Università degli Studi di Pavia

Dottorato in Diritto Pubblico, Giustizia Penale e Internazionale

XXXII ciclo

State Immunity and Access to Justice between the International and the Municipal Legal Order

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Anno accademico 2018/2019

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FOREWORD

This dissertation deals with the subject, extensively debated in literature but still relevant, of the contrast between the principle of customary international law that grants immunity from civil jurisdiction to foreign States, and the rules of domestic and international law protecting human rights. At the domestic level, the Italian Constitutional Court has recently solved this conflict in favour of the individual right of access to justice.[1] The purpose of this work is to assess if, also from an internationalist perspective, it is possible to give prevalence to the justiciability of fundamental human rights over the protection of State sovereignty, in light of the increasing importance of human rights in both national constitutions and international law.

The main assumption underlying this work is that a contrast between State immunity and the right of access to justice does exist, despite the strict distinction between substance and procedure set out by the International Court of Justice in the *Jurisdictional Immunities* case.[2] Indeed, the first institute – which belongs to classic international law – may actually impair the enjoyment of fundamental human rights enshrined both in the internal and the international legal systems. As observed by Benedetto Conforti,

> As for international law, there is no doubt that immunity is in conflict with the right of access to a judge, whatever the dispute in which immunity is invoked. The conflict is even more intolerable when the dispute concerns gross violations of human rights.[3]

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[1] Italian Constitutional Court, Judgment No. 238/2014, 22 October 2014. On this historic decision, widely commented and to which Chapter 4 of this work will be devoted, see, *ex multis*: G. CATALDI, *A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law*, in «Italian Yearbook of International Law», Vol. XXIV (2014), pp. 37-52; P. DE SENA, *The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law*, in «Questions of International Law», Zoom Out II (2014), pp. 17-31; S. DOMINELLI, *Immunity from Civil Jurisdiction: Where Do we Go from Here? Assessing the Relevance of Recent Opposing Trends in the Conceptualization of State Immunity*, in «Conference Paper Series of the European Society of International Law», No. 8/2016 (8-10 September, 2016); O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, in «Rassegna dell'Istituto di Studi Giuridici Internazionali del CNR», No. 2 (2014-2015), pp. 1-22; R. PISILLO MAZZESCHI, *La sentenza n. 238 del 2014 della Corte costituzionale ed i suoi possibili effetti sul diritto internazionale*, in «Diritti umani e diritto internazionale», Vol. 9 (2015), No. 1, pp. 23-40.

[2] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Report 99 (2012). This judgment, and especially the procedural conception of State immunity enshrined therein, will be discussed in detail in Chapter 3 of this work.

[3] B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, in «Italian Yearbook of International Law», Vol.XXI (2011), p. 136.

Therefore, when a national court faces issues of State immunity, it should raise a set of questions before deciding whether to uphold immunity or not. Sovereignty is a fundamental legal value of the international society of States, but should it be protected to the extent that the justiciability of fundamental human rights is completely sacrificed? Or should the individual right of access to justice prevail over the protection of the sovereignty of the foreign State and the swift conduct of international relations, especially if gross violations of human rights are at stake? Moreover, what kind of State conduct is to be regarded as a legitimate expression of sovereign powers, as such deserving the covering of State immunity?

The present work will tackle these problems from an internationalist perspective. To do so, both the theory and practice of State immunity will be taken into account, including relevant international instruments, international judicial decisions and State practice. Particular attention will be paid to the case law of national courts. In fact, albeit being a doctrine of international law, State immunity is applied in domestic courts in accordance with domestic law, and as such represents an intersection between national and international law.[4] National judicial decisions are particularly relevant to the extent that they may amount not only to State practice, but, if soundly reasoned, also to *opinio juris* in favour (or not) of the existence of a rule of customary international law.[5]

Before entering into the heart of the law of State immunity, this study will focus on the general theories of sovereignty and on the relations between the international and the national legal orders. The purpose is twofold: one the one hand, to properly introduce the doctrine of State immunity, founded on the same concept of sovereignty; and, on the other, to demonstrate that the disapplication of international law from the part of domestic courts amounts to a legitimate exercise of sovereign authority, when the international rule at stake is in breach of a fundamental principle of the national legal order which is, at the same time, also a principle of international law, as in the case of the right of access to justice. In this respect, it will be suggested that the organs of the State may play a propulsive role in the development of international law, acting as agents of the international community in defence of shared fundamental values. Sometimes, indeed, domestic legal orders provide a more

[4] H. FOX, P. WEBB, *The Law of State Immunity*, 3rd Edition, Oxford, Oxford University Press, 2013, p.1.

[5] C. GREENWOOD, *The Development of International Law by National Courts*, in T. MALUWA, M. DU PLESSIS, D. TLADI, *The Pursuit of a Brave New World in International Law. Essays in Honour of John Dugard*, Leiden/Boston, Brill/Nijhoff, 2017, pp. 205-206.

advanced protection of fundamental human rights than international law, as shown by judgment No. 238/2014 of the Italian Constitutional Court.[6]

The dissertation will enter into the merits of the law of State immunity with the second chapter, aimed at identifying the rationale and exact content of the restrictive doctrine. From the early practice of States, it will be apparent that restrictions of the scope of application of immunity rules were aimed at providing access to justice to the private parties involved in commercial transactions with foreign States, in line with the surpassing of an absolute concept of sovereignty at the domestic level. As for the content of the doctrine, our analysis will point out the diversity in the practice of States, due to the difficulty to distinguish *acta jure imperii* from *acta jure gestionis* in concrete, especially in labour-related litigations between foreign sovereigns and their employees. A further problem dealt with into this chapter is the enforceability of the decisions rendered against foreign States, strongly limited by the rules on State immunity from measures of execution.

The third chapter will be devoted, instead, to the analysis of national and international judicial decisions – issued before the *Jurisdictional Immunities* judgment – on State immunity in case of serious violations of human rights, as well as to a critical appraisal of the ICJ's decision in light of the structure and method of identification of international custom. The practice of States in the field of sovereign immunities shows that, at the time of the litigation between Germany and Italy, the law of State immunity was in a state of flux: there were States denying the existence of a humanitarian exception to State immunity, and few other States – namely, the United States of America, Italy and Greece – refusing to recognize immunity to foreign sovereigns for certain acts traditionally regarded as *jure imperii*. In this respect, it is argued that the decision of the International Court of Justice, driven by a formalist and State-centred approach, exercised an adverse effect on the evolution of customary international law in a more human rights focused direction.

Lastly, the fourth chapter of this work takes into account the most recent practice of States – in particular, Italy – and the recent case law of the European Court of Human Rights to assess whether a new rule of international law, excluding serious breaches of human rights and humanitarian law from the covering of State immunity, is emerging or not. Even though it might be too soon to speak of a new customary rule, this section will underline the innovative value of Italian judicial practice on the right of access to justice *vis à vis* State immunity. In

[6] See *supra*, note 1.

particular, it will be suggested that, being coherent with the new centrality attributed to the individual and to human rights under contemporary international law, the prevalence of the victims' right of access to justice over State immunity in case of gross violations of human rights may be regarded as an *infra legem*, rather than as a *contra legem* practice.

CHAPTER 1

THE LAW OF THE STATE *VIS À VIS* THE INTERNATIONAL COMMUNITY

1. The international society as a society of States

1.1 Centrality of the State within the international legal system

Statehood has for long been the organizing concept of the international legal system.[7] However, the international society has not always been shaped like this. The origins of the contemporary system are conventionally traced back to 1648, when the Peace of Westphalia put an end to the bloody Thirty Years War among European powers. Before that date, the process of formation of European nation-States had already started, but it was only after the peace treaties signed in the Westphalian cities of Münster and Osnabrück that the Catholic Church dramatically lost its power and the Holy Roman Empire *de facto* disintegrated. The international society made of States, with no other authority above them, was thus born.[8] Also nowadays, despite the emergence of new subjects of international law such as international organizations and individuals, States retain their centrality. This is mainly due to a feature belonging exclusively to States, and to no other subject of international law: *sovereignty*. But what does it mean to be sovereign?

The term derives from classical Latin *supra*, or *superanus* in Medieval Latin, then transposed in early French *sovrains* and later *souverain*, in Italian *sovrano*. [9] It was initially related to the internal organization of power and referred to the subject exercising the supreme authority within the State.[10] Transposed into the international realm, the term lost this original meaning, as international law does not require the State to have a specific organization: the

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[7] K. KNOP, *Statehood: territory, people, government*, in J. CRAWFORD, M. KOSKENNIEMI (Editors), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2012, p. 95.

[8] For an account of the historical evolution of the international society, see: A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, 3rd Edition, Bologna, Il Mulino, 2017, Chapter 2, pp. 37-62; C. FOCARELLI, *Diritto Internazionale*, 4th Edition, Milano, CEDAM-Wolters Kluwer, 2017, pp. 3-4; A. PELLET, *Histoire du droit international: Irréductible souveraineté*?, in G. GUILLAUME (ed.), *La vie internationale*, Paris, Hermann, 2017, pp. 7-24.

[9] L. WILDHABER, *Sovereignty and International Law*, in R. ST. J. MACDONALD, D.M. JOHNSTON (Editors), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, Martinus Nijhoff Publishers, 1983, p.425.

[10] J. CRAWFORD, *Sovereignty as a legal value*, in J. CRAWFORD, M. KOSKENNIEMI, (Editors), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2012, p. 118.

internal distribution of authority is left to the discretion of each State,[11] which is free to determine its own form of government. In fact, there is no general guarantee of democracy in international law,[12] with the only exception of article 25 of the International Covenant on Civil and Political Rights (ICCPR), where some democratic rights are enlisted.

Sovereignty is a two-fold concept, as it implies an internal as well as an external dimension. Within the State, being sovereign means to have monopoly of authority over a certain territory and on the people who live thereon. Such authority consists in the exercise of jurisdiction, articulated into *jurisdiction to prescribe*, *jurisdiction to enforce* and *jurisdiction to adjudicate*.[13] It must be noted that, under international law, the exercise of jurisdiction is not attributed to the body or agency of the State that concretely carries out a certain conduct, but rather to the State conceived as a unitary and abstract entity,[14] regardless of constitutional distribution of power. Although jurisdiction is essentially territorial,[15] as such presumed to be exercised throughout the territory of the State, customary international law admits the exercise of extra-territorial jurisdiction over the activities carried out by the State's consular and diplomatic agents abroad, as well as over the board crafts and vessels registered in, or flying the flag of, that State.[16] State jurisdiction is exercised also on international borders.[17]

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[11] I.B. WUERTH, *Sources of International Law in Domestic Law: Domestic Constitutional Structure and the Sources of International Law*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, Oxford, Oxford University Press, 2017, pp. 1119-1120.

