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Abstract

State immunity is an area that shows both the importance of international law for the conduct of international relations and the complex dynamics between law and politics. It is a crucial topic that has been the object of harsh critiques.
This paper reconsiders State immunity in light of the recent developments in some key decisions of international and domestic courts and tribunals. It is divided into two parts. After briefly introducing the concept of State immunity, it first analyses its development, and second assesses – and, to some extent, challenges – its alleged consolidation.

Key - words

State Immunity; Sovereign Immunity; *Germany v. Italy*; International Court of Justice; European Court of Human Rights; international custom; UN Convention on the Jurisdictional Immunities of States and their Property.

Some Remarks on the Development and Consolidation of State Immunity in International Law

Giuseppe Bianco*

State immunity is an area that shows both the importance of international law for the conduct of international relations and the complex dynamics between law and politics. It offers a model case study on the sources of international law and of the challenges that this branch of law has to face in the evolving historical context. State immunity is a crucial topic in international law, and has been the object of harsh critiques. As Hersch Lauterpacht argued in 1951, "the principle of immunity has become obsolete and productive of injustice and inconvenience".[1]

This paper reconsiders State immunity in light of the recent developments in some key decisions of international and domestic courts and tribunals. It is divided into two parts. After briefly introducing the concept of State immunity, it first analyses its development, and second assesses – and, to some extent, challenges – its consolidation.

Introduction. The Concept of State Immunity

The etymology of immunity expresses the negation, or lack, (by the Latin privative particle "*in*") of a "*munus*", a burden, a duty or an obligation.[2] Thus, immunity serves to unburden the State of some form of untoward obligation. Immunity protects States against (or shields them from) the exercise of jurisdiction by other States. Jurisdiction can take several forms, i.e. legislative, judicial and enforcement jurisdiction.[3] With regard to the latter, for example, there have been incidents of attempts to exercise tax jurisdiction over a foreign country's project and claims of immunity by such country's government vis-à-vis the host State.[4] However, State immunity is mainly concerned

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[1] Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', *British Yearbook of International Law* 28 (1951): 220.

[2] Richard Harrison Black, *An Etymological and Explanatory Dictionary of Words Derived from the Latin* (London: Longman, Hurst, Rees, Orme, Brown, and Green, 1825), 196.

[3] Bernard H Oxman, 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2007).

[4] Charles N. Brower, 'Litigation of Sovereign Immunity before a State Administrative Body and the Department of State: The Japanese Uranium Tax Case', *American Journal of International Law* 71, no. 3 (1977): 438–460.

with immunity from jurisdiction to adjudicate. Indeed, the definition found in the Max Planck Encyclopedia of Public International Law is: "State immunity protects a State and its property from the jurisdiction of the **courts** of another State".[5] This focus will also guide the present analysis.

It is important to bear in mind the existence of other kinds of immunities besides State, or sovereign, immunity. Diplomatic and consular immunities designate the protection granted to the personnel of a diplomatic mission, the premises of the diplomatic mission, its archives and communications, to ensure the effective performance of diplomatic functions.[6] Heads of State, Heads of Government and Ministers for Foreign Affairs, throughout the duration of their office, are granted immunities from jurisdiction in other States to guarantee the smooth performance of their functions on behalf of their respective States.[7] Finally, international organisations enjoy privileges and immunities as necessary for the fulfilment of their purposes and functions.[8] State immunity has to be distinguished from these, although it does share some aspects with them.

State immunity includes both immunity from jurisdiction and immunity from execution.[9] The former relates to the protection that a foreign State receives from being forced into the courts of another State. The latter consists of the protection of State property and assets located in a different country from being seized or frozen to enforce a judicial decision.

1. The Development of State Immunity

As for other doctrines of international law, there is broad consensus on the existence of such a concept as "state immunity". However, as soon as one attempts to enquire more precisely into the notion, consensus quickly fades away. As Sompong Sucharitkul put it in his Hague Academy course: "Few subjects in the progressive development of international law are more perplexing than the immunities of foreign States before national authorities".[10]

State immunity is commonly conceived as stemming from the principle of sovereign equality of

[5] Peter-Tobias Stoll, 'State Immunity', *Max Planck Encyclopedia of Public International Law*, April 2011. Emphasis added.

[6] Cecil Hurst, 'Les immunités diplomatiques', in *Collected Courses of the Hague Academy of International Law*, ed. The Hague Academy of International Law, vol. 12, Publications of The Hague Academy of International Law (The Hague/London/Boston: Brill Nijhoff, 2006).

[7] Pasquale De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Milano: Giuffrè, 1996).

[8] Niels M. Blokker and Nico J. Schrijver, *Immunity of International Organizations* (Leiden: Brill Nijhoff, 2015).

[9] On this topics, see James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', *The American Journal of International Law* 75, no. 4 (1981): 820–69.

