages arising from injuries suffered during the pacification of Szczecyn during the Second World War. Mr Natoniewski was six years old at the time and ‘... suffered extensive burns to his head, chest and both hands, with health consequences that are still present.’¹⁹⁸ The case reached the Polish Supreme Court, which had to rule on whether Polish courts had jurisdiction over the claim and on whether immunity was available for Germany.

The Polish Supreme Court adopted a very orthodox approach to customary international law, relying on Article 38 of the Statute of the ICJ and on the traditional definition of customary international law as being composed of state practice and *opinio juris*.¹⁹⁹ As regards state immunity, the Polish Supreme Court also adopted a textbook approach. It considered that until the 1950s the absolute theory of state immunity prevailed

¹⁹⁴ Giorgio Gaja, ‘The Protection of General Interests in the International Community’ (2012) 364 RCADI 9, 139 (footnote omitted).

¹⁹⁵ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [96].

¹⁹⁶ *GIE de Réunion Aérienne v La Jamahiriya Arabe Libyenne (Case No 09-14743, 9 March 2011)* (n 184).

¹⁹⁷ *ibid.*

¹⁹⁸ *Natoniewski v Federal Republic of Germany (Case No IV CSK 465/09)* (29 October 2010) 30 PYIL 299 (Supreme Court of Poland), 299.

¹⁹⁹ *ibid* 300.

and that, in recent times, immunity is only available in respect of acts *jure imperii* and has been subjected to a growing number of restrictions.²⁰⁰ The Polish Supreme Court asserted that state practice supported the tort exception, there being

‘...no international duty, on the part of States, to grant immunity to other States in matters of torts, if the actions leading to a tort occurred in the territory of the forum State, and if the author of the injury or damage was present in that territory at the time when those actions occurred.’²⁰¹

Since the tort exception was a more recent restriction to state immunity, the Polish Supreme Court had to decide whether it applied to the case at hand. It concluded that, although the general rule was that the applicable law is that in force at the time of the occurrence of the relevant events, in the sphere of procedural law, the principle of direct application of the new law prevailed.²⁰² In the light of the procedural aspect of immunity, the Polish Supreme Court concluded that it had to apply the rules relating to state immunity in force at the time of the Court’s decision on admissibility, and not the rules in force at the time of the events which gave rise to Mr Natoniewski’s claim.²⁰³ Nevertheless, the Polish Supreme Court held that the tort exception did not apply in respect of events during armed conflicts and provided the following justification:

‘The specificity of the causes of armed conflicts suggests the applicability of state immunity for actions arising in the course of these conflicts. Armed conflicts—with victims on a large-scale and an enormity of destruction and suffering—cannot be reduced to the relationship between the state/perpetrator and the injured person; the conflicts exist mainly between states. Traditionally, property claims arising from the events of war shall be settled in peace treaties, aimed at a comprehensive—at the international and individual level—regulation of the consequences of war. In such cases, jurisdictional immunity provides international law means for regulating property claims resulting from the events of war. The removal from court jurisdiction a whole range of civil claims (caused by the war) is designed to counteract the situation, when the normalization of relation between states may face obstacles as a result of a large number of proceedings instituted by individuals. The proceedings could be a factor maintaining political disputes and not necessarily lead to full satisfaction of claims. The international legal procedure for property claims caused by the events of war in conjunction

²⁰⁰ *Natoniewski v Federal Republic of Germany* (n 198) 300.

²⁰¹ *ibid.*

²⁰² *ibid* 300-301.

²⁰³ *ibid* 301.

with the grant of sovereign immunity is a universal solution. Therefore, the international legal procedure for property claims caused by the events of war cannot be seen only from a perspective of relations between Poland and Germany, that is from a perspective of states which ended the war over sixty years ago.²⁰⁴

The Polish Supreme Court also rejected the argument a state is not entitled to immunity for the violation of *jus cogens* rules, although it conceded that it was an ‘axiologically doubtful situation’ that immunity was not available for ‘a single injury’ committed in the territory of the forum state, whilst it was for ‘massive injury’ caused by military action.²⁰⁵ The Court provided the following reasons to justify its position. Firstly, it considered that the implicit waiver theory was inconsistent. In the view of the Polish Supreme Court, a violation of a *jus cogens* rule or the accession to international instruments protecting human rights could not be understood as a waiver of immunity, since a waiver must be clear.²⁰⁶ Secondly, the Polish Supreme Court considered state immunity could not be removed on the basis of general principles of law, insofar as state immunity is a customary rule and, in the view of the Polish Supreme Court, principles could only be invoked to fill lacunae and solve ambiguities.²⁰⁷ Thirdly, the Court asserted that the decision to remove immunity could be considered an act of reprisal, which has a political dimension, and it was questionable whether the court would be competent to perform it.²⁰⁸ Fourthly, the Court contended that the practice of piercing the veil of immunity for acts in violation of human rights committed in the forum state ‘... [was] by no means universal.’²⁰⁹

The Polish Supreme Court also mentioned the grant of immunity in the case was consistent with the case-law of the ECtHR and would not violate Article 6.1 of the ECHR.²¹⁰ Finally, it ruled that, due to the existence of immunity, a requirement for national jurisdiction as provided for in the Polish Code of Civil Procedure had not been met.²¹¹

²⁰⁴ *Natoniewski v Federal Republic of Germany* (n 198) 301.

²⁰⁵ *ibid* 302.

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid* 302-303.

²¹⁰ *ibid* 303.

²¹¹ *ibid.*

3.1.6 The United States

3.1.6.1 The *Princz* case

3.1.6.1.1 Judgment of the District Court for the District of Columbia (1992)

Mr Hugo Princz, a Jewish American, brought a claim against Germany before the United States District Court for the District of Columbia seeking to recover damages suffered by him as a result of his internment in various concentration camps by the Nazis during the Second World War.²¹² At the time they were arrested, in 1942, he and his family lived in Czechoslovakia.²¹³ Mr Princz and his family were subjected to unfathomable atrocities, including enslavement. He was the only member of his family to survive the atrocities perpetrated by the Nazi regime.²¹⁴ Mr Princz was unsuccessful in his endeavors to obtain a pension or other form of reparation under the compensation schemes set up by Germany for victims of the Holocaust.²¹⁵ Attempts to obtain an *ex gratia* payment from Germany were also unsuccessful.²¹⁶

In its ruling on jurisdiction, District Judge Sporkin began by recalling that, in the *Amerada Hess* case, the United States Supreme Court concluded that the FSIA was the sole basis for obtaining jurisdiction over a foreign state in US courts. Nevertheless, in the light of the facts of the case, District Judge Sporkin concluded that the understanding of the Supreme Court in *Amerada Hess* was not a bar to jurisdiction. He also added Germany was *estopped* from invoking US law, since it had showed blatant disregard for the US and for international law:

‘The Supreme Court [in *Amerada Hess*] did not have such extraordinary facts as those presently before this Court in rendering its decision in *Hess*. And the Court cannot believe that,

²¹² *Princz v Federal Republic of Germany* [1996] 103 ILR 598 (United States District Court, District of Columbia), 598.

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

in enacting the Foreign Sovereign Immunities Act, Congress contemplated a factual scenario akin to that at bar, let alone that it intended to bar a U.S. citizen from seeking redress against a nation standing in the shoes of his or her would-be butcher in U.S. courts in a case such as this. Therefore, this Court concludes that neither *Hess* nor the FSIA itself bars this Court from hearing the plaintiff's claim.

'This Court finds that the Federal Sovereign Immunities Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a onetime outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish. The Court cannot permit such a nation, which at the time these barbaric acts were committed neither recognized nor respected U.S. or international law, to now block the legitimate claims of a U.S. citizen by asserting U.S. law to evade its responsibilities. A government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting U.S. law in this fashion. To allow otherwise would create a severe imbalance in the reciprocity and mutual respect which must exist between nations, and would work an intolerable injustice against the plaintiff and the principles for which this country stands.'²¹⁷

As further arguments, District Judge Sporkin also mentioned that it was unlikely that Mr Princz would be able to obtain a remedy before German courts, since the German Supreme Court, in an administrative determination, had signaled Mr Princz's claim would be denied.²¹⁸ District Judge Sporkin reasoned that the case involved not only a violation of international law, but also the violation of Mr Princz's rights of citizenship and as a human being.²¹⁹ Thus, although 'Congress did indeed fashion a comprehensive scheme regarding U.S. courts' jurisdiction over foreign nations', it had not '...stripped Americans of their rights of citizenship or of their right to be protected by [*the United States*] government and ... laws just because they travel overseas.'²²⁰ District Judge Sporkin concluded that to deny Mr Princz redress in the US courts '... would complete the stripping of Mr. Princz's most valuable rights of citizenship.'²²¹

3.1.6.1.2 Judgment of the Court of Appeals for the District of Columbia (1994)

Germany appealed the decision of the District Court to deny its motion to dismiss the suit. Circuit Judge Ginsburg, who delivered the judgment for the Court of Appeals,

²¹⁷ *Princz v Federal Republic of Germany* (n 212) 601.

²¹⁸ *ibid.*

²¹⁹ *ibid* 600.

²²⁰ *ibid* 601.

²²¹ *ibid* 602.

considered that he did not have to decide whether the FSIA applied retroactively because the District Court would lack jurisdiction whether the FSIA applied or not. Mr Princz had argued that the US courts had jurisdiction under the FSIA based on the commercial activity exception, the implied waiver exception and the international agreement exception. Judge Ginsburg proceeded to examine the bases of jurisdiction invoked by Mr Princz.

Section 1605.a.2 of the FSIA provides that a foreign state

‘... shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... in which the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign sovereign elsewhere and that act causes a direct effect in the United States.’²²²

Mr Princz stated that the Nazi government leased his labor for profit to German companies and argued that this was a commercial activity that had a direct effect on the United States.²²³ Judge Ginsburg considered that he did not have to rule on whether leasing slave labor to private companies was a commercial activity under the FSIA because this activity did not have a ‘direct effect’ in the United States, and that rendered the commercial exception inapplicable. Judge Ginsburg dismissed Mr Princz’s argument that, since the companies for which he was forced to provide labor aided Germany in the war effort, the ‘direct effect’ requirement was met. Judge Ginsburg considered that ‘many events and actors necessarily intervened between any work that Mr. Princz performed ... and any effect felt in the United States’, and thus the ‘direct effect requirement was not met.’²²⁴ Mr Princz had also argued that Germany utilized the mail, wire and banking system of the United States to administer its reparation schemes for the victims of the Nazi regime. Judge Ginsburg asserted that the administration of reparation schemes could not amount to a ‘direct effect’ of Mr Princz’s enslavement.²²⁵ Lastly, Judge Ginsburg did not accept the argument that Mr Princz’s continued suffering in the US could be considered a ‘direct effect in the United States’.²²⁶

The waiver exception is provided for in Section 1605.a.1 of the FSIA. It establishes that state immunity is not available in cases in which ‘... the foreign state has waived its

²²² US Code, Section 1605 <<https://www.law.cornell.edu/uscode/text/28/1605>> accessed 26 November 2015.

²²³ *Princz v Federal Republic of Germany* [1996] 103 ILR 604 (United States Court of Appeals, District of Columbia Circuit), 607-608.

²²⁴ *ibid* 608.

²²⁵ *ibid*.

²²⁶ *ibid* 608-609.

immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.²²⁷ It was argued that Germany had implicitly waived its immunity by violating *jus cogens* norms. Although acknowledging the violation of *jus cogens* norms by Germany, Judge Ginsburg dismissed this argument and adopted the same understanding of the Court of Appeals for the Ninth Circuit in *Siderman de Blake*, according to which, lacking an exception in the FSIA, the violation of *jus cogens* norms could not, in itself, confer jurisdiction.²²⁸ Judge Ginsburg added that the ‘... *jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1).’²²⁹ Germany had not showed ‘its amenability to suit’, so the waiver exception could not be used as a basis of jurisdiction in the case.²³⁰

Judge Ginsburg moved next to the ‘treaty provision exception’. Section 1604 of the FSIA establishes that a foreign state is immune from the jurisdiction of the courts of the United States ‘... [s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.’²³¹ Mr Princz relied on the 1907 Hague Convention (IV). Article 52 of the Regulations annexed to the Hague Convention (IV) establishes that the inhabitants of an occupied State shall not be required to ‘... [take] part in military operations against their own country.’²³² Article 3 of the Hague Convention (IV) provides that ‘[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.’²³³ Judge Sporkin considered that the Hague Convention (IV) did not create a private right of action. Furthermore, recalling *Amerada Hess*, he asserted that the ‘treaty provision exception’ is only applicable when there is an ‘express conflict’ between the international agreement and the immunity provisions of the FSIA.²³⁴

Having established that there was not a jurisdictional basis under the FSIA even if it applied retroactively, Judge Ginsburg added that it could not ‘revive the pre-FSIA diversity jurisdiction’, which was enshrined in 28 U.S.C. § 1332, because Congress had

²²⁷ US Code, Section 1605 (n 222).

²²⁸ *Princz v Federal Republic of Germany* (n 223) 610.

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ US Code, Section 1604 <<https://www.law.cornell.edu/uscode/text/28/1604>> accessed 26 November 2015.

²³² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) <http://avalon.law.yale.edu/20th_century/hague04.asp> accessed 26 November 2015.

²³³ *ibid.*

²³⁴ *Princz v Federal Republic of Germany* (n 223) 611.

eliminated this head of jurisdiction when it passed the FSIA.²³⁵ Furthermore, he added the claims brought by Mr Princz were based on tort and quasi-contract law, and not on federal law, and that placed the case outside the federal question jurisdiction.²³⁶

The Court of Appeal upheld Germany's appeal and reversed the finding of the District Court.

3.1.6.1.2.1 The dissenting opinion of Judge Wald appended to the judgment of the Court of Appeals for the District of Columbia in *Princz v Germany* (1994)

Circuit Judge Wald appended a dissenting opinion to the judgment of the Court. Judge Wald started her dissenting opinion with a detailed account of the sufferings inflicted upon Mr Princz by Germany and offered a critique of Germany's conduct:

‘Despite its public professions of penitence for the horrors of the Holocaust ... Germany repeatedly relied on technicalities such as Princz’s citizenship at the time of his enslavement to deny him either a pension or any restitution for his immense suffering. Ironically, had Princz not been an American citizen at the time of the Holocaust, he would have received compensation.’²³⁷

Judge Wald understood the FSIA applied. She considered the language of the FSIA was ambiguous and relied on the standard provided in *Landgraf v USI Film Prods.* by the Supreme Court in respect of retroactivity analysis, according to which

‘... [w]hen ... the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.’²³⁸

²³⁵ *Princz v Federal Republic of Germany* (n 223) 607.

²³⁶ US Code: Title 28—Judiciary and Judicial Procedure <<https://www.law.cornell.edu/uscode/text/28> > accessed 26 November 2015:

‘28 U.S. Code § 1331—Federal question—The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.’

²³⁷ *Princz v Federal Republic of Germany* (Dissenting Opinion of Judge Wald) [1996] 103 ILR 612 (United States Court of Appeals, District of Columbia Circuit), 613.

²³⁸ *Landgraf v USI Film Prods.* (1994) 511 US 244 (Supreme Court of the United States).

The relevant test as regards retroactivity was, therefore, to determine whether the FSIA would ‘impair rights a party possessed when he acted’. She considered that at the time the events took place, between 1942 and 1945, the practice of the courts of the United States concerning state immunity was to ‘[defer] ... to the case-by-case foreign policy determinations of the executive branch.’²³⁹ Judge Wald concluded Germany could not have expected the Executive branch to suggest immunity for acts related to the Holocaust:

‘In the mid-1940s, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the Holocaust. The outcome of the Nuremberg trials provides a clear signal that the international community, and particularly the United States—one of the four nations that established the Nuremberg Tribunal—would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust. ... Clearly, had the question been put to them, the United States executive branch would have opted to deny Germany’s claims to immunity for the crimes alleged in this case.’²⁴⁰

In the light of these considerations, Judge Wald concluded that ‘...because the FSIA infringes upon no rights held by Germany at the time it enslaved and imprisoned Princz, it applies to this case.’²⁴¹

Judge Wald held that Germany had implicitly waived its right to state immunity by violating the *jus cogens* norms which prohibit enslavement and genocide. Underscoring the watershed represented by the Nuremberg trials, she stated the following:

‘Prior to the Nuremberg trials, the positivist theory of international law governed state sovereignty, and a state’s treatment of its own citizens was considered immune from the dictates of international law. ... The Nuremberg trials thus permanently eroded any notion that the mantle of sovereign immunity could serve to cloak an act that constitutes a “crime against humanity,” even if that act is confined within the borders of a single sovereign state. Because the Nuremberg Charter’s definition of “crimes against humanity” includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated. ‘... *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the

²³⁹ *Princz v Federal Republic of Germany* (Dissenting Opinion of Judge Wald) (n 237) 614-615.

²⁴⁰ *ibid* 615.

²⁴¹ *ibid*.

state cannot be performing a sovereign act entitled to immunity. When the Nazis tore off Prinz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and Dachau, and sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law to immunity from this court's jurisdiction.²⁴²

Judge Wald's next step was to reconcile the operation of the implicit waiver in the sphere of international law with the FSIA. Judge Wald recalled that, in the *Paquete Habana* case, the Supreme Court declared that international law is part of the law of the United States.²⁴³ It followed, according to Judge Wald, that the FSIA should be construed consistently with international law:

'The only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) [*the waiver exception*] of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

'Construing § 1605(a)(1) to include as an implied waiver a foreign state's breach of a *jus cogens* norm is not at odds with the language and legislative history of the FSIA, which supply scant guidance as to the provision's meaning.'²⁴⁴

Judge Wald concluded that, by interpreting the FSIA in accordance with international law, under Section 1605.a.1 of the FSIA, Germany had waived its immunity.

3.1.7 The United Kingdom

3.1.7.1 Judgment of the Court of Appeal in *Al-Adsani v Government of Kuwait and Others* (1996)

Lord Justice Stuart-Smith provided a summary of the facts of the case. Mr Al-Adsani, a dual British and Kuwaiti national, was a member of the Kuwait Air Forces who fought in the Gulf War. Mr Al-Adsani remained in Kuwait as a member of the resistance movement during the Iraqi invasion of Kuwait.²⁴⁵ In this context, he came into possession

²⁴² *Prinz v Federal Republic of Germany* (Dissenting Opinion of Judge Wald) (n 237) 618.

²⁴³ *Paquete Habana* (1900) 175 US 677, 700: 'International law is part of our law ...'

²⁴⁴ *Prinz v Federal Republic of Germany* (Dissenting Opinion of Judge Wald) (n 237) 619.

²⁴⁵ *Al-Adsani v Government of Kuwait and others* [1998] 107 ILR 536 (Court of Appeal), 538.

of video tapes of a sexual nature belonging to Sheikh Jaber Al-Sabah Al-Saud Al-Sabah, who is related to the Emir of Kuwait and was considered an influential figure in Kuwait.²⁴⁶ The contents of these video tapes entered circulation and the Sheikh blamed Mr Al-Adsani for it.²⁴⁷ After the Iraqi forces were expelled from Kuwait, in May 1991, Mr Al-Adsani alleged the following, as described by Lord Justice Evans:

‘On 2 May 1991, the plaintiff [*Mr Al-Adsani*] was taken at gun point from his house in Kuwait. He was taken in a government car to the State security prison and was there subjected to very considerable physical ill-treatment.

‘... The matter did not rest there because on 7 May the plaintiff was again taken at gun point, this time to what is described as a royal palace of some member of the ruling family. There he was first immersed in a swimming pool said to have contained a number of corpses, and then was placed in a cell together with a mattress which had been impregnated with petrol and which was afterwards set alight. The plaintiff managed to avoid being burned alive, which is what appears to have been intended. He was then threatened that he would be shot, but fortunately that fate was avoided also.

‘He undoubtedly suffered very serious burns.’²⁴⁸

Torture is an international crime and there is a wide consensus that its prohibition is a norm with the status of *jus cogens*. The prohibition against torture is enshrined in UNGA Resolution 3452 (XXX) of 9 December 1975 (‘Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’), in the CAT 1984, and, at the European level, in the ECHR. In the United Kingdom, pursuant to Sections 134 and 135 of the Criminal Justice Act 1988, torture is a crime punishable in the UK even if committed elsewhere—the exercise of criminal jurisdiction, nevertheless, is only possible ‘... if the accused is physically present within the jurisdiction or amenable to extradition.’²⁴⁹

In the United Kingdom, state immunity is governed by the SIA 1978, whose relevant provisions are the following:

‘1—General immunity from jurisdiction.

²⁴⁶ *Al-Adsani v Government of Kuwait and others* (n 245) 538.

²⁴⁷ *ibid.*

²⁴⁸ *Al-Adsani v Government of Kuwait and others* [1995] 100 ILR 465 (Court of Appeal), 468.

²⁴⁹ *Al-Adsani v Government of Kuwait and others* (n 245) 541; Criminal Justice Act 1988 <<http://www.legislation.gov.uk/ukpga/1988/33/contents>> accessed 26 November 2015.

‘(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

‘(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

‘... 5—Personal injuries and damage to property.

‘A State is not immune as respects proceedings in respect of—

‘(a) death or personal injury; or

‘(b) damage to or loss of tangible property,

‘caused by an act or omission in the United Kingdom.’²⁵⁰

Mr Al-Adsani’s counsel argued that Section 1.1 of the SIA, which establishes that ‘[a] State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act’, should be read as implying that immunity should only be accorded if the state is acting ‘within the Law of Nations’.²⁵¹ In his view, since the prohibition against torture is a norm belonging to the corpus of *jus cogens* and its violation amounts to an international crime, it should override state immunity.²⁵²

Lord Justice Stuart-Smith disagreed with this understanding:

‘The argument is, however, that international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity. No authority is cited for this proposition.’²⁵³

‘... [T]he Act [*the SIA*] is a comprehensive code and is not subject to overriding considerations. At common law, a sovereign State could not be sued at all against its will in the courts of this country. The 1978 Act, by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended Section 1 to be subject to an overriding qualification.’²⁵⁴

His Lordship further supported his position by assessing the case-law of United States courts on the matter. The US, as the UK, has a codification of the law of state immunity. In *Argentine Republic v Amerada Hess Shipping Corporation*, the United States

²⁵⁰ State Immunity Act 1978 <<http://www.legislation.gov.uk/ukpga/1978/33>> accessed 26 November 2015.

²⁵¹ *Al-Adsani v Government of Kuwait and others* (n 245) 540.

²⁵² *ibid* 541.

²⁵³ *ibid*.

²⁵⁴ *ibid* 542.

Supreme Court established the FSIA was the sole basis to obtain jurisdiction over a foreign state in the courts of the US—in the words of Chief Justice Rehnquist, who delivered the opinion of the court, Congress dealt ‘comprehensively with the subject of foreign sovereign immunity in the FSIA...’²⁵⁵. In *Siderman de Blake v Argentina*, the US Court of Appeals for the Ninth District, although mentioning that the theory according to which a state’s violation of *jus cogens* would not be entitled to immunity under international law was compelling, concluded that, in the light of the Supreme Court’s holding in *Amerada Hess*, the violation of *jus cogens* norms committed outside the United States does not confer jurisdiction to the courts of the United States since the FSIA does not provide for such an exception to state immunity.²⁵⁶ Lord Justice Stuart-Smith understood that, in this regard, the SIA functioned like the FSIA in the reading given by the Supreme Court to this statute. He also argued domestic courts are not an appropriate forum to assert jurisdiction

²⁵⁵ *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 488 US 428 (Supreme Court of the United States), 438.

²⁵⁶ *Siderman de Blake v Argentina* (1992) 965 F.2d 699 (United States Court of Appeals, Ninth Circuit), 718-719. Circuit Judge Fletcher pronounced himself in the following way:

‘The question in the present case is what flows from the Sidermans’ allegation that Argentina tortured Jose Siderman and thereby violated a *jus cogens* norm. The Sidermans contend that when a foreign state’s act violates *jus cogens*, the state is not entitled to sovereign immunity with respect to that act.

‘... As a matter of international law, the Sidermans’ argument carries much force.

‘... The Sidermans posit that because sovereign immunity derives from international law, *jus cogens* supersedes it. ... International law does not recognize an act that violates *jus cogens* as a sovereign act. A state’s violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.

‘Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. We must interpret the FSIA through the prism of *Amerada Hess*. Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA’s cloak of immunity. Argentina contends that the Supreme Court’s statement in *Amerada Hess* that the FSIA grants immunity “in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions,” 488 U.S. at 436, 109 S.Ct. at 688, precludes the Sidermans’ reliance on *jus cogens* in this case. Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*. In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement “that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions,” *Amerada Hess*, 488 U.S. at 436, 109 S.Ct. at 688, and so specific in its formulation and method of approach, *id.* at 439, 109 S.Ct. at 690 (“Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here”), that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.’

over an uncooperative foreign sovereign in respect of violations of *jus cogens* committed outside the territory of the forum state:

‘The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign State would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination.’²⁵⁷

Lord Justice Ward took note he found ‘powerful’ the submission state immunity is trumped by *jus cogens* under international law. As put by him:

‘Not to accede to it would have the ironic result that there may be no international forum (other than the forum of the *locus delicti* to whom a victim of torture will be understandably reluctant to turn) where this terrible, if established, wrong can receive civil redress.’²⁵⁸

Nevertheless, he agreed with Lord Justice Stuart-Smith that the SIA bound the Court and that only the exceptions to state immunity expressly provided for in this statute could be accepted:

‘It is inconceivable that Parliament legislated for the loss of State immunity when the acts causing that person injury are committed in the United Kingdom without having borne in mind its clearest international obligations to recognize the fundamental freedom from torture which everyone should enjoy everywhere. Unfortunately, the Act is as plain as plain can be. A foreign State enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that State immunity is afforded in respect of acts of torture committed outside this jurisdiction.’²⁵⁹

²⁵⁷ *Al-Adsani v Government of Kuwait and others* (n 245) 544.

²⁵⁸ *ibid* 547.

²⁵⁹ *ibid* 549-550.

Mr Al-Adsani's appeal was dismissed and he eventually brought the case to the ECtHR.

3.1.7.2 The *Jones* case

3.1.7.2.1 Judgment of the High Court (2003)

The facts of the case were described as follows by the High Court. Mr Jones, a British national, worked as an international tax adviser in Saudi Arabia, when he got injured as a result of a 'bomb blast outside a bookstore' in the city of Riyadh and was taken to a hospital.²⁶⁰ He alleged that, on 16 March 2001, agents of the Kingdom of Saudi Arabia 'took him from the hospital and falsely imprisoned him in solitary confinement', where, for sixty-seven days, he was 'systematically abused and tortured' by Lieutenant Colonel Abdul Aziz.²⁶¹ Mr Jones sued the Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant Colonel Abdul Aziz '... for damages including aggravated and exemplary damages for assault and battery and trespass to the person, torture and unlawful imprisonment on and between 16 March and 21 May 2001.'²⁶² The High Court asserted there was no doubt Mr Jones's allegations amounted to torture.²⁶³

²⁶⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2007] 129 ILR 636 (High Court), 637.

²⁶¹ *ibid.*

²⁶² *ibid* 636.

²⁶³ *ibid* 637-638:

'5. That the allegations made against the defendant in this case amount to torture is plain. The claimant alleges that he was beaten on the palms of the hand with a cane about 4ft long with hands cuffed behind him with the back palms uppermost; of being beaten on the soles of the feet with a cane and also a wooden stave resembling an axe handle and being beaten on the arms, buttocks and lower legs with a wooden stave resembling an axe handle; of slapping and relatively mild punching in the facial area; of suspension of the cuffed hands above the level of his head by attaching them to window fittings; of the shackling of his ankles; of sleep deprivation achieved through being put in partly suspended postures; of being struck anywhere on the body both with and without weapons and being disturbed by noise and by the administration of mind-affecting drugs and other substances.

'6. The claimant says that the result of the injuries he sustained was, at the time, severe pain, discomfort, bruising and swelling and physical and mental trauma. The claimant says that he now suffers from substantial mental trauma and post-traumatic stress disorder, is severely psychologically disabled and is unable to work. He is undergoing treatment and a course of medication but the prospect for speedy recovery is poor. There is consequently a considerable claim for loss of future earnings and the overall value of the claim is put by the claimant at something in the region of £2.5m.'

The High Court followed the approach the Court of Appeal had adopted in *Al-Adsani v Government of Kuwait and others*: it held that the SIA was a comprehensive code, ‘intended to make new provisions for sovereign immunity replacing the common law in its entirety in relation to civil claims.’²⁶⁴ Accordingly, the High Court found the SIA did not provide any exception to state immunity applicable to the claims of the plaintiff.²⁶⁵ The High Court added the ECtHR in *Al-Adsani v the United Kingdom* found the English courts in *Al-Adsani v Government of Kuwait and others* had not violated Article 6 of the ECHR.²⁶⁶ Although the High Court regretted the missed opportunity the ECtHR had and considered the minority dissenting opinions attached to the judgment ‘compelling’, it asserted that

‘... unless Parliament specifically amends the State Immunity Act in this respect, or another case comes before the European Court of Human Rights in which the minority view in *Al-Adsani* prevails, so that our courts can thereafter consider the making of a declaration of incompatibility in respect of the 1978 [*State Immunity*] Act as it applies to civil actions for torture, the Act deprives me and the English courts of jurisdiction over the first defendant in this case. For that reason, with the greatest sympathy for the claimant, I must allow the application of the first defendant and dismiss the claim against them.’²⁶⁷

The High Court also decided Mr Jones’s torturer, Lieutenant Colonel Abdul Aziz, was entitled to the same immunity accorded to the Kingdom of Saudi Arabia, since the claim against the Kingdom of Saudi Arabia was pleaded on the basis of its vicarious responsibility for the acts of Lieutenant Colonel Abdul Aziz.²⁶⁸ According to the High Court,

‘To reach a conclusion that the first defendant [*the Kingdom of Saudi Arabia*] was not liable by reason of state immunity while holding that they are vicarious liable for the second defendant [*Lieutenant Colonel Abdul Aziz*] would undo the result reached in the *Al-Adsani* case.’²⁶⁹

²⁶⁴ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 260) 640.

²⁶⁵ *ibid* 640.

²⁶⁶ *ibid* 646.

²⁶⁷ *ibid* 647.

²⁶⁸ *ibid* 648.

²⁶⁹ *ibid*.

3.1.7.2.2 Judgment of the Court of Appeal (2004)

Mr Jones appealed against the decision of the High Court. The Court of Appeal joined Mr Jones's case with another similar case brought by Messrs Mitchell and Sampson (British nationals) and Mr Walker (a Canadian national) against Ibrahim Al-Dali, Khalid Al-Saleh, Colonel Mohamed Al-Said and Prince Naif, all Saudi Arabian nationals and who were, at the time, respectively, a captain in the Saudi Arabian police force, a lieutenant in the Saudi Arabian police force, a colonel in the Ministry of Interior and Deputy Governor of the Al Ha'ir prison, and head of the Ministry of the Interior.²⁷⁰ These claimants had also allegedly been systematically tortured whilst under official custody in the Kingdom of Saudi Arabia and had also had their applications dismissed by the High Court on the same grounds of its previous ruling in respect of Mr Jones's application.²⁷¹

Lord Justice Mance understood the Court of Appeal had to settle two questions:

'First, is the Kingdom entitled to immunity in respect of Mr Jones's claim, which it accepts has been served on it? Second, is the Kingdom entitled to claim immunity on behalf of its officials in respect of the claims made against those officials in both Mr Jones's and Messrs Mitchell's, Sampson's and Walker's claims?'²⁷²

Lord Justice Mance did not depart from the position the Court of Appeal took in *Al-Adsani v Government of Kuwait*, which considered that the SIA was a 'comprehensive code, and that, although international law prohibited torture, no express or implied exception to immunity existed in cases of torture.'²⁷³ In the same way, Lord Justice Mance remembered the ECtHR had decided that the restriction imposed on Article 6.1 of the ECHR by the English courts pursued a legitimate aim and was proportionate.²⁷⁴ Recalling the decision of the majority in *Al-Adsani v United Kingdom* and one of the passages in Hazel Fox's treatise on the law of state immunity²⁷⁵, Lord Justice Mance did not accept the

²⁷⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 129 ILR 649 (Court of Appeal), 649-650.

²⁷¹ *ibid.*

²⁷² *ibid* 652.

²⁷³ *ibid* 654.

²⁷⁴ *ibid* 654-655.

²⁷⁵ Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2002) 525:

'State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably then, there is no

submission that the *jus cogens* nature of the prohibition of torture prevailed over the hierarchically inferior rules of state immunity:

‘The recognition under general principles of international law of civil immunity on the part of a state from civil suit in a state other than that of the alleged torture does not sanction the torture or qualify the prohibition upon it. It qualifies the jurisdictions in which and means by which the peremptory norms may be enforced. There is a distinction between principles of substantive international law and other issues, such as jurisdiction and immunity in civil proceedings in any particular jurisdiction ...’²⁷⁶

Lord Justice Mance turned next to the question of whether Article 14 of the CAT required the United Kingdom to establish a civil right of redress for its nationals who were victims of torture abroad. Article 14 of the CAT provides that:

‘1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
‘2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.’²⁷⁷

Lord Justice Mance considered that

‘... the article does not state expressly whether there must be any or what connection between the state which must ensure such redress and either the act or the victim. ... [I]t seems unlikely that it can have been intended that every state should ensure that its legal system provided redress for every act of torture by the public officials (or by other persons acting in an official capacity) of other states, wherever committed and whoever the victim.’²⁷⁸

To properly interpret Article 14 of the CAT, Lord Justice Mance compared it with Articles 4 and 5 of the same treaty, which establish rules concerning criminal jurisdiction:

substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.’