[12] According to Focarelli, adherence to democratic principles is not a constitutive element of statehood, although a trend in this direction can be detected since the end of the Cold War. See: C. FOCARELLI, *International Law*, Cheltenham-Northampton, Edward Elgar Publishing, 2019, pp. 52-53.

[13] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 78.

[14] For the purpose of recognition of State immunity, a State is defined as including its various organs of government, its political subdivisions, any agency or instrumentality of the State such as publicly owned companies, as well individuals representing the State acting in its capacity (UN Convention on Jurisdictional Immunities of States and Their Property, 2004, Article 2(1)).

[15] In a number of cases, the European Court of Human Rights has affirmed that jurisdiction is «primarily territorial». See, *inter alia*: European Court of Human Rights, *Case of Soering v. the United Kingdom* (Application No. 14038/88), Judgment of 7 July 1989, paragraph 86; *Case of Al-Skeini and others v. the United Kingdom* (Application No. 55721/07), Judgment of 7 July 2011, paragraph 131.

[16] This rule of customary international law has been codified by the European Court of Human Rights (Grand Chamber) in the case *Banković and Others v. Belgium and Others* (Application No. 52207/99), Judgment of 12 December 2001, paragraph 73. The existence of such rule has been reaffirmed in the subsequent case-law of the Court, most recently in the *Case of Hirsi Jamaa and others v. Italy* (Application No. 27765/09), Judgment of 23 February 2012, paragraph 75.

[17] This is the conclusion that seems to be suggested by the European Court of Human Rights in the case *N.D., N.T. v. Spain* (Applications nos. 8675/15 and 8697/15, Judgment of 3 October 2017), i.e. that State parties must observe the standard of protection embedded in the Convention also in their border areas. However, it is not clear why the Court based its assessment on Spanish jurisdiction on the "effective control" theory, when Spain clearly exercised not only *de facto*, but also *de jure* jurisdiction in accordance with the Spanish-Moroccan agreement on the status of Melilla. For comments on this case, see: G. CELLAMARE, *Note in margine alla sentenza della Corte europea dei diritti dell'uomo nell'affare* N.D. e N.T. contro Spagna, in «Studi sull'integrazione europea», Vol. XIII (2018), No. 1, pp. 153-164; L. SALVADEGO, *I respingimenti sommari di*

In general terms, the internal monopoly of authority is exclusive, so that other States cannot carry out activities on the territory of another State without its consent.[18] The exercise of sovereignty is thus a veritable *jus excludendi alios*.[19] As stated by the Permanent Court of Arbitration in the *Island of Palmas* case, «independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state».[20] Therefore, all coercive actions taking place on the territory of another State without its consent are illegal. This is what the United Nations Security Council affirmed with reference to the Nazi criminal Eichmann's arrest by secret agents of Israeli government in Argentinian territory.[21] Even though the Council judged the prosecution of a war criminal desirable and entirely morally justified, it condemned Israel to pay a reparation to Argentina.[22]

External sovereignty means, instead, that the State is able to conclude international agreements. In fact, sovereignty «does not mean freedom from law but freedom within the law»,[23] and the mere existence of international law is considered as an expression of State sovereignty.[24] In fact, also international organizations may enter into international engagements, but their powers are delegated from member States, which can always take them back and even withdraw from the organization. Moreover, treaties stipulated by international organizations are not binding upon member States, unless the contrary is explicitly stated, as in Article 216(2) of the Treaty on the Functioning of the European Union, according to which member States are bound by the agreements concluded by the EU.[25]

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*migranti alle frontiere terrestri nell'*enclave *di Melilla*, in «Diritti Umani e Diritto Internazionale», Vol. 12 (2018), No. 1, pp. 199-206.

[18] J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 121; R. LUZZATTO, I. QUEIROLO, *Sovranità territoriale, "jurisdiction" e regole di immunità*, in S. BARIATTI, S. CARBONE, *et al.*, *Istituzioni di diritto internazionale*, 5th Edition, Torino, Giappichelli Editore, 2016, pp. 183-185.

[19] A. CASSESE, *International Law*, 2nd Edition, Oxford-New York, Oxford University Press, 2005, pp. 51-52; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 80; S. MARCHISIO, *Corso di diritto internazionale*, Torino, Giappichelli Editore, 2014, p. 37.

[20] Permanent Court of Arbitration, *Island of Palmas (United States of America v. the Netherlands)*, Arbitration Award No. 829, 4 April 1928. Extract quoted in J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 121; S. MARCHISIO, *Corso di diritto internazionale*, cit., p. 37.

[21] UNSC Resolution No. 138, 23 June 1960. The Resolution may be consulted online at the following link: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/138(1960) (last accessed on 4 July 2018).

[22] The case is discussed in A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 81; B. CONFORTI, M. IOVANE (ed.) *Diritto Internazionale*, 11th Edition, Napoli, Editoriale Scientifica, 2018, p. 206.

[23] J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 122; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, Recueil des Cours de l'Académie de Droit International de La Haye, Vol. 365, 2013, p. 93.

[24] L. WILDHABER, *Sovereignty and International Law*, cit., p. 422.

[25] About the personality of international organizations under international law, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 32-33.

Therefore, it can be said that States detain the collective monopoly of the international law-making process.[26]

Such monopoly implies the power not only to conclude international agreements, but also to withdraw from them. A State is allowed, for instance, to leave an international organization, since most treaties include express denunciation clauses that authorize States to exit a treaty regime by simply declaring their intention to do so.[27] When, instead, a treaty is silent on the issue, there is no implied presumption of unilateral withdrawal, unless «a) it is established that the parties intended to admit the possibility of denunciation or withdrawal, or b) right of denunciation or withdrawal may be implied by the nature of the treaty».[28] States' right to treaty denunciation is thus limited, so as to guarantee the stability of international relations based on the principle *pacta sunt servanda*.[29] This does not undermine, however, the monopoly of the international law-making process detained by States, which also enjoy the prerogative of unilateral modification of treaties by means of reservations, even though with the limit of respecting the object and purpose of the treaty.[30]

In conclusion, sovereignty is the founding concept of contemporary international society. However, during the last decades the legal discourse focused on alternative forms of representation such as NGOs and transnational networks, with a particular attention to the role of individuals. Only recently the international law literature has given new centrality to the State.[31] This latter is now regarded not only as the primary actor of international relations, but also as «a repository of ideals for the international system that have been most fully theorised, critiqued and revised and have come closest to being realised in the context of domestic states».[32] An instance of a theory which reintroduced the paradigm of the State is global constitutionalism, which proposes the application of constitutional principles in the

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[26] The expression "monopoly of process" is used by Professor Crawford when discussing the meaning of sovereignty. See J. CRAWFORD, *Sovereignty as a legal value,* cit., p. 122.

[27] L.R. HELFER, *Treaty Exit and Intra-Branch Conflict at the Interface of International and Domestic Law*, in CURTIS A. BRADLEY (Editor), *The Oxford Handbook of Comparative Foreign Relations Law*, Oxford, Oxford University Press, forthcoming, p. 3, available online at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6468&context=faculty_scholarship (last accessed on 28 February 2019).

[28] Vienna Convention on the Law of Treaties, 1969, Article 56(1).

[29] In the sense that the presumption against unilateral withdrawal protects the stability of international relations, on the basis of the preparatory works of the 1969 Vienna Convention on the Law of Treaties, see: T. CHRISTAKIS, *Article 56*, in O. CORTEN, P. KLEIN (Editors), *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford, Oxford University Press, 2011, pp. 1263-1266.

[30] Vienna Convention on the Law of Treaties, 1969, Article 19(c), commented by: A. PELLET, *Article 19*, in O. CORTEN, P. KLEIN (Editors), *The Vienna Conventions on the Law of Treaties. A Commentary*, cit., p. 405 ss.

[31] For a discussion of this literature, see K. KNOP, *Statehood: territory, people, government*, cit.

[32] *Ivi*, pp. 112-113.

international sphere. Its supporters argue that international law has much to learn from the internal legal systems in terms of rule of law and protection of fundamental rights. From this perspective, the State retains its centrality on the international stage thanks to its engagement in the protection of values common to the international society.

1.2 The prerogatives of statehood

After a description of the content of sovereignty, it is now necessary to give a definition of the entity to which sovereignty belongs, i.e. the State. The mainstream legal theory, shared by the majority of international lawyers and international relations scholars, tackles the issue of statehood from a realist point of view. The State is conceived as a factual entity, based on the control exercised over a certain territory and on the people living thereon. According to the Montevideo Convention on Rights and Duties of States (1933),

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.[33]

The definition given in this convention, *per se* irrelevant due to the low number of State parties, has been confirmed in international jurisprudence. For instance, in the *Deutsche Continental Gas-Gesellschaft* case the competent arbitral tribunal affirmed that «a state does not exist unless it fulfils the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory». [34] The same was stated by the Badinter Arbitration Committee in its opinion No. 1 of 1991 on the dissolution of former Yugoslavia.[35]

The definition territory-people-government is «international law's main device for representing the world»,[36] but, as underlined in literature, it does not correspond perfectly to

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[33] Montevideo Convention on Rights and Duties of States, 1933, Article 1.

[34] German-Polish Mixed Arbitration Tribunal, *Deutsche Continental Gas-Gesellschaft v. Polish State*, Award of 1st August 1929 (1929). The extract is quoted in C. FOCARELLI, *Diritto Internazionale*, cit., p. 36.

[35] The Arbitration Commission chaired by Judge Badinter was set up by the Council of the European Community to provide legal advice to the Conference on Yugoslavia. The text of Opinion No. 1 may be consulted online at: https://tu-dresden.de/gsw/jura/ifve/jfoeffl3/ressourcen/dateien/voelkerrecht_1/skript-vr-b3.pdf?lang=en (last accessed on 13 July 2018). This opinion is quoted in C. FOCARELLI, *Diritto Internazionale*, cit., pp. 36-37.

[36] K. KNOP, *Statehood: territory, people, government*, cit., p. 95.

reality.[37] A first reason is that the jurisdiction exercised by States may extend far beyond national territorial borders. This happens on the basis of the nationality principle. Obviously, although the concept of State theoretically implies a static population, people may travel and live abroad. As a consequence, jurisdiction based on nationality often overlaps with that of the territorial State.[38] An outdated example of non-territorial jurisdiction which even used to replace the jurisdiction of the territorial State is the regime of capitulations, according to which disputes among citizens from Western countries traveling or living in China, Japan, Persia and the Ottoman Empire – considered unreliable for their administration of justice – could be adjudicated by the consul of nationality of the defendant. [39]

Another case that does not fit in the territory-people-government definition is that of colonies and occupied territories. In fact, the occupying State usually governs the territory but does not acquire it. This is the case of Palestinian territories occupied by Israel, not recognised as belonging to the occupying State due to Palestinian people's right to self-determination.[40] The same is true for the Turkish Republic of Northern Cyprus, over which, as stated by the European Court of Human Rights in the case *Loizidou v. Turkey*, it is Turkey that exercises jurisdiction within the meaning of Article 1 of the European Convention on Human Rights.[41] Therefore, the government exercising jurisdiction over a certain territory may not necessarily own it.