[10] Sompong Sucharitkul, 'Immunities of Foreign States before National Authorities (Volume 149)', in *Collected Courses of The Hague Academy of International Law*, ed. The Hague Academy of International Law, Publications of The Hague Academy of International Law (Leiden, Boston: Brill Nijhoff, 1976), 93.

States.[11] The Latin maxim lawyers love to recall is "par in parem non habet imperium", coined by Bartolus de Saxoferrato in 1354. Technically, this would concern only immunity from enforcement, therefore "par in parem non habet jurisdictionem" would be more comprehensive.[12]

It evolved from diplomatic immunities, which can boast more age-old origins. Already in ancient Greece and Rome, messengers from other cities were sacred and inviolable.[13] Over time, diplomatic immunity came to include the representatives of the sovereign as well as the sovereign himself, who embodied the State. Thus, sovereign immunity was at once the immunity of the foreign State, in an objective sense, and that of the foreign king, in a personal sense.[14] The same concept included immunities which were later distinguished and developed separately.[15]

Immunities protected the external dimension of sovereignty. As Pierre-Marie Dupuy put it, "si l'indépendance est le critère de la souveraineté, la souveraineté est le garant de l'indépendance".[16]

At the birth of modern international law, the Westphalian ordering of the world (of Europe, in that era) was essentially egalitarian. As neither the pope nor the emperor, both representatives of a hierarchical organisation of international society, had been victorious in their centuries-old struggle for power, a horizontal structure emerged.[17]

In such a horizontal landscape, each sovereign would accord to his peer the same immunity. The reciprocity of these conducts over time gave rise to the customary rule of State immunity.[18]

This aspect was highlighted by the French *Cour de cassation* in *Le Gouvernement espagnol c. Cassaux* in 1849:

> Attendu que l'indépendance réciproque des Etats est l'un des principes les plus universellement reconnus du droit des gens ; que, de ce principe il résulte qu'un gouvernement ne peut être soumis, pour les engagements qu'il contracte, à la juridiction d'un Etat étranger ; qu'en effet le droit de juridiction qui

[11] Rosalyn Higgins, 'Equality of States and Immunity from Suit: A Complex Relationship', *Netherlands Yearbook of International Law* 43 (2012): 129–49.

[12] Andrea Atteritano, 'Stati stranieri (Immunità giurisdizionale degli)', *Enciclopedia del diritto*, Annali (Milano: Giuffrè, 2011).

[13] Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (London: Hurst, 1989), 22.

[14] Malcom N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 698.

[15] Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, vol. Recueil des Cours (The Hague, 1980), 197–99.

[16] Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international : cours général de droit international public (2000) (Volume 297)', in *Collected Courses of The Hague Academy of International Law*, ed. The Hague Academy of International Law, Publications of The Hague Academy of International Law (Leiden, Boston: Brill Nijhoff, 2000), 101.

[17] Heinhard Steiger, 'Concrete Peace and General Order: The Legal Meaning of the Treaties of 24 October 1648', in *1648: War and Peace in Europe*, ed. Klaus Bussmann and Heinz Schilling, vol. Politics, Religion, Law and Society (Münster: Westfälisches Landesmuseum, 1998), 440.

[18] Attila Tanzi, 'Su immunità ed evoluzione della società internazionale', in *Le immunità nel diritto internazionale : Temi scelti : Atti del Convegno di Perugia, 23-25 maggio 2006*, ed. Alessandra Lanciotti and Attila Tanzi (Torino: Giappichelli, 2007), 3.

> appartient à chaque gouvernement pour juger les différends nés à l'occasion des actes émanés de lui est un droit inhérent à son autorité souveraine, qu'un autre gouvernement ne saurait s'attribuer sans s'exposer à altérer leurs rapports respectifs.[19]

Even though, as is well-known, nowadays some treaties deal with sovereign immunity, by and large its development is of a customary nature.

Some scholars have criticised the continuous relevance of sovereign equality as the rationale for State immunity. They have remarked that equality is respected when both States can be impleaded before each other's courts, just as well as when neither can be so impleaded.[20] So long as we apply the same treatment to both States in a bilateral relationship, such treatment would comply with equality.

It is clear that sovereign equality is historically important to explain the emergence and development of State immunity. However, it is not sufficient, in and of itself, fully to justify immunity. Policy considerations must enter the picture. As a thought experiment, we can perfectly imagine domestic courts routinely exercising jurisdiction over foreign sovereigns, and abide by sovereign equality. Nevertheless, the implications of the exercise of full jurisdiction, with no space for immunity, would have effects outside of the courtroom. If States knew that every act they perform could lead to their liability, and to enforcement against their property, before any judge of any other country, international relations would be undermined. Comity of nations or *courtoisie internationale* have thus provided an additional basis for the doctrine of sovereign immunity.[21] Consequently, it is evident that a crucial aspect of State immunity is that of its scope, i.e. the extent to which State activities are shielded from the jurisdiction of foreign judges.