²⁷⁶ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 656-657.

²⁷⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

²⁷⁸ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 657.

‘Article 4

‘1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

‘2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

‘Article 5

‘1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

‘(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

‘(b) When the alleged offender is a national of that State;

‘(c) When the victim is a national of that State if that State considers it appropriate.

‘2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

‘3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.’²⁷⁹

Mirroring Article 5.1.a, Lord Justice Mance considered Article 14 could be interpreted to mean that ‘... it is only concerned to ensure a right of redress in the state where an act of torture is committed.’²⁸⁰ Further building upon the definition of torture enshrined in Article 1 of the CAT, according to which torture ‘... is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’, His Lordship asserted that ‘it would seem curious if each state were not required to ensure a civil right of redress in respect of torture committed abroad by one of its officers’.²⁸¹ However, as added by Lord Justice Mance, neither of these interpretations would require the United Kingdom to provide means of redress regarding an act of torture committed abroad by a foreign official. He further justified this understanding by mentioning that Article 5.1.c. leaves to the discretion of the state whether to exercise or not criminal jurisdiction on the basis that the victim of torture was one of its nationals, so that it would be improbable that states would be required to establish civil

²⁷⁹ Convention Against Torture (n 277).

²⁸⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 658-659.

²⁸¹ *ibid.*

jurisdiction on the same basis.²⁸² On this matter, Lord Justice Mance concluded the following:

‘... article 14(1) is dealing with (no more than) a right of redress in the legal system of the state (state A) by whose official (or other person acting in a public capacity) the alleged act of torture was committed (whether such act was committed at home in state A or abroad). State A is, in short, the responsible state, and it must ensure proper civil redress. Article 14(1) is not designed to require every other state (state B) to provide redress in its civil legal system for acts of torture committed in state A, although under article 14(2) it remains permissible for state B to provide redress in state B for acts of torture committed (either in state A or elsewhere) by officials, etc. of state A.’²⁸³

Having held that the Kingdom of Saudi Arabia was entitled to immunity, Lord Justice Mance moved to the question of whether immunity should extend to the acts and omissions amounting to torture of the individual defendants, who were ordinary state officials.²⁸⁴ As pointed out by him, a state’s claim to immunity *ratione materiae* with respect to a claim against its officials differs from the immunity *ratione personae* of the state itself.²⁸⁵ One of the crucial issues discussed by Lord Justice Mance was the assertion of the Court of Appeal in *Propend* that

‘The protection afforded by the [*State Immunity*] Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, “functionaries”) could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) [*of the SIA 1978*] must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself.’²⁸⁶

Lord Justice Mance remarked that the SIA makes no reference to individual officials of the state—under Section 14.1 of the SIA, references to ‘state’ in the statute include ‘the sovereign or other head of that state in his public capacity’, ‘the government of that state’ and ‘any department of that government’.²⁸⁷ As observed by Hazel Fox and

²⁸² *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 659.

²⁸³ *ibid.*

²⁸⁴ *ibid* 662.

²⁸⁵ *ibid* 695-696.

²⁸⁶ *Propend Finance Pty Limited and Others v Sing and Others* [1997] 111 ILR 611 (Court of Appeal), 669.

²⁸⁷ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 663-664 and 668. As regards Section 14.2 of the SIA, which deals with ‘separate entities’, Lord Justice Mance recalled that the

Philippa Webb, it seems that His Lordship took the position that Section 14.1 deals with immunity *ratione personae*, but, if it applied to immunity *ratione materiae*, it should be read as not including conducts which are outside the scope of the proper exercise of sovereignty, such as international crimes.²⁸⁸ Lord Justice Mance asserted that, in spite of it being defined by Article 1 of the CAT as an act ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’²⁸⁹, torture did not fall in the scope of immunity *ratione materiae*:

‘It seems doubtful that the phrase “acting in an official capacity” qualifies the reference to “a public official”. The types of purpose for which any pain or suffering must be inflicted ... would appear to represent a sufficient limitation in the case of a public official. Be that as it may, the requirement that the pain or suffering be inflicted by a public official does no more in my view than identify the author and the public context in which the author must be acting. It does not lend to the acts of torture themselves any official or governmental character or nature,

Court of Appeal in *Propend* had considered it not to be relevant in respect of individual functionaries. See *Propend* (n 286) 670 (footnote omitted):

‘The concept of an “entity ... distinct from the executive organs of the government of the State and capable of suing or being sued” is not one which would normally be identified with an individual or natural person. Its background and history suggest that the concept was introduced to address the problem presented by artificial legal entities exercising public functions. Lord Goff in the *Kuwait Airways* case ... pointed out that the language makes it probable that the section has in mind entities “of” or, in other words, created by the State in question. Where such an artificial entity exists and is entitled to immunity, then its servants or officers would of course benefit by immunity in similar fashion to the officers or functionaries of a State entitled to immunity. Further, an individual might possess status as a corporation sole or similar status which could constitute him in that capacity a “separate entity” for the purposes of Section 14.’

²⁸⁸ Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 182-184. See Lord Mance, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 663-664:

‘Section 14(1) on its face reflects the personal immunity that those identified would, apart from it, enjoy under both international and common law. If, which I doubt, it goes in its express terms any further, they must, on any view, be read subject to qualification to reflect the distinction between personal and subject-matter immunity.’

Hazel Fox and Philippa Webb added that, in the same judgment, Lord Phillips interpreted Section 14.1 as referring to immunity *ratione materiae*. In any case, he also understood that conducts like torture were outside the scope of immunity *ratione materiae*. See Lord Phillips, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 711:

‘That principle [*established in Propend*] has no application if (i) the state’s immunity is not “in respect of conduct” but is *ratione personae* and (ii) the subject matter of the action does not rank as “matters of state conduct”. That is the position in the present case and, for that reason, the *Propend* case does not establish that state immunity attaches to the claims against the individual defendants.’

²⁸⁹ Convention Against Torture (n 277).

or mean that it can in any way be regarded as an official function to inflict, or that an official can be regarded as representing the state in inflicting, such pain or suffering. Still less does it suggest that the official inflicting such pain or suffering can be afforded the cloak of state immunity. ... The whole tenor of the Torture Convention is to underline the individual responsibility of state officials for acts of torture ... and I do not consider that one can derive from its definition of torture “for the purposes of the Convention” any conclusion on the different question whether a state can assert state immunity in respect of a civil claim against its officials based on allegations of systematic torture.’²⁹⁰

Lord Justice Mance emphasized that, after the House of Lords’ judgment in *Ex parte Pinochet (No 3)*, which related to criminal proceedings against a former head of state, the issue of civil jurisdiction should be considered under a new light.²⁹¹ Taking this into account, His Lordship made some considerations. Firstly, he could not see how civil proceedings against an alleged torturer would involve a greater degree of interference in the domestic affairs of a state when compared to criminal proceedings—also, there would be ‘... no basis on which the state could be made liable to indemnify one of its officials proved to have committed systematic torture’.²⁹² Secondly, Lord Justice Mance referred to the ‘obvious potential for anomalies’ if the provisions of the CAT on international criminal jurisdiction are not matched ‘... by some wider parallel power to adjudicate over civil claims’—it would be, according to him, incongruous that ‘if the alleged torturer was actually within and being prosecuted in the jurisdiction of the forum State pursuant to Article 5(2) of the Torture Convention ... no immunity could be claimed, [*but*] the victim(s) of the alleged torture would be unable to pursue any civil claim.’²⁹³ Thirdly, he argued criminal proceedings have ‘a higher onus and evidential difficulties’ and states may have reasons to pursue or not criminal proceedings, and that makes civil proceedings valuable not only because of the potential financial recovery for the victims, but also in the process of truth-finding, rehabilitation and closure.²⁹⁴ Finally, he considered that the difficulties regarding extraterritorial jurisdiction and execution would not justify ‘... the possession by the foreign state of a *blanket* claim to immunity in respect of such an official or agent in a case of alleged systematic torture.’²⁹⁵

²⁹⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 688-689.

²⁹¹ *ibid* 690-691.

²⁹² *ibid* 691.

²⁹³ *ibid* 692-693.

²⁹⁴ *ibid* 693.

²⁹⁵ *ibid* 695.

Lord Justice Mance considered the impact of Article 6 of the ECHR on civil immunity. Having already concluded that, in the light of the ECtHR's judgment in *Al-Adsani v United Kingdom*, the grant of immunity to the Kingdom of Saudi Arabia did not infringe Article 6 of the ECHR, Lord Justice Mance assessed the impact of the same provision on the different issue of immunity *ratione materiae* of state officials. He found that, unlike in respect of the immunity *ratione personae* of the state itself and the immunity *ratione materiae* of state officials for misconducts that not amount to international crimes, 'there [was] no settled practice in relation to serious international crimes ...'.²⁹⁶ Lord Justice Mance asserted it would be disproportionate to simply guarantee a blanket immunity for state officials who allegedly committed acts of systematic torture.²⁹⁷ He reasoned as follows. Under Article 14 of the CAT states have to '... ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. If the state where the torture occurred or by whose official the torture was committed provided an adequate and effective domestic remedy, other states would be expected to abstain from exercising jurisdiction over the matter. In Lord Justice Mance's view, in the absence of such remedy, it could be disproportionate for other states to simply maintain a blanket immunity in respect of civil proceedings.²⁹⁸ Lord Justice Mance added that, under the Human Rights Act, inasmuch as possible, primary legislation, like the SIA 1978, has to be read and applied in a way which is compatible with the ECHR, and that

'[t]here is nothing in the 1978 Act [*the SIA*] which expressly covers the civil liability of state officials against whom conduct is alleged constituting serious international crime. The gap cannot be filled by a simple assertion that the immunity possessed by a state should be mirrored

²⁹⁶ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 696.

²⁹⁷ *ibid* 696-697. Emphasizing once again the difference between a claim against the state itself and a claim against state officials, Lord Justice Mance remarked that,

'[a]lthough torture by one of its officials is a matter for which a state may be made civilly responsible under article 14(1), any claim to enforce that responsibility must be pursued in the state in question (or in an international forum), otherwise state immunity will still bar it. But, if claims against officials committing torture in the official capacity can be pursued elsewhere, the state will not be impleaded in any direct sense, and will not be obliged to indemnify any official or agent found to have committed systematic torture. Insofar as there may be said that there is interference in a foreign state's domestic affairs or that a foreign state is being indirectly impleaded, this would occur in civil proceedings in respects no more far-reaching than those already permitted in criminal proceedings under the Torture Convention or (on one view) under more general international legal principles.'

²⁹⁸ *ibid*.

by an immunity possessed by the official whose act or omission has given rise to the state's immunity. ...

‘... [I]t can no longer be appropriate give blanket effect to a foreign state’s claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture. To do so could deprive the right of access to a court under article 6 [of the *ECHR*] of real meaning in a case where the victim of torture had no prospect of recourse in the state whose officials committed the torture.’²⁹⁹

Lord Justice Mance allowed the claimants’ appeal in respect of the individual defendants:

‘I would however conclude ... that, even apart from the Human Rights Convention, a foreign state cannot possess (either under international law or under English common law and the United Kingdom’s 1978 Act) any absolute right to claim immunity in respect of civil claims against its officials for systematic torture, even committed outside the country of suit. Further, in a jurisdiction like the English I would consider that it should be possible to cater for any concerns about the exercise of jurisdiction in respect of such claims by appropriate use or development of discretionary principles relating to the exercise of jurisdiction. But, even if that were not so either here or elsewhere, it seems to me that any absolute view of immunity must at the very least yield in the face of assertions of systematic torture to a more nuanced or proportionate approach. As it is, having regard to the [*ECHR*], it is sufficient to decide this appeal that, whether issues of state immunity are or are not treated as theoretically separate from issues of jurisdiction in English law, the permissibility, appropriateness and proportionality of exercising jurisdiction ought to be determined at one and the same time. Such a conclusion reflects the importance attaching in today’s world and in current international thinking and jurisprudence to the recognition and effective enforcement of individual human rights. It fits harmoniously with the position already achieved in relation to criminal proceedings. It caters for our obligation under article 6 of the European Convention on Human Rights not to deny access to our courts, in circumstances where it would otherwise be appropriate to exercise jurisdiction applying domestic jurisdictional principles, unless to do so would be in pursuit of a legitimate aim and proportionate. It also caters for all legitimate considerations, arising from the special position of states and the delicacy of suits indirectly

²⁹⁹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 698-699. Human Rights Act 1998 <<http://www.legislation.gov.uk/ukpga/1998/42/contents>> accessed 26 November 2015:

‘3—Interpretation of legislation

‘(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [*ECHR*].

‘...’

involving them and their affairs. It does so by allowing ample scope for the sensitive handling of claims such as the present which is unquestionably necessary. ...³⁰⁰

Lord Phillips agreed with Lord Justice Mance's conclusions. He shared the view that the Kingdom of Saudi Arabia was entitled to immunity, in conformity with what had been established in *Al-Adsani v Government and Kuwait* (Court of Appeal) and in *Al-Adsani v United Kingdom* (ECtHR).³⁰¹ Accordingly, Lord Phillips also held there is a distinction between the immunity *ratione personae* of the state itself and the immunity *ratione materiae* of state officials. The latter issue was not the subject-matter of the *Al-Adsani* case. As recalled by Lord Phillips, the majority of the House of Lords in *Ex parte Pinochet (No 3)* had considered that the acts of torture with which Pinochet had been charged could not be considered official acts and attract immunity *ratione materiae* in relation to criminal proceedings, since such conduct was a violation of *jus cogens*. Lord Phillips considered there would be no reason to afford individuals immunity for acts of torture in respect of criminal proceedings and not do the same in respect of civil proceedings:

‘Once the conclusion is reached that torture cannot be treated as the exercise of a state function so as to attract immunity *ratione materiae* in criminal proceedings against individuals, it seems to me that it cannot logically be so treated in civil proceedings against individuals.’³⁰²

‘... If civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit *ratione personae*, there can be no suggestion that the state is vicariously liable. It is the personal responsibility of the individuals, not that of the state, which is in issue. The state is not indirectly impleaded by the proceedings.’³⁰³

Lord Phillips argued the ECtHR would reach the same conclusion if confronted with this matter:

‘Had the Grand Chamber been considering a claim for state immunity in relation to claims brought against individuals, I do not believe that there would have been a majority in favour of the view that this represented a legitimate limitation on the right to access to a court under Article 6(1). Had the Court shared the conclusions that we have reached on this appeal, it would have held that there was no recognised rule of public international law that conferred

³⁰⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 701-702.

³⁰¹ *ibid* 703-704.

³⁰² *ibid* 709-710.

³⁰³ *ibid* 710.

such immunity. Had it concluded that there was such a rule, I consider that it would have been likely to have held that it would not be proportionate to apply the rule so as to preclude civil remedies sought against individuals.’³⁰⁴

3.1.7.2.3 Judgment of the House of Lords (2006)

The case reached the House of Lords. The claimants appealed against the grant of immunity to the Kingdom of Saudi Arabia, whilst the Kingdom of Saudi Arabia appealed against the decision regarding the state officials.

Lord Bingham considered the relationship between two principles of international law was the crux of the legal dispute:

‘One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another. The second principle, of more recent vintage but of the highest authority among principles of international law, is one that condemns and criminalises the official practice of torture, requires states to suppress the practice and provides for the trial and punishment of officials found to be guilty of it. ... The House [*of Lords*] must consider the balance currently struck in international law [*between these two principles*] ...’³⁰⁵

Lord Bingham observed that the logic of the international instruments (the ECSI and the UNCJISP) and of the various domestic statutes on state immunity was to establish immunity as a general rule and to specify a number of exceptions to this rule. He argued that, although the SIA 1978 does not have a specific provision governing immunity in respect of claims brought against officials of a foreign state for acts they practiced in the foreign state, there was a ‘... wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state’s right to immunity cannot be circumvented by suing its servants or agents.’³⁰⁶

Lord Bingham added the UNCJISP addressed this issue and in its Article 2.1.b.iv it was established that ‘representatives of the State acting in that capacity’ were comprised in the definition of state. Accordingly, Article 6.2.b provides that

³⁰⁴ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 270) 712.

³⁰⁵ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 129 ILR 713 (House of Lords), 713-714.

³⁰⁶ *ibid* 717.

‘... [a] proceeding before a court of a State shall be considered to have been instituted against another State if that other State ... is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.’³⁰⁷

Unlike what was ruled by the Court of Appeal, to Lord Bingham, the conduct of the defendants was undoubtedly in discharge or purported discharge of their public duties.³⁰⁸ Lord Bingham considered that any act attributable to the state for the purpose of state responsibility is an ‘official act’ for the purpose of immunity *ratione materiae* of state officials.³⁰⁹ Therefore, immunity could not be refused on the grounds of the unlawfulness of a given conduct:

‘International law does not require, as a condition of a state’s entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.

‘... The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity.’³¹⁰

Lord Bingham asserted that a ‘straightforward’ application of the SIA would lead to the conclusion that the Kingdom of Saudi Arabia and its officials were entitled to immunity, insofar as the cases brought to the attention of the Court did not fall under the

³⁰⁷ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force) (2005) 44 ILM 803.

³⁰⁸ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 718.

³⁰⁹ *ibid* 718-719. Lord Bingham relied on Articles 4 and 7 of the DARSIVA 2001 to convey this point. Oddly, he did not refer to Article 58 of the DARSIVA, which states that the articles ‘... are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.’ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 26 November 2015:

‘Article 4. Conduct of organs of a State

‘1. The 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, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

‘2. An organ includes any person or entity which has that status in accordance with the internal law of the State.’

‘Article 7. Excess of authority or contravention of instructions

‘The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.’

³¹⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 718-719.

exceptions provided for in the statute—thus, unlike the Court of Appeal, Lord Bingham considered there was no distinction between the claim against the Kingdom of Saudi Arabia and the claim against the state officials.³¹¹

However, the claimants had also argued that this interpretation of the SIA provisions would violate Article 6 of the ECHR and that, as mandated by Section 3 of the Human Rights Act 1989, '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [ECHR].'³¹² Lord Bingham disagreed that Article 6 of the ECHR was engaged by the grant of immunity, since, according to him, 'the rule of international law is not that a state should not exercise jurisdiction over another state a jurisdiction which it has but that (save in cases recognized by international law) a state has no jurisdiction over another state'³¹³, so it would not make sense to consider that a state was denying a jurisdiction that it did not have in the first place. Nevertheless, Lord Bingham decided to accept the ruling of the ECtHR in *Al-Adsani v United Kingdom*, which had held Article 6 to be engaged. In the jurisprudence of the ECtHR, any limitation to the right of access to court must pursue a legitimate aim and be proportionate. The claimants contended that the grant of immunity in the case did not fulfill these requirements, insofar as it would result in an inconsistency with the *jus cogens* norm of prohibition of torture. Furthermore, as previously discussed, they had argued torture could not be considered an official act entitled to immunity *ratione materiae*.

Lord Bingham disagreed with the submission of the claimants in this regard, which had been previously upheld in the Court of Appeal:

'It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. The claimants' argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity.'³¹⁴

³¹¹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 720.

³¹² Human Rights Act 1989 (n 299).

³¹³ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 720.

³¹⁴ *ibid* 724.

The claimants had referred to the practice of US courts not to recognize violations of *jus cogens* as official acts for the purposes of immunity of state officials. Lord Bingham considered that the position of the US courts in this matter was not relevant because it was not shared by other states. In order to support this point, Lord Bingham referred to the following excerpt of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal annexed to the ICJ's judgment in the *Arrest Warrant* case:

'The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

'In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. *While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.*³¹⁵

The reference of the claimants to the decision of the Italian Court of Cassation in *Ferrini* was not successful either. As previously discussed, in *Ferrini*, the Court of Cassation expressed its disapproval of the ECtHR's judgment in *Al-Adsani v United Kingdom* and of the Superior Court of Justice of Ontario's judgment in *Bouzari v Islamic Republic of Iran*. According to the Italian Court of Cassation, since *jus cogens* norms are hierarchically superior and the emergence of the principle of respect to fundamental human rights as a fundamental principle of the international legal order impacted upon the scope of the principle of sovereign equality, the argument that there was not an explicit norm providing for a *jus cogens* exception to state immunity could not carry the day. Lord

³¹⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) [2002] ICJ Rep 3, [47]-[48] (emphasis added); *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 726-727.

Bingham criticized the assertion of the Court of Cassation according to which the principle of universal jurisdiction applied to civil actions arising from international crimes.³¹⁶ He considered that the judgment of the Court of Cassation in *Ferrini* was not ‘an accurate statement of international law as generally understood’—in his words, ‘one swallow does not make a rule of international law.’³¹⁷

Lord Bingham also understood that Article 14 of the CAT did not provide for universal civil jurisdiction in respect of acts of torture not committed in the state of the forum. The claimants had referred to a commentary of the Committee against Torture in response to the periodic report submitted by Canada. The Committee recommended that Canada ‘should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.’³¹⁸ Lord Bingham argued this recommendation was not binding in international law.³¹⁹ His Lordship also referred to the declaration made by the US in respect of Article 14 of the CAT, according to which Article 14 ‘... requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.’³²⁰

³¹⁶ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 725.

³¹⁷ *ibid.*

³¹⁸ UN Committee Against Torture, ‘Considerations of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture: Canada’ (7 July 2005) CAT/C/CR/34/CAN. In ‘General Comment No 3’ (13 December 2012) CAT/C/GC/3, the Committee Against Torture reiterated the understanding that Article 14 requires States parties to provide universal civil jurisdiction in the following terms:

‘22. ... The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.

‘...
 ‘42. ... [G]ranting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists *de facto*, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims.’

³¹⁹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 726.

³²⁰ Reservations to the Convention Against Torture

<https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en#EndDec> accessed 26 November 2015.

On the other hand, Lord Bingham found the four arguments put forth by the defendants ‘cumulatively irresistible’.³²¹ Firstly, the ICJ in the *Arrest Warrant* case did not find any exception under customary international law to the rule according immunity from criminal jurisdiction to incumbent Foreign Ministers, even in cases in which they are suspected of having committed war crimes and crimes against humanity. Logically, as put by Lord Bingham, it should follow that prohibitions of this character do not automatically prevail over other rules of international law. Moreover, the ICJ in *Armed Activities on the Territory of the Congo* concluded that ‘... the fact that a dispute relates to compliance with a norm having [a *jus cogens* character] ... cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute’³²². Secondly, he agreed that Article 14 of the CAT did not provide for universal civil jurisdiction.³²³ Thirdly, the UNCJISP did not provide for an exception from immunity in respect of civil claims based on violations of *jus cogens*.³²⁴ Finally, it was contended that an obligation to exercise universal jurisdiction over claims arising from breaches of *jus cogens* had not yet emerged in international law.³²⁵ Based on these considerations, Lord Bingham found the SIA was ‘... not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application [*did*] not infringe the claimants’ right under article 6’.³²⁶

Lord Bingham concluded the claims against the Kingdom of Saudi Arabia and the individual defendants should have been dismissed—in his opinion, the Court of Appeal erred in law when it found the individual defendants were not entitled to immunity and asserted ‘a universal tort jurisdiction in cases of official torture ... for which there was no adequate foundation in any international convention, state practice and scholarly consensus’³²⁷.

Lord Hoffmann concurred with the judgment of Lord Bingham, further developing a few points. He did not accept there was a conflict between the *jus cogens* norm of prohibition of torture and a rule that accords immunity:

³²¹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 726.

³²² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Merits: Judgment) [2006] ICJ Rep 6, [64].

³²³ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 727.

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ *ibid* 730.

‘The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. ...

‘... To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority in *Al-Adsani*, it is not *entailed* by the prohibition of torture.’³²⁸

In further examining the relationship between *jus cogens* and state immunity, Lord Hoffmann criticized the decision of the Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany*:

‘The decision of the Greek Court of Cassation in *Prefecture of Voiotia v Federal Republic of Germany*, 4 May 2000 ... went upon a theory of implied waiver which has received no support in other decisions. It was undermined by the court’s own refusal to order enforcement of the judgment and held to be wrong by a judgment of a special Supreme Court (the Anotato Eidiko Dikasterio) convened to decide cases involving the interpretation of international law: *Margellos v Federal Republic of Germany* ... 17 September 2002. The original judgment was coldly received by the German Supreme Court when the claimants attempted to enforce it directly in Germany: *Greek Citizens v Federal Republic of Germany (The Distomo Massacre Case)* (2003) ...’³²⁹

Lord Hoffmann’s criticism of the decision of the Italian Court of Cassation in the *Ferrini* case was even sharper. According to him, the Italian Court of Cassation exhibited ‘the same bare syllogistic reasoning as the judgment of the minority in *Al-Adsani*.’³³⁰ In a very interesting passage, Lord Hoffmann discusses the interpretation Pasquale de Sena and Francesca de Vittor gave to the *Ferrini* case, according to which the systematic approach adopted by the Italian Court of Cassation should be seen as giving primacy to the value of human rights over the value of sovereign immunity as a result of the balancing of these

³²⁸ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 732.

³²⁹ *ibid* 738.

³³⁰ *ibid*.

two fundamental principles of the international legal system.³³¹ Lord Hoffmann argued that this technique was unacceptable in international law:

‘I think that [*‘giving priority to the values embodied in the prohibition of torture over the values and policies of the rules of state immunity’*] is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as “activist” but would have been well within the judicial function. As Professor Dworkin demonstrated in *Law’s Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.’³³²

On the matter of the immunity of the individual defendants, Lord Hoffmann, following Lord Bingham, understood that ‘as a matter of international law, the same immunity against suit in a foreign domestic court which protects the state itself also protects the individual for whom the state is responsible’.³³³ The terms ‘state’ and ‘government’ in the SIA should, according to him, be understood as including state officials acting in that capacity, as a corollary of the principle that the SIA must be ‘construed against the background of those principles of public international law as are generally recognised by the family of nations’³³⁴. In his view, although the CAT withdrew immunity in respect of criminal proceedings, it did not affect immunity for civil proceedings.³³⁵ Lord Hoffmann also agreed with Lord Bingham that an act attributable to the state for the purposes of international responsibility is an ‘official act’ for the purposes of immunity:

‘It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.’

³³¹ Pasquale de Sena and Francesca de Vittor, ‘State Immunity and Human Rights: the Italian Supreme Court on the Ferrini Case’ (2005) 16(1) EJIL 89.

³³² *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 738-739.

³³³ *ibid* 739.

³³⁴ *ibid* 741. See also *Alcom Ltd v Republic of Colombia* [1984] AC 580 (House of Lords).

³³⁵ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 740.

‘Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity ...’³³⁶

Also concurring with Lord Bingham, Lord Hoffmann considered the Court of Appeal had erred when it concluded that the definition of torture enshrined in the CAT (ie, that torture is an act ‘... inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’) did not lend it an official character.³³⁷

The House of Lords ultimately held the Kingdom of Saudi Arabia and the individual defendants were entitled to immunity.

3.1.8 Canada

3.1.8.1 Judgment of the Court of Appeal for Ontario in *Bouzari and others v Islamic Republic of Iran* (2004)

The facts, as described in the judgment, were the following. Mr Houshang Bouzari, an Iranian national, who had been an advisor to the Minister of Petroleum and the state owned National Iranian Oil Company, left the Iranian government in 1987 to found his own consulting company.³³⁸ He eventually helped secure a deal between a consortium of companies seeking to engage in an oil and gas project in the Persian Gulf and the National Iranian Oil Company.³³⁹ Said consortium was to be paid \$1.8 billion and Mr Bouzari’s commission was to be two per cent of this amount.³⁴⁰ Mr Bouzari was approached by the second son of the President of Iran, who offered his father’s help in guaranteeing the contract and demanded \$50 million in return.³⁴¹ Mr Bouzari alleged that, following his refusal to accept the assistance offered, he was kidnapped, imprisoned and repeatedly tortured in Tehran.³⁴²

³³⁶ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (n 305) 743.

³³⁷ *ibid* 744.

³³⁸ *Bouzari et al v Islamic Republic of Iran* [2004] CanLII 871 (Court of Appeal for Ontario), [8]-[9].

³³⁹ *ibid* [8]-[9].

³⁴⁰ *ibid* [10].

³⁴¹ *ibid*.

³⁴² *ibid* [11]-[12].

Mr Bouzari fled to Canada, where he brought suit against Iran for the damages suffered. The Ontario Superior Court of Justice declared it had no jurisdiction to entertain the claim. The ruling was confirmed on appeal by the Court of Appeal for Ontario, whose judgment was delivered by Justice Goudge.³⁴³

Mr Bouzari alleged that, since torture was prohibited by a *jus cogens* norm, there was universal civil jurisdiction for him to bring his claim before the court.³⁴⁴ Justice Goudge asserted there was nothing in the SIA 1985 or in any treaty binding on Canada which would require the application of universal jurisdiction.³⁴⁵ He also found there was nothing in customary international law requiring states to exercise civil jurisdiction for claims arising from torture suffered abroad.³⁴⁶ In any case, Justice Goudge considered it was not necessary to find whether the court had jurisdiction by applying the ordinary test of real and substantial connection, because the issue of state immunity precluded the question.³⁴⁷

Justice Goudge expressed a very orthodox view on state immunity. He considered it to be ‘founded on the concepts of the sovereign equality of states and the non-interference of states in the internal affairs of each other’ and ‘rooted on customary international law’.³⁴⁸ He also considered immunity was once absolute but the ‘dictates of justice’ had led to its attenuation.³⁴⁹

In Canada, state immunity is governed by a statute, the SIA 1985, which establishes immunity as a general rule subject to the exceptions enshrined in the Act itself.

Mr Bouzari relied on three exceptions provided for in the SIA.

Firstly, Section 18 of the Act provides that it ‘... does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.’³⁵⁰ Mr Bouzari alleged that this exception to state immunity applied because he was seeking punitive damages, which have the nature of a fine. Justice Goudge rejected this argument and asserted that punitive damages, whilst having the objective of deterring conduct, are a civil remedy.³⁵¹

Secondly, Mr Bouzari invoked the exception for torts committed in the forum state, enshrined in the SIA. Indeed, Section 6 of the Act provides that ‘[a] foreign state is not

³⁴³ *Bouzari et al v Islamic Republic of Iran* (n 338) [18]-[20].

³⁴⁴ *ibid* [23].

³⁴⁵ *ibid* [28].

³⁴⁶ *ibid*.

³⁴⁷ *ibid* [38].

³⁴⁸ *ibid* [40].

³⁴⁹ *ibid* [41].

³⁵⁰ State Immunity Act 1985 <<http://laws-lois.justice.gc.ca/eng/acts/S-18/>> accessed 26 November 2015.

³⁵¹ *Bouzari et al v Islamic Republic of Iran* (n 338) [44].

immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.’³⁵² Mr Bouzari alleged that his suffering continued in Canada. Justice Goudge considered that the continued suffering of Mr Bouzari was due to the injuries inflicted in Iran, not in Canada, and rejected the argument.³⁵³

Thirdly, Mr Bouzari relied on the exception relating to commercial activity, found in Section 5 of the SIA, according to which ‘[a] foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.’³⁵⁴ The act defines commercial activity as ‘any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.’³⁵⁵ Mr Bouzari claimed the acts of torture he suffered were committed with the purpose of affecting his involvement in a commercial activity. Justice Goudge did not accept this contention and asserted that the acts of torture were not commercial in nature, and that it was not enough that the claim related to ‘... acts which, in turn, relate to commercial activity of the foreign state.’³⁵⁶

Justice Goudge also held the SIA was a comprehensive code, and thus the argument that, under common law, torture could not be considered a government act and could not attract immunity was dismissed.³⁵⁷

Justice Goudge then turned to the question of whether Canada was bound by international law to allow for a civil remedy in the case. He considered that, as far as possible, domestic legislation should be interpreted consistently with international law (be it customary or conventional law).³⁵⁸ At the same time, he found that domestic law prevails when it conflicts with international law.³⁵⁹ As a consequence, he concluded that

‘[e]ven if Canada’s international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a way that does not do so. Section 3 of the SIA accords complete state immunity except as provided by the SIA. And, as we have seen, none of the relevant exceptions in the SIA permits a civil claim against a foreign

³⁵² State Immunity Act 1985 (n 350).

³⁵³ *Bouzari et al v Islamic Republic of Iran* (n 338) [46]-[47].

³⁵⁴ State Immunity Act 1985 (n 350).

³⁵⁵ *ibid.*

³⁵⁶ *Bouzari et al v Islamic Republic of Iran* (n 338) [48]-[55].

³⁵⁷ *ibid* [56]-[59].

³⁵⁸ *ibid* [63]-[65].

³⁵⁹ *ibid* [66].

state for torture committed abroad. Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not.³⁶⁰

Notwithstanding this conclusion, Justice Goudge undertook an examination of Canada's international law obligations. Firstly, he analyzed whether Canada, which is a party to the CAT, was under the obligation to provide a civil remedy for acts of torture committed outside the forum state. Article 14 of the CAT establishes that

'1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

'2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.'³⁶¹

In Justice Goudge's view, a textual analysis of the CAT shows that 'the absence of explicit territorial language does not necessarily mean the absence of territorial limitation'.³⁶² He also mentioned the evidence of state practice regarding Article 14 limited the obligation enshrined in the provision for acts of torture committed in the state of the forum.³⁶³

Mr Bouzari had also argued that the obligation to provide a civil remedy for him was established in Article 14 of the ICCPR, which reads as following:

'Article 14

'1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'³⁶⁴

³⁶⁰ *Bouzari et al v Islamic Republic of Iran* (n 338) [67].