Despite its inaccuracy, the working definition of statehood given in the Montevideo Convention is generally accepted by international law scholarship, but with some additions. A government, a people and a territory are not sufficient for a State to be holder of rights and duties under international law: further requirements are the government's *independence* and *effectiveness*.[42] A State is independent when its legal system does not derive its force from another State. Therefore, puppet regimes – such as the Republic of Salò in Italy during Nazi occupation, or the aforementioned Turkish-Cypriot Republic – are excluded from the *status* of subjects of international law. The same is true for member States of federations, as they are

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[37] *Ibidem*.
[38] *Ivi*, p. 97.
[39] On the regime of capitulations, see: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale,* cit., pp. 40-42, 52; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 206-207.
[40] K. KNOP, *Statehood: territory, people, government*, cit., pp. 97-100.
[41] European Court of Human Rights (Grand Chamber), *Case of Loizidou v. Turkey* (Application No. 15318/89), Judgment of 18 December 1996. The case is discussed in B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 19.
[42] About the State as a subject of international law, see: A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., pp. 66-71; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 13-22; C. FOCARELLI, *Diritto Internazionale*, cit., pp. 36-47.

subjected to the supreme authority of the federal government. As stated by judge Anzilotti in his individual opinion in the case *Austro-German Customs Régime*,

> Independence […] is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.[43]

Government's independence is thus a constitutive element of statehood, as well as a fundamental requirement for a State to be holder of rights and duties under international law.

Effectiveness may be defined, instead, as the capacity of a State to make its judgments, laws and coercive acts obeyed, i.e. the capability to protect the goods and persons under its jurisdiction from violence.[44] Because of lack of effective control, governments in exile such as those of many European countries during WWII cannot be regarded as having full legal personality under international law.[45] Another case of doubtful subjectivity is that of collapsed States like Somalia, whose government is unable to effectively exercise jurisdiction over national territory. Although States within this category are unable to carry out even basic government functions, the contemporary international community normally supports them.[46] The reason is that, nowadays, sovereignty is regarded as a value that needs to be protected.[47]

1.3 The protection of sovereignty

The oldest principle protecting sovereignty is the equality of States, a natural corollary of State sovereignty. Indeed, States can exercise supreme authority over the people and territory under their jurisdiction only if they are recognized as equals to other States before the law: if a political entity is subordinate to another one, it is not independent, and as a consequence not

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[43] Permanent Court of International Justice, *Customs Regime between Germany and Austria*, Advisory Opinion of 5 September 1931, No. 41, paragraph 81.

[44] This definition of effectiveness may be found in C. FOCARELLI, *Diritto Internazionale*, cit., p.42.

[45] V. CANNIZZARO, *Diritto Internazionale*, 2nd Edition, Torino, Giappichelli Editore, 2014, p. 297; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 67-68.

[46] V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 300-302; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 71; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 16.

[47] As underlined by Focarelli, «the rules of international law protecting sovereignty exist in the interest of humankind, no less than any others, in so far as they are aimed at preventing chaos». See C. FOCARELLI, *International Law*, cit., p. 109.

sovereign. Emmeric de Vattel (1714-1767), one of the first jurists to systematize the *droit des gens* of his times, described the equality of States as follows:

> Sovereign states are to be considered as so many free persons living together in the State of nature, that is to say, without a common civil law or common institutions; in such situations they are "naturally equal", and inequality of power does not affect this equality; "[a] a dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom"[48].[49]

Clearly, what matters here is formal equality, not equality in terms of size or power. According to the classic doctrine of international law, the sovereign equality of States, expressed in the Latin formula *par in parem non habet judicium*, is at the very foundation of another set of norms aimed at protecting sovereignty: State immunity rules,[50] whose discussion is postponed to the second chapter of this work.

It is important to underline a difference between our times and the epoch Vattel wrote his *Droit des Gens*: at least until World War I, sovereignty was protected only as long as it lasted. In fact, extinction of the State or reduction of its territory following a war or peace treaty was both very common and admitted in international law.[51] In contrast, since 1945 «statehood is a protected *status* under international law, and to this extent sovereignty once achieved is entrenched».[52] In particular, territorial integrity is a legal value of the international society embedded even in the founding instrument of the United Nations, which at Article 2(4) reads as follows:

> All Members shall refrain in international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[53]

The use of international force is thus prohibited, with the exceptions of self-defence (Article 51 of the United Nations Charter) and measures of collective defence that may be taken by the

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[48] E. VATTEL, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, reprinted, Indianapolis, Liberty Fund, 2008. The extract is quoted in J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 117.

[49] J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 117.

[50] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 133-135; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 269-270. Further bibliography will be provided in the second chapter of this work.

[51] J. CRAWFORD, *Sovereignty as a legal value*, cit., p. 119.

[52] *Ivi*, p. 120.

[53] Charter of the United Nations, 1945, Article 2(4).

UN Security Council under Chapter VII of the Charter. Moreover, customary international law obliges States to deny extra-territorial effects to the acts of government issued in an illegally acquired territory, for instance through aggression or in violation of the principle of peoples' self-determination.[54]

The prohibition of the threat or use of force may be seen as a specification of the more general principle of non-interference in the internal and external affairs of other States, which is a rule of customary international law. Therefore, military support to a rebel group – not recognized by the international community as a national liberation movement – in another State constitutes a breach of both the principle of non-intervention and of prohibition of the use of force, as decided by the International Court of Justice in the case *Military and Paramilitary Activities in and against Nicaragua.* [55]

Besides violence, other means such as economic pressure may seriously impact on the internal and external policies of a State, but in these cases it is difficult to distinguish between mere exercise of influence from illicit intervention in the affairs of other States. On this issue, the International Court of Justice held in the mentioned case *Military and Paramilitary Activities* that the interruption of a development aid programme or the prohibition of imports from a certain State does not qualify as an illicit act under international law.[56] Nevertheless, according to some authors such economic measures violate the principle of non-intervention when they are adopted all at the same time, not as a reaction to a breach of international law, but with the only purpose to modify the conduct of the addressed State.[57]

The territorial integrity of States is protected also by the prohibition of secession. Exceptions to this principle are allowed if the peoples struggling for secession enjoy the right to self-determination under international law, but this is the case only of three categories: the peoples subjected to foreign occupation, to racist regimes or to colonial subjugation.[58] However, according to the theory of *remedial secession* also minorities concentrated in a

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[54] On this rule of customary international law, see B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 209-210. See also Article 41 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, available on-line at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed on 13 October 2017), commented in: A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., pp. 393-396.

[55] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, paragraph 205.

[56] *Ivi*, paragraph 244.

[57] A. CASSESE, *International Law*, cit., p. 55; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 274. In favour of an extensive interpretation of the term "use of force", so as to include any form of pressure undermining the independence and integrity of a State, see: B. GRANDI, *L'uso della forza nelle relazioni internazionali. Saggi di diritto internazionale*, Milano, Giuffrè Editore, 2018, p. 43 ss. (chapter 2).

[58] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 85.

specific part of the State who are excluded from the social and economic life of their country and whose rights are systematically violated are entitled to secession. This theory, not yet accepted by the generality of international law scholars, was mentioned by the Supreme Court of Canada in his advisory opinion about the lawfulness of secession of Quebec, where it stated that Quebecers had no right to secession because they were not discriminated against and fully enjoyed economic, political and social rights in Canada. [59]

The possibility of a secession of last resort, even if not firmly established in international law, represents a mitigation of the principle of effectiveness in favour of legitimacy.[60] Other instances of such mitigation are the agreements between the State and the seceding region, as in the case of the independence of South Sudan from Sudan, obtained after a successful referendum accepted by Khartoum. In more general terms, it can be said that the protection and the same content of sovereignty oscillates between effectiveness and legitimacy, between pluralism and universal values. This inherent contradiction will be discussed in the next section of this chapter.

1.4 Sovereignty between pluralism and universal values

The classic definition of sovereignty under international law is value-neutral. As already illustrated in this first chapter, the internal distribution of power is irrelevant for a State to be sovereign, since there is no general requirement for democracy under international law. Pluralism, i.e. respect for diversity, is a fundamental feature of the international legal system. Classic international law, based on this definition of sovereignty, thus sets minimum standards for peaceful coexistence among States, rather than common objectives.[61] This is why some scholars prefer the expression "international society" – the concept of "society"

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[59] Supreme Court of Canada, *Reference re Secession of Quebec*, Advisory Opinion of 20th August 1998, 2 S.C.R. 217 (1998).

[60] In this sense, see: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 85; A. TANCREDI, *State Sovereignty: Balancing Effectiveness and Legality/Legitimacy*, in R. PISILLO MAZZESCHI, P. DE SENA (eds.), *Global Justice, Human Rights and the Modernization of International Law*, Berlin/Heidelberg, Springer, 2018, pp. 17-38. Tancredi argues that the remedial secession theory, albeit not corresponding to current international law, may be a factor of legitimacy (but not of legality) for the insurgents controlling the seceding region (p. 23).

[61] M. IOVANE, *Conflicts Between State-Centred and Human-Centred International Norms*, in R. PISILLO MAZZESCHI, P. DE SENA (editors), *Global Justice, Human Rights and the Modernization of International Law*, cit., p. 207; L. WILDHABER, *Sovereignty and International Law*, cit., p. 436.

implying that its members act mainly on the basis of self-interest – rather than "international community" sharing common values.[62]

However, the neutrality of international law with regard to values is not so firmly established in international law literature.[63] In particular, the first jurists who systematized the international norms of their times were clearly influenced by natural law thinking.[64] The same concept of *droit des gens* was referred more to inter-individual relations than to abstract and unitary entities such as States, and implied considerations of humanity. Grotius, in his *De Jure Belli ac Pacis* (1625), regarded the supreme power of the State as being limited by natural law and the law of nations. Also de Vattel adopted a humanistic point of view: his *Droit des Gens* (1758) is based on fundamental concepts such as humanity, popular sovereignty, equality and liberty. In his view, sovereignty was not absolute, but existed only for purpose of common good, in his own words «pour le salut e l'avantage de la société».[65] Along the same lines, Kant stressed the features of solidarity within the international legal system, governed by what he defined *jus cosmopoliticum*.[66]

Between the XIX and early XX centuries, natural law thinking was progressively abandoned in favour of "legal positivism", whose objective was to draw a dividing line between positive law and natural law based on human rationality.[67] However, during the 1950s scholars such as Lauterpacht underlined the importance of natural law, although they were conscious that it could not be taken as an alternative for positive international law stemming from States' will, and regarded human rights as «superior to the law of the sovereign State».[68] In Lauterpacht's view,

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[62] A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., p. 35. The distinction between the two concepts belongs to Ferdinand Tönnies (1935). For an assessment of the concept of "international community" and its feasibility in the contemporary international arena, see: P.-M.- DUPUY, *From a Community of States Towards a Universal Community?*, in R. PISILLO MAZZESCHI, P. DE SENA (editors), *Global Justice, Human Rights and the Modernization of International Law*, cit., pp. 47-66.