The principal source of the law on the subject is to be found in the judicial practice of States.[22] It is here that we can seek some guidance on the proper scope of immunity, and examine its development. One of the earliest cases is *The Schooner Exchange* by the Supreme Court of the United States of America, which concerned a vessel seized under a decree of the French Emperor Napoleon and converted into a public armed ship. Chief Justice Marshall affirmed the absolute immunity of foreign States in the following terms:

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[19] Cour de cassation, '*Le Gouvernement Espagnol c. Cassaux*', D. 1849-1-5, 7; J. Pal. 1849-1-116; S. 1849-I-81, 94, 22 January 1849.

[20] Alexander Orakhelashvili, 'State Practice, Treaty Practice and State Immunity in International and English Law', in *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, ed. Mads Andenas and Eirik Bjørge (New York: Cambridge University Press, 2015), 421.

[21] Sucharitkul, 'Immunities of Foreign States before National Authorities (Volume 149)', 119.

[22] Sucharitkul, 93.

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign nation, though not expressly stipulated, are reserved by implication and will be extended to him.[23]

The immunity was thus based on the consent of the territorial State to waive its exclusive jurisdiction, but also on an implicit obligation to do so under the law of nations.[24]

Courts in other countries followed this approach. The English Court of Appeal in *The Parlement Belge* applied it more broadly, to cover all ships of a foreign State, whether used for public service or for trade.[25] In this first phase, therefore, immunity was absolute: whatever the nature and purpose of the activities, so long as they were performed by a foreign government, the latter could not be impleaded to account for them. Likewise, any property of a foreign sovereign was *ipso facto* immune from attachment.

Over time, exceptions to State immunity began to emerge. In particular, Italian and Belgian courts moved toward a more restrictive view of immunity already at the end of the 19th century.[26] This trend became stronger after the Russian Revolution of 1917. As the new Soviet State fundamentally reorganised the way in which it operated in the economy, many activities formerly performed by private actors were now managed by State agencies and other public entities. When the latter claimed immunity from the jurisdiction of foreign courts, the doctrine of immunity took a narrower scope.

The pronouncements of several domestic courts already in the 1920s were followed by an authoritative statement of the US State Department. The 1952 Tate Letter represented the official view of the Administration: absolute immunity would no longer be favoured.[27] US courts took into account this development and by and large followed it.[28]

The Federal Constitutional Court of Germany endorsed the restrictive theory of State immunity in

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[23] U.S. Supreme Court, '*The Exchange v. McFaddon*', 11 U.S. 7 Cranch 116, 1812, 137.

[24] Hazel Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in *International Law*, ed. Malcolm D Evans, 4th ed. (Oxford: Oxford University Press, 2014), 339.

[25] '*The Parlement Belge*', 5 Prob Div 197 (CA), 90 1879.

[26] Xiaodong Yang, ed., *State Immunity in International Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2012), 13.

[27] Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting. U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 *Dept. State Bull.* 984–985 (1952).

[28] See e.g. *Alfred Dunhill* v. *Cuba*, US, 425 US 682, 703 (1976); 66 ILR 212, 225.

the leading *Empire of Iran* case in 1963.[29] It highlighted the distinction between sovereign and non-sovereign acts. And here lies the crux of the matter: the controversy mainly shifted from one on the scope of immunity (absolute or restrictive) to one on the method for the distinction to be made within the restrictive theory of immunity. The question is a constant source of disagreement.[30]

Only sovereign activities are shielded by State immunity, whereas non-sovereign activities, though performed by a State, would allow for the exercise of jurisdiction. The "magisterial decision" (in the words of Hazel Fox[31]) of the German Constitutional Court gave prominence to the nature of the transaction over its underlying motive and policy.[32] "Nature over object" is another way to frame the dichotomy.

With regard to this dichotomy, the English House of Lords clearly argued that if an act could be performed by any private actor, it would attract no immunity, even though the situation related to a political context.[33] Courts thus anchored their distinction in the *jure imperii* v. *jure gestionis* character of the transaction. Only transactions undertaken *jure imperii*, with a resort to the special powers of the State as State, would warrant immunity. In French legal discourse, this has materialised as the "prérogatives de puissance publique" of the State.

The restrictive theory has been embraced by the vast majority of countries, in their case law or via legislative enactments. Two statutes, in particular, have signalled the *Zeigeist* of the move to the restrictive theory: the Foreign Sovereign Immunities Act adopted by the USA in 1976 and the State Immunity Act adopted by the UK in 1978.