³⁶¹ Convention Against Torture (n 277).

³⁶² *Bouzari et al v Islamic Republic of Iran* (n 338) [76].

³⁶³ *ibid* [78].

³⁶⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Justice Goudge found there was no evidence that Article 14 of the ICCPR was interpreted to require a state to provide a remedy for sovereign acts committed outside its jurisdiction.³⁶⁵

As regards customary international law, Justice Goudge considered the *jus cogens* character of the prohibition of torture was not questioned.³⁶⁶ Based on a comparative review of domestic and international practice, it was concluded that, under customary international law, there was no exception to state immunity in respect of acts in breach of *jus cogens* committed outside the forum state.³⁶⁷ Nevertheless, even if this was the case, Justice Goudge asserted that the SIA is a comprehensive and does not provide for such an exception to state immunity:

‘... the SIA simply does not include a civil action for damages for torture in any of the specifically drawn exceptions to the encompassing state immunity provided in s. 3(1). Moreover, the extent of the prohibition against torture as a rule of *jus cogens* is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of states.’³⁶⁸

The reference to *Ex parte Pinochet (No 3)* was deemed not to be relevant for the case. As put by Justice Goudge:

‘... the opinions in *Pinochet* clearly reflect the distinction for state immunity purposes between proceedings seeking a criminal sanction against an individual for acts of torture committed abroad and proceedings seeking a civil remedy against a foreign state for the same acts. In the former case, the sanction can be imposed on the individual without subjecting one state to the jurisdiction of another. That is not so in the latter case.’³⁶⁹

Finally, Justice Goudge dismissed the argument that, since the prohibition of torture implies the right to be free from it, there must be a remedy for it.³⁷⁰ He offered a two-fold response. Firstly, he considered that a civil remedy was not the only way to give effect for the prohibition of torture and that the CAT provided for the prosecution of

³⁶⁵ *Bouzari et al v Islamic Republic of Iran* (n 338) [82]-[83].

³⁶⁶ *ibid* [87].

³⁶⁷ *ibid* [88].

³⁶⁸ *ibid* [90].

³⁶⁹ *ibid* [91].

³⁷⁰ *ibid* [92].

individuals who committed acts of torture committed abroad.³⁷¹ Secondly, Justice Goudge asserted that state practice did not indicate that states were under the obligation to provide for a civil remedy for acts of torture committed outside the forum state and that the *jus cogens* character of the prohibition against torture did not have as a consequence an obligation for states to provide a civil remedy for its violation.³⁷²

He concluded that

‘... [b]oth under customary international law and international treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other’s jurisdiction. It would be inconsistent with this balance to provide a civil remedy against a foreign state for torture committed abroad. In the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the SIA that is not there, or seeing a widespread state practice that does not exist today.’³⁷³

Mr Bouzari’s appeal was dismissed by the Court.

3.2 Decisions rendered by international courts prior to *Jurisdictional Immunities of the State*

3.2.1 Judgment of the ECtHR in *Al-Adsani v United Kingdom* (2001)

Having his appeal dismissed by the House of Lords, Mr Al-Adsani brought suit against the United Kingdom before the ECtHR. Mr Al-Adsani alleged the violation of Article 3 (prohibition of torture)³⁷⁴ read in conjunction with Articles 13 (right to an

³⁷¹ *Bouzari et al v Islamic Republic of Iran* (n 338) [93].

³⁷² *ibid* [94].

³⁷³ *ibid* [95].

³⁷⁴ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221:

‘Article 3—Prohibition of torture—No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

effective remedy)³⁷⁵ and 1 (obligation to respect Human Rights)³⁷⁶, and of Article 6.1 (right to a fair trial)³⁷⁷ of the ECHR.

The ECtHR found there had been no violation of Article 3, since the events alleged by Mr Al-Adsani did not take place in the United Kingdom and the United Kingdom authorities did not have a causal connection with them. Accordingly, the ECtHR held that ‘... it [*could not*] be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.’³⁷⁸

With respect to Article 6.1, the ECtHR dismissed the United Kingdom’s first submission, namely that Mr Al-Adsani’s claim had no basis in domestic law because whatever substantive right he might have been entitled to had been extinguished by the operation of state immunity.³⁷⁹ According to the ECtHR, ‘[t]he grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right.’³⁸⁰ Having established Article 6.1 was applicable, the ECtHR turned to the question of compliance. The ECtHR began by sketching its doctrine with respect to the right of access to court, ie, that it is not an absolute right, and that it can be limited ‘by implication’ provided that there is a relationship of proportionality between the

³⁷⁵ European Convention on Human Rights (n 374):

‘Article 13—Right to an effective remedy—Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

³⁷⁶ *ibid*:

‘Article 1—Obligation to respect Human Rights—The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

³⁷⁷ *ibid*:

‘Article 6—Right to a fair trial—1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...’

³⁷⁸ *Al-Adsani v United Kingdom* [Grand Chamber] (Application No 31253/96) (Merits: Judgment) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59885>> accessed 26 November 2015, [40].

³⁷⁹ *ibid* [48].

³⁸⁰ *ibid*.

means employed and the aim sought to be achieved, and that the limitations applied do not impair the very essence of the right and pursue a legitimate aim.³⁸¹ It then outlined its view on state immunity:

‘... sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State ... [T]he 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.’³⁸²

Applying Article 31.3.c of the VCLT, according to which the treaty interpreter shall take into account, together with the context, ‘[a]ny relevant rules of international law applicable in the relations between the parties’³⁸³, the ECtHR understood that

‘... measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.’³⁸⁴

The ECtHR moved next to the submission that the norm violated (the prohibition of torture), having the nature of *jus cogens*, took precedence over state immunity. The ECtHR noted that, in a Report produced in 1999, the ILC pointed out two developments that could support the argument a state could not invoke immunity in respect of gross violations of human rights.³⁸⁵ The first development was the Antiterrorism and Effective Death Penalty Act of 1996, which amended the FSIA to add a new exception to the grant of immunity in cases in which ‘... money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act...’, provided that the foreign state in question is designated as a ‘sponsor of terrorism’ by the United States and that the claimant or victim was a national of the United States when the acts

³⁸¹ *Al-Adsani v United Kingdom* (n 378) [53].

³⁸² *ibid* [54].

³⁸³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

³⁸⁴ *Al-Adsani v United Kingdom* (n 378) [56].

³⁸⁵ ILC Working Group, ‘Report of the Working Group on Jurisdictional Immunities of States and their Property’ A/CN.4/L.576 (1999) II(2) YILC.

occurred.³⁸⁶ The second was the *Ex parte Pinochet (No 3)* case, in which the House of Lords held that immunity *ratione materiae* did not extend to former Heads of State who committed acts of torture.³⁸⁷ The ECtHR remained unconvinced that, from these developments, it could be concluded there was acceptance in international law that states could not invoke immunity in civil claims for damages arising from *jus cogens* violations.³⁸⁸ As the ECtHR remarked, ‘the very fact that the amendment [to the *FSIA*] was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture.’³⁸⁹ Also, the *Ex parte Pinochet (No 3)* case dealt with the immunity *ratione materiae* of a former Head of State from criminal jurisdiction, whilst the case under discussion dealt with the immunity *ratione personae* of a state from civil jurisdiction.³⁹⁰ The ECtHR concluded the grant of immunity to Kuwait by the English courts did not violate Article 6.1 of the ECHR.

In a concurring opinion, Judge Pellonpää, joined by Judge Bratza, added two arguments to support the ECtHR’s judgment. The first one is a variation of the ‘flood-gate’ argument, ie accepting *jus cogens* norms override sovereign immunity would have as a consequence a steep increase in undesired litigation:

‘The somewhat paradoxical result, had the minority’s view prevailed, could have been that precisely those States which so far have been most liberal in accepting refugees and asylum-seekers, would have had imposed upon them the additional burden of guaranteeing access to a court for the determination of perhaps hundreds of refugees’ civil claims for compensation for alleged torture. Even if the finding of a violation of Article 6 in this case had not had a “chilling effect” on the readiness of the Contracting States to accept refugees—a consequence

³⁸⁶ US Code, Section 1605A <<https://www.law.cornell.edu/uscode/text/28/1605A>> accessed 26 November 2015.

³⁸⁷ *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (House of Lords).

³⁸⁸ *Al-Adsani v United Kingdom* (n 378) [66]:

‘The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 [*State Immunity*] Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.’

³⁸⁹ *ibid* [64].

³⁹⁰ *ibid* [65].

which I would not totally exclude—the question of the effectiveness of the access in the circumstances ... would inevitably have arisen.’³⁹¹

The second argument concerned the extension of the *jus cogens* exception to the domain of immunity from execution. If *jus cogens* norms prevailed over the rule which requires one state to accord jurisdictional immunity to another, there would be no reason for them not to prevail over the rule which requires one state to accord immunity from execution to another, and negative consequences would ensue:

‘If immunity from jurisdiction were to be regarded as incompatible with Article 6 because of the *jus cogens* nature of the prohibition of torture, which prevails over all other international obligations not having that same hierarchical status, it presumably would also have to prevail over rules concerning immunity from execution. Consequently, the Contracting States would have had to allow attachment and execution against public property of respondent States if the effectiveness of access to a court could not otherwise be guaranteed.

‘... [I]n order not to contradict itself the Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State’s public property, such as bank accounts intended for public purposes, real estate used for a foreign State’s cultural institutes and other establishments abroad (including even, it would appear, embassy buildings), etc., since it has not been suggested that immunity of such public property from execution belongs to the corps of *jus cogens*. Although giving absolute priority to the prohibition of torture may at first sight seem very “progressive”, a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of “Pyrrhic victory”. International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework, and I believe it is more conducive to orderly international cooperation to leave this framework intact than to follow another course.’³⁹²

3.2.1.1 The dissenting opinions appended to the judgment of the ECtHR in *Al-Adsani v United Kingdom* (2001)

Eight out of the seventeen judges of the Grand Chamber of the ECtHR dissented of the judgment of the majority. In a much quoted dissenting opinion, Judges Rozakis and

³⁹¹ *Al-Adsani v United Kingdom* (Concurring Opinion of Judge Pellonpää Joined by Judge Bratza) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59885>> accessed 26 November 2015.

³⁹² *ibid.*

Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, asserted that ‘the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status.’³⁹³ Considering that it was demonstrated that the prohibition of torture had ‘crystallised as a *jus cogens* rule’ and that the rules on state immunity ‘have never been considered by the international community as rules with a hierarchically higher status’³⁹⁴, the dissenting judges concluded that the veil of state immunity should be pierced if it conflicted with *jus cogens*. As explained by the judges:

‘[t]he acceptance ... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

‘... [T]he distinction made by the majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere.’³⁹⁵

At the beginning of his dissenting opinion, Judge Ferrari Bravo exclaimed: ‘What a pity!’ Judge Ferrari Bravo lamented the ‘golden opportunity’ missed and the endorsement by the ECtHR of ‘old formalist arguments’ in the conclusion that it was not yet accepted in

³⁹³ *Al-Adsani v United Kingdom* (Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59885>> accessed 26 November 2015.

³⁹⁴ *ibid.*

³⁹⁵ *ibid.*

international law the proposition that states are not entitled to immunity in respect of civil claims arising out of acts of torture that were not committed in the territory of the forum state.³⁹⁶ Judge Loucaides, in his dissenting opinion, stated that, to him, *any* blanket immunity is a disproportionate violation of Article 6.1 of the ECHR. According to him, in order to apply immunity, it is always necessary to balance the competing interests, ie those related to the grant of immunity and those related to the nature of the substantive claim.³⁹⁷

3.2.2 Judgment of the ECtHR in *Kalogeropoulou and Others v Greece and Germany* (2002)

The *Kalogeropoulou* case has a direct link with the Multi-Member Court of Levadia's *Judgment No 137/1997*, which was confirmed and made final by the Greek Court of Cassation in *Judgment No 11/2000*. In *Jugment No 137/1997*, the Multi-Member Court of Levadia ordered Germany to pay compensation for the relatives of the victims of the massacre perpetrated by Germany in Distomo during the Second World War. The enforcement proceedings related to *Judgment No 137/1997* were, however, unsuccessful. Article 923 of the Greek Code of Civil Procedure establishes as a precondition to the enforcement of decisions against foreign states the authorization of the Minister of Justice, which was not obtained by the applicants.³⁹⁸ Although the Athens Court of First Instance held that Article 923 was incompatible with Article 6.1 of the ECHR and Article 2.3 of the ICCPR, the Athens Court of Appeal upheld Germany's objection and set aside the judgment of the Court of First Instance, asserting that Article 923 pursued the public interest aim of avoiding disturbances in international relations and was proportionate to that aim.³⁹⁹ The Greek Court of Cassation ultimately upheld the position of the Athens Court of Appeal, considering that the limitation imposed by Article 923 of the Greek Code of Civil Procedure was compatible with Article 6.1 of the ECHR.⁴⁰⁰

The applicants resorted to the ECtHR, claiming Greece and Germany, by refusing to comply with *Judgment No 137/1997* of the Multi-Member Court of Levadia, had

³⁹⁶ *Al-Adsani v United Kingdom* (Dissenting Opinion of Judge Ferrari Bravo) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59885>> accessed 26 November 2015.

³⁹⁷ *Al-Adsani v United Kingdom* (Dissenting Opinion of Judge Loucaides) (2001) <<http://hudoc.echr.coe.int/eng?i=001-59885>> accessed 26 November 2015.

³⁹⁸ *Kalogeropoulou and Others v Greece and Germany* [First Section] (Application No 59021/00) (2002) <<http://hudoc.echr.coe.int/eng?i=001-23539>> accessed 26 November 2015. I did not have access to the text of the Greek Code of Civil Procedure. Thus I had to rely on the ECtHR's account of the relevant provision.

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

infringed Article 6.1 of the ECHR (effective judicial protection) and Article 1 of Protocol No 1 to the ECHR (peaceful enjoyment of possessions).⁴⁰¹

The ECtHR strictly followed the approach it had set out in respect of Article 6.1 in its prior case-law and, when dealing with the relationship between Article 6.1 and state immunity, adhered to its decision in *Al-Adsani*. The ECtHR began by considering the right of access to court is not absolute and may be subject to limitations. It then asserted that Contracting States have a margin of appreciation, but the ECtHR has the final word concerning the compatibility of the limitations adopted by Contracting States with the ECHR. And then the ECtHR laid out the criteria the limitations applied have to fulfill: (i) they cannot impair the very essence of the right; (ii) they have to pursue a legitimate aim; and (iii) there must a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In line with the *Al-Adsani* judgment, the ECtHR considered 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.’⁴⁰²

It also stated that, under Article 31.3.c of the VCLT, the ECHR must be interpreted in harmony with other rules of international law. Accordingly, the ECtHR found that

‘... measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.’⁴⁰³

Like in *Al-Adsani*, the ECtHR remarked that it was not established that there was acceptance for the proposition that states are not entitled to immunity in civil proceedings for damages arising from crimes against humanity committed outside the forum state.⁴⁰⁴ At the same time, and repeating what it had stated in *Al-Adsani*, the ECtHR left open the possibility that there could be such a development in customary international law in the future.⁴⁰⁵ In the light of these considerations, the conclusion of the ECtHR with respect to the claim Greece had violated Article 6.1 of the ECHR was predictable:

⁴⁰¹ *Kalogeropoulou and Others v Greece and Germany* (n 398).

⁴⁰² *ibid.*

⁴⁰³ *ibid.*

⁴⁰⁴ *ibid.*

⁴⁰⁵ *ibid.*

‘... the Minister of Justice’s refusal to give the applicants leave to apply for expropriation of certain German property situated in Greece cannot be regarded as an unjustified interference with their right of access to a tribunal, particularly as it was examined by the domestic courts and confirmed by a judgment of the Greek Court of Cassation.’⁴⁰⁶

The ECtHR then moved to the complaint under Article 1 of Protocol No 1 of the ECHR. The ECtHR remarked it was not disputed the ‘enforceable claim’ obtained by the applicants was a ‘possession’ within the meaning of Article 1 of Protocol No 1 and that there had been an interference with their right to the peaceful enjoyment of their possessions.⁴⁰⁷ It then examined whether the requirements for a justified interference under the ECHR had been satisfied. The ECtHR considered that ‘the first and most important requirement’ provided for by Article 1 of Protocol No 1 is that a deprivation of possessions must be lawful: it is only authorized ‘... subject to the conditions provided for by law...’.⁴⁰⁸ The ECtHR did not dwell too much on this requirement, considering it had been met since the interference in question was based on Article 923 of the Greek Code of Civil Procedure. Article 1 of Protocol No 1 also establishes that a deprivation of possessions must be ‘in the public interest.’ It concluded that there could be no doubt that this requirement had been fulfilled, ‘since it was intended to avoid disturbances in relations between Greece and Germany.’⁴⁰⁹ Lastly, the ECtHR considered that the structure of Protocol No 1 required ‘a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.’⁴¹⁰ The ECtHR stressed once again that

⁴⁰⁶ *Kalogeropoulou and Others v Greece and Germany* (n 398).

⁴⁰⁷ *ibid.*

⁴⁰⁸ Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) 213 UNTS 262:

‘Article 1—Protection of property

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

‘The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

⁴⁰⁹ *Kalogeropoulou and Others v Greece and Germany* (n 398).

⁴¹⁰ *ibid.*

‘... the Greek Government could not be required to override the principle of State immunity against their will and compromise their good international relations in order to allow the applicants to enforce a judicial decision delivered at the end of civil proceedings.’⁴¹¹

As supporting arguments to contend that a balance between the general interest and the protection of the applicants’ right to the peaceful enjoyment of property had been struck, the ECtHR emphasized that the situation could not have given rise to a legitimate expectation, since the applicants were aware that the authorization of the Minister of Justice had not been obtained, and that the applicants might be able to enforce the relevant judgment in the future or in another country.⁴¹²

The ECtHR also declared Germany’s responsibility under the ECHR had not been engaged. Article 1 of the ECHR prescribes that ‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’⁴¹³ The ECtHR understood that the participation of Germany in proceedings against it in the courts of another state was not sufficient to bring the applicants ‘within [its] jurisdiction’ for the purposes of Article 1 of the ECHR—Germany’s position in the proceedings was akin to that of a private individual.⁴¹⁴

3.3 The ICJ’s judgment in *Jurisdictional Immunities of the State* (2012)

3.3.1 Submissions of the parties

Germany started proceedings against Italy before the ICJ on 23 December 2008, invoking as basis for the jurisdiction of the Court Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which entered into force between Germany and Italy on 18 April 1961.⁴¹⁵

⁴¹¹ *Kalogeropoulou and Others v Greece and Germany* (n 398).

⁴¹² *ibid.*

⁴¹³ European Convention on Human Rights (n 374).

⁴¹⁴ *Kalogeropoulou and Others v Greece and Germany* (n 398).

⁴¹⁵ European Convention for the Peaceful Settlement of Disputes (adopted 29 April 1957, entered into force 18 April 1961) 320 UNTS 423:

‘Article 1—The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; and d) the nature or extent of the reparation to be made for the breach of an international obligation.’

When it seized the Court, Germany advanced the following submissions, which remained unchanged throughout the proceedings:

‘Germany prays the Court to adjudge and declare that the Italian Republic:

‘(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

‘(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

‘(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

‘Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

‘(4) the Italian Republic’s international responsibility is engaged;

‘(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;

‘(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above.’⁴¹⁶

Italy, on its part, requested the ICJ to ‘... adjudge and hold the claims of the Applicant to be unfounded’ but it added that it had ‘... no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled.’⁴¹⁷

3.3.2 Merits of the case

Having established the scope of its jurisdiction, the ICJ first addressed Germany’s submission that Italy had acted in breach of Germany’s jurisdictional immunity by

⁴¹⁶ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [15]-[17].

⁴¹⁷ *ibid.*

exercising jurisdiction over civil claims based on the violations of the international law of armed conflict committed by Germany in Italian territory between 1943 and 1945.

The ICJ recalled that there could be no doubt the acts perpetrated by Germany which provided the basis for the civil claims brought to the Italian courts were in violation of the international law of armed conflict applicable at the time, but it emphasized the question it had to settle was whether Italy had the obligation to accord immunity to Germany in those proceedings.⁴¹⁸

The Court then turned to the question of sources of law and the applicable law to settle the dispute. Its first finding was that the parties were in agreement that ‘... immunity is governed by international law and is not a mere matter of comity.’⁴¹⁹ When considering the treaty law on the subject, the ICJ found out that the ECSI was not applicable because, although Germany was one of the Parties to the treaty, Italy was not. Neither state had ratified the UNCJISP, which nonetheless was not yet in force internationally.⁴²⁰ The conclusion was that the Court had to determine the scope and extent of the customary international law of state immunity.⁴²¹

In a rather formal fashion, the Court, invoking the *North Sea Continental Shelf* cases⁴²², stated that it had to identify with respect to state immunity the existence of a ‘settled practice’ coupled with *opinio juris*. Whilst it is not always clear how to isolate one element from the other, since, in order to demonstrate the existence of *opinio juris*,

⁴¹⁸ *Jurisdictional Immunities of the State* (n 416) [52]-[53]. The ICJ identified three categories of cases: the first related to the ‘large-scale killing of civilians in occupied territory as part of a policy of reprisals’; the second category involved the deportation of civilians from Italy to perform slave labor in Germany; the third, the denial of the status of prisoners of war (and the protections entailed by this status) to members of the Italian armed forces, who were also submitted to forced labor.

⁴¹⁹ *ibid* [53].

⁴²⁰ *ibid* [54].

⁴²¹ *ibid* [55].

⁴²² *North Sea Continental Shelf (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* (Merits: Judgment) [1969] ICJ Rep 3, [77]:

‘The essential point in this connection ... is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.’

reference is made to practice, and *opinio juris* is employed to identify the relevant practice⁴²³, the ICJ established a divide between the two:

‘In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.’⁴²⁴

After having established the dispute would have to be settled on the basis of customary international law, the ICJ expressed its view on the importance and on the foundations of the law of state immunity. The ICJ considered that ‘... the rule of State immunity occupies an important place in international law and international relations’⁴²⁵ and conveyed the traditional view that state immunity ‘... derives from the principle of sovereign equality of state, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.’⁴²⁶ The Court then briefly considered that, whilst exceptions to state immunity ‘represent a departure from the principle of sovereign equality’, immunity itself ‘may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.’⁴²⁷

⁴²³ See Peter Haggemacher, ‘La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale’ (1986) 90 RGDIP 5; Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1(1) EJIL 4, 20-27; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 388-473.

⁴²⁴ *Jurisdictional Immunities of the State* (n 416) [55].

⁴²⁵ *ibid* [57].

⁴²⁶ *ibid*.

⁴²⁷ *ibid*.

The Court then addressed a question of intertemporal law on which the Parties disagreed, namely whether the law to be applied was that in force in 1943-1945, at the time the events which gave rise to the proceedings in Italian courts happened, or that which applied at the time the proceedings before Italian courts occurred.⁴²⁸ The ICJ found its response in Article 13 of the DARSIVA 2001, according to which ‘[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.’⁴²⁹ Considering the issue in question was the denial of immunity by Italian courts, the Court found that it had to apply the international law in force at the times the proceedings in question happened.⁴³⁰

Lastly, before addressing Italy’s arguments substantiating the contention that it had not failed to respect Germany’s jurisdictional immunity, the ICJ made some remarks regarding the nature of the acts committed by Germany which were the subject of proceedings before Italian courts. According to the Court, those were *acta jure imperii*. The ICJ dismissed the understanding according to which acts amounting to international crimes and grave breaches of international humanitarian law could not have the nature of sovereign acts. As it explained:

‘The Court considers that the terms “*jure imperii*” and “*jure gestionis*” do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*). To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State’s courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.’⁴³¹

Having stated its position on these questions, the ICJ turned to Italy’s first argument, based on the territorial tort principle. The Italian contention was that, under

⁴²⁸ *Jurisdictional Immunities of the State* (n 416) [58].

⁴²⁹ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 20 November 2015.

⁴³⁰ *Jurisdictional Immunities of the State* (n 416) [58].

⁴³¹ *ibid* [60].

customary international law, a foreign State does not have the right to immunity for torts committed in the forum state, even for *acta jure imperii*. The arguments brought by Italy regarding this point were not different from the ones used by Italian courts. Italy pointed out that Article 11 of the ECSI and Article 12 of the UNCJISP enshrined the tort exception, and so did numerous domestic codifications of the law of state immunity.⁴³² Italy also added that Article 31 of the ECSI, which reinstates the rule of state immunity for acts performed by armed forces on the territory of another Contracting State, had to be interpreted as referring to the tolerated presence of armed forces under regular circumstances, particularly in the context of Status of Force Agreements.⁴³³

The ICJ remarked that it did not have to rule whether, under customary international law, the tort exception was applicable to *acta jure imperii*. It decided to take a more restrictive approach and understood that it only had to verify whether the tort exception applied to ‘... acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.’⁴³⁴ In consonance with what it had indicated, the ICJ followed a very formalistic path to find the answer to this question.

Firstly, it analyzed the treaty law on the matter, but only insofar as it shed light on customary international law. Unlike Italy had argued, the ICJ found that Article 31 of the ECSI did not refer solely to the regular, consented presence force of armed forces in the territory of the forum state, but applied ‘... irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict.’⁴³⁵ Although the UNCJISP does not have a clause excluding the acts of armed forces from its scope, the ICJ referred to the ILC’s Commentaries to the Draft Articles that resulted in the adoption of the UNCJISP, according to which Article 12 is not meant to apply to ‘situations involving armed conflicts’, noting that this interpretation remained unchallenged by other states and that two states which ratified the Convention (Sweden and Norway) declared the same understanding.⁴³⁶

⁴³² *Jurisdictional Immunities of the State* (n 416) [62].

⁴³³ *ibid.*

⁴³⁴ *ibid* [65].

⁴³⁵ *ibid* [67].

⁴³⁶ *ibid* [69]; ILC, ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries’ in ‘Report of the International Law Commission on the work of its forty-third session’ (29 April-19 July 1991) UN Doc A/46/10 (1991) II(2) YILC 13-62, 44-46.

Subsequently, the ICJ analyzed the domestic codifications of the law of state immunity, and found that out of ten states (United States, United Kingdom, South Africa, Canada, Australia, Singapore, Argentina, Israel, Japan, Pakistan), nine had codified the tort exception (Pakistan being the exception). Out of these nine, only the United Kingdom's State Immunity Act 1978 and Singapore's State Immunity Act 1985 excluded proceedings related to the activities of armed forces from their scope. In any case, however, as found by the ICJ, the courts of the other states, whose codifications did not provide for such a general exclusion, had never been called to adjudicate a case involving the acts of armed forces in a situation of conflict.⁴³⁷

Finally, the ICJ examined the judgments of national courts. It gave special attention to cases which had later developments in international courts. The ICJ remarked that in *McElhinney v UK*, *Grosz v France* and *Kalogeropoulou and others v Greece and Germany*, the ECtHR took the position that the grant of immunity to a foreign state in respect of *acta jure imperii* committed by its armed forces in the territory of the forum state did not violate the ECHR. Surveying the judgments of domestic courts, the ICJ found that only judgments of Italian courts and the judgments of the Greek courts in the *Distomo* case supported the tort exception argument put forth by Italy.⁴³⁸ The ICJ also remarked that the Greek Special Supreme Court in *Margellos v Germany* held that Germany was entitled to immunity, thus having taken a different position than the Greek Supreme Court in the *Distomo* case, and that, under Greek law, Greek courts have to follow the position of the Special Supreme Court, unless they find customary international law on the subject has changed.⁴³⁹

The ICJ took with respect to the tort exception argument what the Italian Court of Cassation labeled as a *quantitative* approach. The ICJ limited itself to take note of treaty law and domestic statutes. When it assessed the judicial decisions on the subject, it merely took note of the outcomes, not dwelling upon the consistency of the arguments employed. The ICJ ultimately found that

‘... customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.’⁴⁴⁰

⁴³⁷ *Jurisdictional Immunities of the State* (n 416) [71].

⁴³⁸ *ibid* [76].

⁴³⁹ *ibid*.

⁴⁴⁰ *ibid* [78].

Next, the ICJ analyzed Italy's three-stranded argument according to which the denial of immunity was justified due to the subject-matter and the circumstances of the claim brought before its courts. According to Italy, the gravity of the acts committed by Germany (amounting to war crimes and crimes against humanity), the violation of *jus cogens* norms, and the lack of other forms of redress entitled the Italian courts not to grant immunity to Germany.

The ICJ, although emphasizing Germany committed serious violations of international law, ruled that the gravity of these violations did not operate to deprive Germany of its entitlement to immunity. The ICJ reasoned that there would be a logical inconsistency otherwise, since immunity is an issue which precedes the merits and the determination of the gravity of the acts committed presupposes an examination of the merits. In the words of the Court,

‘... 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 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 skillful construction of the claim.’⁴⁴¹

Nevertheless, the ICJ conceded that, although it may be illogical, customary international law might have evolved to require or to allow the denial of immunity in cases in which a state is responsible for serious violations of international humanitarian law and international human rights law.⁴⁴² The ICJ once again adopted a quantitative approach to the issue. It concluded that only the judgments of Italian courts and the judgments of the Greek courts in the *Distomo* case (which were later repudiated by the Greek Special

⁴⁴¹ *Jurisdictional Immunities of the State* (n 416) [82].

⁴⁴² *ibid* [83].

Supreme Court in *Margellos v Germany*) could substantiate this claim.⁴⁴³ By reviewing many domestic judgments, the ICJ found out there was a widespread tendency to reject the position of the Italian courts, which, in its view, demonstrated that ‘... customary international law does not treat a State’s entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.’⁴⁴⁴ The ICJ also rejected Italy’s argument that the law of state immunity was undergoing a process of change, which could result in a new exception to state immunity based on the gravity of the violations. The ICJ added that the judgment of the House of Lords in *Ex Parte Pinochet (No 3)* was not relevant, because it dealt with the different issue of the immunity of a former Head of State from criminal jurisdiction.⁴⁴⁵ Furthermore, the ICJ observed that neither domestic legislations nor treaty law (the ECSI and UNCJISP) limited immunity on the grounds of the gravity of the acts committed or the peremptory character of the rule violated.⁴⁴⁶ Finally, the Court referred again to the judgments of the ECtHR in *Al-Adsani v United Kingdom* and *Kalogeropoulou and others v Greece and Germany*, which pointed out that, under international law, it was not established there was an exception to state immunity in respect of civil claims brought against foreign states for grave breaches of international humanitarian law and human rights law.⁴⁴⁷ The ICJ therefore concluded that

⁴⁴³ *Jurisdictional Immunities of the State* (n 416) [83].

⁴⁴⁴ *ibid* [84]-[85]:

‘That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, [2004] *Dominion Law Reports (DLR)*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586; allegations of torture), France (judgment of the Court of Appeal of Paris, 9 September 2002, and *Cour de cassation*, No. 02-45961, 16 December 2003, *Bulletin civil de la Cour de cassation (Bull. civ.)*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *Cour de cassation*, No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *Cour de cassation*, No. 04-47504, 3 January 2006 (the *Grosz* case); allegations of crimes against humanity), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang v. Jiang*, High Court, [2007] *New Zealand Administrative Reports (NZAR)*, p. 420; *ILR*, Vol. 141, p. 702 ; allegations of torture), Poland (*Natoniewski*, Supreme Court, 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299 ; allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 *Appeal Cases (AC)* 270 ; *ILR*, Vol. 129, p. 629 ; allegations of torture).’

⁴⁴⁵ *ibid* [87].

⁴⁴⁶ *ibid* [88]-[89].

⁴⁴⁷ *ibid* [90].

‘... 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. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.’⁴⁴⁸

Subsequently, the Court addressed the second strand of the argument, namely that there is a conflict between state immunity and *jus cogens*, and that this conflict should be solved in favor of the higher-ranking *jus cogens* norms. According to the ICJ, there is no such conflict: *jus cogens* norms have a substantive character, whilst the rules of state immunity are procedural in nature. In the ICJ’s view, there could not be a relationship of subordination between *jus cogens* norms and the rules of state immunity. The ICJ expressed itself in the following way:

‘... no such conflict [*between rules of jus cogens and the rule of customary international law which requires one state to accord immunity to another*] exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules 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. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility ... For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.’⁴⁴⁹

The ICJ took a position that many would consider to render *jus cogens* norms otiose. Relying on its pronouncements in *Armed Activities on the Territory of the Congo*,

⁴⁴⁸ *Jurisdictional Immunities of the State* (n 416) [91].

⁴⁴⁹ *ibid* [93].

according to which the violation of a *jus cogens* norm does not confer to the Court a jurisdiction it would not otherwise have⁴⁵⁰, and in *Arrest Warrant*, in which the Court held that an incumbent Foreign Minister enjoyed immunity from criminal jurisdiction even when suspected of having violated rules that possess the character of *jus cogens*⁴⁵¹, the ICJ asserted there was ‘no basis’ for the proposition according to which

‘... no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict ... A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.’⁴⁵²

Lastly, in order to dismiss this argument, the ICJ once again assessed domestic judicial practice, concluding that national tribunals had overall rejected that *jus cogens* had the effect of overriding state immunity.⁴⁵³

⁴⁵⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Merits: Judgment) [2006] ICJ Rep 6, [64]:

‘... The Court observes, however, as it has already had occasion to emphasize, that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things” (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

‘The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.’