[63] In this sense, see: M. VEC, *Sources of International Law in the Nineteenth-century European Tradition: the Myth of Positivism*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., pp. 121-145.

[64] For a brief account of natural law thinking in international law, see: S. MARCHISIO, *Corso di diritto internazionale*, cit, pp. 21-23.

[65] Extract quoted in L. WILDHABER, *Sovereignty and International Law*, cit., p. 430.

[66] I. KANT, *Perpetual Peace. A Philosophical Sketch*, 1795. The text is available online (translated in Italian) at: http://btfp.sp.unipi.it/dida/kant_7/ar01s10.xhtml (last accessed on 26 October 2017). About the Kantian model of international society, see A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., p. 35.

[67] Scholars like H. Kelsen, H. Triepel and D. Anzilotti, whose theories will be discussed later in this chapter, adhered to "legal positivism". For a definition of "legal positivism", see: S. MARCHISIO, *Corso di diritto internazionale*, cit., pp.23-25.

[68] H. LAUTERPACHT, *International Law and Human Rights*, London, Stevens & Sons Limited, 1950, p. 70.

> Even after human rights and freedoms have become part of the positive fundamental law of mankind, the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international.[69]

Therefore, part of the doctrine deemed natural law to represent a source of validity for positive international law.

As for the practice of international law, references to humanity reappeared at the end of the 19th century with the first conventions on the laws of armed conflict. In particular, the Preamble of the 1899 Hague Convention on the Laws and Customs of War on Land (II) included the well-known "Marten's clause", adopted on the Russian delegate's proposal:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, *from the laws of humanity and the requirements of the public conscience*.[70]

Considerations of humanity also inspired the emergence, after World War II, of the categories of *jus cogens* [71] and obligations *erga omnes*,[72] whose necessity had been supported by jurists of the natural law school like de Vattel and von Martens.[73] Moreover, the *domaine réservé* traditionally accorded to States, which were once free to keep any conduct with respect to their citizens, was considerably eroded by a number of treaties protecting human rights.[74] It

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[69] *Ivi*, p. 74.

[70] Hague Convention on the Laws and Customs of War on Land (II), 1899, Preamble. Italic is my own addition.

[71] The concept of *jus cogens* firstly found recognition in the Vienna Convention on the Law of Treaties, at Articles 53 and 64 respectively. On the effects that the contrast with *jus cogens* rules displays on treaties, see, *inter alia*: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 255 ss.

[72] A reference to the existence of *erga omnes* obligations, binding upon the whole international community, was firstly made by the International Court of Justice in an *obiter dictum*, in the *Barcelona Traction* case. See: International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, paragraphs 33-34.

[73] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 253.

[74] In this sense, see for instance: A. PELLET, *Less is More. International Law of the 21st Century. Law without Faith*, in J. CRAWFORD, S. NOUWEN (ed.), *Select Proceedings of the European Society of International Law*, Oxford, Hart Publishing, 2012, p. 84. In Professor Pellet's view, nowadays the very idea of States' "reserved domain" is not acceptable, because international law has evolved to the extent that it covers every human activity. See also: R. PISILLO MAZZESCHI, *La protezione internazionale dei diritti dell'uomo e il suo impatto sulle concezioni metodologiche della dottrina giuridica internazionalistica*, in «Diritti umani e diritto internazionale», Vol. 8, No. 2 (2014), pp. 275-318.

can thus be maintained that international law has evolved in a value-focused direction,[75] even though the pluralistic model has not yet been (and maybe will not be) surpassed.

In more general terms, the concept of sovereignty is now expanding beyond the traditional limits of effectiveness. A revised concept of sovereignty is proposed in the legal doctrine: as argued by the doctrine of "global constitutionalism", external sovereignty needs to be justified exactly like internal sovereignty, and is legitimized only as long as the sovereign is capable to fulfil human needs, interests and rights.[76] This theorization of the State is not really new, if we take into account the very foundations of sovereignty dating back to modern Europe: according to social contract theories, absolute monarchies were justified at the national level on the basis of their capacity to grant their peoples' welfare.[77] Nowadays, however, the concept of "peoples' welfare" has much expanded to include a set of individual rights and corresponding States' obligations, so that a humanized concept of sovereignty coexists with the classic value-neutral model.

1.5 The State as ruler and/or addressee of rules: the human rights approach

As pointed out earlier in this chapter, States' external sovereignty entails the capacity to enter into international agreements with other States or with international organizations. Under the classic value-neutral model of international law, treaties mostly regulated inter-States relations. International law did not intrude within the domestic sphere of States. The only exceptions in this regard were the traditional limits to the exercise of sovereign authority set out by customary international law, such as the rules on the protection of foreigners. According to the classic model of international law, these latter were not regarded as individuals enjoying human rights, but as property of the foreign sovereign.[78] Therefore, when the State of nationality acted by means of diplomatic protection to protect its citizens

[75] As pointed out by F. Salerno, contemporary international law has a "promotional function" aimed at realizing common objectives. See: F. SALERNO, *Diritto internazionale. Principi e norme*, 5th Edition, Milano, CEDAM-Wolters Kluwer, 2019, pp. 20-21.

[76] In this sense, see: A. PETERS, *Humanity as the A and Ω of Sovereignty*, in «The European Journal of International Law», Vol. 20, No. 3 (2009), pp. 513-544.

[77] C. FOCARELLI, *Diritto Internazionale*, cit., pp. 376-377.

[78] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 131.

mistreated abroad, it did not defend the individuals in themselves, but it reasserted its own rights as offended sovereign.[79]

Nowadays, customary rules on the protection of foreigners coexist with and complement the human rights instruments which have progressively eroded the *domaine réservé* of States.[80] At least until the end of the 19th century, however, individuals were not *per se* addressees of any rule of international law, since States remained for a long time not only the sole international law makers, but also the only subjects to enjoy rights and duties under international law.[81] In fact, citizens were not afforded any form of international protection against their own State;[82] likewise, stateless persons were not taken into account under the international legal regime.[83] This paradigm gradually changed between the end of the 19th century and the aftermath of WWI, when, in parallel with the emergence of the aforementioned rules aimed at the humanization of armed conflicts, States bound themselves to international agreements establishing rules on the protection of minorities[84] and workers' rights.[85]

But it was only after WWII, in light of the horrors perpetrated by authoritarian regimes, that States seriously engaged in the protection of "human rights", meant as belonging to every person in her quality of human, independently from her ethnic origin, religion or nationality. The main rationale behind the first human rights instruments such as the Universal Declaration on Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was precisely to avoid the tragedies of the recent past.[86] The promotion and protection of human

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[79] Diplomatic protection is thus a right of the State. As stated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, «By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law». Permanent Court of International Justice, *Mavrommatis Palestine Concessions (Greece v. Britain)*, Series A, No. 2 (1924), paragraph 21.

[80] The International Court of Justice has recently tried to reconcile general international law on the protection of foreigners, in particular the institution of diplomatic protection, with human rights law in the *Diallo* case. In this sense, see: A. YUSUF, *The International Court of Justice (ICJ) and the Development of Human Rights Law: from Collective Rights to Individual Rights*, in A. DI STEFANO, R. SAPIENZA (Ed.), *La tutela dei diritti umani e il diritto internazionale*, Napoli, Editoriale Scientifica, 2012, pp. 579-580; C. ZANGHÌ, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, 4th Edition, Torino, G. Giappichelli Editore, 2019, p. 23 ss.

[81] C. FOCARELLI, *International Law*, cit., pp. 92-93.

[82] C. FOCARELLI, *Diritto Internazionale*, cit., p. 360.

[83] *Ibidem*.

[84] See, for instance, the 1919 Treaty of Peace Between the Allied and Associated Powers and Bulgaria, and Protocol and Declaration signed at Neuilly-sur-Seine, whose Section IV is specifically devoted to the protection of minorities in Bulgaria.

[85] See, in this respect, ILO Convention No. 29 (1930), also known as the Forced Labour Convention, which is still into force.

[86] This intent clearly emerges in the Preamble of the European Convention, where it is stressed that «the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be

rights were also enlisted among the objectives to be pursued by the newly born organization of the United Nations in connection with the maintenance of world peace.[87] Indeed, human rights protection was regarded not as an end in itself, but as an instrument to realize justice and peace among the nations.[88]

From the maintenance of peace, the focus of the human rights approach gradually shifted to the effective enjoyment of rights for all the persons subjected to the jurisdiction of the territorial State. To this purpose, States bound themselves to a number of human rights treaties which also foresee mechanisms of control, so as to grant a human rights standard common to all the States parties to the conventional regime.[89] Of the outmost importance for the development of international law was the creation of judicial or quasi-judicial bodies with the competence to hear individual complaints filed against States. Natural and legal persons' *locus standi* before international commissions and tribunals is one of the main features of contemporary international law which points to the emergence of the individual as a new subject of international law.[90]

As for the catalogues of rights enshrined in the main existing human rights treaties, it is interesting to notice that they largely correspond to the constitutional charters or bill of rights adopted within States, in particular liberal-democracies. Indeed, national law substantially inspired the content of international human rights law: many principles of law present in the majority of national legal systems were also transposed into international instruments, so that States bound themselves to protect certain categories of rights both at the internal and at the international level. The category of general principles of law as a source of human rights law

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pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms» (Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, paragraph 4).

[87] Charter of the United Nations, Article 1(3). This provision, however, does not contain any definition of "human right" nor a catalogue of rights. Moreover, the Charter safeguarded the *domaine réservé* of States, affirming the incompetence of the organization to intrude into the domestic jurisdiction of States (Article 2(7) of the Charter).

[88] In this sense see, with particular reference to the human rights provisions contained in the UN Charter: C. FOCARELLI, *Diritto Internazionale*, cit., p. 365.

[89] C. FOCARELLI, *Diritto Internazionale*, cit., p. 361.