In those years, the Council of Europe promoted an international treaty on the topic. The European Convention on State Immunity of 1972 introduced a number of exceptions to immunity from adjudication, based on the commercial, or private law, distinction.[34]

However, this apparent consensus on a restrictive notion of State immunity has to be put into context. The agreement was amongst countries of the First World. The Soviet Bloc continued to invoke absolute immunity, albeit with some nuances over time. Furthermore, newly decolonised countries called into question the very legitimacy of custom as a source of obligations on the international plane. As they had not contributed to the emergence of customary rules, they invoked the need to have a clean slate. At most, only by virtue of the tacit agreement (or tacit consent) of the new States, could the latter be bound by pre-existing customary norms.[35]

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[29] Bundesverfassungsgericht (Federal Constitutional Court of Germany), '*Empire of Iran*', 45 ILR 57, 30 April 1963.
[30] Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: Oxford University Press, 2013), 417 ff.
[31] Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', 341.
[32] Bundesverfassungsgericht (Federal Constitutional Court of Germany), '*Empire of Iran*', 80.
[33] House of Lords, '*I Congreso del Partido*', I AC 268, 1983.
[34] Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', 341.
[35] G. I. Tunkin, *Theory of International Law* (London: George Allen & Unwin Ltd., 1974), 133.

The uncertainty over the fate of customary law prompted the work to codify international law in the form of treaties. The Vienna Conventions on Diplomatic and Consular Relations, of 1961 and 1963, devoted considerable importance to their respective immunities. A similar path for sovereign immunity was initiated by the International Law Commission at the end of the 1970s. The Commission adopted a text in its second reading in 1991. The historical context was in the midst of a major change, and State interests and coalitions would have significantly evolved in ways impossible to predict. Consequently, this stream of work was conveniently put on hold.[36]

The UN General Assembly asked the International Law Commission to resume its work in 1998, and an *ad hoc* Committee was established the next year. The final text was adopted by the Assembly on 2 December 2004. This marks the second point in this paper, the consolidation of State immunity in international law.

2. The Consolidation of State Immunity

Several elements corroborate the argument that State immunity has reached a stage of general consolidation of its major features. First, the adoption of an international treaty beyond a regional framework, such as the European Convention. The UN Convention on the Jurisdictional Immunities of States and their Property embraces the restrictive doctrine of State immunity with regard to civil and commercial proceedings in national courts. This treaty provides a comprehensive code, and is further elaborated upon in the commentaries accompanying the 1991 ILC Draft Articles.[37] Therefore, this codification could provide for the ultimate consolidation of the law on State immunity.[38]

The UN Convention is essentially a compromise between different views on the proper scope of sovereign immunity and its exceptions. Art. 10(1) embodies the restrictive approach:

> If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from

[36] Tanzi, 'Su immunità ed evoluzione della società internazionale', 13.
[37] Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', 344.
[38] Some have also proposed to take the UN Convention as a model for a treaty on the immunity of international organisations. For a critique of such a proposal, see Philippa Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations Special Issue: Immunity of International Organizations', *International Organizations Law Review* 10, no. 2 (2014): 319–31.

> that jurisdiction in a proceeding arising out of that commercial transaction.

Nevertheless, the compromise between the different approaches to the test for immunity emerges in Art. 2(2):

> In determining whether a contract or transaction is a "commercial transaction" […], reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

Consequently, on the one hand, the UN Convention confirms the approach taken by domestic legislation and case law in Western countries since the 1960-70s. It gives priority to the nature of the transaction to determine its commercial character. On the other hand, the treaty does allow for some degree of difference in this respect. The parties to the transaction themselves or the forum State may attribute importance to the purpose of the transaction. The criterion to distinguish commercial transactions, which are not covered by immunity, from non-commercial transactions, which to the contrary do command such immunity, becomes more open to uncertainty.

However, in general the consolidation of State immunity rests today on the theory of restrictive immunity. It covers acts *jure imperii* and allows for the exercise of jurisdiction over acts *jure gestionis*.

Second, the case law of international courts has further affirmed the continued relevance of this distinction, and defended it from doctrinal and jurisprudential critiques. The latter have mainly come from the demands to affirm the protection of human rights of victims of State actions[39] and the invocation of the violation of peremptory norms of international law (*jus cogens*) as a ground not to accord immunity.[40]

In 2001, the European Court of Human Rights delivered two important judgments on sovereign immunity on the same day. In *Al-Adsani*, a claim of damages for torture against Kuwait before English courts, the Court held that Art. 6 of the European Convention on Human Rights, on the

[39] Philippa Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?', *European Journal of International Law* 27, no. 3 (2016): 745–67.

[40] See Christian Tomuschat, 'L'immunité des Etats en cas de violations graves des droits de l'homme', *Revue générale de droit international public* 109, no. 1 (2005): 51–74.

right of access to a court, was at stake.[41] It qualified the grant of immunity as "a procedural bar on the national courts' power to determine the right".[42] However, it held that the bar was justifiable. First, it pursued a legitimate aim, "complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[43] Second, the restriction was proportionate to the aim. Art. 6 could not be interpreted in a vacuum, but taking into account "any relevant rules of international law applicable in the relations between the parties", as mandated by the Vienna Convention on the Law of Treaties. When European States adopt measures that "reflect generally recognised rules of public international law on State immunity", they will fall within the restrictions inherent to the right of access to court.[44]

In the *Fogarty* judgment, the European Court dealt with a sex discrimination case brought in England against the United States by a secretary (so, a non-diplomatic staff member) of the US embassy in London.[45] The Court noted a trend towards limiting State immunity in respect of employment-related disputes. Yet, the UK was not alone in according immunity and its conduct did not "fall outside any currently accepted international standards".[46] Consequently, the UK did not exceed "the margin of appreciation allowed to States in limiting an individual's access to court".[47] On balance, these cases seem to demonstrate the consolidation of State immunity, as the European Court of Human Rights upheld sovereign immunity when the relevant transaction was considered non-commercial.