⁴⁵¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits: Judgment) [2002] ICJ Rep 3, [58]:

‘The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.’

⁴⁵² *Jurisdictional Immunities of the State* (n 416) [95]

⁴⁵³ *ibid* [96]:

‘... [the] argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland

Subsequently, the ICJ considered Italy's argument that the denial of immunity could be justified on the grounds that other attempts to secure compensation for the victims had failed. This argument concerned particularly the group of victims referred as Italian Military Internees. Those victims were members of the Italian armed forces who were deported to Germany to perform forced labor. Although at the time they were entitled to the status of prisoners of war, they were denied it by the German Reich. When Germany set up a scheme of compensation to the individuals who were subject to forced labor and other violations, by means of a Federal Law passed on 2 August 2000, it excluded from the right to compensation those who had the status of prisoner of war, based on the consideration that, under international law, prisoners of war could be put to work under certain conditions. Therefore, although those victims had the right to the protection owed to prisoners of war, they were denied this status by the Germany Reich. Still, when Germany set up a system of compensation, it considered that the Italian Military Internees had never lost the status of prisoner of war and did not have the right to compensation under the 2000 Federal Law.

The ICJ limited itself to say that it was a matter of 'regret' and 'surprise' that

'... Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.'⁴⁵⁴

Nevertheless, after highlighting once again one of the recurring themes of its judgment—namely that state immunity, international responsibility and the duty to make reparation are different questions—the ICJ held that it could

(*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang v. Jiang*, High Court, [2007] NZAR p. 420; *ILR*, Vol. 141, p. 702), and Greece (*Margellos*, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani v. United Kingdom* and *Kalogeropoulou and others v. Greece* and Germany ..., in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne v. Libyan Arab Jamahiriya* (No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion.'

⁴⁵⁴ *Jurisdictional Immunities of the State* (n 416) [99].

‘... find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.’⁴⁵⁵

The ICJ also dismissed Italy’s contention that the three strands of the argument (the gravity of the violations, the *jus cogens* status of the norms breached and the lack of other means of redress) had a ‘combined effect’. Since it was not persuaded by each of the three strands, the Court asserted that, even if considered together, they would not have the effect purported by Italy.⁴⁵⁶ The Court also took the opportunity to assert immunity was a right of the state and therefore it could not be displaced by means of a *balancing* exercise—an exercise which, as it may be remembered, was performed by the Italian Court of Cassation:

‘... [A]ccording to international law, State immunity, where it exists, is a right of the foreign State. In addition ... national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.’⁴⁵⁷

The two other submissions put forth by Germany were dealt with by the ICJ rather succinctly.

After the decision of the Multi-Member Court of Levallois in the *Distomo* case was declared enforceable in Italy, the Greek claimants registered a legal charge (‘ipoteca giudiziale’) against the German property of Villa Vigoni, located in Italian territory. Germany argued that Italy, by taking this measure of constraint, had violated Germany’s right to immunity from enforcement. The ICJ found that, being ‘... clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany’s sovereign functions’⁴⁵⁸, Italy had indeed breached the obligation to respect the immunity from enforcement owed to Germany.

The decisions of the Italian courts conferring *exequatur* to the decisions of the Greek courts in the *Distomo* case were also found to be in violation of Germany’s right to immunity. Whilst the purpose of *exequatur* proceedings is not to decide the merits of a

⁴⁵⁵ *Jurisdictional Immunities of the State* (n 416) [101].

⁴⁵⁶ *ibid* [105]-[106].

⁴⁵⁷ *ibid* [104].

⁴⁵⁸ *ibid* [120].

case, the ICJ considered that the court seized of such an application ‘... has to ask itself whether, in the event that it had itself been seized of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State.’⁴⁵⁹ Given that Italy would have to grant immunity if it had been seized of a case identical to the one the Greek courts adjudged, the ICJ concluded that Italy had violated Germany’s jurisdictional immunity by granting *exequatur* to the aforementioned decisions of the Greek courts.

3.3.3 The dissenting opinion of Judge Cançado Trindade

Whilst Judge Yusuf⁴⁶⁰ and Judge *ad hoc* Giorgio Gaja⁴⁶¹ dissented from the finding that Italy had violated Germany’s jurisdictional immunity by allowing civil claims based on the violations of international humanitarian law committed by Germany between 1943 and 1945, Judge Cançado Trindade was the only judge to dissent of the ICJ’s judgment as a whole, asserting he was in disagreement with ‘the adopted methodology, the approach

⁴⁵⁹ *Jurisdictional Immunities of the State* (n 416) [130].

⁴⁶⁰ See *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Yusuf) [2012] ICJ Rep 99. Judge Yusuf’s dissent focused on the processes of change and development of international law. He highlighted that, there being a ‘grey zone’ in the law, a court may clarify and fix its content, thus acting as an agent of development of international law (§47). Yusuf criticized the ICJ’s approach to the ascertainment of customary international law by asking why the Court attached more weight to some decisions to the detriment of the decisions rendered by the Italian and Greek Courts and whether customary international law was a ‘question of relative numbers’ (§24). After all, as put by him, ‘[s]tate immunity is ... as full of holes as Swiss cheese’ (§26), and these holes were mostly produced by the action of domestic courts, at first isolated. In his words (§48- §51):

‘... in the area of State immunity it is not to be excluded that such domestic courts may be performing a law-development function, even when their decisions are not yet shared by other jurisdictions or are considered, at first sight, not to conform to what may have hitherto been viewed as State practice. The Court itself appears to recognize the potential of domestic courts for further development of the law of immunity through its references to certain judicial decisions which were the first to formulate some of the derogations and exceptions to State immunity.

‘... The assertion of jurisdiction by domestic courts for a failure to make reparations for serious breaches of the law of armed conflict admitted by the responsible State, particularly where no other means of redress is available, could not, in my view, harm the independence or the sovereignty of another State. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the principles underlying human rights and humanitarian law and on the widely-held *opinio juris* of ensuring the realization of those rights, including the right to an effective remedy, in those circumstances where the victims would have no other means of redress.’

⁴⁶¹ See *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge ad hoc Gaja) [2012] ICJ Rep 99. Judge ad hoc Gaja focused on the tort exception and concluded that ‘at least for certain decisions of Italian courts, the exercise of jurisdiction could not be regarded as being in breach of an obligation under general international law’ (§12).

pursued, the whole reasoning in its treatment of issues of substance, as well as the conclusions of the Judgment.⁴⁶²

Paraphrasing Voltaire, Andrea Bianchi said that '[i]f Cançado did not exist, it would be necessary to invent him.'⁴⁶³ The lengthy dissenting opinion Judge Cançado Trindade annexed to the judgment of the ICJ is a testament to the flexibility of international law and to the plurality of views international legal argumentation can accommodate. Indeed, the contrast between his dissenting opinion and the judgment of the ICJ could hardly be more pronounced.

Right at the outset, Cançado Trindade laid down the tone of his dissenting opinion, stating he was guided '... by the ultimate goal precisely of the *realization of justice*.'⁴⁶⁴ Cançado Trindade emphasized more than once the importance of the factual background to the legal issues and also the recognition by Germany of its responsibility for the serious violations of international humanitarian law it had committed.⁴⁶⁵ It is clear Cançado Trindade wanted to defy the notion law can be considered in a vacuum and that law can be appraised by making abstraction of the facts underlying the case. Before further advancing in his argumentation, Cançado Trindade devoted a section of his dissenting opinion to expose its doctrinal foundations and remarked that, in his view, valuable lessons from the past are forgotten and the legal profession has a 'persistent obsession of privileging strategies of litigation over consideration of fundamental human values.'⁴⁶⁶

Cançado Trindade briefly analyzed the works of three jurists (Albert de La Pradelle, Max Huber, Alejandro Álvarez) and picked up the elements of the doctrines of these three authors which informed his dissenting opinion: the emphasis on fundamental human values, the critique of a state-centric approach to international law and the belief international law exists first and foremost to serve human beings.⁴⁶⁷ Cançado Trindade underlined his conception of international law was '... quite distinct from that of the Court's majority'⁴⁶⁸ and, in his view, a 'strict inter-State outlook' could not suffice. In

⁴⁶² See *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) [2012] ICJ Rep 99, [1].

⁴⁶³ Andrea Bianchi, 'On Certainty' <<http://www.ejiltalk.org/on-certainty/>> accessed 26 November 2015.

⁴⁶⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [2].

⁴⁶⁵ *ibid* [18]-[31].

⁴⁶⁶ *ibid* [33].

⁴⁶⁷ *ibid* [32]-[40].

⁴⁶⁸ *ibid* [72].

Cançado Trindade's perspective, 'the ultimate material source of all Law' is the 'universal juridical conscience'.⁴⁶⁹

Cançado Trindade also highlighted the gravity of the violations of international humanitarian law and human rights law committed by Germany, which, according to him entailed '...ineluctable legal consequences for the removal of any bar to jurisdiction and for the question of reparations to the victims.'⁴⁷⁰

Furthermore, in Cançado Trindade's view, the victims had a direct right to reparation.⁴⁷¹ This is why, according to Cançado Trindade, the waiver effectuated by Italy in the Peace Agreement of 1947 and the Bonn Agreement of 1961, which provide for an inter-state reparation scheme to the victims of the German Reich, could not affect the rights of victims of grave violations of international law—such a waiver, insofar as they involve rights that belong to individuals, and not to the state itself, according to the Judge, would breach *jus cogens* and be against the international *ordre public*:

'Article 3 of the IV Hague Convention of 1907 and Article 91 of Additional Protocol I of 1977 confer the right to reparation at international level to victims of those grave breaches. And the responsible States are bound to provide them such reparation. A vast practice to this effect has developed in recent years, in the domain of the *corpus juris* of the International Law of Human Rights, marking—being one of the multiple aspects of—the emancipation of the individuals from their own State, in the vindication of the rights inherent to them.'⁴⁷²

Before considering the relationship between state immunity and *jus cogens*, Cançado Trindade assessed the status of forced labor in international law, concluding that, at the time of World War II, it was 'a form of slave work ... already prohibited by international law' and that 'the absolute prohibition of forced and slave work in the war industry' had the status of *jus cogens*.⁴⁷³

Cançado Trindade retorted Germany's argument that the decision to set aside state immunity could jeopardize the structure of the international society quite eloquently:

⁴⁶⁹ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [71]-[72]; *Jurisdictional Immunities of the State (Germany v Italy), Counter-Claim, Order of 6 July 2010* (Dissenting Opinion of Judge Cançado Trindade) [2010] ICJ Rep 310, [124]-[125].

⁴⁷⁰ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [54].

⁴⁷¹ *ibid* [53]-[62].

⁴⁷² *ibid* [70].

⁴⁷³ *ibid* [117]-[119].

‘In my understanding, what jeopardizes or destabilizes the international legal order are the international crimes, and not the individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims in search for justice. When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose. Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would block the access to justice, and impose impunity. It is, in fact, the opposite that should take place: breaches of *jus cogens* bring about the removal of claims of State immunity, so that justice can be done.’⁴⁷⁴

Cançado Trindade criticized the ICJ’s approach of relying on decisions of national tribunals. According to him, the ICJ should have had a broader outlook on the matter and have taken into account other sources of international law. With this consideration in mind, Cançado Trindade set out to address the tension between state immunity and the right of access to justice in the light of the concept of rule of law in the following terms:

‘The concept of rule of law moves away from the shortsightedness of legal positivism (with its characteristic subservience to the established power), and comes closer to the idea of an ‘objective’ justice, at national and international levels, in line with jusnaturalist legal thinking. Within the realm of this latter, it is attentive to the protection of human rights, anterior and superior to the State.’⁴⁷⁵

The codification of the tort exception in the ECSI and in the UNCJISP was, according to Cançado Trindade, an acknowledgment that ‘... their subject-matter [*did*] not exhaust itself in purely inter-State relations.’⁴⁷⁶ Always criticizing what he labeled ‘the strict inter-State outlook’ and state consent as the foundation of international law, and advocating a return to the universalism of the founding fathers of international law, Cançado Trindade put forth the view that, in the present case, the distinction between *acta jure imperii* and *acta jure gestionis* was irrelevant:

⁴⁷⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [129].

⁴⁷⁵ *ibid* [150].

⁴⁷⁶ *ibid* [154].

‘War crimes and crimes against humanity are not to be considered *acta jure gestionis*, or else “private acts”; they are crimes. They are not to be considered *acta jure imperii* either; they are grave *delicta*, crimes. The distinction between acts *jure imperii* and acts *jure gestionis*, between sovereign or official acts of a State and acts of a private nature, is a remnant of traditional doctrines which are wholly inadequate to the examination of the present case on the Jurisdictional Immunities of the State before the Court. Such traditional theories, in their myopia of State-centrism, forgot the lessons of the founding-fathers of the law of nations, pointing to the acknowledgement that individuals are subjects of the law of nations (*droit des gens*).

‘There is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity. To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice. The present case of the *Jurisdictional Immunities of the State (Germany versus Italy, Greece intervening)* gives eloquent testimony of this.’⁴⁷⁷

Being *delicta imperii*, ie international crimes in breach of *jus cogens*, the grant of immunity to Germany would be, according to Cançado Trindade, inadmissible.⁴⁷⁸

Cançado Trindade then turned to the question of access to justice. Cançado Trindade considers that the right of access to justice has to be viewed in its essence of a fundamental right, and not, like the ECtHR does, from the standpoint of permissible limitations. As famously stated by the ECtHR in *Golder v United Kingdom*, ‘the right of access to the courts is not absolute ... there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.’⁴⁷⁹ In *Ashingdane v United Kingdom*, the ECtHR enumerated the requirements that must be fulfilled for lawful limitations of this right: (i) the limitations applied must not restrict or reduce the right of access to court in a way that impairs ‘the very essence of the right’; (ii) they have to pursue a ‘legitimate aim’; and (iii) there must be a ‘reasonable relationship of proportionality between the means employed and the aim sought to be achieved.’⁴⁸⁰ According to Cançado Trindade, the IACtHR has a more sensible approach to the right of access to justice

⁴⁷⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [178]-[179].

⁴⁷⁸ *ibid* [184].

⁴⁷⁹ *Golder v United Kingdom* [Plenary] (Application No 4451/70) (Merits: Judgment) (1975) <<http://hudoc.echr.coe.int/eng?i=001-57496>> accessed 26 November 2015, [38].

⁴⁸⁰ *Ashingdane v United Kingdom* [Chamber] (Application No 8225/78) (Merits: Judgment) (1985) <<http://hudoc.echr.coe.int/eng?i=001-57425>> accessed 26 November 2015, [57].

(enshrined in Articles 8 and 25 of the ACHR). The judge recalled the case *Goiburú et al v Paraguay*, in which the IACtHR stated that

‘El acceso a la justicia constituye una norma imperativa de Derecho Internacional y, como tal, genera obligaciones *erga omnes* para los Estados de adoptar las medidas que sean necesarias para no dejar en la impunidad esas violaciones, ya sea ejerciendo su jurisdicción para aplicar su derecho interno y el derecho internacional para juzgar y, en su caso, sancionar a los responsables, o colaborando con otros Estados que lo hagan o procuren hacerlo.’⁴⁸¹

Accordingly, in this respect, Cançado Trindade concluded the following:

‘[*The right of access to justice*] assumes an imperative character in face of a crime of State: it is a true *droit au Droit*, a right to a legal order which effectively protects the fundamental rights of the human person... We are here, in sum, in the domain of *jus cogens*.’⁴⁸²

Cançado Trindade lamented the fact that the text of the UNCJISP remained silent in respect of the incidence of *jus cogens* and did not address the problem of the relationship between state immunity and serious breaches of international humanitarian law and human rights law.⁴⁸³ Indeed, the Working Group of the Sixth Committee of the UNGA, in a document pertaining to the travaux préparatoires of the UNCJISP, declared that ‘... the question of the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law ... did not seem to be ripe enough for the Working Group to engage in a codification exercise over it.’⁴⁸⁴ Cançado Trindade remarked that both the ECtHR in *Al-Adsani* and, after over a decade apart, the ICJ in *Jurisdictional Immunities of the State* used this ‘omission’ in the reasoning of their decisions. In his view, these judgments had the effect of ‘freezing’ international law.⁴⁸⁵

It was not left unobserved by Cançado Trindade one of the most acute contradictions of the regime of state immunity:

⁴⁸¹ *Goiburú et al v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006), [131].

⁴⁸² *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [217].

⁴⁸³ *ibid* [221]-[226].

⁴⁸⁴ ‘Report of the Chairman of the Working Group’ (12 November 1999) A/C.6/54/L.12, [46]-[47]; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [224]-[226].

⁴⁸⁵ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [226]. In his words: ‘I cannot at all accept that contemporary international law can thereby be “frozen”.’

‘... to admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time to insist on shielding States with immunity, in cases of international crimes marked by grave violations of human rights and of international humanitarian law in pursuance of State (criminal) policies, in my perception amounts to a juridical absurdity.’⁴⁸⁶

In another step of his dissenting opinion, Cançado Trindade sought to demonstrate the existence under international law of an individual right to reparation for the victims of grave violations of international humanitarian law and human rights law:

‘An interpretation of the regime of reparations as belonging purely to the inter-State level would furthermore equate to a complete misconception of the position of the individual in the international legal order.

‘... [T]he regime of reparations for grave breaches of human rights and of international humanitarian law cannot possibly exhaust itself at the inter-State level, wherein the individual is left at the end without any reparation at all.’⁴⁸⁷

This right to reparation, according to him, leads ultimately to the impossibility of invoking state immunity in order to be exempt from the duty to provide reparation for the victims.⁴⁸⁸

Lastly, Cançado Trindade devoted a section of his dissenting opinion to assess the impact of *jus cogens* in the case. Again he expressed his concern that the ICJ was contributing to keep international law ‘frozen’ and ‘stagnated’.⁴⁸⁹ The judge criticized the positivist methodology employed by the ICJ, which relied on ‘an empirical factual exercise of identifying the incongruous case-law of national courts and the inconsistent practice of national legislations on the subject-matter at issue’⁴⁹⁰. According to Cançado Trindade, these are

‘... positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of

⁴⁸⁶ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [239].

⁴⁸⁷ *ibid* [252].

⁴⁸⁸ *ibid* [254].

⁴⁸⁹ *ibid* [288].

⁴⁹⁰ *ibid* [293].

the kind of the ones so widespread in the legal profession, such as, *inter alia*, the counterpositions of “primary” to “secondary” rules, or of “procedural” to “substantive” rules, or of obligations of “conduct” to those of “result”.⁴⁹¹

As discussed previously, one of the pivotal points of the ICJ’s decision in *Jurisdictional Immunities of the State* was the contention that there was no conflict between *jus cogens* norms (considered ‘substantive’ in nature) and the norms of state immunity (characterized by the Court as ‘procedural’). Cançado Trindade strongly criticized this approach:

‘To me, the separation between procedural and substantive law is not ontologically nor deontologically viable: *la forme conforme le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice. And the application of substantive law is *finaliste*, it purports to have justice done.

‘... There is thus a material conflict, even though a formalist one may not be discernible. The fact remains that a conflict does exist, and the Court’s reasoning leads to what I perceive as a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences.’⁴⁹²

At one point, in paragraph 294 of his dissenting opinion, Cançado Trindade asked: ‘Words, words, words ... Where are the values?’⁴⁹³ This question indeed encapsulates Cançado Trindade’s perspective of international law, which privileges fundamental human values and the realization of justice.

⁴⁹¹ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) (n 462) [294].

⁴⁹² *ibid* [295]-[296].

⁴⁹³ *ibid* [294].

3.4 Decisions rendered by national courts after *Jurisdictional Immunities of the State*

3.4.1 Italy

3.4.1.1 Judgment of the Italian Court of Cassation in the *Albers* case (2012)

After the ICJ's judgment of 3 February 2012 in *Jurisdictional Immunities of the State*, the Court of Cassation had once again the opportunity to dwell on the issue of state immunity in cases of a breach of peremptory norms of international law.

The first judgment concerning the *Albers* case was handed down on 26 June 2009 by the Tribunale Militare di Roma, which condemned to life imprisonment nine German citizens (Albers Paul, Baumann Joseph, Bichler Hubert, Kusterer Wilhelm Ernst, Rosler Arnold, Schneider Adolf, Schneider Max, Trager Heinz-Fritz, Wulf Helmut) who had belonged to the XVI SS Panzergrenadier Division.⁴⁹⁴ They had taken part in a massacre that occurred in Italy involving the death of about 350 Italian citizens not engaged in military operations, among women, children and the elderly.⁴⁹⁵ Based on the Court of Cassation's previous judgments⁴⁹⁶, the Corte Militare di Appello partially upheld the first-instance judgment. One of the accused, Rosler Arnold, was acquitted, and four others (Albers Paul, Bichler Hubert, Schneider Adolf, Trager Heinz-Fritz) had died before the judgment and therefore had their criminal liability extinguished.⁴⁹⁷ The Court also upheld the civil claims except with respect to Rosler Arnold, Albers Paul, Bichler Hubert, Schneider Adolf, and Trager Heinz-Fritz.⁴⁹⁸ The Corte Militare di Appello had also held Germany civilly liable and, as a result, on 23 June 2011, Germany appealed to the Court of Cassation protesting Italy's exercise of jurisdiction.⁴⁹⁹

Germany argued the principle of access to justice for the victims of gross violations of human rights did not prevail over the rule of state immunity from civil jurisdiction and that, in any case, the right to obtain civil compensation for damages arising from these

⁴⁹⁴ *Military Prosecutor v Albers and others and Germany (Case No 32139/2012)* (9 August 2012) ILDC 1921 (Italian Court of Cassation), [Ritenuto in fatto, 1]. The ILDC database includes a summary and an analysis of *Albers* written by Daniele Amoroso.

⁴⁹⁵ *ibid.*

⁴⁹⁶ Reference is made to *Ferrini v Germany* and the group of identical decisions rendered on 29 May 2008, such as *Mantelli and Others v Germany*.

⁴⁹⁷ *Military Prosecutor v Albers* (n 494) [Ritenuto in fatto, 1].

⁴⁹⁸ *ibid.*

⁴⁹⁹ *ibid* [Ritenuto in fatto, 4].

breaches was not part of the body of *jus cogens*.⁵⁰⁰ Germany pointed out that, in its view, the decisions rendered by the Italian courts contrasted with international practice and that the arguments employed in the different decisions were not consistent among themselves,

‘... ora facendosi riferimento all’*emersione di una regola* non ancora sorretta dalla prassi internazionale, ora richiamando una *tendenza evolutiva* nella dottrina internazionalistica e in una parte ancora minoritaria della giurisprudenza interna ovvero una consuetudine internazionale in via di formazione, ora utilizzando il criterio del bilanciamento di interessi, ora facendo leva sul metodo *qualitativo* di rilevazione della consuetudine internazionale e privilegiando, con argomenti che si assumono in ordine sistematico e logico, la prassi qualitativamente superiore seppure minoritaria.’⁵⁰¹

The Court of Cassation strongly criticized the ICJ’s judgment in *Jurisdictional Immunities of the State*. As previously mentioned, the ICJ held that there was no conflict between the customary norm which requires one state to accord immunity to another and *jus cogens* norms. To the Court of Cassation, it seemed

‘... indebitamente riduttivo confinare la categoria dello *jus cogens* alla sua sola portata sostanziale, ignorando che la sua effettività concreta si mistura proprio alla stregua delle conseguenze giuridiche che derivano dalla violazione delle norme imperative. E—d’altro canto—non appare marginale considerare che proprio la predicata distinzione tra norme « sostanziali » e « procedurali » cagiona null’altro che l’impunità dei soggetti e finisce per riaffermare la poca persuasiva attrazione, nella sfera della esenzione dalla giurisdizione, propria degli atti adottati *jure imperii*, di atti quali i crimini contro l’umanità che in quella categoria stentano ad essere ricompresi.’⁵⁰²

Nevertheless, the Court of Cassation conceded it had to take into account the ICJ’s judgment due to its ‘indiscutibile autorevolezza’ and its ‘non assenti tratti di persuasività’.⁵⁰³ As a matter of fact, the Court of Cassation went beyond that and considered the pronouncement of the ICJ should be examined ‘come *dictum* del Giudice internazionale ben prima che come fonte di una soluzione giuridica dotata di elevata

⁵⁰⁰ *Military Prosecutor v Albers* (n 494) [Ritenuto in fatto, 6].

⁵⁰¹ *ibid.*

⁵⁰² *ibid* [Considerato in diritto, 5].

⁵⁰³ *ibid.*

plausibilità'.⁵⁰⁴ In the Court of Cassation's view, the judgment of the ICJ was owed deference due to being a *dictum* of the international judge and because it expressed the lack of support of the international community with regard to the position adopted by the Italian courts. The Court of Cassation remained, however, convinced of the soundness of its previous decisions and hopeful that its position would be adopted in the future:

‘E pertanto, se è ben vero che non è dato desumere dalla statuizione della Corte internazionale argomenti in grado di sconfiggere la persuasività e solidità giuridica dei principi fino ad ora affermati da questa Corte, tale statuizione, nel rammentato quadro di sostanziale isolamento della posizione del Giudice italiano, consiglia certamente di valutare le statuizioni del 2004 e del 2008—espressamente intese come fonti di un contributo “all’emersione di una regola conformativa dell’immunità dello Stato estero”—come un tentativo, dettato da esigenze di affermazione di principi di civiltà giuridica, che, in difetto della sua “convalida” da parte della Comunità internazionale della quale la Corte dell’Aja è il massimo momento di sintesi giurisdizionale, non è stato, o non è stato ancora, fornito della necessaria condivisione, e che, per questa ineluttabile considerazione, non può essere portato ad ulteriori applicazioni.

‘Le espressioni di pieno consenso alle posizioni della Corte italiana da parte di autorevole parte della dottrina e lo stesso sintomatico emergere di opinioni dissenzianti nella pronunzia della Corte internazionale non fanno escludere che in avvenire il principio del necessario ritirarsi della immunità per gli Stati che agiscano *jure imperii* quando l’azione incida sui diritti individuali di rilievo primario per i cittadini possa essere in tutto o in parte acquisito dalla Comunità internazionale. Ma allo stato ciò non è.’⁵⁰⁵

The Court of Cassation pointed out the ICJ held Italy had incurred international responsibility and had to restore the situation which existed before the wrongful acts were committed.⁵⁰⁶ The Court of Cassation highlighted it was left to Italy to choose the means to implement its obligations, given the ‘... totale autonomia della funzione giurisdizionale ... da vincoli diretti ed immediati scaturenti dal *dictum* della Corte Internazionale’.⁵⁰⁷ The Court of Cassation chose, however, to comply with the ICJ's ruling and to annul the decision of the Corte Militare di Appello. The Court added the recognition of Germany's entitlement to immunity from suits based on violations of fundamental rights would not

⁵⁰⁴ *Military Prosecutor v Albers* (n 494) [Considerato in diritto, 6]. See Filippo Fontanelli, ‘Criminal Proceedings against Albers’ (2013) 107(3) AJIL 632, 634. Fontanelli remarked that, in an implicit way, the Court of Cassation equated the ICJ's judgment to a source of law.

⁵⁰⁵ *Military Prosecutor v Albers* (n 494) [Considerato in diritto, 6].

⁵⁰⁶ *ibid.*

⁵⁰⁷ *ibid.*

raise a question of constitutionality.⁵⁰⁸ It recalled Article 10.1 of the Italian Constitution provided for the automatic conformity of the Italian legal system with international law. Hence customary international law assumed the role of a primary source of law and the corresponding norms were subordinated only to the Italian Constitution, being ‘norme interposte’. Rather cryptically, the Court of Cassation added that, since it was inaccurate in the ascertainment of custom in previous cases, the custom it had once conceived did not produce ‘norme interposte’ and that would render a question of constitutionality immaterial.⁵⁰⁹

3.4.1.2 *Judgment No 238 of the Italian Court of Cassation (2014)*

This time, the Court of Cassation was seized with a request by the Tribunal of Florence to decide on the constitutionality of various norms of Italian law related to the implementation of the ICJ’s ruling in *Jurisdictional Immunities of the State* and to the internalization of the UNCJISP 2004. Said referral had its origin in three different cases in which the subject-matter was again whether the Italian legal system required Italian courts to grant immunity to a foreign state in respect of proceedings seeking damages in cases involving the perpetration by Germany of war crimes and crimes against humanity in Italian territory.⁵¹⁰

⁵⁰⁸ *Military Prosecutor v Albers* (n 494) [Considerato in diritto, 6].

⁵⁰⁹ *ibid*: ‘... il diniego della attuale sussistenza di una consuetudine internazionale quale quella divisata a suo tempo dalle Sezioni Unite di questa Corte comporta necessariamente l’inesistenza delle “norme interposte” e fa venir meno, di necessità, alcuna rilevanza al dubbio stesso di illegittimità costituzionale.’ See also Fontanelli (n 504) 638 (footnotes omitted):

‘In *Albers*, the Court of Cassation opined that, since the custom envisaged in *Ferrini* does not in fact exist, no issue of constitutionality can arise ... This passage is elliptical, as it fails to specify which statutory act was suspected of breaching the alleged custom. Perhaps it refers to a conflict between the statutes enjoining Italian courts to decline jurisdiction and the *Ferrini* principle, elevated to a constitutional standard under Article 10 of the Constitution. Perhaps the Court was referring to another—more radical— conflict adumbrated by the plaintiffs, between immunity and constitutional counterlimits. If international *jus cogens* cannot trump sovereign immunity, one could try to invoke domestic peremptory safeguards to escape compliance with detestable international obligations, as in the *Kadi* case.’

⁵¹⁰ *Judgment No 238/2014* (22 October 2014)

<<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238>> accessed 26 November 2015 (Italian Court of Cassation), [Ritenuto in fatto, 1.2]. An unofficial English translation of this judgment by Alessio Gracis can be found in the following link:

<<https://itdpp.files.wordpress.com/2014/11/judgment-238-ita-eng-alessio-gracisnr.pdf>> accessed 29 April 2016.

The context was different from the cases previously analyzed. As pointed out by the Tribunal of Florence, in the proceedings, Germany requested the Italian judge to give effect to the decision rendered by the ICJ and to declare lack of jurisdiction.⁵¹¹ Also, the Italian Court of Cassation itself had departed from the standard crafted in *Ferrini v Germany* (eg, in the *Albers* case, which was examined in the previous section of this monograph), and the Italian state had made efforts to conform to the ICJ's ruling.⁵¹² Article 3⁵¹³ of Law No 5 of 14 January 2013 ('Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno') established Italian judges had to comply with the ruling of the ICJ. This Article also provided even final judgments already rendered by the Italian courts which contrasted with the decision of the ICJ could be revised ('impugnate per revocazione').

The Tribunal of Florence pointed out it was undisputed that the facts underlying the claims had the nature of international crimes.⁵¹⁴ At the same time, it conceded to the authoritativeness of the pronouncements of the ICJ and assumed that there was no conflict between *jus cogens* norms and state immunity, that the crimes perpetrated by the German Reich were *jure imperii* and that customary international law recognized state immunity was applicable in civil proceedings even for international crimes committed by the armed forces and other organs of a state in the territory of the forum state.⁵¹⁵ The argument of the

⁵¹¹ *Judgment No 238/2014* (n 510) [Ritenuto in fatto, 1.1].

⁵¹² *ibid* [Ritenuto in fatto, 1.2].

⁵¹³ Legge 14 gennaio 2013, No 5 ('Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno')

<<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2013-01-29&atto.codiceRedazionale=13G00023¤tPage=1>> accessed 26 November 2015:

'Art. 3—Esecuzione delle sentenze della Corte internazionale di giustizia: 1. Ai fini di cui all'articolo 94, paragrafo 1, dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945 e reso esecutivo dalla legge 17 agosto 1957, n. 848, quando la Corte internazionale di giustizia, con sentenza che ha definito un procedimento di cui è stato parte lo Stato italiano, ha escluso l'assoggettamento di specifiche condotte di altro Stato alla giurisdizione civile, il giudice davanti al quale pende controversia relativa alle stesse condotte rileva, d'ufficio e anche quando ha già emesso sentenza non definitiva passata in giudicato che ha riconosciuto la sussistenza della giurisdizione, il difetto di giurisdizione in qualunque stato e grado del processo. 2. Le sentenze passate in giudicato in contrasto con la sentenza della Corte internazionale di giustizia di cui al comma 1, anche se successivamente emessa, possono essere impugnate per revocazione, oltre che nei casi previsti dall'articolo 395 del codice di procedura civile, anche per difetto di giurisdizione civile e in tale caso non si applica l'articolo 396 del citato codice di procedura civile.'

⁵¹⁴ *Judgment No 238/2014* (n 510) [Ritenuto in fatto, 1.2].

⁵¹⁵ *ibid*.