[90] In this sense, see: V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 321-334; A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., pp. 209-224; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 24-26; C. FOCARELLI, *Diritto Internazionale*, cit., p. 82 ss.; C. FOCARELLI, *International Law*, cit., p. 93 ss. On the individual as a subject of international law, see also: A. PETERS, *Beyond Human Rights. The Legal Status of the Individual in International Law*, Cambridge University Press, 2016. One of the first jurists who supported the legal personality of individuals in international law was Lauterpacht. See: H. LAUTERPACHT, *International Law and Human Rights*, cit., pp. 27-47. Among Italian scholars who still deny the legal personality of the individual under international law, see, instead: S. MARCHISIO, *Corso di diritto internazionale*, Torino, Giappichelli Editore, 2014, pp. 264-292; B. NASCIMBENE, *L'individuo e la tutela internazionale dei diritti umani*, in S. BARIATTI, S. CARBONE *et al.*, *Istituzioni di diritto internazionale*, 5th Edition, Torino, Giappichelli Editore, 2016, pp. 379-434.

thus deserves further attention. The question of the interaction between national legal systems and the international legal order, instead, will be thoroughly dealt with in the second section of this chapter.

1.6 «General principles of law recognized by civilized nations» as a source of human rights law

«General principles of law recognized by civilized nations» are mentioned as a source of international law in the Statute of the Permanent Court of International Justice and its successor, the International Court of Justice.[91] Those principles must be distinguished from principles belonging exclusively to international law, insofar as they stem from domestic law and are thus to be found *in foro domestico*. Principles of this kind reflect principles of justice and of legal logic often derived from Roman law, expressed in Latin formulas such as *ne bis in idem* and *in claris non fit interpretatio*.[92]

Differently from treaties and custom, general principles arise independently from the consent of States.[93] The drafters of the PCIJ Statute decided to introduce a source which did not belong to positive law precisely to allow the international judge to solve disputes on issues not regulated by custom or treaty, thus avoiding a *non liquet*.[94] In other words, general principles of domestic law were designed to fill the gaps in international law, with a subsidiary function with respect to custom and treaties.[95] This was the role they had fulfilled during the 19th century, when arbitrators faced with disputes arising from concession contracts

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[91] Statute of the International Court of Justice, Article 38(c).

[92] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 50.

[93] S. BESSON, *Sources of International Human Rights Law*: *How General is Genera International Law?*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., p. 853. The identification of general principles of law common to most legal systems is left to the international adjudicator by means of a survey of national legal systems.

[94] For further details on the discussion within the Advisory Committee, see: J. D'ASPREMONT, *What Was Not Meant to Be: General Principles of Law as a Source of International Law*, in R. PISILLO MAZZESCHI, P. DE SENA (editors), *Global Justice, Human Rights and the Modernization of International Law*, cit., p. 165; O. SPIERMANN, *History of Article 38 of the Statute of the International Court of Justice: "A Purely Platonic Discussion?",* in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., pp. 170-173.

[95] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 49-50; M. FITZMAURICE, *History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., p. 192.

for the exploitation of natural resources, lacking other applicable international rules, used to make reference to the principles recognized in all major legal systems.[96]

Although general principles of law stemming from national legal orders are nowadays regarded as a well-established source of international law, their position with respect to customary law is not clear.[97] For instance, Conforti theorized general principles as a particular category of custom, whose *diuturnitas* is given by the uniform application of the principle at stake in most national legal orders, whereas the *opinio juris* corresponds to States' belief that the principle is necessarily applicable at the international level because it stems from universal legal reasoning.[98] Others scholars, instead, conceive general principles of law as an autonomous source of international law, to the extent that they are present in all major legal systems – to the exclusion of those States whose practices are universally condemned – and can be transposed into the international realm.[99] In the opinion of this author, however, nothing prevents a general principle of law from becoming a rule of customary law, if it fulfils the necessary requirements of practice and *opinio juris*.[100]

It was observed in literature that general principles of law have played a marginal role in the case law and reasoning of the two World Courts, despite the wording of their Statutes.[101] In more general terms, it is argued that general principles were disregarded in international practice, and that they gradually lost their significance as a source of international law because of the proliferation of treaties.[102] Moreover, by virtue of their subsidiary character, general principles of law have been regarded as a secondary source of international law, hierarchically inferior to custom and treaties.[103] It is worth noticing, however, that in certain legal regimes general principles of law stemming from the national legal orders not only played a very important role, but even acquired the *status* of fundamental principles.

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[96] C. FOCARELLI, *Diritto Internazionale*, cit., p. 121.
[97] M. FITZMAURICE, *History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present*, cit., p. 193.
[98] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 51.
[99] C. FOCARELLI, *Diritto Internazionale*, cit., p. 124.
[100] In this sense, see: M. FITZMAURICE, *History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present*, cit., p. 192.
[101] J. D'ASPREMONT, *What Was Not Meant to Be: General Principles of Law as a Source of International Law*, cit., p. 169; I.B. WUERTH, *Sources of International Law in Domestic Law: Domestic Constitutional Structure and the Sources of International Law*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., p. 1130.
[102] See *supra*, note 97.
[103] *Ivi*, p. 194.

This was the case, in particular, of the principles of law protecting human rights common to the Member States of the European Communities, now European Union, which were recognized by the Court of Justice as a fundamental source of Community law.[104] Even nowadays, fundamental rights «as they result from the constitutional traditions common to the Member States» constitute general principles of EU law.[105] Another example is the field of international criminal law. International criminal tribunals often made reference to principles of law common to all major legal systems, such as the presumption of innocence, the non-retroactivity of criminal law and the accused person's right to appeal,[106] to the extent that they were present in both common law and civil law systems.[107] General principles are also enlisted in the Statute of the International Criminal Court as applicable law, albeit with a subsidiary function.[108]

As apparent from the examples of EU law and international criminal law, general principles of law have proved to be particularly relevant as far as individual rights are concerned. In fact, general principles enshrined in domestic legal systems inspired the catalogue of rights contained in many human rights instruments. As observed in literature, the reference to general principles, as in the *Teheran Consular and Diplomatic Staff* case,[109]

> has explicitly included the reference to the principles enunciated in the 1948 Universal Declaration of Human Rights (UDHR), presumably through their pre-existence or later recognition in domestic bills of rights, thus confirming that UDHR rights are recognized as general principles of international law and have acquired legal validity through that source.[110]

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[104] Court of Justice of the European Union, Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970; Court of Justice of the European Union, Case 4-73, *J. Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities*, Judgment of 14 May 1974. On domestic principles of law common to Member States as a source of European law (and, in more general terms, of international law), see: A. TIZZANO, *Ancora sui rapporti tra corti europee: principi comunitari e c.d. controlimiti costituzionali*, in «Diritto dell'Unione Europea», Vol. 12, No. 3 (2007), pp. 734-744.

[105] Treaty on the European Union, consolidated version, Article 6(3).

[106] On the rights of the accused before international criminal justice, see: F. POCAR, *Human Rights and International Criminal Justice*, in A. DI STEFANO, R. SAPIENZA (Editors), *La tutela dei diritti umani e il diritto internazionale*, cit., pp. 31-49.

[107] C. FOCARELLI, *Diritto Internazionale*, cit., p. 121.

[108] Rome Statute of the International Criminal Court, Article 21(1)(c).

[109] International Court of Justice, *Case Concerning United States Diplomatic And Consular Staff In Tehran* (United States Of America v. Iran), Judgment Of 24 May 1980, paragraph 91.

[110] S. BESSON, *Sources of International Human Rights Law*: *How General is General International Law?*, cit., p. 854. Footnotes are dropped.

General principles protecting human rights *in foro domestico* need not be universally respected to be sources of international law; what matters is that they are recognized in most national legal systems.[111]

It is true, however, that general principles as enshrined in domestic constitutions and interpreted by domestic courts might not perfectly correspond to their counterparts contained in international instruments. An instance in this regard is the right of access to justice: being protected in both national constitutions and international instruments,[112] the right of access to justice can be regarded as belonging to general international law, in particular as a «general principle of law recognized by civilized nations» in the terms of Article 38 of the ICJ Statute.[113] Nonetheless, the scope of the protection afforded to this right might considerably vary on the basis of the court that enforces it, as will be apparent when dealing with the issue of the immunity of States *vis à vis* the individual right of access to justice. Once again, the interactions between the international and national legal orders and the influence that domestic legal systems exercise over the development of international law (and *vice versa*) are at the heart of international law theories and need thus to be further explored.

2. Theories of the State and the international legal order

2.1 General overview

After a short illustration of the content and protection of sovereignty, it is necessary to discuss the relationship between the international and the domestic legal order. Are they part of a general legal system, or rather do they constitute separate regimes? Is there any form of hierarchy between the two? Different answers are possible, depending on the importance given, alternatively, to national constitutions or to international rules.

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[111] *Ibidem*.

[112] A number of human rights treaties protect the right of access to justice, including the International Covenant on Civil and Political Rights (Article 14) and, at the regional level, the European Convention on Human Rights (Article 6), the EU Charter of Fundamental Rights (Article 47), the American Convention on Human Rights (Articles 8 and 25) and the African Charter on Human and Peoples' Rights (Article 7).

[113] In this sense, see: B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 141 ss. On the right of access to justice as a fundamental human right protected under customary international law, see: F. FRANCIONI, *Il diritto di accesso alla giustizia nel diritto internazionale generale*, in F. FRANCIONI (Editor), *Access to Justice as a Human Right*, Oxford, Oxford University Press, 2007, p. 3 ss.

Three main theories tried to clarify the relationship between the international and the municipal legal order: "nationalist monism", according to which there is only one legal system including both national law and international law, where national law prevails; "dualism" or pluralism", whose supporters argue that the international and the domestic legal systems constitute separate legal regimes; and "internationalist monism", which shares with "nationalist monism" the idea according to which international and municipal law constitute a comprehensive legal regime, but maintains that international law must prevail.[114] In order to understand which theory reflects reality in the best way, a presentation of "dualism" and "internationalist monism" will be provided in the next sections of this chapter, whereas it will be now briefly explained why "nationalist monism" will not be taken into consideration.

The theory of "nationalist monism", firstly proposed by Moser (1701-85) and further elaborated by German authors between the XIX and XX centuries, reflected the nationalist and authoritarian ideologies of the time. It was monist in the sense that domestic law was believed to absorb international law, referred to as "external national law".[115] The theory was built on an absolute concept of sovereignty inspired by Hegel's general theory of law, according to which the State was the highest legal and moral instance. No room was left for rules binding upon the State: international law was deemed to be made of guidelines that could be disregarded if in contrast with powerful States' interests,[116] while international relations were considered as being «governed only by a network of free expressions of the States' will».[117] Since it denied the same existence of international law and was mainly aimed at supporting certain ideological positions, "nationalist monism" has been rejected by contemporary legal doctrine as non-scientific,[118] even if it is worth noticing that this theory had always remained marginal. For this reason, "nationalist monism" does not deserve further discussion.