Yet, the codification provided by the 2004 UN Convention played a major role in the consolidation by regional human rights bodies. In *Cudak v Lithuania*, in 2010, the claimant was a secretary employed by the Polish embassy in Vilnius.[48] The European Court of Human Rights found that Lithuanian courts, in upholding Poland's immunity, had exceeded the margin of appreciation available to them. With respect to the previous judgments from 2001, there were now binding international rules on contracts of employment. The European Court considered that Article 11 of the UN Convention had acquired the status of customary law.[49] Consequently, the fact that Lithuania had not ratified the treaty and that the latter was not yet in force was immaterial.

This provision of the UN Convention provides that there is no immunity in respect of contracts of employment to be performed in the forum State, except in five cases. The Strasbourg Court

[41] European Court of Human Rights, '*Al-Adsani v United Kingdom*', 34 EHRR 11, 2001.
[42] *Idem*, para. 48.
[43] *Idem*, para. 54.
[44] *Idem*, para. 56.
[45] European Court of Human Rights, '*Fogarty v United Kingdom*', 34 EHRR 12, 2001.
[46] *Idem*, para. 37.
[47] *Idem*, para. 39.
[48] European Court of Human Rights, '*Cudak v Lithuania*', 51 EHRR 15, 2010.
[49] *Idem*, para. 67.

considered that none of those exceptions applied. In particular, the exception for employees who perform functions closely related to the exercise of governmental authority did not apply.[50] This was because the employee's tasks (as a secretary) could not objectively relate to the sovereign interests of the Polish Government.

The European Court of Human Rights adopted the same approach in *Sabeh El Leil v France* in 2011.[51] The head of the accounts department of the Kuwaiti embassy in Paris claimed that her dismissal was unfair. The Strasbourg Court held that the *Cour de Cassation* had not had regard to customary international law as embodied in the UN Convention, and had not provided adequate reasons for the view that the employee's duties involved participating in exercises of governmental authority.[52]

The restrictive doctrine of sovereign immunity for contracts of employment as codified by the UN Convention thus guides the interpretation by the Strasbourg judges of the European Convention on Human Rights. The Court has applied its line of reasoning in other cases, such as *Wallishauser v Austria* in 2012[53] and *Radunović v Montenegro* in 2016.[54] Consequently, the consolidation of the UN Convention as the standard seems confirmed.

In recent years, the most authoritative seal on the process of consolidation of State immunity in international law has come from the International Court of Justice. In the case of *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* of 2012, the World Court held that Germany enjoyed immunity under international law from civil claims brought before Italian courts based on violations of international humanitarian law committed by the German *Reich* between 1943 and 1945.[55]

The dispute stemmed from the decision of the Italian Supreme Court, the *Corte di Cassazione*, in the *Ferrini* case of 2004.[56] In essence, the domestic court had considered that immunity could be overridden when the act complained of amounted to an international crime.[57]

In addition to the war crimes committed in Italy, Greek claimants who had obtained favourable judgments by Greek courts for massacres committed on Greek territory during the Second World

[50] *Idem*, para. 69.
[51] European Court of Human Rights, '*Sabeh El Leil v France*', 54 EHRR 14, 2012.
[52] *Idem*, paras. 62–67.
[53] European Court of Human Rights, '*Wallishauser v Austria*', App No 156/04, 17 July 2012.
[54] European Court of Human Rights, '*Radunović v Montenegro*', Apps. Nos. 45197/13, 53000/13 and 73404/13, 25 October 2016.
[55] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment*, I.C.J. Reports 2012, p. 99.
[56] Corte di cassazione, '*Ferrini v Federal Republic of Germany*, Decision No 5044/2004', 87 Rivista di diritto internazionale 539, 128 ILR 658, 2004; Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case', *European Journal of International Law* 16, no. 1 (2005): 89–112.
[57] Andrea Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?', *Leiden Journal of International Law* 24, no. 1 (2011): 173–200.

War had attempted to execute them in Greece and Germany, in vain. They had also brought their case before the European Court of Human Rights, which had considered that the refusal to authorise enforcement proceedings was not an unjustified interference with the applicants' right of access to a tribunal. The Greek claimants therefore applied to Italian courts to obtain the execution of Greek judgments. However, the fact that the regional human rights court had found that State immunity should be upheld even vis-à-vis grave violations of fundamental rights already gave an indication as to the likely outcome.