Tribunal of Florence was that if, on one hand, the ICJ has an ‘absolute and exclusive’ competence over these matters, on the other, the Italian judge has competence to decide on whether the grant of immunity to a foreign state to the detriment of individual rights complied with the Italian Constitution and its integrative sources.⁵¹⁶ What the Tribunal of Florence pointed out is that, even if international law required state immunity to be granted in the proceedings in question, that could be in violation of domestic law: it shifted the focus from *international jus cogens* to *domestic jus cogens*.⁵¹⁷

In an initial step, the Court of Cassation dismissed the understanding laid out in *Judgment No 48/1979* and followed in other judgments according to which only customary international law norms created after the entry into force of the Italian Constitution could be subjected to constitutional review and have their reception precluded in the Italian legal system.⁵¹⁸ In the light of what was previously held by the Italian Court of Cassation in *Judgment No 48/1979*, one could conclude that, since the customary international norms being discussed pre-existed the entry into the force of the Italian Constitution, the Italian legal system would have automatically and fully received them. The Court of Cassation, relying on another decision (*Judgment No 1/1956*)⁵¹⁹, expressed a different position and

⁵¹⁶ *Judgment No 238/2014* (n 510) [Ritenuto in fatto, 1.2].

⁵¹⁷ See Filippo Fontanelli, ‘I know it’s wrong but I just can’t do right. First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court’ <<http://www.diritticomparati.it/2014/10/i-know-its-wrong-but-i-just-cant-do-right-first-impressions-on-judgment-no-238-of-2014-of-the-italian-constitutional.html#sthash.W70Kak9m.dpuf>> accessed 26 November 2015.

⁵¹⁸ See *Judgment No 48/1979* (18 June 1979) <<http://www.giurcost.org/decisioni/1979/0048s-79.html>> accessed 26 November 2015 (Italian Court of Cassation), [Considerato in diritto, 3]:

‘Occorre comunque affermare, più in generale, per quanto attiene alle norme di diritto internazionale generalmente riconosciute che venissero ad esistenza dopo l’entrata in vigore della Costituzione, che il meccanismo di adeguamento automatico previsto dall’art. 10 Cost. non potrà in alcun modo consentire la violazione dei principi fondamentali del nostro ordinamento costituzionale, operando in un sistema costituzionale che ha i suoi cardini nella sovranità popolare e nella rigidità della Costituzione (art. 1, secondo comma e Titolo VI della Costituzione).’

The same understanding was followed in *Presidenza del consiglio dei ministri v Federazione italiana lavoratori trasporto della provincia di Trento et al (Case No 530)* (3 August 2000) ILDC 18 (Italian Court of Cassation), [8]:

‘... [P]er le norme di diritto internazionale generalmente riconosciute anteriori alla data d’entrata in vigore della Costituzione, la disposizione di cui al primo comma dell’articolo 10 della Carta costituzionale ne determina l’automatica ricezione piena e senza limiti; ed il problema della coerenza delle omologhe norme con i principi fondamentali della Costituzione (con la conseguenza, in caso negativo, della preclusione all’operatività del meccanismo dell’adeguamento automatico) si pone solo per le norme che siano venute ad esistenza dopo quella data.’

⁵¹⁹ *Judgment No 1/1956* (14 June 1956) <<http://www.giurcost.org/decisioni/1956/0001s-56.html>> accessed 26 November 2015 (Italian Court of Cassation):

asserted the understanding according to which norms created both before and after the Italian Constitution could be made subject to constitutional review also applied to the norms incorporated in the Italian legal system through Article 10.1 of the Italian Constitution.⁵²⁰

Interestingly, the Court of Cassation dismissed the rigid distinction made by the ICJ between procedural and substantive rules and did not accept the argument that the establishment of jurisdiction of the forum state on the basis of a claim for compensation for damages caused by breaches of peremptory norms of international law would amount to reversing the order of assessment of jurisdiction and merits.⁵²¹ According to the Court of Cassation, ‘... un’eccezione relativa alla giurisdizione richiede necessariamente una valutazione del petitum in base alla prospettazione della domanda, come formulata dalle parti.’⁵²²

In the merits, the Court of Cassation followed the reasoning of the Tribunal of Florence and adhered to a dualistic view of the relationship between international law and the Italian legal system. The Court of Cassation considered domestic judges should adopt the ‘principle of conformity’ and follow the interpretation of international law as adopted at the international level.⁵²³ The ICJ having defined the scope of the norm of state immunity, the Court of Cassation was called to pronounce itself on the compatibility of the

‘L’assunto che il nuovo istituto della “illegittimità costituzionale” si riferisca solo alle leggi posteriori alla Costituzione e non anche a quelle anteriori non può essere accolto, sia perché, dal lato testuale, tanto l’art. 134 della Costituzione quanto l’art. 1 della legge costituzionale 9 febbraio 1948, n. 1, parlano di questioni di legittimità costituzionale delle leggi, senza fare alcuna distinzione, sia perché, dal lato logico, è innegabile che il rapporto tra leggi ordinarie e leggi costituzionali e il grado che ad esse rispettivamente spetta nella gerarchia delle fonti non mutano affatto, siano le leggi ordinarie anteriori, siano posteriori a quelle costituzionali’.

⁵²⁰ *Judgment No 238/2014* (n 510) [Ritenuto in diritto, 2.1]:

‘E qui oggi si riconosce, pertanto, che il principio affermato nella appena ricordata sentenza n. 1 del 1956, secondo il quale il controllo di legittimità costituzionale riguarda sia norme posteriori che norme anteriori alla Costituzione repubblicana, vale anche per le norme del diritto internazionale generalmente riconosciute di cui al meccanismo di adattamento automatico dell’art. 10, primo comma, Cost. che si siano formate prima o dopo la Costituzione. ‘...’

‘In definitiva, non sussistono, sul piano logico e sistematico, ragioni per le quali il controllo di legittimità costituzionale dovrebbe essere escluso per le consuetudini internazionali o limitato solo a quelle posteriori alla Costituzione, tenuto conto che a queste ultime è riconosciuta la medesima efficacia delle consuetudini formatesi in epoca precedente ed il medesimo limite del rispetto degli elementi identificativi dell’ordinamento costituzionale, vale a dire dei principi fondamentali e dei diritti inviolabili della persona.’

⁵²¹ *ibid* [Ritenuto in diritto, 2.2].

⁵²² *ibid*.

⁵²³ *ibid* [Ritenuto in diritto, 3.1].

domestic norm created by virtue of Article 10.1 of the Italian Constitution and which mirrors the customary international norm in question with the norms and principles of the Italian Constitution, specifically Articles 2⁵²⁴ (protection of fundamental human rights) and 24⁵²⁵ (right of access to justice).⁵²⁶

The Court of Cassation then highlighted the role of national courts in the transition from the absolute doctrine to the restrictive doctrine of state immunity and the later recognition of this practice by international organs in the process of identifying customary international law.⁵²⁷ The Court of Cassation argued that the respect to the Italian Constitution had the effect of further restricting the scope of state immunity and that, although this effect was limited to the Italian legal system, it could concur ‘ad un’auspicabile e da più parti auspicata evoluzione dello stesso diritto internazionale.’⁵²⁸ Unlike the ICJ, which established a stark distinction between procedural and substantive rules, the Court of Cassation considered that Articles 2 and 24 of the Italian Constitution are ‘inestricabilmente connessi’, ie it considered there is an intimate connection between the protection of human rights and the right of access to court⁵²⁹. Recalling its case-law, the Court of Cassation asserted that limits to the right of access to justice had to be justified by a ‘a public interest’.⁵³⁰ The Court of Cassation could not find in the Italian Constitutional order a public interest able to justify a norm which requires the ‘complete sacrifice’ of the right of access to court in cases in which damages are sought by victims of crimes against humanity and gross violation of human rights.⁵³¹

⁵²⁴ Costituzione della Repubblica Italiana <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:costituzione>> accessed 26 November 2015:

‘Art. 2—La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.’

⁵²⁵ *ibid*:

‘Art. 24—1. Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi. 2. La difesa è diritto inviolabile in ogni stato e grado del procedimento. 3. Sono assicurati ai non abbienti, con appositi istituti, i mezzi per agire e difendersi davanti ad ogni giurisdizione. 4. La legge determina le condizioni e i modi per la riparazione degli errori giudiziari.’

⁵²⁶ *Judgment No 238/2014* (n 510) [Ritenuto in diritto, 3.1].

⁵²⁷ *ibid* [3.3].

⁵²⁸ *ibid*.

⁵²⁹ *ibid* [Ritenuto in diritto, 3.4]. The Court of Cassation added: ‘Sarebbe invero arduo individuare quanto resterebbe di un diritto se non potesse essere fatto valere dinanzi ad un giudice per avere effettiva tutela.’

⁵³⁰ *ibid*.

⁵³¹ *ibid*.

The Court of Cassation espoused the understanding that the immunity from jurisdiction ‘consented by Articles 2 and 24 of the Italian Constitution’ could only protect the sovereign function of foreign states, and ‘... non anche comportamenti che non attengono all’esercizio tipico della potestà di governo, ma sono espressamente ritenuti e qualificati illegittimi, in quanto lesivi di diritti inviolabili...’.⁵³² In the view of the Court of Cassation, denying judicial protection to the victims of international crimes would amount to a disproportionate sacrifice of the rights enshrined in Articles 2 and 24 of the Italian Constitution:

‘... la circostanza che per la tutela dei diritti fondamentali delle vittime dei crimini di cui si tratta, ormai risalenti, sia preclusa la verifica giurisdizionale rende del tutto sproporzionato il sacrificio di due principi supremi consegnati nella Costituzione rispetto all’obiettivo di non incidere sull’esercizio della potestà di governo dello Stato, allorquando quest’ultima si sia espressa, come nella specie, con comportamenti qualificabili e qualificati come crimini di guerra e contro l’umanità, lesivi di diritti inviolabili della persona, in quanto tali estranei all’esercizio legittimo della potestà di governo.’⁵³³

If in *Ferrini v Germany* the Court of Cassation engaged directly in the interpretation of international law, in this judgment the Court deferred to the interpretation established by the ICJ. Such deferral, nonetheless, amounted to lip service. In a formal fashion, the Court of Cassation concluded that the international norm granting jurisdictional immunity to states in respect of egregious violations of human rights had never entered the Italian legal system in the first place. Since it is in conflict with Articles 2 and 24 of the Italian Constitution, the operation of Article 10.1 of the Italian Constitution was precluded in this situation, and the international norm did not produce a domestic norm with the same content.⁵³⁴

Article 1 of Law No 848/1957, which gave ‘full and complete execution’ to the UN Charter and, in particular, to Article 94 of the UN Charter, which requires Member States ‘... to comply with the decision of the International Court of Justice in any case to which it is a party’, was also deemed to be in breach of Articles 2 and 24 of the Italian Constitution, but only insofar as it required compliance with the judgment of the ICJ in *Jurisdictional*

⁵³² *Judgment No 238/2014* (n 510) [Ritenuto in diritto, 3.4].

⁵³³ *ibid.*

⁵³⁴ *ibid* [Ritenuto in diritto, 3.5].

Immunities of the State.⁵³⁵ The Court of Cassation highlighted its decision did not impact any other obligations imposed by the UN Charter on Italy, including the duty to comply with other decisions of the ICJ.⁵³⁶

Finally, on the same grounds, the Court of Cassation also declared unconstitutional Article 3 of Law No 5/2013, which had been adopted to enable compliance with the ruling of the ICJ.

In order to justify its dualistic position, the Court of Cassation made reference to the *Kadi I* case.⁵³⁷ This case concerned the setting up, by the UNSC, of a sanctions regime targeting individuals suspected to be associated with international terrorism. This sanctions regime imposed, *inter alia*, the freezing of assets of listed individuals without regard to basic guarantees, such as the right to be heard and the right to effective judicial protection. Mr Kadi and Al Barakaat brought proceedings before the CFI seeking the annulment of certain EU Regulations implementing SC Resolutions linked to the sanctions regime in question. Ultimately, the ECJ adopted an essentially dualist approach, dismissing the possibility of reviewing a SC Resolution even if it were in breach of *jus cogens*.⁵³⁸ This would not, nevertheless, limit in any way its capacity to fully review measures emanating from the European legal system—quite the opposite: according to the ECJ, the system set out by the UN Charter does not prohibit any judicial review of the internal lawfulness of contested EU Regulations in the light of the fundamental freedoms of the European legal system, even if the Regulations in question are intended to give effect to a SC Resolution adopted under Chapter VII of the UN Charter. As well said by Antonios Tzanakopoulos, the ECJ put states in an awkward situation, insofar as they have to choose either to obey the ruling of the ECJ or the SC.⁵³⁹ In a similar way, in *Judgment No 238/2014*, the Italian

⁵³⁵ *Judgment No 238/2014* (n 510) [Ritenuto in diritto, 4.1]; Charter of the United Nations with the Statute of the International Court of Justice annexed thereto (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi; Legge 17 agosto 1957, No 848 ('Esecuzione dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945')

<<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1957-09-25&atto.codiceRedazionale=057U0848¤tPage=1>> accessed 26 November 2015.

⁵³⁶ *Judgment No 238/2014* (n 510) [Ritenuto in diritto, 4.1].

⁵³⁷ Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-3533; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Judgment [Grand Chamber]) [2008] ECR I-6351.

⁵³⁸ See Katja S. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) HRLR 288, 293-95.

⁵³⁹ Antonios Tzanakopoulos, 'Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ' (2013) <www.ejiltalk.org/kadi-showdown/> accessed 26 November 2015.

Court of Cassation put the Italian State in the awkward position of having to incur international responsibility.

3.5 Decisions rendered by international courts after *Jurisdictional Immunities of the State*

3.5.1 Judgment of the ECtHR in *Jones v United Kingdom* (2014)

In the light of having their appeals denied by the House of Lords in the *Jones* case, Mr Jones and Messrs Mitchell, Sampson and Walker brought their cases before the ECtHR, which decided to join both applications, given their factual and legal similarities. They complained of a violation of Article 6.1 of the ECHR.⁵⁴⁰ Mr Jones's claim was that the grant of immunity to the Kingdom of Saudi Arabia and to the individual defendants was a disproportionate violation of the right of access to court, whilst Messrs Mitchell, Sampson and Walker claimed that the grant of immunity to the individual defendants in their case was a disproportionate violation of the same right.

Although the United Kingdom argued Article 6.1 was not engaged and the case should not be admitted, the ECtHR followed the understanding it had adopted in *Al-Adsani* according to which '... the grant of immunity did not qualify the substantive right but acted as a procedural bar on the national courts' power to determine the right', thus finding Article 6.1 to be engaged.⁵⁴¹

The ECtHR started its assessment by laying out its understanding of Article 6.1 of the ECHR in a similar fashion to what it did in *Al-Adsani*. It found the right of access to court was not absolute and it could be subject to limitations. Contracting States have a margin of appreciation in respect of the limitations, but the ECtHR has the final word in

⁵⁴⁰ European Convention on Human Rights (n 374):

'Article 6—Right to a fair trial—1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...'

⁵⁴¹ *Jones and others v United Kingdom* [Fourth Section] (Application Nos 34356/06 and 40528/06) (Merits: Judgment) (2014) <<http://hudoc.echr.coe.int/eng?i=001-140005>> accessed 26 November 2015, [164].

respect of the observance of the requirements such limitations must satisfy: (i) they must not ‘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’; (ii) they must pursue a legitimate aim; and (iii) there must be a ‘reasonable relationship of proportionality between the means employed and the aim sought to be achieved’⁵⁴² The ECtHR did not depart from its decision in *Al-Adsani*. It found that

‘... sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. 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.

‘... [T]he need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity, has led to the Court to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.’⁵⁴³

The ECtHR emphasized that it had held in *Al-Adsani* that there was not yet acceptance in international law for the proposition that states were not entitled to immunity in respect of civil claims arising out of alleged acts of torture that were not committed in the territory of the forum state—accordingly, in the case, the United Kingdom was found not to have violated Article 6.1 of the ECHR for having granted immunity to Kuwait. The same conclusion was reached later in *Kalogeropoulos*. Since the ECtHR had left open the possibility of further developments in customary international law, the next step it took was to consider whether the approach adopted in *Al-Adsani* should be revisited. The Court did not develop its reasoning, merely mentioning that the approach adopted in respect of the proportionality test under Article 6.1 in *Al-Adsani* involved its obligation ‘to take account of the relevant rules and principles of international law and to interpret the [ECHR] so far as possible in harmony with other rules of international law of which it forms part’—and, as asserted by the ECtHR in *Al-Adsani*, these rules include the

⁵⁴² *Jones and others v United Kingdom* (n 541) [186].

⁵⁴³ *ibid* [188]-[189].

‘generally recognised rules of public international law on State immunity’.⁵⁴⁴ Without further considerations, the ECtHR limited itself to state that it was ‘satisfied that the approach to proportionality set out by the Grand Chamber in *Al-Adsani* ... ought to be followed.’⁵⁴⁵

The ECtHR highlighted the similarities between Mr Jones’s claim regarding the grant of state immunity to Saudi Arabia and the material facts underlying the *Al-Adsani* case. Accordingly, the ECtHR considered that, if in *Al-Adsani*, it had held that the grant of immunity pursued a legitimate aim (namely, ‘complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty’) and was proportionate (because the ECHR has to be as far as possible interpreted in harmony with other rules of international law and the measures taken by a state which reflect generally recognized rules of public international law on state immunity could not be considered in principle as imposing a disproportionate restriction on Article 6.1),⁵⁴⁶ it could only do otherwise in this case if at the time the House of Lords rendered its decision in 2006 there had already been

‘... an evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity ... such as to warrant the conclusion that the grant of immunity in [*the*] case did not reflect generally recognised rules of public international law on State immunity.’⁵⁴⁷

The ECtHR mentioned cases decided by domestic courts in which the issue was whether there was a *jus cogens* exception to state immunity in civil claims against the state, but decided not to proceed to a closer examination of the reasoning employed in these judgments. Instead, the ECtHR decided to defer to the position taken by the ICJ in *Jurisdictional Immunities of the State*, according to which a *jus cogens* exception to state immunity had not yet emerged:

‘... the recent judgment of the International Court of Justice in *Germany v. Italy* ... —which must be considered by this Court as authoritative as regards the content of customary international law—clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. The application by the English courts of the provisions of the

⁵⁴⁴ *Jones and others v United Kingdom* (n 541) [195]; *Al-Adsani v United Kingdom* (n 378) [55].

⁵⁴⁵ *ibid* [195].

⁵⁴⁶ *Al-Adsani v United Kingdom* (n 378) [52]-[56].

⁵⁴⁷ *Jones and others v United Kingdom* (n 541) [196].

1978 Act to uphold the Kingdom of Saudi Arabia's claim to immunity in 2006 cannot therefore be said to have amounted to an unjustified restriction on the applicant's access to a court. It follows that there has been no violation of Article 6 § 1 of the Convention as regards the striking out of Mr Jones' complaint against the Kingdom of Saudi Arabia.⁵⁴⁸

Next, the ECtHR moved to the question of whether the grant of immunity *ratione materiae* to state officials was compatible with Article 6.1 of the ECHR. The ECtHR, like the House of Lords, deemed the immunity of state officials symmetrical to the immunity of the state itself.⁵⁴⁹ Therefore, it considered that the grant of immunity to state officials was *prima facie* legitimate and proportionate:

'... the immunity which is applied in a case against State officials remains "State" immunity: it is invoked by the State and can be waived by the State. Where, as in the present case, the grant of immunity *ratione materiae* to officials was intended to comply with international law on State immunity, then as in the case where immunity is granted to the State itself, the aim of the limitation on access to court is legitimate.

'Since measures which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court, the sole matter for consideration in respect of the applicants' complaint is whether the grant of immunity *ratione materiae* to the State officials reflected such rules.'⁵⁵⁰

Accordingly, in order to assess whether the limitation on Article 6.1 was proportionate, the ECtHR had to confirm the limitation in question reflected general rules of international law, ie it had to establish the existence of a rule requiring domestic courts to grant immunity to the Kingdom of Saudi Arabia's claim in respect of its officials and

⁵⁴⁸ *Jones and others v United Kingdom* (n 541) [198].

⁵⁴⁹ See Philippa Webb, 'Jones v UK: The Re-Integration Of State And Official Immunity?' <<http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>> accessed 26 November 2015:

'... [T]he decision in *Jones* to uphold the immunity of the State officials even in the face of allegations of torture ... stretches the meaning of the ICJ *Jurisdictional Immunities* Judgment and goes against two emerging trends: (1) accountability of non-high ranking State officials for serious human rights violations; (2) the diversification of various forms of immunity.

'...
'*Jones v UK* puts the brakes on the independent evolution of the immunity of State officials by re-integrating or re-aligning that immunity with that of the State.'

⁵⁵⁰ *Jones and others v United Kingdom* (n 541) [200]-[201].

also whether there was an exception to the general rule in respect of claims arising from alleged acts of torture.

The ECtHR considered that it had accepted that the grant of immunity to the state itself reflected generally recognized rules of public international law. It added to its reasoning that acts cannot be practiced by the state itself, but only by individuals—in the words of the ECtHR, ‘an act cannot be carried out by a State itself but only by individuals acting on the State’s behalf’⁵⁵¹. Therefore, in the ECtHR’s reasoning, whenever the state itself can invoke immunity, then, in principle, state officials must be able to invoke immunity *ratione materiae*. As the ECtHR put it, ‘[i]f it were otherwise, State immunity could always be circumvented by suing named officials.’⁵⁵² In order to support what it called a ‘pragmatic understanding’, the ECtHR invoked an argument that was also employed in the judgment of the House of Lords, namely that the UNCJISP established in Article 2.1.b.iv that, for the purposes of the Convention, the word ‘state’ should be understood as comprising ‘representatives of the State acting in that capacity’.⁵⁵³

The ECtHR also examined the practice of domestic (England, Canada, Australia, New Zealand, the United States) and international courts (the ICJ and the ICTY) on the matter. From its survey, the ECtHR concluded that

‘... [t]he weight of authority at international and national level therefore appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.’⁵⁵⁴

The ECtHR was then left with the question of whether there was an exception to this rule in respect of acts of torture. As with the discussion about this issue which took place in the House of Lords, one of the crucial points was whether torture could be considered an ‘official act’ for the purpose of immunity *ratione materiae*. The ECtHR first considered the definition of torture enshrined in Article 1 of the CAT, according to which torture is an act ‘inflicted by or at the instigation of or with the consent or acquiescence of

⁵⁵¹ *Jones and others v United Kingdom* (n 541) [202]. See also Webb (n 549) and William S. Dodge, ‘Is Torture An “Official Act”? Reflections On Jones v. United Kingdom’ <<http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/>> accessed 26 November 2015.

⁵⁵² *Jones and others v United Kingdom* (n 541) [202].

⁵⁵³ *ibid*; United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force) (2005) 44 ILM 803.

⁵⁵⁴ *Jones and others v United Kingdom* (n 541) [204].

a public official or other person acting in an official capacity’.⁵⁵⁵ Although Lord Justice Mance in the Court of Appeal argued this definition did not lend to acts of torture an official character and merely served to identify the author and the public context of the act, the ECtHR preferred the position adopted by the House of Lords:

‘[The definition of torture in the CAT] appears to lend support to the argument that acts of torture can be committed in an “official capacity” for the purposes of State immunity. ... [A]fter an extensive review of the sources of international law, [Lord Justice Mance’s reasoning in the Court of Appeal] was rejected by a unanimous House of Lords. Lord Bingham, in particular, pointed out that the only case-law relied upon by the applicants to support this argument, which came from the United States, did not express principles widely shared and observed among other nations ...’⁵⁵⁶

Subsequently, the ECtHR discussed the DARSIVA and the relationship between state responsibility and state immunity.⁵⁵⁷ Indeed, Articles 4 and 5 of the DARSIVA attribute to the state acts which were performed by state organs (as defined in Article 4) and persons or entities exercising elements of governmental authority (Article 5).⁵⁵⁸ Article 7 establishes that ‘[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.’⁵⁵⁹ Article 58, on its turn, makes clear that ‘[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.’⁵⁶⁰ Thus, although the ECtHR had stated that, in principle, state officials have immunity *ratione materiae* in respect of acts undertaken on behalf of the state, it conceded that

‘... individuals may in certain circumstances also be personally liable for wrongful acts which engage the State’s responsibility, and that this personal liability exists alongside the State’s liability for the same acts ... This potential dual liability ... is clearly seen in the criminal

⁵⁵⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁵⁵⁶ *Jones and others v United Kingdom* (n 541) [206].

⁵⁵⁷ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 20 November 2015.

⁵⁵⁸ *ibid.*

⁵⁵⁹ *ibid.*

⁵⁶⁰ *ibid.*

context, where individual criminal liability for acts of torture exists alongside State responsibility. ... Thus, as the existence of individual criminal liability shows, even if the official nature of the acts is accepted for the purposes of State responsibility, this of itself is not conclusive as to whether, under international law, a claim for State immunity is always to be recognised in respect of the same acts.⁵⁶¹

It seems that the ECtHR identified a difference between criminal and civil proceedings regarding the availability of immunity *ratione materiae* for state officials. As remarked by William Dodge,

‘... the ECtHR looks to the possibility of individual responsibility under criminal law to satisfy Article 58 [of the *DARSIWA*] ... Indeed, throughout its decision, the ECtHR repeatedly distinguishes the substantial authority against treating human rights violations as official acts on the ground that those cases involved criminal proceedings.’⁵⁶²

The ECtHR considered that it was ‘far from settled’ whether Article 14 of the CAT had given rise to universal civil jurisdiction in respect of acts of torture.⁵⁶³ Although the Committee Against Torture in General Comment No 3 stated the view that Article 14 ‘requires all States Parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress’⁵⁶⁴, the ECtHR pointed out that the United States had made a declaration to the CAT in which it expressed the understanding that Article 14 required a State Party to provide a civil remedy only in respect of acts of torture committed in a territory under the jurisdiction of that State Party.⁵⁶⁵ The ECtHR then added that the judicial practice in Canada (the Ontario Court of Appeal in *Bouzari v Islamic Republic of Iran*) and in the United Kingdom (the Court of Appeal and the House of Lords in the *Jones*

⁵⁶¹ *Jones and others v United Kingdom* (n 541) [207].

⁵⁶² Dodge (n 551). Dodge criticized this perspective:

‘I find it hard to maintain a civil/criminal distinction with respect to immunity under customary international law, given the diversity of forms in which jurisdiction is exercised around the globe, with many nations allowing private parties to initiate criminal proceedings (subject to varying degrees of government control) and to seek damages in such suits. But even if one looks only at state practice in civil cases, there is clearly no general and consistent practice of States treating human rights violations as “official acts.”’

⁵⁶³ *Jones and others v United Kingdom* (n 541) [208].

⁵⁶⁴ UN Committee Against Torture, ‘General Comment No 3’ (13 December 2012) CAT/C/GC/3, [22].

⁵⁶⁵ *Jones and others v United Kingdom* (n 541) [208]; Declarations and Reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en> accessed 26 November 2015.

case) also shared the understanding that Article 14 was not meant to give rise to universal civil jurisdiction.⁵⁶⁶

Nonetheless, in the context of immunity *ratione materiae* of state officials, the ECtHR identified ‘some movement towards the establishment of an exception to State immunity [*for acts of torture*].’⁵⁶⁷ Indeed, upon ratification of the UNCJISP, Norway, Sweden and Switzerland declared that ‘... the Convention is without prejudice to any future international development in the protection of human rights’.⁵⁶⁸ Also, a Resolution of the IDI concluded in Naples in 2009 (‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’) provided in Article III that ‘[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crime’, having previously established in Article I that ‘jurisdiction’ for the purposes of the Resolution encompassed both civil and criminal jurisdiction⁵⁶⁹. Furthermore, in a dictum of the *Furundzija* case, also mentioned by the Italian Court of Cassation in the *Ferrini* case, the ICTY, in the context of discussing the *jus cogens* nature of the prohibition of torture, declared that ‘the victim [*of an act of torture*] could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act’.⁵⁷⁰ The separate opinion of Judges Higgins, Kooijmans and Buerghenthal in the ICJ’s *Arrest Warrant* case also remarked that ‘[i]t is now increasingly claimed in the literature ... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform’⁵⁷¹—although Lords Bingham and Hoffmann in *Jones* contended otherwise.

In the light of all these elements, the ECtHR found ‘there was acknowledged not to be any consensus yet’ in respect of the establishment of an exception to the immunity of state officials for acts of torture.⁵⁷²

⁵⁶⁶ *Jones and others v United Kingdom* (n 541) [208].

⁵⁶⁷ *ibid* [209].

⁵⁶⁸ Declarations and Reservations to the United Nations Convention on Jurisdictional Immunities of States and Their Property <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en> accessed 26 November 2015.

⁵⁶⁹ Institut de Droit International, Napoli Session ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (2009) Third Commission (Rapporteur: Lady Fox).

⁵⁷⁰ *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1-T (10 December 1998), [155].

⁵⁷¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buerghenthal) [2002] ICJ Rep 3, [85].

⁵⁷² *Jones and others v United Kingdom* (n 541) [209].

The ECtHR then turned to civil claims brought before domestic courts dealing with the question of whether there was a *jus cogens* exception in respect of the immunity *ratione materiae* of state officials. The survey of domestic case-law (Canada, Australia, New Zealand, the United States) undertaken by the ECtHR showed that, as regards civil proceedings, only in the US there was judicial practice supporting the contention that violations of *jus cogens* could not be considered official acts for the purpose of immunity *ratione materiae* of state officials.⁵⁷³ It was concluded that there was no ‘sufficient reason ... to find that the grant of immunity in the [*Jones*] case did not reflect generally recognised rules of public international law.’⁵⁷⁴ Although the ECtHR conceded the law on the matter was still evolving, it found no fault in the judgment of the House of Lords—quite to the contrary, the ECtHR commended it:

‘... [W]hile there is in the Court’s view some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, *the bulk of the authority is ... to the effect that the State’s right to immunity may not be circumvented by suing its servants or agents instead.* Taking the applicants’ arguments at their strongest, there is evidence of recent debate surrounding the understanding of the definition of torture in the Convention against Torture; the interaction between State immunity and the rules on attribution in the Draft Articles on State Responsibility; and the scope of Article 14 of the Convention against Torture ... However, *State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity ratione materiae in such cases.*

‘... [T]he House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity ... In a lengthy and comprehensive judgment ... it concluded that customary international law did not admit of any exception—regarding allegations of conduct amounting to torture—to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. The findings of the House of Lords were neither manifestly erroneous nor arbitrary but were based on extensive references to international law materials and consideration of the applicant’s legal

⁵⁷³ *Jones and others v United Kingdom* (n 541) [210]-[211]. There are many difficulties surrounding judicial practice on this topic. The ECtHR mentioned there was ‘little national case-law’ in respect of civil claims against state officials for the violation of *jus cogens*. In respect of criminal cases, the survey of the ECtHR showed (§212) ‘some support ... for the argument that torture cannot be committed in an “official capacity” ...’. Also, some domestic legislations allow victims to attach a civil claim to criminal proceedings and, consequently, as mentioned by the ECtHR (§212), ‘... any difference in the approach to immunity *ratione materiae* between civil and criminal cases will have an impact on the degree to which civil compensation is available in the different States.’

⁵⁷⁴ *ibid* [212].

arguments and the judgment of the Court of Appeal, which had found in the applicants' favour.⁵⁷⁵

The ECtHR ultimately found that the grant of immunity *ratione materiae* to the individual defendants by the English courts reflected generally recognized rules of international law and did not violate Article 6.1 of the ECHR.⁵⁷⁶

3.5.1.1 The dissenting opinion of Judge Kalaydjieva appended to the judgment of the ECtHR in *Jones v United Kingdom* (2014)

On the point of whether there had been a violation of Article 6.1 in respect of Mr Jones's claim against the Kingdom of Saudi Arabia, Judge Kalaydjieva remarked that he '[shared] the doubts' of some of the dissenting judges in *Al-Adsani*. Judge Kalaydjieva also pointed out an incoherence in the law of state immunity that is often highlighted by commentators: the ECtHR '... had no difficulties in waiving the automatic application of State immunity and finding violations of the right of access to court concerning disputes over employment ... but not concerning redress for torture.'⁵⁷⁷

Regarding the applicants' claims that there had been a violation of Article 6.1 due to the grant of immunity to the state officials, Judge Kalaydjieva recalled some of the arguments employed by Lord Justice Mance in the Court of Appeal's judgment in *Jones*. He pointed out he found it difficult to accept the distinction between criminal and civil law justified the grant of immunity in respect of the latter only.⁵⁷⁸ He added he did not find compelling the argument civil proceedings against an alleged torturer involved a greater interference in the internal affairs of a foreign state than criminal proceedings.⁵⁷⁹ He also mentioned there would be an incongruity if an alleged torturer could be prosecuted under Article 5.2 of the CAT and at the same time could rely on immunity in respect of a civil claim pursued by the victim.⁵⁸⁰ Finally, Judge Kalaydjieva criticized the ECtHR's perspective on the matter, which aligned the immunity of the state itself with the immunity *ratione materiae* of state officials:

⁵⁷⁵ *Jones and others v United Kingdom* (n 541) [213]-[214] (emphasis added).

⁵⁷⁶ *ibid* [215].

⁵⁷⁷ *Jones and others v United Kingdom* (Dissenting Opinion of Judge Kalaydjieva) (2014) <<http://hudoc.echr.coe.int/eng?i=001-140005>> accessed 26 November 2015.

⁵⁷⁸ *ibid*.

⁵⁷⁹ *ibid*.

⁵⁸⁰ *ibid*.