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[114] For an account of the main theoretical approaches to the relationship between the national and the internal legal systems, see: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 319-323; L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, in R. ST. J. MACDONALD, D.M. JOHNSTON (Editors), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, Martinus Nijhoff Publishers, 1983, pp 715-744; G. GAJA, *Dualism – a Review*, in J. E. NIJMAN, A. NOLLKAEMPER, *New Perspectives on the Divide Between National and International Law*, Oxford, Oxford Scholarship, 2007, Chapter 2, pp. 52-62.

[115] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 319.

[116] *Ibidem.*

[117] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 729.

[118] The poor scientific value of "nationalist monism" is pointed out in A. CASSESE, M. FRULLI, (ed.), *Diritto Internazionale*, cit., p. 322.

2.2 The relationship between domestic and international law from a "dualist" perspective

Legal thinking on the issue of the relationship between national and international law became necessary at the end of the XIX century, when a growing number of conventional rules – in particular, the rules of warfare and humanitarian law – needed to be transposed into the internal legal systems. The question why international law is part of the law of the land became thus relevant.[119] "Dualistic" approaches tried to answer this question taking inspiration from the early practice of countries such as the United Kingdom and the United States, where customary international law as well as treaties ratified by national competent authorities were incorporated into municipal law.[120]

The theory of "dualism", firstly proposed by Triepel (1868-1946) in his famous essay *International Law and Municipal Law* (1899),[121] became dominant in continental Europe,[122] being followed by many scholars such as the Italian Anzilotti (1867-1950)[123] and Perassi (1886-1960).[124] In these authors' view, the international and national legal systems constitute two separate and autonomous regimes, and that is why the theory is called "dualism". Of course, it is apparent that the systems under consideration are not two, but at least as much as the States on earth. Nevertheless, for reasons of clarity and simplification the theory is normally referred to as "dualism" rather than "pluralism".[125] But what makes of international law a set of rules different and independent from internal law?

Firstly, scholars of the "dualist" school maintained that internal and municipal law are fundamentally different because of their legal source. In Triepel's view, every legal norm can be defined as an expression of will able to restrain individual wills, i.e. as a will superior to individual ones.[126] Then, a question arises: what is the supreme will that produces international legal rules? In Triepel's opinion, while municipal law derives from the will of a single State, international law is the product of the common will of two or more States,

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[119] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., pp. 728-729.
[120] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 320; L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., pp. 729-730.
[121] H. TRIEPEL, *Diritto internazionale e diritto interno*, Traduzione italiana con note a cura di G.C. BUZZATI, Torino, Unione tipografico-editrice torinese, 1913.
[122] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 729.
[123] D. ANZILOTTI, *Il diritto internazionale nei giudizi interni*, Bologna, Ditta Nicola Zanichelli, 1905.
[124] T. PERASSI, *Lezioni di diritto internazionale*, Padova, Cedam, 1961, p. 33 ss.
[125] G. GAJA, *Dualism – a Review*, cit., p. 53; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., p. 216.
[126] H. TRIEPEL, *Diritto internazionale e diritto interno*, cit., p. 30.

expressed in treaties [127] or in customary international law.[128] Thus, the State and the international community have different foundations: in Triepel's words,

> […] only the common will of two or more States, blended into unity through consent, can be source of international law. [129]

In a dualist perspective, national law therefore pre-exists international law, and finds its validity exclusively in the constitutional arrangement of the State.[130]

Secondly, according to "dualists" international and municipal law are different because of their content. Indeed, international law disciplines the relations among independent entities, i.e. States, whereas national law regulates relations within an organized juridical society. In contrast with the independence and equality of States,

> […] internal rules regulate relations within societies which have a juridical organization, and thus contain an implicit idea of supremacy and subordination, of an *imperium* exercised by a collective over its associates.[131]

While domestic law regulates the functioning of the State and the relations between this latter and individuals, international law only regulates inter-State relations, thus granting the peaceful coexistence among independent entities.

Thirdly, a consequence of the difference in the foundations and sources of the two legal systems concerns subjects. In the legal doctrine, a person has legal personality only as long as the law establishes for her rights and duties. "Dualists" argued that, since international law regulates relations only among States establishing rights and duties for them, individuals cannot be subjects of international law.[132] It is impossible, in Anzillotti's view, that an individual breaches international law, or is holder of rights under international law, because

> […] a right or duty exists under international law only as long as an international rule confers that right or imposes that duty; if international law norms have been collectively established by States in order to discipline their relations, it follows that the commands and prohibitions contained in an international rule concern only States, and attribute rights and duties only upon States. The

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[127] *Ivi*, p. 54.
[128] *Ivi*, p. 95.
[129] *Ivi*, p. 34. My own translation from Italian.
[130] J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., p. 221.
[131] D. ANZILOTTI, *Il diritto internazionale nei giudizi interni*, cit., p. 42. My own translation from Italian.
[132] *Ivi*, p. 44.

> individual as such escapes from the domain of application of these rules; and it is hence impossible that the individual breaches international obligations, or enjoy rights under international law.[133]

Therefore, although international law aims at protecting mainly individual interests, this does not suffice to make of physical and juridical persons subjects of international law.[134] In Anzilotti's view, even the prohibition of *crimina juris gentium* does not impose duties upon individuals, but rather obliges the State to prohibit and punish a certain conduct, so that the individual committing a crime is breaching internal law, not international law.[135] This argument is still used nowadays to deny the subjectivity of the individual under international law, but only a minority of international lawyers agrees with that.[136]

Another consequence that "dualists" derived from the differences of source and content is that the international and internal legal systems are like circles which may touch each other, but never cross.[137] This means that an internal and an international rule of exactly the same content may exist, but one does not produce the other: a source of international law cannot directly produce internal law,[138] so that it is necessary to have an internal act that incorporates the international rule. Of course, national law is necessary in order to put into practice the precepts of international law.[139] However, as maintained by Anzilotti, there can never be perfect formal identity between an internal norm and international law, but rather analogies of content.[140]

As for the hierarchy between international and national law, scholars of the "dualist" school pointed out that municipal law cannot modify international law, so that a State's unilateral legislation has no influence on international law. In fact, a law can be modified only by the same legislator which has established it, that is, in the case of treaties, the concurrent will of State parties.[141] At the same time, international law cannot modify automatically internal law. Although international law is superior to national law because it is expression of a collective

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[133] *Ibidem.* My own translation from Italian.
[134] H. TRIEPEL, *Diritto internazionale e diritto interno*, cit., p. 22.
[135] D. ANZILOTTI, *Il diritto internazionale nei giudizi interni*, cit., p. 67.
[136] Against the full subjectivity of individuals under international law, see: S. MARCHISIO, *Corso di diritto internazionale*, cit., pp. 264-292; B. NASCIMBENE, *L'individuo e la tutela internazionale dei diritti umani*, in S. BARIATTI, S. CARBONE, et al., *Istituzioni di diritto internazionale*, cit., pp. 379-434.
[137] H. TRIEPEL, *Diritto internazionale e diritto interno*, cit., p. 111.
[138] *Ivi*, p. 125.
[139] D. ANZILOTTI, *Il diritto internazionale nei giudizi interni*, cit., p. 44; H. TRIEPEL, *Diritto internazionale e diritto interno*, cit., p. 268.
[140] D. ANZILOTTI, *Il diritto internazionale nei giudizi interni*, cit., p. 44.
[141] H. TRIEPEL, *Diritto internazionale e diritto interno*, cit., p. 255.

will rather than of the will of a single State, the validity/invalidity of an internal legal act depends only from the internal organs of the State.[142] This means that international law does not invalidate a contrary domestic statute, but rather establishes the consequences and punishment of the act which constitutes a breach of international law.[143] Despite the pre-eminence accorded to international law, it is apparent that the theory of "dualism" was inspired to a moderate nationalism, since an internal act of adaptation was deemed to be necessary for international law to enter into the municipal legal system.[144]

2.3 The relationship between domestic and international law from an "internationalist monist" perspective

The historical foundations of "monism" may be traced back to the end of World War I, after which emerged a new concept of international criminal responsibility of the organs of the State, responsibility which existed independently from transposition of international rules into national law. An instance were Articles 227 and 228 of the Treaty of Versailles, according to which former German Emperor William II and German military officials had to be put on trial for crimes against the laws and customs of war. [145] The former Emperor was never judged by an international tribunal, but the issue of international norms directly affecting individuals had been raised.[146] In the same period, attempts were made to protect minorities under the shield of the newly-born League of Nations, conveying the impression that «the constitutional system of the State itself could be subject to an international authority whose powers were based on international rules».[147]

"Monism" was firstly proposed by the German jurist Kaufmann (1858-1926) and further elaborated by Kelsen (1881-1973) between 1920 and 1934. Also the Austrian Verdross (1890-1980) and the French Scelle (1878-1961) followed a "monist" approach.[148] As the theory found the best and most complete systematization in Kelsen's work, this paragraph will be mostly devoted to his view of the relationship between the international and the

[142] *Ivi*, p. 257-258.
[143] *Ivi*, p. 286; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 320.
[144] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 320.
[145] The text of the Treaty of Versailles may be consulted on-line at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf (last accessed on 3 November 2017).
[146] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 731.
[147] *Ivi*, pp. 732-733.
[148] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 321.

municipal legal order. A quick reference will be subsequently made to Scelle's theory of *dédoublement fonctionnel,* particularly interesting for the role attributed to the organs of the State as enforcers of international law.

Kelsen's theorization of "monism" stems from his pure theory of law, which conceives all norms as part of a cohesive system. It brings different branches of law and legal orders together, denying the existence of an ontological division between the State and its juridical system, between private and public law, between national and international law.[149] In particular, as far as the relationship between international law and national law is concerned, Kelsen affirms the unity of the two. In his opinion, the "dualist" doctrine is ill-founded because, from a purely logical point of view, it is impossible that two different sets of norms are valid at the same time. His pure theory of law, being based on the principle of non-contradiction,[150] does not admit that both norms «A must be» and «A must not be» are binding at the same time.[151] Hence, international and national law must be part of the same set of norms.

Before going into the very content of "monism", it necessary to tackle another fundamental principle of Kelsen's pure theory of law. Kelsen conceives a legal system as made by laws which are produced through a superior norm in which they find their validity. Such validity is only formal and independent from the content of the law, as required by "normative positivism". The starting point of the productive concatenation on which the legal system is based is a fundamental norm (*Grundnorm*), which is not established, but rather assumed or taken as given.[152] The content of the fundamental norm depends on how the relationship between national and international law is shaped.