Faced with the arguments raised by the defendant (Italy), which recalled those of its Supreme Court, the ICJ upheld sovereign immunity against any potential claims for derogations. First, the Court affirmed that State immunity is required by international law and is not merely a matter of comity.[58]

Second, it recalled that rules on State immunity were procedural and "necessarily preliminary in nature".[59] Therefore, they could not be weighed against the substantive nature of the conduct at issue.[60] Even when a claim concerned a violation of *jus cogens* (or peremptory norms of international law), it could not displace sovereign immunity.[61]

Third, the International Court of Justice also rejected the "last resort" argument put forward by Italy.[62] Even where victims of severe violations of human rights did not have any forum open to them or any other alternative remedy or means of redress, such a State of affairs could not justify the denial of immunity.[63]

Fourth, the Court addressed the issue of immunity from enforcement. It held that no measure of constraint could be imposed against property belonging to a foreign State without its consent, if the asset was used for governmental non-commercial purposes. As Villa Vigoni, near Lake Como, was a centre of Italian-German co-operation in scientific research, the mortgage ordered by Italian courts was illegal.[64]

Fifth, the same line of reasoning applied to the *exequatur* declared by Italian courts of the decisions of Greek courts upholding civil claims against Germany, which violated the foreign State's entitlement to immunity.[65]

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[58] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment*, para. 53.
[59] *Idem*, para. 82.
[60] For a broader discussion on the substantive/procedural divide, see Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished', *Leiden Journal of International Law* 25, no. 4 (2012): 979–1002.
[61] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment*, para. 95.
[62] *Idem*, para. 101.
[63] For an analysis focused on the lack of remedies in international law for the breaches of human rights, see Enzo Cannizzaro and Beatrice Bonafé, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights', in *From Bilateralism to Community Interest*, ed. Ulrich Fastenrath et al. (Oxford: Oxford University Press, 2011).
[64] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment*, para. 120.
[65] *Idem*, para. 131.

Despite such broad and apparently unassailable upholding of State immunities even in the face of *jus cogens* violations, other aspects of the judgment should not be disregarded. The Court recalled that one should view immunity together with the principle of territorial sovereignty, from which stems jurisdiction over events and persons within that territory. Consequently, "[i]mmunity may represent a departure from the principle of territorial sovereignty and the jurisdiction that flows from it".[66] Although the Court did not draw the implication that exceptions to jurisdiction (such as immunity) should be interpreted narrowly, one might take note of the careful consideration.

Furthermore, the ICJ took care narrowly to circumscribe the issue before it. It avoided a decision on the broader question of whether there is a "territorial tort exception" to State immunity applicable to acts *jure imperii*. It made it clear that its decision was confined to acts *jure imperii* committed during an armed conflict.[67] It also made it clear that it was not addressing the separate issue of the immunity of State officials from foreign criminal jurisdiction.[68]

On the one hand, some scholars harshly criticised the judgment. They argued that it represented "a missed opportunity to re-interpret the scope of the immunity rule in harmony with the evolution of human rights law".[69] On the other hand, others have praised the clarity of the judgment, and the "lack of ambiguity" in the assessment of the current law on State immunity.[70]

Moreover, as Judge Koroma noted in his Separate Opinion: "nothing in the Court's Judgment today prevents the continued evolution of the law on State immunity… The Court's Judgment applies the law as it exists today".[71] Consequently, further developments are not impeded by the decision[72] – even though the chilling effect could be substantial.

A third element that seems to strengthen the view of the consolidation of State immunity is the approach taken by some domestic courts, which have followed the restrictive theory as codified in the UN Convention. A very recent case from the UK Supreme Court will illustrate this point.

In *Benkharbouche*, decided on 18 October 2017, the claimants were two Moroccan nationals: a domestic worker at the Libyan embassy in London and the other a housekeeper at the Sudanese

[66] *Idem*, para. 57.
[67] *Idem*, para. 78.
[68] *Idem*, para. 91.
[69] Stefania Negri, 'Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)', *International Community Law Review* 16, no. 1 (2014): 137.
[70] Carlos Espósito, 'Of Plumbers and Social Architects: Elements and Problems of the Judgment of the International Court of Justice in Jurisdictional Immunities of States', *Journal of International Dispute Settlement* 4, no. 3 (2013): 455.
[71] 'Separate Opinion of Judge Koroma, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*', 2012, para. 7.
[72] On the prospective developments left open by the ICJ, see Lorna McGregor, 'State Immunity and Human Rights. Is There a Future after Germany v. Italy?', *Journal of International Criminal Justice* 11, no. 1 (2013): 125–45.

embassy in London.[73] They had brought complaints related to their employment. Lord Sumption, for the majority of the Supreme Court, began by noting that the State Immunity Act provided that a State is immune both in proceedings about a contract of employment between a State and a person who is neither a national of the United Kingdom nor resident there, and in proceedings about the employment of members of a diplomatic mission, including its administrative, technical and domestic staff. Consequently, at first sight, the case fulfilled the requirements for sovereign immunity.[74]