‘I find myself unable to agree with the findings of the majority that “since an act cannot be carried out by a State itself but only by individuals acting on the State’s behalf, where immunity can be invoked by the State then the starting point must be that immunity *ratione materiae* applies to the acts of [torture committed by] State officials” ... This appears to suggest that torture is by definition an act exercised on behalf of the State. That is a far cry from all international standards, which not only analyse it as a personal act, but require the States to identify and punish the individual perpetrators of torture—contrary to the “pragmatic understanding” of the majority that “[i]f it were otherwise, State immunity could always be circumvented by suing named officials”. I fear that the views expressed by the majority on a question examined by this Court for the first time not only extend State immunity to named officials without proper distinction or justification, but give the impression of also being capable of extending impunity for acts of torture globally.’⁵⁸¹

Judge Kalaydjieva did not miss the opportunity and remembered the words of Judge Ferrari Bravo in his dissenting opinion appended to *Al-Adsani*:

‘To use the words of one of the dissenting judges in *Al-Adsani*: “What a pity!”’⁵⁸²

3.6 Concluding remarks

The trickle did not turn to a flood. The mainstream, hegemonic approach in respect of the law of state immunity prevailed in spite of being strongly contested by alternative views. Before the delivery of the ICJ’s judgment in *Jurisdictional Immunities of the State*, Roger O’Keefe remarked the following:

‘The final nail in the coffin of attempts to circumvent state immunity in domestic civil proceedings for death or personal injury alleged to be caused by the defendant state in breach of some norm, perhaps peremptory, of international law relative to the humane treatment of individuals may well prove to be the case of *Jurisdictional Immunities of the State*, brought by Germany against Italy in the ICJ and currently in progress.

‘...[I]t is extremely hard to picture a majority of the [ICJ] backing—in the absence of consistent and representative state practice and *opinio juris* (not to mention logically cogent arguments) in support of the proposition, and given the potential of such a decision to lead to antagonism between states—a customary international rule to the effect that state immunity is

⁵⁸¹ *Jones and others v United Kingdom* (Dissenting Opinion of Judge Kalaydjieva) (n 577).

⁵⁸² *ibid.*

unavailable as a bar to domestic civil proceedings alleging the violation by the defendant foreign state of rules, even those of a peremptory character, of international law. And were the ICJ, as is not unlikely, to come down categorically against such a rule, even if only in terms of customary international law “as it presently stands” and subject to an impassioned dissent by Judge Cançado Trindade, the chances that future national courts (or legislatures) would reopen the matter are close to zero.’⁵⁸³

Indeed, the ICJ, through its *quantitative* approach to the ascertainment of customary international law and resorting to formalist arguments like the distinction between procedural and substantive rules, may have crystallized a consensus according to which state immunity prevails over individual rights. This consensus came about through what Roger O’Keefe called a ‘customary international legal feedback loop’. As put by him:

‘... *Al-Adsani* and *Kalogeropoulou* have given rise to a customary international legal feedback loop. The ECtHR holds that states do not currently accept that state immunity is unavailable as a bar to domestic proceedings for damages in respect of death or personal injury allegedly caused by an international wrong at the hands of the defendant state. As a result, the courts of nearly all of the member states of the Council of Europe dismiss legal arguments in favor of the unavailability of state immunity in such cases. In turn, it stands to reason that the ECtHR, and indeed other relevant international jurisdictions, will hold in future that states do not accept that state immunity is unavailable as a bar to domestic proceedings for damages in respect of death or personal injury allegedly caused by an international wrong at the hands of the defendant state. And so on *in saecula saeculorum*.

‘In addition, we are already seeing the courts of states outside the Council of Europe, when similarly faced with the submission that international law does not require the grant of state immunity in civil claims for torture, looking for guidance to the decisions of the ECtHR in *Al-Adsani* and *Kalogeropoulou* or to subsequent decisions of the courts of states parties to the ECHR in analogous cases—especially, in the common law world, to the influential conclusion of the House of Lords in *Jones*.’⁵⁸⁴

The scope of the ICJ’s ruling was very strict as regards the tort exception (in essence, the ICJ considered the tort exception inapplicable in respect of acts committed by armed forces in the course of an armed conflict in the territory of the forum state), but it may be subject to more expansive readings in the future. Also, the argument according to

⁵⁸³ Roger O’Keefe, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’ (2011) 44 VandJTL 999, 1032-1033.

⁵⁸⁴ *ibid* 1017.

which *jus cogens* may override state immunity is unlikely to succeed in the future. In *Jones*, as seen previously, the ECtHR employed the ICJ's pronouncement in respect of the relationship between state immunity and *jus cogens* to support its reasoning. It is worth remembering that eight out of the seventeen judges of the Grand Chamber dissented of the judgment rendered in the *Al-Adsani* case. The *Jones* case was decided by a chamber of the ECtHR. Out of the six judges, only one dissented and put forth that the approach adopted in *Al-Adsani* should have been reconsidered. This is an indication that the current professional consensus does not favor further restrictions to state immunity.

As mentioned before, the Italian Court of Cassation, in *Judgment No 238/2014*, *rebelled* against the ruling of the ICJ, but, as asserted by Fontanelli, 'it is clear that Italy has gone down a spiral of isolation from the rest of the international community.'⁵⁸⁵

The antiquity and persistence of the law of state immunity may indeed explain partially its 'pull to compliance'⁵⁸⁶. State immunity is, after all, widely understood as an expression of defining characteristics of the international legal system.

⁵⁸⁵ Fontanelli (n 517).

⁵⁸⁶ Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998) 37.

4 — PROPOSALS BY SCHOLARS

In this chapter, I expose and analyze the critiques of attempts to better reconcile state immunity and human rights and the proposals to accomplish it put forth by two scholars, namely Lee Caplan and Jürgen Bröhmer. The chapter concludes by briefly assessing them.

4.1 Lee Caplan

4.1.1 Critiques of other attempts to reconcile state immunity and human rights

In Caplan's view, the normative hierarchy theory is flawed in its foundations. As mentioned previously in this monograph, the normative hierarchy theory, perceiving the existence of a conflict between state immunity and *jus cogens*, asserts that *jus cogens* norms, due to their higher rank, must be given precedence. According to Caplan, 'the norms that are purportedly at odds with one another under the normative hierarchy theory in reality never clash'.¹ As seen in the first chapter of this monograph, Caplan is one of the authors who contend that state immunity does not arise from the principle of sovereign equality and the maxim derived from it—*par in parem non habet imperium*.² According to Caplan, the principle of sovereign equality ought to be read as meaning an 'equal capacity for rights'.³ In his view, from this understanding, it follows that

'... [t]his [*equal*] capacity diminishes when a state intrudes on another state's sphere of authority, and becomes virtually dormant within another state's territorial borders. There is thus no inherent right of state immunity, as, ironically, is often suggested in the writings in support of the normative hierarchy approach.'⁴

¹ Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97(4) AJIL 741, 771.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

According to Caplan, the binding norms created by the practice of waiving adjudicatory jurisdiction (ie, norms relating to state immunity) do not comprehend ‘state conduct ... that undermines the aim and purpose of the international legal order.’⁵ This is why he says that the normative hierarchy theory implies that the scope of state immunity is larger than what is required by the international legal order.

The real conflict, according to Caplan, does not occur between state immunity and *jus cogens*, but between *jus cogens* and the state’s right of adjudicatory jurisdiction, since, in his perspective, the grant of immunity in cases of violations of human rights is the result of the exercise by the forum state of its authority to regulate access to its courts.⁶ Lady Hazel Fox, in her treatise on the law of state immunity, famously stated that

‘State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.’⁷

Supported by this quotation, Caplan adds another criticism to the normative hierarchy theory:

‘To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm.’⁸

Caplan also makes the point that the difficulties surrounding the application of *jus cogens* norms undermine the normative hierarchy theory. As is known, although there is a positive concept of *jus cogens*, there is not a consensus in respect of the content and the scope of the body of *jus cogens* beyond a few norms (eg, prohibitions against torture, slavery, aggression, genocide).⁹ Since, pursuant to the normative hierarchy theory, all *jus*

⁵ Caplan (n 1) 771.

⁶ *ibid.*

⁷ Hazel Fox, *The Law of State Immunity* (OUP 2002) 525.

⁸ Caplan (n 1) 772.

⁹ *ibid.*

cogens norms can potentially pierce the veil of state immunity, courts might find themselves in an odd situation. As explained by Caplan:

‘Requiring application of the theory beyond cases of genocide, slavery, and torture would place national courts in an awkward position. The [*normative hierarchy*] theory not only would deprive the forum state of its right to regulate access to its own courts, but also would force them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success. Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary. Finally ... [*the*] adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution against sovereign property and ultimately threaten the “orderly international co-operation” between states.’¹⁰

Another argument advanced by Caplan is that, if one considers the principle of state jurisdiction as belonging to the body of *jus cogens*, then there would be difficulties in situations in which it clashes with *jus cogens* norms relating to the protection of human rights. Caplan questions:

‘Can there be a hierarchy of norms within the body of peremptory norms and, if so, which ranks higher, human rights or territorial jurisdiction? The answers to these questions, if any, lie deep in uncharted territory of international legal scholarship ... The very fact that the normative hierarchy theory would appear to lead courts into such a theoretical abyss casts doubt on its practical viability and utility.’¹¹

Caplan also critiques two explanations linked to the normative hierarchy theory of how a state may lose its entitlement to immunity. The first explanation is the implied waiver theory, according to which a state, by violating a *jus cogens* norm, implicitly renounces its right to immunity. The second explanation is that according to which

¹⁰ Caplan (n 1) 773 (footnotes omitted).

¹¹ *ibid* 774.

violations of *jus cogens* are not within the scope of acts *jure imperii*, thus being outside the realm of acts protected by immunity.

Since, in Caplan's view, the principle of adjudicatory jurisdiction is the starting point of analysis and there is no entitlement to state immunity in respect of human rights violations in international law, he concludes the 'implied waiver' theory is not compelling. In his words:

'[A] foreign state's entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law.'¹²

The second explanation is also not compelling to him:

'[A] foreign state does not cease to be a sovereign state simply because it commits acts of a criminal nature, including violations of human rights norms. Moreover, if state conduct that violates *jus cogens* is assertedly not *jure imperii* and obviously not *jure gestionis* (private or commercial), then what is it? This question is not addressed by supporters of the normative hierarchy theory. The real answer lies in the fact that foreign states are entitled to immunity for human rights violations only to the extent that a forum state grants them that privilege.'¹³

It thus can be said that Lee Caplan rejects the normative hierarchy theory in all its facets.

4.1.2 Proposal

Being a critic of the normative hierarchy theory and dismissing the soundness of the approach to state immunity according to which the starting point is the principle of sovereign equality, Caplan proposes an alternative perspective, labeled by him as the 'theory of state collective benefit'. It is a proposal *de lege lata*, insofar as Caplan believes there is a misunderstanding concerning the basis of state immunity. One of the foundations of his approach is Chief Justice Marshall's judgment in the *Schooner Exchange* case. As discussed before, in this case Marshall considered that

¹² Caplan (n 1) 775.

¹³ *ibid* (footnotes omitted).

‘... [*the*] common interest impelling [*sovereigns*] to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.’¹⁴

Caplan conceives state immunity ‘... as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse.’¹⁵ The crystallization of this practice into customary international law would thus determine the scope of the international rule of state immunity, which is founded, as remarked by Chief Justice Marshall, on the common interest of states. According to Caplan, the ICJ adopted this *functional* approach to state immunity in the *Arrest Warrant* case when it considered that ‘... in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.’¹⁶ It is doubtful whether the ICJ departed from the approach according to which state immunity derives from the principle of sovereign equality of state. In *Jurisdictional Immunities of the State*, a judgment delivered about a decade later, the ICJ stated that ‘the rule of State immunity ... derives from the principle of sovereign equality of States’.¹⁷ In any case, Caplan laid out his alternative approach to state immunity in the following way:

‘... the sole raison d’être for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.

‘If one accepts this basic premise, then conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be

¹⁴ *The Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116 (Supreme Court of the United States) <<https://supreme.justia.com/cases/federal/us/11/116/case.html>> accessed 26 November 2015, 137.

¹⁵ Caplan (n 1) 777.

¹⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits: Judgment) [2002] ICJ Rep, [53].

¹⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [57].

whether the state conduct is public or private, as the theory of restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state.’¹⁸

Caplan’s starting point is the state’s right of adjudicatory jurisdiction, which gives states a lot of leeway to determine the scope of state immunity rules. Nevertheless, Caplan lays down two limitations to this approach. The first one relates to the consistency of the forum state’s immunity policy with the international rules of adjudicatory jurisdiction—in his words, ‘... when opening up domestic courts to human rights litigation, it is necessary to ensure maintenance of an appropriate connection between the dispute and the forum state under international law.’¹⁹ The second one relates to the consistency with international law in general. As put by him, ‘... any alteration in state immunity law that unjustifiably endangers peaceful relations may be unlawful.’²⁰

Finally, Caplan gives two examples in international practice consistent with his ‘theory of collective state benefit’.

The first one is the Antiterrorism and Effective Death Penalty Act 1996, which amended the FSIA 1976. As previously discussed, this Amendment removes immunity in cases in which ‘... money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act...’.²¹ This removal of immunity is applicable only in respect of states designated by the United States as ‘sponsors of terrorism’. Also, as specified by the Act, the claimant or the victim must be a ‘national of the United States’, ‘a member of the armed forces’ or ‘otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment’.

The second example given by Caplan is the judgment of the Greek Court of Cassation in the *Distomo Massacre* case. As previously discussed, in this judgment, the Areios Pagos mentioned the emergence in international law of an exception to state immunity in respect of torts committed in the state of the forum, but remarked that this exception did not apply in situations of armed conflict. However, in the case, Germany had perpetrated crimes against people unconnected with the military operations, which led the

¹⁸ Caplan (n 1) 777.

¹⁹ *ibid* 778.

²⁰ *ibid*.

²¹ US Code, Section 1605A <<https://www.law.cornell.edu/uscode/text/28/1605A>> accessed 26 November 2015.

Court to hold that the tort exception to state immunity was applicable—furthermore, as argued by the Greek Court of Cassation, those acts had been committed in abuse of sovereign power. Caplan commended the reasoning adopted in the judgment of the Areios Pagos, except in respect of its endorsement of the normative hierarchy theory. Caplan concluded that both examples

‘... demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of *Prefecture of Voiotia [the Distomo Massacre case]*), is empowered to modify foreign state immunity law to an extent consistent with the theory of collective state benefit.’²²

4.2 Jürgen Bröhmer

4.2.1 Critiques of other attempts to reconcile state immunity and human rights

In his book, which, to my knowledge, was the first one to deal comprehensively with the relationship between state immunity and human rights, Bröhmer critically surveyed four attempts to reconcile both.

Bröhmer dismisses the implied waiver theory, according to which, by violating a *jus cogens* norm, a state waives its right to immunity. He presented the following criticism:

‘Waiver of immunity is just another term for consenting to submit to the jurisdiction of the forum. To construe consent where there is none does not make sense. ... While it is unclear whether a state is really entitled to immunity in cases of *jus cogens* violations, the intentions of that state will certainly not be directed at giving up its claim to immunity. The opposite is true and that is precisely the reason for the controversy. If, however, the state’s interest and intention is to avoid a lawsuit and possible liability, it is illogical to maintain that the same state has waived the very right enabling to achieve that goal. To construe an implied waiver in these cases is effectively the same as saying that here is no immunity in the first place for states which have violated the said norms of international law.’²³

²² Caplan (n 1) 780.

²³ Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff 1997) 191 (footnotes omitted).

Bröhmer also highlights the inadequacies of restricting immunity as a ‘reprisal’. As pointed out by Matthias Ruffert, the notion of ‘reprisals’ has largely been replaced by that of ‘countermeasures’—something that is reflected in the DARSIVA 2001, which adopted the latter notion. The term ‘reprisals’ is nowadays limited to the context of wartime measures.²⁴ In any case, Bröhmer employed the term in a manner coincident with the current usage of countermeasures, ie as ‘... coercive measures adopted by one state against another state, which would be illegal under international law, were it not aimed at the settlement of a dispute brought about by the latter’s illegal or unjustified conduct.’²⁵ The ILC’s Commentaries to the DARSIVA state that countermeasures

‘... may only be taken by an injured State in order to induce the responsible State to comply with its obligations ... to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State. Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State [*to cease the internationally wrongful conduct*] ...’²⁶

Bröhmer points out several problems that may arise from the adoption of the notion of reprisals in order to justify the restriction of state immunity in respect of violations of human rights:

‘First and foremost, it would require that the denial of immunity is considered a violation of international law and only admissible because it is itself directed against such a violation. Even if one were to consider the denial of immunity in such cases as contrary to international law ... this notion could not be upheld. Within the framework of judicial proceedings it would inevitably lead into a circular argument because it will often be the object of the proceedings to determine whether international law has been breached. Should the court determine that this was not the case, the forum state would itself have committed a violation of international law by allowing the proceedings in the first place. This would cause a great amount of legal uncertainty, without answering the principle underlying question of whether international law demands immunity in such cases and if so why, respectively, why not. Other questions and problems would arise in regard to the controversial nature of the concept of reprisal itself. What kind of link is necessary between the state using its court system as a reprisal and the

²⁴ Matthias Ruffert, ‘Reprisals’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012).

²⁵ Bröhmer (n 23) 193 (footnotes omitted).

²⁶ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 26 November 2015.

violation to be remedied by it (e.g. protection of nationals only?) and how do those links differ from those needed to establish jurisdiction *stricto sensu*?²⁷

A similar proposal to that of the implied waiver theory, the idea of forfeiture of immunity as a consequence of the *jus cogens* and *erga omnes* character of the human rights norms violated is also not accepted by Bröhmer, since ‘... resorting to forfeiture would mean that all cases in which the violation of *jus cogens* norms of international human rights law is at issue would have to be treated the same’ and he doubts whether that would be an adequate solution.²⁸

Lastly, Bröhmer analyzes Mathias Reimann’s proposal for an amendment of the FSIA to allow suits for human rights violations. Mathias Reimann considered two explanations for the removal of immunity in respect of human rights violation: the first is the argument according to which a violation of *jus cogens* could not be considered a sovereign act, thus not being entitled to immunity; the second, the argument according to which *jus cogens* norms are hierarchically superior to the norms relating to state immunity, and, as result, the former take precedence over the latter.²⁹ Mathias Reimann takes the position that these propositions may have troublesome consequences, insofar as they suggest state immunity should always be denied in respect of *jus cogens* violations.³⁰ Reimann argues that the approaches which suggest ‘... the forum may, or at most should (but not must) deny immunity for massive human rights violations’ are more consistent with ‘the two major principles underlying the sovereign immunity rule, namely noninterference with another state’s internal affairs, and equality of sovereigns’.³¹ In the light of these considerations, he proposes ‘... an individual country’s courts should hear only cases in which this country has a specific and legitimate concern.’³² In the context of the FSIA, he expresses approval as regards piercing the veil of immunity in cases in which nationals of the forum state were victims of grave human rights violations.³³ In any case, Reimann recommends caution and advises that

²⁷ Bröhmer (n 23) 193 (footnotes omitted).

²⁸ *ibid* 194.

²⁹ Mathias Reimann, ‘A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*’ (1995) 16 *MichJIL* 403, 421.

³⁰ *ibid* 421.

³¹ *ibid*.

³² *ibid* 422.

³³ *ibid*.

‘... in order to enhance the international acceptability of results, courts in human cases against foreign sovereigns should tread lightly and err on the side of deference to the defendant state’s law as long as such law is acceptable under international standards.’³⁴

Bröhmer asserts that Reimann’s proposal is, in fact, ‘no restriction from the point of view of international law because such an exception could then be invoked by nationals of all countries in their respective domestic forums.’³⁵ In his view, Reimann’s proposal does not really reconcile human rights and state immunity because it does not confer proper regard to the sovereignty of the defendant state, thus defeating the purpose of immunity rules.³⁶

4.2.2 Proposal

In order to formulate his proposal, Bröhmer sought to identify the *rationale* that governs the attribution of immunity and then to apply it to the situation of human rights violations. In Bröhmer’s assessment, state practice revealed two approaches in respect of the grant of state immunity.³⁷ The first one adopts the distinction between *acta jure imperii* and *acta jure gestionis*. The second one supports the understanding according to which the veil of immunity can be pierced even in respect of *acta jure imperii* if there is a sufficient territorial link.

Bröhmer argues that these two mainstream approaches reveal that the distinction between immune and non-immune acts is based on three elements.³⁸ He labels the first two elements ‘option’ and ‘risk calculability’. The third element is the pacifying function of immunity.³⁹ If these criteria justify the removal of immunity in some cases, it should be assessed whether they could also justify the removal of immunity in respect of human rights violations.

Bröhmer explains the ‘option’ element in the following way:

³⁴ Reimann (n 29) 422 (footnotes omitted).

³⁵ Bröhmer (n 23) 196.

³⁶ *ibid.*

³⁷ *ibid.* 197.

³⁸ *ibid.*

³⁹ *ibid.*: ‘Immunity as a reflection of a state’s sovereignty is also aimed at avoiding conflicts between states. The immunity privilege safeguards and preserves the international peace of justice.’

‘The *gestionis/imperii* distinction is in principle based on the fictional assumption that by choosing private means of pursuing an objective the state also willingly exposes itself to the potential liability risks and to private remedies available to the other party of the transaction.

... Under the broad restrictive approach, which denies immunity for government torts if a sufficient territorial link can be established, the right to exercise jurisdiction can be justified as a consequence of the decision of the foreign state to act within (or with a sufficient connection to) the territory and the legal order of the forum state.’⁴⁰

The idea underlying the ‘risk calculability’ element is that

‘... foreign states should be able to foresee and calculate potential liability risks which might arise as a result of their exposure to foreign jurisdiction and thus be put in a position to adapt their behavior accordingly. ... [T]he higher the liability risk, the more difficult it will be to argue that the state really *opted* to accept that risk.’⁴¹

Bröhmer links both criteria to the concept of sovereignty. The ‘option’ element relates to the sovereign equality of states and emphasizes consent, whilst the ‘risk calculability’ element relates to the functional aspect of sovereignty and puts into the equation the fact that the ability of a state to perform its functions could be threatened if it had to cover liability claims in a multitude of *fora* around the world.⁴²

Bröhmer assesses that the ‘option’ element can also justify the removal of immunity in cases of human rights violations. In the same way a state can choose whether or not to enter into a private transaction, a state can choose among alternatives in the domain of human rights. The distinction is that, in the domain of human rights, the option is predetermined by international law. As put by Bröhmer:

‘States *must* not violate fundamental human rights. The sovereignty of states does not include the right to submit an individual to torture or to arbitrarily kill people ... Nonetheless, the state fully retains the power to influence its fate: no violation, no liability.’⁴³

As regards the ‘risk calculability element’, Bröhmer points out that, in the context of commercial transactions, ‘the economic interest of the state will in most cases prevent the state from assuming unforeseeable and incalculable commercial risks’.⁴⁴ The situation

⁴⁰ Bröhmer (n 23) 197-198.

⁴¹ *ibid* 197.

⁴² *ibid* 198.

⁴³ *ibid* 199.

⁴⁴ *ibid* 201.

in respect of torts is different, insofar only negligent torts are insurable. Although intentional torts are not insurable, Bröhmer considers that, in this case, ‘the impossibility of precisely pre-calculating the liability risk is compensated by the fact that the state has full control of its conduct.’⁴⁵ Furthermore, Bröhmer points out that the position of a state as regards an intentional tort can be even more favorable than as regards a commercial transaction. As put by him:

‘Whereas practical circumstances might force a state to enter into a high risk commercial transaction, it is inconceivable that a state might be compelled to commit an intentional tort by way of violating human rights.’⁴⁶

In the light of these considerations, Bröhmer concludes the ‘risk calculability’ element does not support the view that human rights violations should be protected by immunity. The ‘option’ and the ‘risk calculability’ elements, in Bröhmer’s analysis, justify protecting states with the shield of immunity. There are situations in which, however, not granting immunity to states in respect of human rights violations may not fulfill the third criterion proposed by Bröhmer in order to differentiate between immune and non-immune conducts: the pacifying function of immunity. As argued by him:

‘... [H]uman rights can be violated in many different ways. Massive violations of the laws of war, for example, could result in the death or injury of thousands, perhaps even millions of individuals. If all these potential victims were to bring actions against the violating state, the state would necessarily cease to function long before all these individuals could be compensated. Even if one assumes that the violating state would try to comply with judgments rendered against it, compensation would reach only a few individuals on a “first-come-first-serve” basis. However, it is questionable whether any state could and would accept a regime which would render it defunct both internally and externally as a member of the international community. Such a regime would undoubtedly jeopardise the international peace of justice while at the same time doing nothing for the individual victim. The war crimes committed by all sides during World War II, the Holocaust with its millions of victims, the conflict in former Yugoslavia, to name just a few examples, cannot be dealt with before the district courts of the world, notwithstanding the fact that all the suffering brought about by these violations of international law was ultimately individual suffering.’⁴⁷

⁴⁵ Bröhmer (n 23) 201.

⁴⁶ *ibid* 202.

⁴⁷ *ibid* 204-205.

Having this in mind, Bröhmer proposes that immunity should be removed in respect of violations of human rights ‘carried out with the intention to inflict injury on specific, isolated and pre-identified individuals’ and preserved as regards violations of human rights ‘... carried out indiscriminately, for example in an armed conflict’⁴⁸. Whilst very original, Bröhmer’s proposal sounds indeed quite shocking. The *rationale* is that the liability risk associated with *individualized* violations of human rights will not threaten a state’s functional sovereignty. As explained by Bröhmer:

‘War, war crimes and genocide *per definitionem* inflict pain on thousands, sometimes millions of individuals. Municipal courts are just not equipped to deal with the sheer number of cases which could arise from such crimes. It would be impossible for the responsible state to satisfy all the judgments rendered against it. Even an attempt to do so would cripple its ability to function as a state for an unpredictable period of time. The resulting inability to continue to function as a state, to preserve peace and to promote some kind of general welfare, would not only constitute the ultimate infringement on that state’s functional sovereignty it would also constitute a threat to international peace because states would most likely not accept such subordination.’⁴⁹

Bröhmer admits there are borderline cases in which it is difficult to differentiate between *individualized* and *indiscriminate* violations of human rights. In these cases, Bröhme suggests a procedure analogous to that of filing bankruptcy:

‘The defendant state could be allowed to invoke the immunity defence if it can establish to the satisfaction of the court that the exercise of jurisdiction in this particular case could prompt so many other victims of human rights violations to also commence proceedings in the same or other national forums that the cumulative effect of a negative outcome of these cases would imperil its functional sovereignty.

‘... The state’s position could be improved further by applying the rule “*in dubio pro immunitate*” in this respect. In borderline cases the defendant state’s position could be additionally improved if recourse to the immunity defence were allowed if the state proves to the court that it has submitted the matter either to a respective international institution with jurisdiction to review the allegations and provide the plaintiff with adequate compensation or to some other effective international dispute settlement mechanism.’⁵⁰

⁴⁸ Bröhmer (n 23) 205.

⁴⁹ *ibid* 206-207.

⁵⁰ *ibid* 212-213.

In sum, Bröhmer's argument is that international law does not prohibit states from exercising jurisdiction over foreign states in cases in which victims of human rights violations seek damages against the foreign state for injuries which could be characterized as torts under the law of the forum, even if these violations were committed *jure imperii*. Bröhmer, however, adds a limitation: immunity remains if the exercise of jurisdiction over the matter in question could threaten the foreign state's functional sovereignty by allowing a large number of similar claims, since that could interfere with the foreign state's capacity to discharge its public functions.⁵¹

4.3 Assessment and concluding remarks

As seen in chapter 3, most judgments dealing with the relationship between state immunity and human rights relied on an amorphous notion of sovereignty and on the maxim *par in parem non habet jurisdiction* and lacked a more solid theoretical elaboration of the law of state immunity. The proposals put forth by Caplan and Bröhmer reveal that the foundations of the principles and rules relating to state immunity are still a contentious issue.

⁵¹ Bröhmer (n 23) 214. Bröhmer formulated a provision codifying his proposal that could be included in an international treaty on the subject of state immunity in the following way:

- 'A Foreign State shall not be immune from the jurisdiction of the forum State to adjudicate
- 'A. If the case of action relates to death or personal injury and the act or omission, whether governmental in nature or not, which caused the death or injury also constitutes a violation of such fundamental international human rights, which are part of the *jus cogens* body of international law, eg the prohibition of torture and extrajudicial killing, and if
 - '1. the act or omission of the Foreign State which caused the death or personal injury was aimed at the injured or killed individual and if
 - '2. the act or omission of the Foreign State which caused the death or personal injury is not in violation of other norms of international law designed to protect large groups of individuals, eg the prohibition of genocide and if
 - '3. the act or omission of the Foreign State which caused the death or personal injury did not occur in the context of an armed conflict between states.
- 'B. In exceptional circumstances a Foreign State shall be immune from the jurisdiction of the forum State to adjudicate despite the applicability of section A.1 above
 - '1. if the Foreign State presents a *prima facie* case that the exercise of jurisdiction in this matter could lead to an unforeseeable number of similar claims in the forum state or other states which to settle individually could seriously interfere with the Foreign State's ability to discharge its public functions or if
 - '2. the Foreign State establishes to the satisfaction of the tribunal that it has submitted the matter either to a respective international institutional with jurisdiction to review the allegations and provide the plaintiff with adequate compensation or to some other effective international dispute settlement mechanism.'

Caplan's attempt to reconcile state immunity and human rights sought to rescue a foundational discourse on the *rationale* of state immunity enshrined in Chief Justice Marshall's judgment in *Schooner Exchange*, namely that state immunity has the function of ensuring the development of beneficial relations among states. In Caplan's view, it should follow that conducts that do not conform to this purpose, such as human rights violations, are not immune under international law. Caplan also emphasizes that the international rules on jurisdiction must be respected, ie there must be an appropriate connection between the dispute and the forum state in accordance with international law.

Bröhmer took a different path. He tried to identify the elements that justify the removal of immunity in the two mainstream approaches to the law of state immunity. As seen previously, the first one is based on the distinction between *acta jure imperii* and *acta jure gestionis* and posits that immunity should be accorded only to the former. The second model posits that the veil of state immunity can be pierced even for *acta jure imperii* provided the existence of a sufficient territorial link. In Bröhmer's view, the elements that govern these two approaches can justify the removal of immunity in respect of human rights violations, subject to the limitation that the exercise of jurisdiction in these cases does not threaten the functional aspect of the foreign state's sovereignty. In Bröhmer's model, therefore, cases connected to *indiscriminate* violations of human rights would remain protected by state immunity.

Both authors highlighted the awkwardness of the solutions generally adopted to justify the removal of state immunity in human rights cases, such as the normative hierarchy theory and the implied waiver theory.

Although both proposals are interesting, thus far they failed to gain general acceptance. As discussed in chapter 3, in *Germany v Prefecture of Vojotia*, the Italian Court of Cassation adopted a *functional* approach to state immunity identical to the one proposed by Caplan, but it remained isolated.

5 — A CONFLICT OF CONCEPTIONS OF INTERNATIONAL LAW

‘It is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.’

Lord Hoffmann, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another Intervening)* [2007] 129 ILR 713 (House of Lords), [63]

‘... [Q]ueste Sezioni unite sono consapevoli di contribuire così alla emersione di una regola conformativa della immunità dello Stato estero, che si ritiene comunque già insita nel sistema dell’ordinamento internazionale...’

Germany v Mantelli and Others (Case No 14201/2008) (29 May 2008) ILDC 1037 (Italian Court of Cassation), [11]

‘... [I]t was never the essential meanings of words that allowed us to do the good things we associate with the rule of law. ... If as a last resort you wish to argue that it is a good thing to maintain the myth of the neutral rule of law (while privately acknowledging its emptiness), I would remind you that those who rely for their defense on myths are always misdirected and often disappointed.’

James Boyle, ‘Ideals and Things: International Legal Scholarship and the Prison-House of Language’ (1985) 26(2) HILJ 327, 351-352

The relationship between state immunity and human rights has been one of the most controversial and discussed subjects of international law. The decision rendered by the ICJ in *Jurisdictional Immunities of the State* was said to have settled some key points of the debate. Finally there would be certainty in a debate relating to an area of law distinguished by fragmentation. As Philippa Webb correctly indicated, the ICJ's *Jurisdictional Immunities of the State* judgment can provide a 'point of integration' concerning the law.¹ Although it may be argued that it is a bad point of integration, the authority usually attached to pronouncements of the ICJ has the effect of *consolidating* the law and limiting to a certain extent the scope of further discussions on the issues that were settled.

One could, therefore, conclude that the only logical thing for commentators and theorists to do would be to update textbooks to include the inescapable conclusions drawn by the ICJ and to write articles commenting on and spreading the 'correct' legal interpretation. Notwithstanding this line of thinking, I share Andrea Bianchi's belief that '[t]here is nothing inherently correct or incorrect in a judicial determination such as this.'²

This chapter argues that the technical and dogmatic normative discussions engaged in by the various courts which had to deal with issues relating to state immunity and human rights hide theoretical conflicts, which happen at a 'higher level of abstraction'.³ What we have at hand is essentially a conflict among different conceptions of international law. There is nothing inherent about the hegemonic outcome privileging state immunity to the detriment of human rights. This consensus, which may have crystallized with the ICJ's ruling in *Jurisdictional Immunities of the State*, is contingent and can be questioned.

In the first part of this chapter, I shall present Koskeniemi's proposal to treat international law *as* a language and discuss how it relates to the problem of the indeterminacy of international law. Koskeniemi's argument highlights the contingency of current preferred interpretative outcomes and the existence of structural biases.

In the following section, I contend that the legal questions in respect of the relationship between state immunity and human rights the various courts had to consider do not have objectively ascertainable answers. As previously mentioned, the conflicting

¹ Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 92.