In Kelsen's view, two "monist" theorizations of the relations between the internal and the international legal systems are possible: a State-centred view, which corresponds to the theory of "nationalist monism" criticized earlier in this work, and an internationalist approach. In Kelsen's opinion, both are sound theories. The choice between the two is eminently political: those in favour of autocracy normally prefer the first approach, while the supporters of

[149] M.G. LOSANO, *Saggio introduttivo*, in H. KELSEN, *La dottrina pura del diritto*, Traduzione a cura di M.G. LOSANO, Torino, Giulio Einaudi Editore, 1966, pp. XXVIII-XXXV.
[150] H. KELSEN, *La dottrina pura del diritto*, cit., p. 217 ss.
[151] *Ivi*, p. 361.
[152] *Ivi*, p. 245.

democracy tend to choose the second one.[153] Kelsen clearly was among these latter, as his legal thinking was based on the values of internationalism and pacifism.[154]

If international law is conceived as part of internal law, its validity depends on the validity of the internal legal system, so that the *Grundnorm* from which both municipal and international law – this latter regarded as "external public law" – derive is the national original constitution.[155] On the contrary, if it is assumed that international law is superior to national law, as according to "internationalist monism", national norms find their validity in international law, whose *Grundnorm* corresponds to the maxim *consuetudo est servanda*. Municipal legal systems may thus be regarded as

> […] partial juridical systems delegated by international law, subordinated to it and established by international law within a world legal order: their functioning parallel in space and subsequent in time is granted precisely by international law.[156]

From the point of view of the application of international law within the internal legal systems, the assumed superiority of international law over municipal law has two main consequences. Firstly, as international and national norms are part of the same legal system, internal adaptation is not necessary from the point of view of international law, so that national tribunals can directly apply international law even without an internal act of incorporation.[157] Secondly, international law prevails over national law in case of contrast. However, in Kelsen's view such contrast is illusory, like the contrast between a law and its violation: the internal norm contrary to the obligations binding upon the State qualifies as an illicit act under international law, but cannot be invalidated by international law.[158] Starting from different premises, "dualism" and "monism" arrive thus to the same conclusion.

Another relevant aspect of Kelsen's theory concerns the subjects of international law. According to his pure theory of law, the purpose of a norm is to influence the behaviour of its addressee, who is free to choose between compliance or breach. The only entities capable of voluntary determination are human beings: in fact, the will of a juridical person is composed by the wills of the individuals who act on its behalf.[159] This is true also for the State: in other

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[153] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 736.
[154] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 321.
[155] On the State-centred perspective, see: H. KELSEN, *La dottrina pura del diritto*, cit., pp. 365-368; p. 372.
[156] *Ivi*, p. 369. My own translation from Italian.
[157] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 321; G. GAJA, *Dualism – a Review*, cit., p. 59.
[158] H. KELSEN, *La dottrina pura del diritto*, cit., pp. 362-364.
[159] L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 736.

words, «one speaks of the State as an international person only for practical purposes, as such person in fact does not exist».[160] The only juridical persons, both in national and international law, are individuals.[161]

The "monist" approach was followed, among the others, by Scelle, who shared with Kelsen the idea both of a hierarchy between the international and the national legal order and of the legal personality of the individual under international law. However, the theory of *dédoublement fonctionnel* described in his book *Manuel de droit international public* (1948)[162] was much different from Kelsen's pure theory of law. Firstly, Scelle justified the prevalence of international law over municipal law on the basis that, without this hierarchy, international law would be reduced to no more than some principles of ethics. Secondly, in his opinion subjects of international law are State officials or the *gouvernants*, not individuals in general.[163]

State officials exercise, in Scelle's view, a fundamental role for the international legal system, whose existence depends on its capability to fulfil the law-making, adjudicative and enforcement functions. In absence of functioning international institutions, internal agents play a double role:

> […] they act as state organs whenever they operate within the national legal system; they act *qua* international agents when they operate within the international legal system. Thus, when the head of state or the state legislature take part in the formation of a law-making treaty, they act as international law-making bodies; by the same token, any time a domestic court deals with a conflict of law question, it acts *qua* an international judicial body; similarly, any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they act as international enforcement agencies ("agents exécutifs internationaux").[164]

The unity of international and municipal law is thus a consequence of the role played by internal agents, i.e. of the delegation of powers from the international to the municipal legal order.[165]

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[160] *Ibidem*.
[161] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 321.
[162] G. SCELLE, *Manuel de Droit International Public*, Paris, Domat-Montchrestien, 1948.
[163] Scelle's theory of *dédoublement fonctionnel* is discussed and summarized in A. CASSESE, *Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law*, in «European Journal of International Law», No. 1 (1990), pp. 210-231.
[164] *Ivi*, pp. 212-213.
[165] The expression "delegation of powers" is used by L. FERRARI BRAVO, *International and Municipal Law: The Complementarity of Legal Systems*, cit., p. 736.

Scelle's theory of *dédoublement fonctionnel* had the merit to underline the necessary interaction that takes place between the international and the national realms,[166] overlooked under the pure "monist" paradigm. Moreover, he pointed out that the international community tends to be made of rulers, rather than of political communities. This is why he advocated an individual-focused shift in the international legal doctrine, hence breaking the dominant "legal positivism" paradigm with a value-oriented proposal.[167]

2.4 A critical appraisal of "dualism" and "internationalist monism"

"Dualism" and "internationalist monism" outline two opposed views of the relationship between the international and the internal legal order. While the first theory justifies the separation and independence between legal systems on the basis of their different source, content and subjects, the second one denies the same existence of those differences, affirming the essential unity of international and municipal law. But which theory – if any – reflects reality most accurately? At least certain aspects of the theory of "monism", progressive and even utopian at the times it was formulated,[168] have found confirmation in reality. This is the case of the legal personality of the individual under international law as well as of the content of the law.

As for the first, the strict distinction proposed by "dualists" between subjects of international law and legal persons in municipal law has been surpassed: nowadays, the majority of international lawyers agree on the legal personality of the individual under international law.[169] Not only a number of treaties confer rights directly upon individuals, as recognized by the International Court of Justice in the *LaGrand* case[170] with reference to Article 36(b) of the Vienna Convention on Consular Relations,[171] but, as underlined earlier in this chapters, individuals can also bring cases before competent international courts for alleged violations of their rights under special regimes such as the European Convention on Human Rights. At the same time, the emergence of the concept of international criminal responsibility of the

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[166] J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., pp. 216-217.
[167] A. CASSESE, *Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law*, p. 216.
[168] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 322.
[169] See *supra*, note 90.
[170] International Court of Justice, *LaGrand* Case (Germany v. United states of America), Judgment of 27 June 2001, paragraph 77. See also G. GAJA , *Dualism – a Review*, cit., p. 55.
[171] Vienna Convention on Consular Relations, 1963, Article 36(b).

individual made clear that this latter is holder both of rights and duties stemming from international law.[172]

Another aspect which makes of "dualism", as formulated by Triepel and Anzilotti, an obsolete theory concerns the content of international law. In contrast to what affirmed by scholars of the "dualist" school, nowadays international law does not constitute anymore a set of norms rigidly separated from internal law, regulating only inter-State relations. On the contrary, as already pointed out earlier in this chapter, the *domain réservé* of States has been considerably eroded by a number of conventional norms which regulate the conduct of States at the *internal* level. Moreover, general principles of law recognized *in foro domestico*, especially those protecting human rights, are a relevant source of international law. As observed in literature, also the emergence of values common to the international community leads "beyond the divide" between national and international law.[173] Kelsen's assumption of unity of international and national law thus seems to have been realized, at least from the point of view of content.

At the same time, "dualism" has the merit to stress the concrete problem of adaptation of internal law to international law, deemed to be irrelevant by "monists". While admitting the hierarchical superiority of international law over municipal law, "dualists" underline the necessity of an internal act of incorporation for international law to become operative within municipal legal systems. In fact, if internal law is irrelevant from an international law perspective, as established in the law of treaties and of State responsibility,[174] also the contrary is true: international law is irrelevant for the municipal legal system until it is not incorporated through an internal act. If the ultimate word about the incorporation of international law belongs to national instances, as stated by many national courts, the two regimes seem indeed to be separate. In other words, the principle of supremacy of international law

[172] In this sense, see *supra*, note 90.

[173] J. NIJMAN, A. NOLLKAEMPER, *Beyond the Divide*, in in J. E. NIJMAN, A. NOLLKAEMPER (Editors), *New Perspectives on the Divide Between National and International Law*, Oxford, Oxford Scholarship, 2007, pp. 342-348.

[174] The principle of irrelevance of domestic law as a justification for the commission of an illicit act, firstly asserted by the Permanent Court of International Justice in the case *Treatment of Polish Nationals*, is protected also under Article 27 of the Vienna Convention on the Law of Treaties and Article 32 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

> […] does not, by its own force, make international law supreme in the domestic legal order, at least not in the same manner as European law has relatively successfully claimed supremacy over, and forced itself into, domestic law.[175]

In conclusion, it is worth underlining the fact that, despite the adherence to "legal positivism" made by the main scholars of the two schools, both "dualism" and "internationalist monism" reflect considerations of value. The first upholds the idea that national law is supreme and cannot be trumped by international law, while the second one «tends to assume the (moral) supremacy of international law rather than that of the State» and emphasizes the role of the individual.[176] The monist outlook has inspired the development of both international and national law, especially on human rights issues.[177] However, nowadays the "dualist" model of international relations is more attractive for at least two reasons: firstly, because international norms are not necessarily well applied and interpreted at the international level, so that national courts may play an important role in the defence of internationally shared values. As in Scelle's theory of *dédoublement fonctionnel*, domestic courts could act as agencies of the international community,[178] or, in other words, as the "gate-keepers" of international law.[179] Secondly, a "dualist" paradigm might be preferred because «from a democratic perspective dualism offers a larger degree of representation».[180] Due to this evolution in the "monism"-"dualism" debate, the choice between the two has become one of value.

3. The application of international law within domestic legal systems

3.1 The problem of adaptation to international law

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[175] A. NOLLKAEMPER, *Rethinking Supremacy of International Law*, in «Zeitschrift für öffentliches Recht», Vol. 65, No. 1 (2010), p. 68.
[176] J. NIJMAN, A. NOLLKAEMPER, *Beyond the Divide*, cit., p. 356.
[177] *Ibidem.*
[178] In this sense, see: G. CATALDI, *Immunités juridictionnelles des États étrangers et droit de l'homme: quel équilibre entre les valeurs fondamentales de l'ordre national et le droit international coutumier?*, in J. CRAWFORD, A.G. KOROMA, S. MAHMOUDI, A. PELLET (Editors), *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz*, Leiden-Boston, Brill/Nijhoff, 2017, pp. 589-590; A. NOLLKAEMPER, *Conversations among Courts. Domestic and International Adjudicators*, in C. PR. ROMANO, K.J. ALTER, Y. SHANY (Editors), *The Oxford Handbook of International Adjudication*, Oxford, Oxford University Press, 2014, Chapter 24, p. 526.
[179] This expression is used in: A. NOLLKAEMPER, *Rethinking Supremacy of International Law*, cit., p. 84.
[180] J. NIJMAN, A. NOLLKAEMPER, *Beyond the Divide*, cit., p. 356. On these idelogical positions, see: V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 459-462.