Nevertheless, the judgment embarked upon a much more thorough enquiry. To assess whether such recognition of immunity would comply with the European Convention on Human Rights and the European Union Charter of Fundamental Rights, Lord Sumption investigated whether the State Immunity Act provisions were based on customary international law. The objective was to find the relevant rule of international law by reference to which Art. 6 ECHR must be interpreted (in line with the Vienna Convention on the Law of Treaties).[75]

Although the United Kingdom had not ratified the UN Convention on State Immunity, Lord Sumption acknowledged the significance of the Convention as a codification of customary international law.[76]

Lord Sumption held that if the foreign State is immune, international law mandates the forum State to give effect to that immunity, as the International Court of Justice had confirmed in *Germany v Italy*. However, if the foreign State is not immune, "there is no relevant rule of international law at all. What justifies the denial of access to a court [under the ECHR] is the international law obligation of the forum State to give effect to a justified assertion of immunity. A mere liberty to treat the foreign State as immune could not have that effect, because in that case the denial of access would be a discretionary choice on the part of the forum state".[77]

The UK Supreme Court then investigated whether, under international law, States were immune for employment disputes brought by staff in the domestic service of diplomatic missions. It relied on the case law of the European Court of Human Rights expounded above, as well as on the Court of Justice of the European Union, which in *Mahamdia v People's Democratic Republic of Algeria* in 2013, had held the State not immune "where the functions carried out by the employee do not fall

[73] '*Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah (Respondent)*', [2017] UKSC 62, 18 October 2017.
[74] *Idem*, para. 4.
[75] *Idem*, para. 20.
[76] *Idem*, para. 32.
[77] *Idem*, para. 34.

within the exercise of public powers".[78] The Supreme Court accordingly concluded that the two claimants' duties (a domestic worker and a housekeeper) fell within the category of acts *jure gestionis* and did not warrant immunity under international law.[79]

Finally, the Secretary of State argued that the provision could be justified on domestic policy grounds: the UK's interest in asserting its jurisdiction was only for its own nationals or residents. Lord Sumption held that "the forum State has duties as well as rights, and … they extend to the protection of those lawfully living and employed in the United Kingdom", and not only its nationals or permanent residents.[80] In conclusion, the Supreme Court held that the relevant provisions of the Sovereign Immunity Act were incompatible with the European Convention on Human Rights, and, to the extent that they affected claims derived from EU law, the English domestic law was to be disapplied.[81]

This seemingly homogenous narrative corroborating the consolidation of the international law on State immunity must however be nuanced. A series of developments signals that the level of consolidation is far from uniform. On the one hand, some courts have seemed to uphold sovereign immunity even where the restrictive doctrine would have likely commanded to find an exception. On the other hand, other domestic courts have indicated a willingness to recognise a broader role to human rights to the detriment of State immunity.

In particular, the *A v B* case before the Supreme Court of Norway in 2004 is worth noticing.[82] A, citizen of Norway, had worked as a driver for a foreign embassy in Oslo and complained of the unlawfulness of his dismissal. The *Høyesteretts ankeutvalg*, the Appeals Selection Committee of the Supreme Court of Norway, considered itself bound by international law, which recognised a restrictive theory of State immunity. In order to apply the distinction between *acta jure imperii* and *acta jure gestionis*, the Supreme Court argued that activities of a foreign embassy concerned the very core of sovereign authority, and that the nature of the employment was irrelevant. The circumstance that the claimant was not involved in diplomatic or other sensitive activities of the "core business" of an embassy was disregarded. Whereas scholarship already at that time was more cautious as to the State of international law on this issue, the Supreme Court adhered to a formal categorisation. It noted that the draft UN Convention would have allowed for the exercise of jurisdiction over these matters, but as no final text had been adopted, it did not follow such a rule. Differently from the UK Supreme Court, the Norwegian one did not deem the rule had reached

[78] Court of Justice of the European Union, '*Mahamdia v People's Democratic Republic of Algeria*', (Case C-154/11) [2013] ICR 1, n.d., para. 57.
[79] *Benkharbouche*, para. 55.
[80] *Idem*, para. 68.
[81] *Idem*, para. 79.
[82] Supreme Court, Norway, '*A v B*', 2004.

customary status.

A particularly difficult problem is then posed by countries that seem to continue to rely on an absolute doctrine of sovereign immunity. China is the prime example:

> The consistent position of China is that a State and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution. The courts in China have no jurisdiction over any case in which a foreign State is sued as a defendant or any claim involving the property of any foreign state. China also does not accept any foreign courts having jurisdiction over cases in which the State of China is sued as a defendant, or over cases involving the property of the State of China.[83]

This official statement was made by the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region in a case of 2011, *FG Hemisphere*. The Hong Kong Court of Final Appeal held that Hong Kong must adhere to the doctrine of State immunity adopted by the People's Republic of China.[84] This raises important questions, which still remain open, such as whether China could be considered a persistent objector to the customary rule of restrictive immunity and, in that case, if it should it be accorded immunity by foreign courts for all its acts.