² Andrea Bianchi, 'On Certainty' <<http://www.ejiltalk.org/on-certainty/>> accessed 26 November 2015.

³ This expression is borrowed from Koskeniemi. See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 3.

answers reproduce theoretical conflicts that happen at a ‘higher level of abstraction’. The hegemonic outcomes may, therefore, be questioned through the language of international law. In the case of the relationship between state immunity and human rights, it is considered that, although the ICJ may have crystallized a consensus according to which the former prevails over the latter, many dissenting voices emerged and this position remains open to contestation. It is also highlighted how the different theoretical approaches to international law resulted in different attitudes towards its ascertainment and towards the role of the interpreter and of the institution in charge of applying the law. Subsequently, it is analyzed whether the judicial practice surveyed represented a victory for formalism in matters regarding the relationship between state immunity and human rights.

Prospects are considered in the next section. It is pondered whether there may still be room for courts to reassess the relationship between state immunity and human rights. The section then briefly examines the proposal for an optional protocol to the UNCJISP providing for the abrogation of state immunity in civil claims based on violations of human rights. Also, it discusses the suggestion that focus should be shifted from the failure of the forum state’s courts to provide a remedy for the victims of serious violations of human rights as a result of the grant of state immunity to the state which caused death or personal injury in breach of international law and to the state which failed to defend the rights of its nationals who were victims of human rights violations committed by other states. Some concluding remarks ensue.

5.1 International law as language

In his treatise on the structure of international legal argumentation, Koskenniemi posited the thesis that international law has a ‘... “grammar” which controls the production of particular arguments within discourse and which counts for the lawyer’s specific legal “competence”’,⁴ defined by him as ‘... *the ability to use grammar in order to generate meaning by doing things in argument.*’⁵ Said grammar imposes limitations related to how competently arguments may be presented, but not to substantive outcomes: competent

⁴ Martti Koskenniemi (n 3) 11.

⁵ *ibid* 571.

lawyers are able to defend conflicting positions in a legal dispute, and thus justify different substantive outcomes.⁶ As summarized by Koskenniemi:

‘The argumentative architecture allows *any* decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising. Participants and observers will continue to disagree on the particular interpretations of the facts and the law, but the disagreements will remain internal to the profession ... They are matters of “feel” and choice; they are the politics of international law. This does not mean that decisions would be random or difficult to predict ... Competent lawyers are aware of patterns and tendencies. In any language, some expressions are used more than other expressions. This is not a function of the grammar, however, but of the social and cultural context in which native speakers act.’⁷

The distinction made by Ferdinand de Saussure, in his *Cours de linguistique générale*, between *langue* and *parole* provides one way to better picture this relationship between the grammar of international law and the possibility of employing it to produce opposing, but equally competent, legal arguments.

Saussure emphasizes the difficulty of establishing the object of linguistics due to the constant duality that characterizes the linguistic phenomenon.⁸ Syllables, says Saussure, are ‘acoustic impressions’ perceived by the ear, but they would not exist without vocal organs.⁹ Sound, a ‘complex acoustic-vocal unity’, composes with the idea a complex physiologic and mental unity.¹⁰ According to Saussure, the *langage* is also characterized by dualities: it has a social and an individual aspect and it implies at the same time an established and an evolving system.¹¹ Saussure’s solution to the problem posed is to focus on the *langue*, which can, according to him, be autonomously defined.¹²

The *langage* ‘... est multiforme et hétéroclite ; à cheval sur plusieurs domaines, à la fois physique, physiologique et psychique ... il ne se laisse classer dans aucune catégorie des faits humains, parce qu’on ne sait comment dégager son unité.’¹³ The *langue* is an essential part of the *langage*, being ‘... à la fois un produit social de la faculté du langage

⁶ Koskenniemi (n 3) 570-511. Koskenniemi also adds that ‘winning’ or ‘losing’ a case is more related to the biases and preferences of the institution before which the arguments are presented than to the worth of the arguments themselves.

⁷ *ibid* 589 (emphasis added).

⁸ Ferdinand de Saussure, *Cours de linguistique générale* (Payot 1995) 23-24.

⁹ *ibid*.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² *ibid* 25.

¹³ *ibid*.

et un ensemble de conventions nécessaires, adoptées par le corps social pour permettre l'exercice de cette faculté chez les individus.¹⁴ According to Saussure, whilst the *langue* is social and essential, the *parole* is individual and accessory.¹⁵ Saussure provides the link between *langue* and *parole* when he indicates that the *langue* is a repository furnished through the practice of *parole* by the members of a community, ie it is a grammatical system that, although existing in each brain of a given community, exists perfectly only in the group considered as a whole.¹⁶ The *langue* is, in a way, presupposed when exercising the *parole*, which is '... un acte individuel de volonté et d'intelligence', comprising 'les combinaisons par lesquelles le sujet parlant utilise le code de la langue en vue d'exprimer sa pensée personnelle' and 'le mécanisme psycho-physique qui lui permet d'extérioriser ces combinaisons.'¹⁷ The relationship between the two is of interdependence: without the *langue*, one could not understand the *parole*, which would be deprived of effects; at the same time, without the *parole*, the *langue* could not have established itself in the first place.¹⁸

Koskenniemi intended not to merely examine international law '*like* a language', but to treat it '*as* a language'.¹⁹ According to him, this approach has the advantage of accounting for two very pronounced features of international legal argumentation: its sense of 'rigorous formalism' and its 'substantive open-endedness'.²⁰ Whilst there may be a myriad of possible solutions (which could also be referred as arguments or doctrines) to a given legal problem or dispute, if one wishes to be heard and to proficiently support a particular one, it is necessary to follow rigid patterns of argumentation accepted by the 'invisible college of international lawyers', to use the expression of Oscar Schachter²¹. These arguments and doctrines are, in Saussurean terminology, the *parole* of international law. As in any other language, to be able to produce *parole*, it is necessary to know the *langue*—in Saussure's words, 'la langue ... est la partie sociale du langage, extérieure à

¹⁴ Saussure (n 8) 25.

¹⁵ *ibid* 30.

¹⁶ *ibid* 30.

¹⁷ *ibid* 30-31 (footnotes omitted).

¹⁸ *ibid* 36-38.

¹⁹ Koskenniemi (n 3) 568.

²⁰ *ibid* 562-566.

²¹ Oscar Schachter, 'The Invisible College of International Lawyers' (1977-1978) 72 *NwULRev* 217, 217. Oscar Schachter elaborated on this concept at an ASIL meeting in 2001. See Miekej. Clincy, 'An Interview with Oscar Schachter' (2001) 95 *ASILP* 18.

l'individu, qui à lui seul ne peut ni créer ni la modifier ... l'individu a besoin d'un apprentissage pour en connaître le jeu ...'²².

Through the process of learning the *langue* of international law, a structure, which constrains what can be said, is internalized, although one may not be aware of it.²³ As Koskenniemi pointed out:

‘At the *parole* level, human agents appear as conscious builders of the world. At the *langue* level they work within the possibilities offered by a historically given code which the actors are routinely unable to transgress. Analogously, ... arguments and doctrines about international law are only a contingent surface of a socially shared manner of envisaging international relations. ... [T]his cannot be a code which is somehow “inherent” in the contexts in which we use it. It has neither descended from heaven to determine what we can see in international life, nor emerged as an aprioristic construction of an autonomous individual.’²⁴

The core of Koskenniemi's thesis is that international law is founded on a *liberal theory of politics* and reproduces the contradictions found therein. According to Koskenniemi, this theory assumes law's objectivity, ie its dual character as simultaneously normative and concrete. Koskenniemi asserts that the grammar of international law is governed by these two elements: concreteness and normativity. The former expresses the understanding that law ‘emerges from the legal subjects’²⁵; the latter, the understanding that law binds the legal subjects regardless of their wills²⁶. In other words, there is a distinction between law-creation (the realm of subjectivity) and law-ascertainment (the realm of objectivity).²⁷ Without concreteness, law would seem *utopian*, disconnected from reality—it would amount to ‘natural morality’.²⁸ If normativity were lacking, law would seem *apologist*, incapable of providing a standard against which state behavior could be assessed.²⁹

²² Saussure (n 8) 31.

²³ Koskenniemi (n 3) 10-12 and 615.

²⁴ *ibid* 11 (footnotes omitted).

²⁵ *ibid* 21.

²⁶ *ibid* 23.

²⁷ *ibid*.

²⁸ *ibid* 20.

²⁹ *ibid* 20, 67 and 600. Koskenniemi pointed out that his argument, according to which ‘international law is singularly useless as a means for justifying or criticizing international behavior’, is often misunderstood. See Koskenniemi (n 3) 600:

‘Taken out of its context, this is wrong—for international law *is* constantly used to justify or criticize international behaviour. In the context where it appears, however, its point remains valid: although international law has justifying or critical force, that force is inexplicable by the

To Koskenniemi, concreteness and normativity are ultimately incompatible. Nonetheless, in order to maintain that international law cannot be reduced to neither ‘social description’ nor ‘political prescription’³⁰, international lawyers have to show ‘law is simultaneously normative and concrete—that it binds a State regardless of that State’s behavior, will or interest but that its content can nevertheless be verified by reference to actual State behavior, will or interest.’³¹ Koskenniemi labeled this approach the ‘social conception of international law’. As defined by him:

‘The social conception proceeds from an agnostic view on value and a functional notion of society. Its central problem is how to cope with the tension between the (arbitrary) values held by members of society and the need for order so as to sustain social life.

‘... The difficulty now becomes how to extract ‘international law’ from other aspects of social life among States, i.e. how to distinguish between political and legal obligation, convenience and custom, violence and enforcement. Inasmuch as recourse to ideas about the good life is excluded, in making these distinctions, jurists have assumed this to be a technical or a pragmatic approach. Simultaneously, theory has been reduced to methodology: practical guidelines for isolating what is law and what is politics in what States do or say.’³²

The belief on law’s objectivity, which is the cornerstone of the social conception of law, was once taken to extremes, as demonstrated by the doctrine of the limitation of the judicial process, which, as described by Lauterpacht, contended that some disputes were not justiciable due to: (i) the non-existence of applicable rules of law; (ii) the subject-matter of the dispute being related to important interests of states; (iii) the undesirability and the incompatibility with the demands of justice of the result of the application of the existing rules; (iv) the controversy being related to conflicts of interests and not disputes as to rights.³³ In other words, the understanding underlying this doctrine is that some disputes are not justiciable if their content is, in one way or another, political.

liberal political theory that is invoked as its foundation. If we take liberalism seriously, then international law can only seem an abysmal fraud.’

³⁰ Koskenniemi (n 3) 16.

³¹ *ibid* 25.

³² Martti Koskenniemi, ‘Theory: Implications for the Practitioner’ in P. Allott et al (eds), *Theory and International Law: An Introduction* (BIICL 1991), 6-7.

³³ Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933). See also Koskenniemi (n 3) 28-29 (footnotes omitted):

‘The basic position about the objectivity of international law is clearest within the doctrines of the judicial function. Their identity as distinct doctrines depends on the way they explain the law-ascertainment job as more objective than the legislative one.

The embodiment of this doctrine in a treaty can be exemplified by the Locarno Pact. Article 3.2 of the Locarno Pact established that '[a]ny question with regard to which the Parties are in conflict as to its respective rights shall be submitted to judicial decision', whilst Article 3.3 provided that '[a]ll other questions shall be submitted to a conciliation commission.'³⁴

Lauterpacht wrote one of his major works, *The Function of Law in the International Community*, precisely to counter this idea, which, according to him, was an attempt to conciliate sovereignty with the demands by the international community and public opinion in favor of treaties providing for the judicial settlement of disputes³⁵—in his words, this doctrine was 'first and foremost, the work of international lawyers anxious to give legal expression to the State's claim to be independent of law.'³⁶

Being a natural lawyer who proposed that the 'initial hypothesis' of international law ought to be considered the 'will of the international community'—*voluntas civitatis maximae est servanda*, as opposed to the traditional rule *pacta sunt servanda*³⁷—Lauterpacht believed in the *material* completeness of international law:

'... [T]he necessary aim of any legal system is also material completeness. In order to achieve that material completeness the judge must consider not only the letter of the law, but also its spirit and purpose.

'... The conception of the completeness of the legal order is a beneficent notion inasmuch as it excludes the anarchical possibilities of a *non liquet*. But there is little doubt that this very notion may obstruct the path of the law by being used as a justification for the renunciation on the part of the judge of his power to apply the existing law in a just, creative, and scientific manner.'³⁸

'The classic separation of justiciable from non-justiciable disputes is one manner of upholding this distinction. In late 19th and early 20th century doctrines it was largely assumed that the prevalence of subjective State interests in some disputes rendered them incapable of legal settlement or that trying to find a general rule with which to solve them was pointless as the subjective interests would in any case overrule any attempt at legal solution. It has, however, been impossible to make a clear distinction between these two types of disputes. ...'

³⁴ Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy (The Locarno Pact) (adopted 16 October 1925, entered into force 14 September 1926) <http://avalon.law.yale.edu/20th_century/locarno_001.asp> accessed 26 November 2015.

³⁵ Lauterpacht (n 33) 4-5.

³⁶ *ibid* 6.

³⁷ *ibid* 420-423.

³⁸ *ibid* 86. See also Koskeniemi (n 3) 52-56.

Lauterpacht's conception of international law allowed him to question the idea that the intrinsic character of some disputes had as a result their non-amenability to the rule of law—at the same time, his conception was still informed by the idea of objectivity.³⁹

In any case, Koskenniemi grounds his thesis on a completely different basis than that of Lauterpacht, namely on the idea that objectivity at the level of law-ascertainment is a myth. As Koskenniemi explains, his idea about the indeterminacy of international law does not relate to semantic ambiguity or ambivalence:

‘... [E]ven where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled. To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future. Hence they agree to supplement rules with exceptions, have recourse to broadly defined standards and apply rules in the context of other rules and larger principles. Even where there is little or no semantic ambiguity about an expression in a rule ... that expression cannot quite have the normative force we would like it to have.’⁴⁰

This indeterminacy, which Koskenniemi in fact considers essential to international law's acceptability, is, in his view, linked to the fact that, inasmuch as rules have to fulfill

³⁹ See Koskenniemi (n 3) 52-53 (footnotes omitted):

‘For Lauterpacht, the legal system controls effectively all the outcomes of legal decision-making. There is a positive duty on the judge (lawyer) to decide the cases brought to him, to determine the parties' rights and duties. But exclusionary residual rules—such as the presumption of the freedom of the State—cannot suffice. Contrary to Kelsen, Lauterpacht does not postulate *formal* but *material* completeness of the law, constructed by the lawyer as he proceeds to solve the case. But this construction is neither arbitrary nor based on abstract principles of justice or derivations from the nature of the thing. It is more than an effort to ascertain community consensus or the actual background purposes. For Lauterpacht, legal problem-solution seeks to ensure the unity, consistency and effectiveness of international law as a whole. By using analogy and abstracting general principles from individual rules the lawyer will be able to perceive the law as a coherent, meaningful whole which “is originally and ultimately not so much a body of legal rules as a body of legal principles”. These principles express the law's autonomous, systemic “coherence” which ultimately justifies the solution of hard cases.’

⁴⁰ *ibid* 590-591.

purposes that are conflicting among actors and not consistent throughout time, there is a risk that they will be over-inclusive and under-inclusive.⁴¹

The point about the over-inclusiveness and under-inclusiveness of rules can perhaps be illustrated by the distinction Thomas Franck proposed between *idiot* and *sophist* rules. In Franck's definition, idiot rules are characterized by their clarity, precision and transparency.⁴² They manifest what Franck calls a *what*-based normativity, in the sense that they are concerned with *what* was done.⁴³ Sophist rules, on the other hand, are characterized by their 'multi-layered complexity' and their elasticity, as, for instance, '[n]orms setting out standards of compliance which are measured in complex qualitative terms, or which are hedged by *why* and *to whom* exculpations, [*and they*] may be difficult to apply to real life situations.'⁴⁴ The determinacy of a sophist rule will depend '... on the degree of common community understanding of the rule's complex content and ... on the perceived legitimacy of the process by which the rule is applied.'⁴⁵ As regards application, Thomas Franck considers that '[w]hile an idiot rule more-or-less applies itself, sophist rules usually require an effective, credible, institutionalized, and legitimate interpreter of the rule's meaning in various instances.'⁴⁶ As Franck puts it, however, it is not the case that idiot rules will always be more determinate than sophist rules—the precision of an idiot rule may have the effect of actually undermining its determinacy. Franck explains this situation in the following way:

'...[C]larity, while often an indicator of determinacy, may occasionally produce results which are so at variance with common sense that the clear meaning of the rule is rejected by those whose conduct the rule is intended to govern. A rule which appears to be perfectly clear *unintentionally* may command what turns out to be an absurdity. Indeed, the simpler, clearer, and

⁴¹ Koskenniemi (n 3) 591-592. Koskenniemi explains that the force of rules is undermined because of issues related to their over-inclusiveness and under-inclusiveness, and, as a consequence, 'discretion' is encouraged. See Koskenniemi (n 3) 591-592:

'... The rules will include future cases we would not like to include and exclude cases that we would have wanted to include had we known of them when the rules were drafted. This fundamentally—and not just marginally—undermines their force. It compels the move to "discretion" which it was the very purpose to avoid by adopting the rule-format in the first place.'

⁴² Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 71-77.

⁴³ *ibid* 75-77.

⁴⁴ *ibid* 74-75 and 79.

⁴⁵ *ibid* 80.

⁴⁶ *ibid* 81.

more straightforward a rule is, the greater is its propensity to produce an unintended absurdity, usually in unforeseen circumstances.

‘... [D]espite its superficial clarity, the [*idiot*] rule—under certain circumstances—does not satisfy the test of common sense or fairness; and thus, deprived of the compliance pull its clear standard was meant to assure, the rule also will not accurately predict the actual conduct of states. This is because a literal reading of the rule can lead to absurd results at the margins of its application.’⁴⁷

Franck utilizes Articles 2.4 and 51 of the UN Charter to exemplify an international idiot rule. Article 2.4 establishes the general prohibition of the use of force, whilst Article 51 preserves a state’s inherent right of self-defense. *Prima facie*, the rule according to which a state cannot initiate the use of force, but only respond to an actual armed attack is highly determinate. However, as Franck points out,

‘... a literal reading of the rule can lead to absurd results at the margins of its application. For example it would compel a state threatened by a nuclear attack to wait until it had actually been hit (“armed attack”) before permitting the use of force in self-defense. In less dramatic circumstances, the rule would require even a state like Israel or Singapore to wait until after an armed attack before striking back, by which time its minute territory might well have been overrun. Such a rule lacks essential legitimacy, because it is evidently absurd. It is easy to predict that no state would abide by its strictures in at least some situations, as Israel demonstrated by destroying the Iraqi nuclear reactor in an air raid ... [T]he clear meaning of the rule is *not* determinate because the members of the community to which it applies have already decided that, in at least some circumstances, the rule cannot mean what it says.’⁴⁸

At the domestic level, the problems relating to idiot and sophist rules are usually dealt with by courts, which may refuse to apply idiot rules in a literal manner if it leads to absurd results and may clarify the content of elastic sophist rules.⁴⁹ It is then expected that, in international law, the problems related to idiot and sophist rules will be more acutely felt, due to the lack of international compulsory jurisdiction.

The nature of international law’s indeterminacy, in Koskeniemi’s view, is not then related to the lack of clarity of legal norms—indeed, Franck demonstrated that the clarity of a legal rule may even contribute to its indeterminateness. As Koskeniemi explains,

⁴⁷ Franck (n 42) 68 and 76.

⁴⁸ *ibid* 76.

⁴⁹ *ibid* 78-79 and 82-83.

‘[t]here is nothing necessarily unclear about “if an armed attack occurs” or “territorial inviolability” or “right to life”. The indeterminacy is about the relationship of those expressions to their underlying reasons and to other rules and principles that makes it sometimes seem necessary to deviate from a formally unambiguous provision in view of new information or a new circumstance, to sacrifice a smaller good (abstract legality) in view of realizing a larger one. ‘...’

‘... [E]ven a “literal” application is always a choice that is undetermined by literality itself. There is no space in international law that would be “free” from decisionism, no aspect of the legal craft that would not involve a “choice”—that would not be, in this sense, a *politics of international law*.’⁵⁰

To pick up on a point raised in the beginning of this section, indeterminacy does not mean that a judicial decision is random or unpredictable or that ‘anything goes’. International law has an inter-subjective dimension: doctrines can attain professional consensus and some theoretical trends may be more widespread among the professional community than others. And, as pointed out by Koskenniemi, structural biases play a crucial role. As he highlights, ‘*the system still de facto prefers some outcomes or distributive choices to other outcomes or choices*.’⁵¹

Koskenniemi’s thesis about the indeterminacy of international law highlights the fact that there is nothing inherent about current preferred outcomes. They remain contingent and can be contested through the language of international law:

‘... [T]he fluidity of international law does not deny the fact that there exists at any one time a professional consensus or a mainstream answer to any particular problem. Although, logically speaking, all positions remain open and contrasting arguments may be reproduced at will, in practice it is easy to identify areas of relative stability, moments where a mainstream has consolidated or is only marginally threatened by critique. Professional competence in international law is precisely about being able to identify the hegemonic and counter-hegemonic narratives and to list one’s services in favour of one or the other.’⁵²

⁵⁰ Koskenniemi (n 3) 595-596.

⁵¹ *ibid* 606-607.

⁵² *ibid* 607.

5.2 The debate on the relationship between state immunity and human rights as a conflict of conceptions of international law

5.2.1 The role of theory

In analyzing the various cases dealing with the relationship between state immunity and human rights, courts had to answer a multitude of questions. Is state immunity a rule of customary international law? Or is it only an expression of comity? Is it underpinned by the principle of sovereign equality and a consequence of the maxim *par in parem non habet imperium*? Or is it an exception to the principle of adjudicatory jurisdiction? Is state immunity *functional* and should it only be accorded when it promotes the interests of the community of states? Can gross violations of international humanitarian law and of international human rights law be considered *acta jure imperii*? Or are they *delicta imperii* that do not fit the dichotomy between *acta jure imperii* and *acta jure gestionis*? Is there a tort exception to state immunity under customary international law? If so, does it allow piercing the veil of state immunity for *acta jure imperii* and for acts committed by armed forces in the territory of the forum state? Does a state tacitly waive its right to immunity by violating a *jus cogens* norm? Or no such waiver can be implied from this act? Do *jus cogens* norms have a substantive nature that does not affect the operation of procedural norms? Or is the distinction between procedural and substantive norms immaterial to the concept of *jus cogens*? Are the effects of *jus cogens* limited to restricting the contractual liberty of states? Do *jus cogens* norms take primacy over other norms of international law when there is a *material*, but not a *formal*, conflict between them? Is the grant of state immunity in cases involving gross violations of human rights outside the jurisdiction of the forum state a violation of the individual's right of access to justice? Or is it a lawful limitation of this right because it is a measure which reflects generally recognized rules of public international law and which pursues the legitimate aim of promoting good relations between states? Are states required under Article 14 of the CAT to provide a remedy for acts of torture committed outside the forum state? Or are they required only to provide a remedy for acts of torture committed in the forum state? Does Article 3 of the Hague Convention (IV) of 1907 confer a right to reparation to individuals? Or are the effects of this provision limited to inter-state relations? Can the ascertainment of customary international law be limited to a *quantitative* approach? Or is it a *qualitative* approach required?

These are all questions underlying the many cases previously analyzed. And different answers were offered to them by the various courts. The argument of this monograph is that the answers to these technical and dogmatic questions hide conflicts that exist—to use Martti Koskenniemi’s expression—at a ‘higher level of abstraction’.⁵³ They hide conflicts about different *conceptions* of international law, ie about what international law is and about how to find it out. The aforementioned questions do not have answers that can be ascertained objectively. Different theoretical assumptions can lead to conflicting answers. And a given preferred outcome or decision is contingent and remains open to contestation. Oscar Schachter, for instance, in an article in which he tried to come up with a ‘more adequate theory’ of the basis of obligation in international law given the emergence of new normative processes which could not easily fit in the categories of treaty and customary law, listed

‘... at least a baker’s dozen of “candidates” ... : (i) Consent of States; (ii) Customary practice; (iii) A sense of “rightness”—the juridical conscience; (iv) Natural law or natural reason; (v) Social necessity; (vi) The will of the international community (the “consensus of the international community”); (vii) Direct (or “stigmatic”) intuition; (viii) Common purposes of participants; (ix) Effectiveness; (x) Sanctions; (xi) “Systemic” goals; (xii) Shared expectations as to authority; (xiii) Rules of recognition ...’⁵⁴

It is not within the purposes of this monograph to dwell upon Schachter’s own proposal, a task for which he relied on the works of Harold Lasswell and Myres McDougal, but I share his view that these foundational issues matter because they have practical significance and are important to the outcome of concrete controversies.⁵⁵

Although in the cases surveyed some of the courts engaged in, to use Philippa Webb’s expression, a ‘high level of judicial dialogue’⁵⁶, inasmuch as they cited and discussed other courts’ decisions, sometimes it felt like they were talking past one another, due to the adoption of different theoretical premises. As Koskenniemi highlighted:

⁵³ Koskenniemi (n 3) 3.

⁵⁴ Oscar Schachter, ‘Towards a Theory of International Obligation’ in Stephen M. Schwebel (ed), *The Effectiveness of International Legal Decisions* (Oceana Publications 1971), 9-10 (footnotes omitted).

⁵⁵ *ibid* 11 and 31.

⁵⁶ Philippa Webb, ‘Immunities and Human Rights: Dissecting the Dialogue in National and International Courts’ in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012), 250.

‘Whether the difficulty regards the sense of “rules” or the meaning of “facts”, the problem is that the theories and intuitions which may justify differing constructions are, by definition, external to the rules of facts themselves and do not, therefore, lend themselves to a discussion within the social conception [*of law*]. Nevertheless, the practical need for action compels the practitioner into a justification that at least addresses the normative claims which underlie the particular controversy and the differing views that exist for its solution, and establishes some kind of a reasoned balance or priority between them.

‘It is an illusion to believe that there could be a “theory” or “method” which could solve such interpretative problems in a final way. States will continue to disagree about applicable law and its correct interpretation. This is not a result of the law’s poor quality or the statesman’s bad faith. Law carries political struggle *within* itself by receiving meaning only in frameworks of interpretation that reflect political priorities. The practitioners will continue to have some difficulty in coping with this fact. But the persistence of interpretative controversy is not really a “problem” to be solved by a better theory of method—it is the *fundamental condition which defines what international legal practice is about*.’⁵⁷

Despite having such a great influence, theoretical assumptions are usually embedded in an implicit way in the discourses found in legal texts. This happens because ‘reification’—which could be defined as ‘... an attempt to deny both “contingency” and choice by incorporating some political decision about a subject into the *description* of that subject’⁵⁸ or as ‘the way we turn other people, or social systems, or institutional hierarchies into objects which we then confront as disempowered observers’⁵⁹—is pervasive in the practice of international legal argumentation. In other words, the authoritativeness of a technical, dogmatic argument is founded on the assumption that it derives from sound, unquestionable and neutral theoretical premises about the nature of international law. And, as a matter of fact, these theoretical premises incorporate choices. As James Boyle argued:

‘Doctrinal scholarship often appears to be an attempt to show that rules can achieve determinacy, to show that there are correct interpretations of international legal norms. My claim is that this attempt is only explicable as the objectified manifestation of a different, more contentious political project. International lawyers are not attempting to show that rules are definite, firm and predictable because they believe this exercise will be good for their health. Their aspiration is to show that international law is a legitimate system for constraining power and irrationality, and,

⁵⁷ Koskenniemi (n 32) 44.

⁵⁸ James Boyle, ‘Ideals and Things: International Legal Scholarship and the Prison-House of Language’ 26 HILJ 327, 328-329.

⁵⁹ *ibid* 352.

in their minds, they carry the assumption that it could only be such a system if there are neutral, objective answers to legal questions.

‘... The dominant background conception of “reason,” self-interest and politics—and the utopian vision of power constrained by rules that is generated within that conception—seem to *require* a set of a-political rules. Since the mark of a neutral set of rules is their ability to provide one logically correct answer to each case, both the compulsive denial of contradiction and the doctrinal structure that this denial “generates” can be seen as products of the initial reification—the attempt to define “what law is,” in order to separate it conceptually from morals and political argument.’⁶⁰

There is nothing inherently *right* or *wrong* about the answers provided by the various courts on the questions relating to the relationship between state immunity and human rights. The answers offered will have varying degrees of persuasiveness that depend not only on their intrinsic attributes, like internal coherence, but also on the audience (eg, the acceptability by the audience of the premises of a given answer to a legal question, the biases of the audience etc.).⁶¹

5.2.2 Consensus and dissension, law-breaking and law-making

In the case of state immunity, most courts adopted what could be called an orthodox, textbook approach to state immunity. They saw state immunity as underpinned by the principle of sovereign equality of states and as an expression of the Latin maxim *par in parem non habet imperium*. A distinction between procedure and substance was employed in order to preclude the effects of (substantive) *jus cogens* norms in the realm of (procedural) state immunity. Also, most courts adopted state immunity as the starting point of analysis—an exception in respect of human rights and *jus cogens* violations had thus to be found in the practice of states. And, as considered previously, this type of analysis gave rise to what Roger O’Keefe called a ‘customary international legal feedback loop’⁶², which was well received by the ICJ. Through its *quantitative* approach to customary international law, the ICJ may have crystallized the consensus according to which state immunity trumps the individual’s right to reparation arising out of serious violations of human rights.

⁶⁰ Boyle (n 58) 347 and 356.

⁶¹ See Andrea Bianchi, ‘Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond Germany v Italy’ (2013) 4(3) JIDS 457, 467.

⁶² Roger O’Keefe, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’ (2011) 44 VandJTL 999, 1017.

Nevertheless, many dissenting voices emerged. In the *Princz* case, the decision of District Judge Sporkin and the dissenting opinion of Judge Wald. In Greece, *Judgment No 137/1997* of the Multi-Member Court of Levadia, *Judgment No 11/2000* of the Areios Pagos, and the dissenting opinion appended to the judgment of the Special Supreme Court in *Germany v Margellos and Other*. In the ECtHR, the dissenting opinions appended to *Al-Adsani* and *Jones*. Judge Cançado Trindade appended a dissenting opinion to the judgment of the ICJ in *Jurisdictional Immunities of the State* in which he disagreed with the reasoning adopted by the ICJ as a whole. Cançado Trindade made his *jusnaturalist* perspective clear. In his view, the ultimate material source of law is the ‘universal juridical conscience’ and the inter-state outlook of international law is something that ought to be overcome. Cançado Trindade, so to speak, found that international law had a different *Grundnorm* and reached conclusions which were in stark opposition to those of the majority of the ICJ.⁶³

The case-law of the Italian Court of Cassation is the one that stood out the most. It adopted an entirely different approach as regards the role of domestic courts in the application of international law.⁶⁴ The Italian Court of Cassation took on an *active* role and emphasized its self-awareness by stating that it was conscious that it was contributing to the emergence of further restrictions to the scope of state immunity.

George Scelle’s theory of role splitting (‘la loi du dédoublement fonctionnel’) can perhaps shed light on the attitude of the Italian courts. Scelle, in the course he taught at the Hague Academy in 1933, explained what he called the ‘loi du dédoublement fonctionnel’ in the following terms:

‘... [i]l en résulte que, dans l’ordre interétatique, où il n’existe pas de gouvernants et agents spécifiquement internationaux, les agents et gouvernants étatiques qui les remplacent sont investis d’un double rôle. Ils sont agents et gouvernants nationaux lorsqu’ils fonctionnent dans l’ordre juridique étatique; ils sont agents et gouvernants internationaux lorsqu’ils agissent dans l’ordre juridique international. C’est ce que nous appellerons la loi fondamentale du dédoublement fonctionnel.

⁶³ See *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) [2012] ICJ Rep 99 and Rosalyn Higgins, ‘Equality of States and Immunity from Suit: A Complex Relationship’ (2015) 43 NYIL 129, 146-148.

⁶⁴ See Rosanne van Alebeek, ‘Domestic Courts as Agents of Development of International Immunity Rules’ (2013) 26(3) LJIL 559 and Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 ICLQ 57. Both authors assessed the different approaches domestic courts adopted with regard to the development of the law of state immunity. The perspectives they presented on the subject are very distinct from each other.

‘... [U]n acte n’a d’autre critère juridique que sa substance, et toutes les fois que nous nous trouvons en face d’un rapport et d’une situation internationale, il en résulte mathématiquement que l’acte juridique qui lui donne naissance est par nature un acte international.’⁶⁵

According to Scelle’s theory, when a domestic court delivers a decision on international law issues, it is acting *qua* an international organ because it is operating within the international legal system.⁶⁶

Furthermore, the attitude of the Italian courts may be better understood in the light of some aspects of the process of changes in international law, in which the frontiers between deviance, law-development and law-creation are not very clear. As put by John Merrills, in international law, law-breaking can sometimes be a method of law-making:

‘Since customary international law is based on usage, the making of new claims always has the effect of weakening the established rule. If such claims are accepted, or become sufficiently widespread, that rule will change. Until that point is reached there is no doubt that the enforcement of a disputed claim involves a breach of a legal obligation. That international law can change quite rapidly even on highly controversial matters is illustrated by the emergence, against strong opposition, of the concept of the Exclusive Economic Zone. As that experience shows, however, when breaking law is an important method of law making conflict and controversy are unavoidable.