Another instance of variance concerns the French *Cour de cassation*'s treatment of Argentine sovereign bonds. A waiver in the bond contracts issued by Argentina allowed for enforcement. During the confrontation between Argentina and its creditors, when a vulture fund attempted to enforce a US decision and seize monies owed by French companies to the Argentine government, the French Supreme Court first recalled the international customary rule, as reflected in the UN Convention, that States can waive their immunity from enforcement. However, it then held that such a waiver must be done "de manière expresse et spéciale".[85] As the case concerned tax and social security claims, and the waiver did not specifically mention those assets, the Court held that Argentina was immune from execution. The decision by the French Court of Cassation considerably reduced the scope of application of waivers of immunity from enforcement, and was likely influenced by the geopolitical context.

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[83] '*Democratic Republic of the Congo v. FG Hemisphere Associates*, 8 June 2011, Hong Kong Court of Final Appeal', 2011, 444.

[84] *Idem*, 435.

[85] *NML Capital c/ La République argentine ; et autre*, pourvois n°10-25.938, n°11-10.450 et n°11-13.323 (Cour de cassation, Première chambre civile 28 March 2013).

Finally, some courts have openly defied the *decisum* of the International Court of Justice over the respective role of *jus cogens* and State immunity. After the *Germany v Italy* decision, the Italian *Corte di Cassazione*[86] and the legislator swiftly complied with the recognition of sovereign immunity to Germany.[87] However, in 2014, the Italian Constitutional Court handed down decision 238, where it held that implementing the ICJ's judgment would imply an unqualified denial of access to justice for the victims and would be incompatible with the supreme principle of judicial protection of fundamental human rights guaranteed by the Italian Constitution.[88] The *Consulta* affirmed it was not reviewing the World Court's position and its authoritative statement on the international customary law on State immunity. But it did find a conflict between such a customary rule (which enters the Italian legal system by a constitutional provision allowing for automatic incorporation, a "trasformatore permanente" according to Tomaso Perassi[89]) and other constitutional principles. Some have viewed this decision as a building block in the wall of protection built up by domestic courts against the intrusion of international law.[90] Others have harshly criticized the *Corte costituzionale* for failing to strike an appropriate balance between the right to judicial redress and the compliance with international law, which is also required under the Italian Constitution.[91]

Conclusion

In conclusion, State immunity in international law seems to have consolidated around the UN Convention and the ICJ *Germany v Italy* judgment. However, the landscape is not homogeneous. Immunities remain "a messy affair…between law, politics and comity".[92]

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[86] Corte di Cassazione, prima sezione penale, '*Sentenza n. 32139*', 9 August 2012, 32139.

[87] 'Legge 14 Gennaio 2013 n. 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'.

[88] Corte costituzionale, '*Sentenza 238*', 22 October 2014; 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', *Diritti Comparati* (blog), 2014, www.diritticomparati.it/2014/10/; Lorenzo Gradoni, 'Corte costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile', *SIDIBlog* (blog), 2014, http://www.sidiblog.org/2014/10/27/corte-costituzionale-italiana-e-corte-internazionale-di-giustizia-in-rotta-di-collisione-sullimmunita-dello-stato-straniero-dalla-giurisdizione-civile/; Pasquale De Sena, 'Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale', *SIDIBlog* (blog), 2014, http://www.sidiblog.org/2014/10/30/spunti-di-riflessione-sulla-sentenza-2382014-della-corte-costituzionale/.

[89] Tomaso Perassi, *Lezioni di diritto internazionale* (Padova: Cedam, 1957), 29.

[90] Anne Peters, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL: Talk!* (blog), 22 December 2014, https://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/.

[91] Attila Tanzi, 'Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale', *La Comunità internazionale* 70 (2015).

[92] Anne Peters, 'Immune against Constitutionalisation?', in *Immunities in the Age of Global Constitutionalism*, ed. Anne Peters et al. (Leiden: Leiden: Brill Nijhoff, 2014), 1.

Political considerations have marked the evolution of the doctrine. As for the shift from absolute to restrictive immunity, we might witness in the near future a trend toward a further reduction in the scope of immunity, to make room for a more robust protection of human rights.

In 1984 James Crawford noted that "we lack a rationale, a connected explanation for this State of affairs" in State immunity.[93] Despite the considerable evolution, this holds true still nowadays. Crawford also noted that sovereign immunity could not be functional (as is the case for international organisations), because there was no general theory of government agreed upon by the different ideologies in the Cold War.[94] In light of the contemporary understanding of sovereignty as a "faisceau de compétences"[95], we might reconsider the issue and pose the challenging question of reformulating a theory of State immunity as a functional one.

[93] James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', *British Yearbook of International Law* 54, no. 1 (1984): 75.
[94] Crawford, 89.
[95] Charles Rousseau, *Droit international public*, 7th ed. (Paris: Dalloz, 1973), 95.