‘... [S]ince international law is a reflection of the way states view the world, law cannot be made when, as often is the case, their interests are in sharp conflict. When state’s interests change established principles come under challenge. In such a situation only state practice can change the law and there will be controversy until new law emerges from the cauldron of claim

⁶⁵ George Scelle, ‘Règles générales du droit de la paix’ (1933) 46 RCADI 327. Cassese wrote an excellent analysis of Scelle’s ‘loi du dédoublement fonctionnel’. See Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law’ (1990) 1(1) EJIL 210.

⁶⁶ From a formal perspective, James Crawford argued Scelle’s theory fails because international law does not confer on domestic courts a mandate to act as international law ‘agencies’. See James Crawford, ‘Chance, Order, Change: The Course of International Law’ (2013) 365 RCADI 13, 168 and 180:

‘It is true that courts sometimes use language consistent with *dédoublement fonctionnel*. In *Eichmann* the Supreme Court of Israel stated that “in the capacity of a guardian of international law and an agent for its enforcement”, Israel was entitled to prosecute crimes that “shake the international community to its very foundations”. Similar assertions of guardianship were made by the US federal courts in *Filártiga* and *Yunis* ...

‘But these assertions were not only equivocal; they were effectively self-judging. There was no specific international mandate in either case, such as the clear authority to exercise jurisdiction in various suppression treaties such as the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 5.

‘... As we have seen, Scelle’s theory of the *dédoublement fonctionnel* fails at a general level for want of any mandate from international law to domestic organs, notably courts, requiring them to act as international agencies.’

and counter-claim. In that convulsive process the tendency of states to regard as legally permitted any claim successfully asserted by any state in the past invests even individual states acts with a powerful law creating potential.

‘With the creation of international law such a decentralised process, so liable for the reasons described to give rise to doubt or controversy, much clearly depends on the possibility of obtaining authoritative interpretations of the law ...’⁶⁷

The Italian Court of Cassation assumed an active role and it can be argued that it sought to engage in *dédoublement fonctionnel*. The Court did so in an ingenious manner. The Court of Cassation’s *dédoublement fonctionnel* was ‘colored’ by an attempt to further develop the law of state immunity.⁶⁸ Perhaps to avoid the accusation it was *breaking*

⁶⁷ John Merrills, *Anatomy of International Law* (2nd edn, Sweet & Maxwell 1981) 14-15. It might be added Anthea Roberts asserted that, in international law, domestic courts have a legitimate role as law-creators, which can be formally justified on the doctrine of sources. See Roberts (n 64) 62-63 and 70-71 (footnotes omitted):

‘National court decisions play a distinctive dual role in the doctrine of sources: as evidence of State practice, relevant to the interpretation of treaties and the formation of custom (where domestic judgments play a role in law creation), and as a subsidiary means of determining the existence and content of international law (where domestic judgments can be characterized as law enforcement). The resulting Janus-faced nature of domestic court decisions gives rise to conflicting approaches about their purpose and value.

‘...

‘Judicial decisions of international courts provide a subsidiary means of determining international law only. National court decisions alone have the potential to wear both hats and thus their value is often considered to be mixed ...

‘...

‘Domestic court decisions—like other forms of State practice emanating from legislatures and executives—can constitute breaches just as they can be evidence of emulation and acquiescence. To argue otherwise, and to limit the role of national courts to impartial law enforcement only, is to deny their potential role in developing international law and to accord greater power in this regard to legislatures and executives.’

Rosanne van Alebeek criticized Roberts’ argument. See Alebeek (n 64) 54.

⁶⁸ See Alebeek (n 64) 572-574 and 577-78; Roberts (n 64) 68-71. Alebeek explains that Scelle’s *dédoublement fonctionnel* ‘... arguably ... provides above all a normative framework’ in the sense that, as a matter of international law, domestic courts are expected to be faithful to international law as it stands and should not have a domestic perspective on it. In this point of view, the position adopted by the Italian Court of Cassation in cases like *Ferrini* could be interpreted as a departure from *dédoublement fonctionnel* if it is understood that the Court violated international law. The Italian Court of Cassation, however, did not affirm that it was *breaking* international law, but rather that it was contributing to the emergence of further restrictions to state immunity that were already implicit in international law. The Court tried to frame its attitude as an exercise of development. Roberts argued that the Italian Court of Cassation in *Ferrini* fulfilled a ‘... “legitimate” function in pushing for a new interpretation of international law based on its role as a law creator rather than enforcer’ and contended that ‘[c]ustomary international law is made on the back of State practice, including court decisions, and custom is changed through breaches of existing rules, coupled with emulation or acquiescence.’ Alebeek criticized this perspective, claiming that it advances a ‘... completely novel take on the “role splitting of domestic courts”’, in which, rather than a splitting between the domestic and the international legal order, there is a splitting, within the international legal order, between law creation and law enforcement. Alebeek added that ‘[t]he process of change of custom through violation ... is in any case not an instrument that fits the judicial toolbox.’ Another point raised by Alebeek was that the importance of domestic decisions to custom formation is based on the ‘... strong assumption that these

international law, the Court of Cassation alleged that the restrictions it had found in the law of state immunity were *already implicit* in international law.⁶⁹ In order to find out what was *already implicit* in international law, the Court of Cassation adopted an approach to custom ascertainment that radically differed from that of the other courts.

The Court of Cassation recognized the existence of an antinomy between two principles of international law—state immunity and the protection of inviolable human rights—and asserted there was a *qualitative* difference between norms of customary international law.⁷⁰ In the Court of Cassation's view, unlike the norms relating to state immunity, the norms relating to the protection of fundamental human rights belong to the body of *jus cogens* norms and take precedence over other norms of international law.⁷¹ It should follow that a state cannot hide behind the shield of state immunity when it violated peremptory norms of international law. Given the existence of an antinomy between norms, the Court of Cassation considered it had to coordinate them on the systematic level by making a *value-oriented choice*.⁷² By means of this coordination and on the basis of the criterion of balancing of interests, the Court of Cassation concluded that it had to give priority to the higher ranked norms. It may be said that underlying the Court of Cassation's reasoning was the idea that legal norms are not in a vacuum—indeed, the Court of Cassation asserted that legal norms cannot be interpreted separately from one another, and that *jus cogens* norms affected the scope of norms relating to state immunity.⁷³ Not only that, but on the logical level, the Court of Cassation considered it would not make sense to proclaim the primacy of certain norms and then to deprive individuals from having access to a remedy to make them effective.⁷⁴

The Court of Cassation criticized what it labeled a *quantitative* approach to customary international law.⁷⁵ The Court considered that the practice of the various

decisions accurately reflect international law.' Nevertheless, Alebeek conceded that '[s]ince every application of a legal rule entails interpretation, and hence development, domestic courts have the ability to act as agents of change of international immunity rules.' As the Italian Court of Cassation showed, it is doubtful whether a distinction between law-development and law-creation can be rigorously maintained.

⁶⁹ *Germany v Mantelli and Others (Case No 14201/2008)* (29 May 2008) ILDC 1037 (Italian Court of Cassation), [11].

⁷⁰ *Milde (Case No 1072/2009)* (13 January 2009) ILDC 1224 (Italian Court of Cassation).

⁷¹ *Ferrini v Germany (Judgment No 5044/2004)* (11 March 2004) ILDC 19 (Italian Court of Cassation); *Germany v Mantelli and Others (Case No 14201/2008)* (n 69); *Milde (Case No 1072/2009)* (n 70).

⁷² *Milde (Case No 1072/2009)* (n 70) [6].

⁷³ *Ferrini v Germany (Judgment No 5044/2004)* (n 71) [9.2].

⁷⁴ *Milde (Case No 1072/2009)* (n 70) [7].

⁷⁵ *ibid* [4]. There are indeed many difficulties related to the quantitative ascertainment of customary international law. See Roberts (n 64) 90 (footnotes omitted):

domestic courts was important, but it highlighted that, in its view, the ascertainment of customary international law could not be limited to *arithmetically counting* decisions in favor and against a certain position. This approach would be *reductive* of the role played by the interpreter, who should take account, as regards customary international law norms, ‘delle consistenze qualitative di esse, delle interrelazioni riscontrabili tra le stesse, dell’operatività dei nessi di interdipendenza e di collocazione gerarchica operanti in diretta funzione del rango attribuito a ciascuna di quelle norme rispetto alla scala dei valori generalmente accolta dall’ordinamento internazionale.’⁷⁶

Furthermore, in *Germany v Prefecture of Vojetia*, the Court of Cassation coupled the perspective on the relationship between state immunity and human rights based on a *qualitative* assessment of customary international law—which was developed in the *Ferrini*, *Milde* and *Mantelli* cases—with a functional approach to state immunity.⁷⁷ In *Judgment No 238/2014*, in the light of the ICJ’s judgment, the Court of Cassation shifted the focus from *international jus cogens* to *domestic jus cogens* and declared provisions of Italian law which were adopted to implement the ruling of the ICJ in *Jurisdictional Immunities of the State* as incompatible with the Italian Constitution.⁷⁸ If in cases like *Ferrini*, *Mantelli* and *Milde* the Court of Cassation actively applied international law and consciously acted as an agent of the development of international law, in *Judgment No 238/2014* the Court of Cassation considered the pronouncement of the ICJ in *Jurisdictional Immunities of the State* was authoritative as a matter of international law. At the same time,

‘... it is virtually impossible to accurately assess the customary status of almost any norm given the number of States, the myriad forms of State practice, the existence of language barriers, and disputes about what counts as State practice and *opinio juris*. The result is that many actors, including international courts, routinely assert the existence of custom based on a handful of examples of State practice, with contrary practice being discounted as a breach and the absence of other practice being explained through concepts such as acquiescence.

‘...’

‘If a comparative survey produces cases that the decision maker likes, the temptation will be to characterize these judgments as impartial evidence of the existence or meaning of international law. If the survey produces cases that the decision maker dislikes, these decisions are likely to be discounted as unpersuasive on the basis that they reflect the practice of only a few States.’

⁷⁶ *Milde* (Case No 1072/2009) (n 70) [4].

⁷⁷ *Germany v Prefecture of Vojetia* (Case No 11163/2011) (20 May 2011) ILDC 1815 (Italian Court of Cassation).

⁷⁸ *Judgment No 238/2014* (22 October 2014)

<<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238>> accessed 26 November 2015 (Italian Court of Cassation). See Filippo Fontanelli, ‘I know it’s wrong but I just can’t do right. First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court’ <<http://www.diritticomparati.it/2014/10/i-know-its-wrong-but-i-just-cant-do-right-first-impressions-on-judgment-no-238-of-2014-of-the-italian-constitutional.html#sthash.W70Kak9m.dpuf>> accessed 26 November 2015.

the Court of Cassation *rebelled* against it by adopting a dualistic position in respect of the relationship between domestic and international law, and remained hopeful that its position could contribute to future changes in international law.⁷⁹

In contrast, the ICJ and most other courts adopted a different methodology to custom ascertainment. Instead of acknowledging the existence of a conflict between existing customary international law norms which had to be solved by coordinating and balancing them, they sought to find whether state practice supported or not the removal of immunity in cases of gross violations of human rights. This approach effectively killed any possibility of adding this further restriction to state immunity and perpetuated the aforementioned ‘customary international legal feedback loop’. There was also a lack of nuance in this formalist exercise. Most courts merely took note of legislations and of the outcomes of judicial decisions of other states, without evaluating context. The ICJ, for instance, did not properly take into consideration that the courts of most common law countries, having statutes codifying rules relating to state immunity, did not rely directly on international law to reach their conclusions.

The criticisms directed at the Italian Court of Cassation reveal the adoption of a manifestly voluntarist model of international legal rationality. As seen in chapter 3, Lord Hoffmann argued that the technique of balancing interests, which had been employed by the Italian Court of Cassation, could not be adopted in international law because that would mean unilaterally developing it, and that, according to him, would run counter to ‘the common consent of nations’, upon which international law is founded.⁸⁰ Similarly, the ICJ asserted that state immunity, being a right of the foreign state, could not ‘... be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.’⁸¹

⁷⁹ *Judgment No 238/2014* (n 78):

‘Ad essa [Corte] spetta in via esclusiva il compito di assicurare il rispetto della Costituzione ed a maggior ragione dei suoi principi fondamentali e quindi la necessaria valutazione della compatibilità della norma internazionale sull’immunità degli Stati dalla giurisdizione civile degli altri Stati con i predetti principi, con l’effetto di produrre un ulteriore ridimensionamento della portata della predetta norma, limitato al diritto interno ma tale da concorrere, altresì, ad un’auspicabile e da più parti auspicata evoluzione dello stesso diritto internazionale.’

⁸⁰ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 129 ILR 713 (House of Lords), 738-739.

⁸¹ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits: Judgment) [2012] ICJ Rep 99, [101].

Upon the analysis of the various cases, it is clear that the methodology adopted by the courts for the ascertainment of customary international law, which created and perpetuated a loop, contributed to what Higgins called ‘the disturbing ethical dilemma presented by the law of State immunity’⁸².

To my knowledge, thus far, the Italian courts were the only domestic courts to react to the judgment of the ICJ. In the *Jones* case, the ECtHR confirmed its previous case-law and relied on the judgment of the ICJ in *Jurisdictional Immunities of the State* to do so. The ECtHR mentioned it considered the ICJ’s judgment ‘authoritative as regards the content of customary international law’.⁸³ The ECtHR thus concluded no *jus cogens* exception to state immunity had crystallized. As Judge Cançado Trindade anticipated, it seems that the ICJ’s judgment in *Jurisdictional Immunities of State* indeed has contributed to the stagnation of the law of state immunity.

5.2.3 A victory for formalism?

As regards the relationship between state immunity and human rights, the cases studied showed the prevalence of formalism, of sovereign equality as the principle governing the outcome of the judicial decisions, and of a voluntarist rationality in the ascertainment of customary international law.

Lorna McGregor captured how the use of the language of international law deflects attention from the real underlying problems and argued that the neutrality of state immunity is a myth:

‘The formal division between procedural and substantive norms as parallel but distinct regimes provides plausible legal language to justify the provision of immunity without directly rejecting the prohibition of torture. In the same sentence, states and judicial bodies can reaffirm their commitment to the prohibition of torture and claim, through the neutralizing rhetoric of the law of procedure, that immunity sits compatibly with the prohibition of torture by not interacting with it at all. Equally, however, attempts to deny the impact of other procedural rules on the prohibition of torture have been exposed and rejected.

⁸² Higgins (n 63) 142. Interestingly, when analyzing the availability of state immunity in cases of perpetration of heinous international crimes and of violations of *jus cogens* norms, Higgins considered that ‘... the arguments of logic do not in fact seem to be insurmountable: it is really the will of States to develop the law, rather than principles of logic, which is *pro tem* the insurmountable hurdle.’ See Higgins (n 63) 141.

⁸³ *Jones and others v United Kingdom* [Fourth Section] (Application Nos 34356/06 and 40528/06) (Merits: Judgment) (2014) <<http://hudoc.echr.coe.int/eng?i=001-140005>> accessed 26 November 2015, [198].

‘... By framing immunity as a procedural rule, the pretence of neutrality acts to steer attention away from the deeper question of the legitimacy of immunity when torture is alleged ... [T]he focus on procedure sanitizes immunity, thus legitimizing and denying the impact of immunity on impunity ... Once the mythology of the neutrality of immunity is exposed, immunity no longer presents itself as simply a procedural rule, but a barrier tantamount to the acceptance of torture; an acceptance which cannot co-exist with rejection of its prohibition. As such, procedural rules cannot be used to evade substantive obligations, as this would defeat the core basis for *jus cogens* norms such as the prohibition of torture, by facilitating unlawful derogation.’⁸⁴

In the same vein, Lorna McGregor also pointed out that the rhetoric of immunity is based on an idea about the scope of sovereignty that simply does not correspond to its current status—in her words, there has been a ‘disjuncture’ between sovereignty and immunity:

‘If immunity derives from sovereignty, its meaning, extent, and impact must also be contingent on the current scope of sovereignty. Yet, by simply restating the origins of immunity in sovereignty, courts have failed to acknowledge the restrictions on the scope of immunity caused by the evolution of sovereignty over time. As such, judicial decisions in which a state pleads immunity against allegations of torture result in an inevitable clash between the principles of 1648 and those of today. To tie immunity to the 1648 meaning of sovereignty positions the sovereign above the law. As a consequence, immunity renders the prohibition of torture impotent and also frees sovereignty from its own constitutive framework in international law. As with the division between procedural and substantive rules, the masked reliance on a Westphalian sovereignty would accord states the effective freedom to avoid accountability for a crime such as torture, while advancing a rhetorical commitment to its prohibition.

‘... [B]y simply referring to sovereignty as if amorphous, abstract, and temporally detached, a Westphalian sovereignty is injected, enabling states to stand outside the law while framing the decision within the confines of the law.’⁸⁵

⁸⁴ Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’ (2008) 18(5) EJIL 903, 911 (footnotes omitted). As remarked by Roberts, who referred specifically to the application of international law by domestic courts, the rhetoric of neutrality employed by courts can disguise attempts of progressive development as well as justify inaction. See Roberts (n 64) 71-72:

‘In some cases, national courts embrace the vision of themselves as impartial law enforcers as a cloak to disguise their progressive development of the law. In others, domestic courts cling to this role as a shield to justify inaction and deflect criticism for not developing the law. In this way, the mantra of impartial law enforcement may serve to obscure the real actions or motivations of domestic courts.’

⁸⁵ McGregor (n 84) 916-918 (footnotes omitted).

Nevertheless, these rhetorical strategies—a rigorous formalism, as seen in the stark division between procedural and substantive norms, the employment of an amorphous and hazy concept of sovereignty, and, it might be added, a quantitative methodology for the ascertainment of customary international law—have been successful, as demonstrated by the ‘customary international legal feedback loop’, which was picked up by the ICJ.

As pointed out by Andrea Bianchi, the judgment delivered by the ICJ was ‘perfectly attuned’ to its audience, namely states, or, more specifically, individuals who ‘in their professional capacity depend heavily on the inter-state system.’⁸⁶ Bianchi’s analysis is grounded on the perspective of the relationship between the speaker (ie, the Court) and the audience (ie, states). This framework of analysis clarifies why the ICJ’s ruling was rhetorically effective. The adoption of alternative views by the ICJ might have been not only unsuitable for the audience, but also might have put at risk the legitimacy of the Court. In a commentary to the dissenting opinions attached to the ICJ’s judgment (particularly that of Judge Cançado Trindade), Bianchi highlighted the following:

‘To adopt, as normative background, the protection of individuals and, therefore, the fundamental principles of human rights and humanitarian law will not make inroads on the views of those who look at the state as the main hinge upon which the whole international legal system revolves. It would be naïve to think that this way of thinking may be adopted by judges whose overwhelming majority acted in their prior professional experience as state’s or international organization’s advisers.

‘... To appeal to values other than those traditionally upheld in the state-centred view of international law—the principle of sovereign equality being a good case in point!—can be counter-productive in a context such as that of the ICJ.

‘... The passion and the sense of commitment to such a noble (and yet value-laden in the perception of the traditional approach to international law!) cause as the protection of human rights are not favourably received in an intellectual and professional *milieu*, which is more inclined to give weight to apparently value-free and objective standards such as the rules that they themselves are supposed to find in international law and that—what a coincidence!—tend to provide support to the current status quo and power structures of the international legal system.’⁸⁷

It may be added that, in this case, the position adopted by the ICJ was also legitimized by the previous rulings of the domestic courts, which acted mostly as

⁸⁶ Bianchi (n 61) 467-468.

⁸⁷ *ibid* 472 (footnotes omitted).

‘objective’ or ‘impartial’ enforcers of international law.⁸⁸ Deflection from the norm according to which immunity should be granted even in claims arising out of gross violations of human rights will be even more difficult after the judgment of the ICJ.

In an article written before the ICJ’s judgment, Roger O’Keefe asserted there was no ‘knock-down argument’ which could be marshaled in support of the circumvention of state immunity in human rights cases.⁸⁹ Within the current prevailing state-centered outlook of international law, that is indeed the case. Furthermore, the authority attached to rulings of the ICJ—in the expression of Jennings, there is the tendency of courts and writers ‘... to cite isolated passages from judgments, almost as if they were passages from Holy Writ’⁹⁰—is an almost insurmountable obstacle to the success of a future generalized acceptance of a restriction to state immunity in respect of violations of human rights. The strategy adopted by the Italian Court of Cassation in *Judgment No 238/2014* is very telling in this respect. Although the Court of Cassation criticized the ruling of the ICJ, it conceded that it was an authoritative pronouncement in matters of customary international law. The only way out was to adopt a dualistic position and declare that the customary international norm ascertained by the ICJ did not produce a domestic norm with the same content due to its incompatibility with the Italian Constitution. Thus far, the Italian Court of Cassation is isolated in its approach, but we ought to be careful not to rush to the conclusion that the ICJ’s judgment will settle the discussion. As pointed out by Bianchi:

‘It is certainly true that the judgment in the *Jurisdictional Immunities of the State* case is a very good example of rhetorical efficacy and of the capacity of a judicial body to be attuned to its own audience. Having said that, one needs to notice that the blatant denial of any legal remedy to victims of serious human rights violations strikes a chord with transnational civil society that no technical reasoning or justification based on jurisdictional immunities can effectively counter. The idea that the privilege of immunity may shield a state just because of its status is unlikely to be well received by those who are unfamiliar with the law. It may then be argued that this is precisely the reason for which the law exists. My hunch, however, is that once the law becomes too disconnected from the societal body from which it emanates, its credibility is at risk.

‘History shows that this is an area of law in which the activism of domestic courts has always led the way, one way or the other. Even though the constraints currently posed by domestic and international judicial precedents, let alone multilateral treaties, seem to be an insurmountable

⁸⁸ See Roberts (n 64) 64-73 and 80-81; Alebeek (n 64) 573-574.

⁸⁹ O’Keefe (n 62) 1025.

⁹⁰ Robert Y. Jennings, ‘The Role of the International Court of Justice’ (1998) 68(1) BYIL 1, 41. Bianchi also referred to this passage from Jennings in his article. See Bianchi (n 61) 463.

obstacle to denying state immunity to violators of human rights, one should be cautious before concluding that what the ICJ held is the last word on the matter.⁹¹

Although the current consensus is biased towards privileging a formalist, quantitative approach to the ascertainment of custom over a qualitative one, states' rights over human rights, and the maintenance of an alleged stability of international relations to the detriment of the right to reparation of victims of gross violations of human rights, it is important to highlight it is always possible to contest the current structural biases. And this contestation, as Koskeniemi argued, can be carried out through the language of international law.

5.3 Prospects

From a *geological* perspective, the accretion and thickening of the layers relating to the protection of human rights generated pressures on the law of state immunity, which is located in lower layers of international law.⁹² Nevertheless, these pressures were not enough to give rise to a generalized acceptance of further restrictions to the scope of state immunity. The decisions of the ICJ in *Jurisdictional Immunities of the State* and of the ECtHR in *Jones* make it more difficult and unlikely for changes to occur in this regard. At the same time, and as noted by Andrea Bianchi, there may be a risk that the law is becoming 'too disconnected from the societal body from which it emanates' and it might be the case that the ICJ did not pronounce the last words on the matter. Domestic courts may still have the opportunity to develop renewed assessments of the relationship between state immunity and the human rights.⁹³

As considered previously, the ICJ asserted that a state's right to immunity could not be made dependent upon a balancing exercise to be conducted by a national court and that changes in the scope of state immunity could only be made by changes in state practice,

⁹¹ Bianchi (n 61) 474 (footnotes omitted).

⁹² See Joseph Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 548 and Christian Djeflal, 'Constitutional paths not taken: Germany vs. Italy before the ICJ' <<http://verfassungsblog.de/constitutional-paths-germany-italy-icj/>> accessed 29 April 2016.

⁹³ See Alebeek (n 64) 574-578. In Alebeek's understanding, '... domestic courts are, *as a matter of international law*, bound by both primary and secondary rules of international law when applying international immunity rules.' She ponders that, even within these strict limits, '... the particular sensitivity of domestic courts to the right of individuals makes them an obvious candidate for the much-called-for reconsideration of both the ECtHR and the ICJ perspectives on the relationship between immunity rules and the right of access to court.'

whilst the ECtHR concluded that the individual's right of access to court could be limited by state immunity because such a limitation pursues a legitimate aim (the promotion of good relations between states) and is proportionate (because it is a measure which reflects a generally recognized rule of public international law). The Italian Court of Cassation, on the other hand, employed techniques typical of modern constitutionalism, resorting to general principles, to the concept of normative hierarchy, and to balancing and proportionality.⁹⁴ This comparison may indicate that domestic courts are in a better position to strike a balance between state immunity and human rights in order not to disregard the rights of individuals.⁹⁵ Furthermore, an international court such as the ICJ may feel that it is at risk of undermining its legitimacy vis-à-vis its 'clients' (ie, states) by resorting to hermeneutical techniques like the ones employed by the Italian Court of Cassation. Only the future will tell whether the current consensus will be questioned and revisited by domestic courts.

There have been proposals for an optional protocol to the UNCJISP providing for the abrogation of immunity in civil claims based on serious violations of human rights, but, as put by Roger O'Keefe, 'the idea is a pie in the sky'⁹⁶, since most states are content with the status quo. Furthermore, as pointed out by him, states most likely to appear as defendants in proceedings of this kind would probably not ratify the proposed protocol.⁹⁷

O'Keefe also highlighted that there would be obstacles even if jurisdictional immunity were abrogated. Immunity from execution, 'the last bastion of State immunity'⁹⁸, is governed by different rules and it would still remain even in the case in which a victim of a serious violation of human rights obtained a favorable judicial decision. O'Keefe contends that the strategy of targeting the forum state's courts for the failure of providing a remedy for the victims of serious violations of human rights due to the grant of state immunity is misdirected both in terms of fairness and in terms of ultimate policy objectives.⁹⁹ In his view, this strategy is misdirected in terms of fairness because the 'chief villain' is the state responsible for the violations of international human rights law

⁹⁴ See Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (OUP 2012).

⁹⁵ See also Alebeek (n 64) 574-577.

⁹⁶ O'Keefe (n 62) 1034.

⁹⁷ *ibid* 1035.

⁹⁸ ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries' in 'Report of the International Law Commission on the work of its forty-third session' (29 April-19 July 1991) UN Doc A/46/10 (1991) II(2) YILC 13-62, 56.

⁹⁹ O'Keefe (n 62) 1037-1040.

and international humanitarian law and which denies redress for the victims.¹⁰⁰ Accordingly, the state of the victim's nationality is also to be blamed inasmuch as it fails to exercise diplomatic protection in order to secure redress.¹⁰¹ As regards policy objectives, O'Keefe argues that the exercise of jurisdiction over foreign states in human rights cases does not solve the ultimate problem of the civil impunity of states which violate international human rights law and international humanitarian law and it also exempts states from defending the rights of its nationals who were victims of such violations committed by other states—it is, in his expression, 'a band-aid solution to the problem of civil impunity for violations of international rules on the humane treatment of individuals'.¹⁰² His suggestion is therefore to shift the focus to the state which caused death or personal injury in breach of international law and to the state of the victim's nationality.¹⁰³

It is doubtful, however, whether mobilizing the shame of states would be a more successful strategy than litigation. Pressuring the state of the victim's nationality for a more active stance as regards diplomatic protection is unlikely to yield the desired results. Diplomatic protection is exercised by the state in its own right and has a discretionary nature. As Lorna McGregor highlighted, diplomatic protection, from the victim's perspective, is not a 'controllable and predictable' mechanism through which a claim can be made.¹⁰⁴ In any case, these strategies are not mutually exclusive.

5.4 Concluding remarks

As underscored in the beginning of this chapter, Koskeniemi's treatment of international law *as* a language accounts for two remarkable characteristics of international legal argumentation: its 'rigorous formalism' and its 'substantive open-endedness'. This means that current hegemonic views are always open to contestation, provided that this is done through the patterns of argumentation accepted by the 'invisible college of international lawyers'. As regards the relationship between state immunity and human rights, the current hegemonic professional consensus privileges a rigorous formalism, as expressed in the rigid dichotomy between procedural and substantive norms and in a

¹⁰⁰ O'Keefe (n 62) 1037-1039.

¹⁰¹ *ibid.*

¹⁰² *ibid* 1039-140.

¹⁰³ *ibid.*

¹⁰⁴ McGregor (n 84) 908-911.

quantitative methodology for the ascertainment of customary international law. There is also a widespread use of an amorphous, hazy concept of sovereignty in order to justify the primacy of state immunity over the rights of individuals. Appeals to the necessity of maintaining the stability of international relations are also employed in order to rationalize the sacrifice of the individual's right to compensation arising from serious violations of international human rights law and international humanitarian law.

The decisions of the ICJ in *Jurisdictional Immunities of States* and of the ECtHR in *Jones* may have crystallized this consensus. As remarked before, it is the case that, in international law, the distinction between deviance and law-creation is not always clear. Nevertheless, in the light of the authority attached to these pronouncements, deflection from the norm according to which immunity should be granted even in claims arising out of gross violations of human rights will more likely be considered law-breaking rather than law-development or even law-making.

Contestation always remains a possibility. As David Kennedy observed, '... the patterns of repetitions, associations and references which characterise public international law seems suited to a practice of interminable discourse', and '[t]he interminability of international law seems the subtle secret of its success.'¹⁰⁵ It may be the case that the balance struck between state immunity and human rights, regarded by many as unsatisfactory, will be reassessed in the future.

¹⁰⁵ David Kennedy, *International Legal Structures* (Nomos 1987) 294.

6 — GENERAL CONCLUSION

‘Why is it that concepts and structures that are themselves indeterminate nonetheless still end up always on the side of the status quo?’

Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 606

‘International law might better be viewed as an area of contestation between different visions of international law articulated by many different actors, including domestic courts.’

Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 ICLQ 57, 80

The law of state immunity, which belongs to the international law of coexistence, is located in the lower layers of international law.¹ Accordingly, expressions like ‘sovereign equality’, ‘the comity of nations’, and ‘the dignity of the sovereign’ will inevitably be raised when discussing it.² Pressures on these layers have been caused by the accretion and thickening of the legislative and constitutional strata of international law, as evidenced by the remarkable expansion of the body of international human rights law.

¹ See Joseph Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 ZaöRV 548 and Christian Djefal, ‘Constitutional paths not taken: Germany vs. Italy before the ICJ’ <<http://verfassungsblog.de/constitutional-paths-germany-italy-icj/>> accessed 29 April 2016.

² On the inadequacy of these expressions given the shift to the restrictive doctrine of state immunity, see Rosalyn Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’ in Rosalyn Higgins, *Themes and Theories; Selected Essays, Speeches and Writings in International Law* (Vol 1, OUP 2009) 376-377.

Thus far, however, these pressures have not been enough to result in the preponderance of human rights over the norms relating to state immunity. Although state immunity prevents the realization of justice for the victims of serious violations of international law, it still exerts a compliance pull—something that may be explained by its symbolic validation, to use Franck’s expression.³ State immunity has been associated by most courts with the principle of sovereign equality, expressed in the maxim *par in parem non habet imperium* and which is widely recognized as one of the cornerstones of international law.

Within the current predominant state-centered outlook of international law, in general terms, arguments supporting the contention according to which a state is not entitled to immunity for acts that violate human rights and *jus cogens* norms have not been successful. There have been, of course, voices that strongly disagreed with this hegemonic perspective. And they expressed this disagreement coming from different premises. It can be mentioned here Cançado Trindade’s dissenting opinion appended to the judgment of the ICJ in *Jurisdictional Immunities of the State*, in which it was proposed that the state-centric approach to international law should give place to fundamental human values. The Italian Court of Cassation resorted to techniques of adjudication usually associated with modern constitutionalism, such as general principles, the concept of normative hierarchy, and balancing and proportionality.⁴ In a stark contrast, the idea that the state’s right to immunity could be balanced with other competing interests was frowned upon both in the House of Lords and in the ICJ. The judgments of the ICJ in *Jurisdictional Immunities of the State* and of the ECtHR in *Jones* have not, however, settled the debate, as demonstrated by the Italian Court of Cassation in *Judgment No 238/2014*.

The legal discussions on the relationship between state immunity and human rights often hide and deflect attention from the real underlying problem, namely that of impunity. After all, civil claims arising from serious violations of human rights are brought against foreign states mostly due to the impossibility of obtaining a remedy otherwise.

³ Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998) 34: ‘Symbolic validation communicates authority. ... A rule is symbolically validated when it has attributes, often in the form of cues, which signal its significant part in the overall system of social order.’

⁴ See Massimo Iovane, ‘Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law’ in Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (OUP 2012).

Lady Hazel Fox and Philippa Webb emphasized that ‘[t]he law of State immunity is not static.’⁵ It is unlikely, but it may be the case that the situation will eventually reach a point in which transformative action⁶ will be felt needed—and, through the general acceptance by courts and states, changes in the consensus about the law of state immunity may take place. International law can change quickly, even in issues that once were considered extremely contentious.⁷ And it might also be the case that transformative action will assume other forms unrelated to the exercise by domestic courts of jurisdiction over foreign states in human rights cases.

At the moment, the hegemonic consensus is on the side of the maintenance of the status quo. Nonetheless, contestation through the language of international law remains a possibility.

⁵ Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 3.

⁶ See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 614-615.

⁷ See John Merrills, *Anatomy of International Law* (2nd edn, Sweet & Maxwell 1981) 14-15.

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