As mentioned in the previous paragraph, the theory of "dualism" correctly underlined the importance of domestic incorporation of international law. In fact, every State – even the ones adhering to the paradigm of "internationalist monism" – has to deal with this practical problem. In Triepel's words, «international law is like a field marshal who can achieve his goals only if his generals (in this case, States) issue orders to their subordinates».[181] The necessity to open up legal systems to international rules has become even more urgent since the *corpus* of international law expanded to cover matters which, according to the "classic" model of international law, belonged to the exclusive domain of States. The result is that, nowadays, a number of treaties explicitly require States to adopt adequate implementing legislation. This is the case, for instance, of the Convention on the Prevention and Punishment of the Crime of Genocide (Article 5), as well as of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 4 and 5).[182]

Nevertheless, under international law there is no general prescription on how domestic adaptation to international rules should take place,[183] so that there is substantial anarchy on the issue.[184] In other words, «domestic law, not international law continues to determine the breadth of the influence of international law in the domestic legal order».[185] This is because, from an internationalist perspective, what matters is State's compliance with its international obligations, independently from the legal instruments employed at the national level. In other words, international law sets out only *obligations of result*,[186] leaving States free to choose their preferred solution concerning the domestic incorporation of international law, provided that they respect the international obligations they have entered into. Otherwise, their responsibility for internationally wrongful acts would be engaged.

There are remarkable differences among States as far as their degree of openness to international law is concerned. In this regard, it is worth noticing that it is actually impossible

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[181] Extract quoted in G. BARTOLINI, *A Universal Approach to International Law in Contemporary Constitutions: Does it Exist*, in «Cambridge Journal of International and Comparative Law», No. 3 (2014), p. 1288. The original source is H. TRIEPEL, *Les Rapports entre le droit interne et le droit international*, in «Recueil des courses de l'Académie de la Haye», No. 106.

[182] A more extended list of the treaties requiring States to adopt specific legislation may be found in A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 323-324.

[183] *Ivi*, p. 323.

[184] A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, Napoli, Editoriale Scientifica, 2009, pp. 16-17.

[185] A.L. PAULUS, *The emergence of the International Community and the Divide Between International and Domestic Law*, in J. E. NIJMAN, A. NOLLKAEMPER, *New Perspectives on the Divide Between National and International Law*, Oxford, Oxford Scholarship, 2007, Chapter 9, p. 218.

[186] P. IVALDI, *L'adattamento del diritto interno al diritto internazionale (e dell'Unione europea)*, in S. BARIATTI, S. CARBONE, *et al.*, *Istituzioni di diritto internazionale*, cit., pp. 139-140.

to find an internal legal order which is completely open or closed with respect to international law, nor to come across pure applications of "dualism" or "internationalist monism". In fact, every domestic legal system shows at least a minimum degree of openness to international rules, trying to preserve, at the same time, its autonomy and independence from the international legal order.[187] As pointed out in literature, «classifying a State's constitutional design as either monist or dualist is not so much an exercise in absolute as a matter of degree».[188]

Even though pure paradigms are not to be met in practice, it might nevertheless be useful to build a tentative classification of the different domestic legal systems on the basis of how they concretely deal with international law. In particular, two main factors should be taken into account: the formal procedure employed for adaptation to international law – being it of treaty, customary or judicial nature – and the rank that the newly incorporated rule of international law enjoys within the domestic legal system.[189] The following sections will provide a brief survey on how the problem of adaptation to international law is solved by States, which does not pretend, of course, to be exhaustive.[190] Particular attention will be devoted to the German and Italian legal systems, where the "counter-limits" doctrine was born.

3.2 Formal procedures of incorporation of international law

As far as the procedural factor is concerned, States may choose between "ordinary" or "special" procedures of adaptation to international law.[191] The first kind of procedure entails

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[187] In this sense, see: V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 466-467.

[188] J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., p. 218.

[189] A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., p. 16 ss.; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 323 ss.

[190] Interesting insights on the domestic incorporation of international law, limited to few of the major civil and common law systems, are provided in: A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., p. 30 ss; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., pp. 227-241. For a more exhaustive survey, dealing especially with "young" national constitutions, see: G. BARTOLINI, *A Universal Approach to International Law in Contemporary Constitutions: Does it Exist*, cit., pp. 1287-1320; A. PETERS, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, in «Vienna Journal on International Constitutional Law», Vol. 3, No. 3 (2009), pp. 170-198..

[191] On this distinction, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 340-341; P. IVALDI, *L'adattamento del diritto interno al diritto internazionale (e dell'Unione europea)*, cit., pp. 142-143. Other authors provide different classifications of adaptation procedures. For instance, Ronzitti distinguishes between "formal" and "material" references to international law (see: N. RONZITTI, *Introduzione al diritto internazionale*, 5th Edition, Torino, Giappichelli Editore, 2016, p. 249 ss.), whereas Cassese draws a distinction between "automatic" and "*ad hoc*" procedures of incorporation of internal law,

the integral restatement of the international rule into an internal legal act that cannot be distinguished from other laws and regulations of exclusively domestic content, if not for the *occasio legis* which has generated it.[192] On the contrary, "special" procedures provide for a reference to the relevant international source, which becomes automatically binding within the internal legal system with no need to restate it in a domestic legal act. A special procedure is called "permanent" if it entails the incorporation of a whole category of international norms (for instance, customary law), whereas "*ad hoc* special" procedures imply the domestic adaptation to a single international instrument or rule.[193]

The choice of "special" procedures points out a higher degree of openness *vis à vis* international law,[194] because a direct link is established between the relevant international rule and the domestic legal order. From this perspective, "special" procedures should be preferred to ensure State's compliance with its international obligations, at least in case of self-executing international rules, i.e. norms which do not require further implementing legislation to become enforceable within the domestic legal order. This is because incorporation by means of "special" procedure permits to avoid all the mistakes that could be made by the national legislator during the statute-making process.

Indeed, when "special" procedures of adaptation are adopted, the assessment of the content of international law is carried out by the competent national authority on a case by case basis, so that erroneous applications of international law have an impact only on the case at hand, limiting their adverse effect on State's compliance with its international obligations.[195] Conversely, if the incorporation of international law takes place through "ordinary" procedure, the domestic bodies charged of applying the national statute reproducing international rules cannot make reference to the original source, unless there are doubts concerning its interpretation. As a consequence, domestic authorities cannot refrain from applying the internal law reproducing the relevant international rule, not even if this latter expired or is invalid under the law of treaties.[196]

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the last category being articulated into "normative ad hoc" and "automatic *ad hoc*" procedures (see: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 324-326).

[192] This is the definition provided by Benedetto Conforti. See, for instance: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 341.

[193] *Ibidem*.

[194] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 326; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 341.

[195] *Ibidem.*

[196] V. CANNIZZARO, *Diritto Internazionale*, cit., p. 477 ss.; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 333-335.

In common law countries of "dualist" tradition such as the UK, Australia and South Africa, the process of internal adaptation to international law normally takes place by means of "ordinary" procedure. Treaties do not produce direct effects on the national legal system, where they become binding only after being rewritten and transformed in national statutes enacted by the Parliament.[197] This is true not only for those treaties which would need, in any case, implementing internal legislation to become effective (so-called non self-executing treaties), but for every treaty to which the State is a party. As observed in literature with reference to the UK, «although the law may mirror the terms of the treaty implemented, it is not the treaty itself but the statute that forms part of English law».[198] As for customary law, it is not regarded as being part of common law. Rather, judges may refer to an international custom «to coin in near enough its image a rule of common law applicable in an English court».[199]

In contrast, States adhering – at least partly – to the "internationalist monist" paradigm normally prefer "special" procedures of adaptation to international law. This is the case of civil law countries such as France and the Netherlands. In France, all the international treaties ratified or approved by the State are automatically applicable as soon as they are published, in accordance with Article 53 and 55 of the Constitution.[200] A similar provision is enshrined in the Dutch Constitution, whose Article 93 prescribes that «provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published».[201]

Nevertheless, "special" procedures are not a prerogative of States with "monist" traditions. For instance, even a common law country such as the United States incorporates international law through a "special" procedure, so that treaties ratified by the Congress become

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[197] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 325.

[198] J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., p. 228.

[199] *Ivi*, p. 230. The original quotation is by Roger O'Kefee.

[200] Article 53 reads as follows: «Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'État, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi. Ils ne prennent effet qu'après avoir été ratifiés ou approuvés […]», whereas Article 55 establishes that «Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.» Both provisions may be consulted online at: http://www.assemblee-nationale.fr/connaissance/constitution.asp#titre_6 (last accessed on 29 May 2018). The example of France is provided in A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 325; V. CANNIZZARO, *Diritto Internazionale*, cit., p. 467; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., pp. 235-236.

[201] Article 93 of the Constitution of the Kingdom of the Netherlands. The text may be consulted online at: https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf (last accessed on 18 June 2018).

immediately a source of federal law, with no need for a national statute which integrally restates the treaty.[202] But not every treaty or rule of international law produces direct effects on the internal legal system: in *Medellín v. Texas,*[203] the Supreme Court denied not only the binding character of the judgments rendered by the International Court of Justice, but also the presumption of the self-executing nature of the treaties concluded by the United States. This is a clear example of how the distinction between self-executing and non-self-executing norms may be used in an instrumental way, so as to avoid compliance with international obligations.[204]

Also "dualist" States such as Italy and Germany[205] rely on "special" procedures of adaptation to international law. An example in this regard is Article 10(1) of the Italian Constitution,[206] which makes all the rules of general international law, including both customary international law and general principles, automatically applicable within the domestic legal order.[207] The German Basic Law contains a similar clause at Article 25, which states that «the general rules of public international law constitute an integral part of federal law»[208] and directly create rights and duties for the inhabitants of the country. Moreover, in both legal systems also the adaptation to treaties takes place through a special procedure – in that case, an *ad hoc* one. Treaties requiring the prior approval of the Parliament are

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[202] Article 6(2) of the Constitution of the United States of America. The official text may be consulted online at: https://www.archives.gov/founding-docs/constitution-transcript#toc-article-vi- (last accessed on 29 May 2018). On adaptation to international law within the U.S., see: A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., pp. 50-58; V. CANNIZZARO, *Diritto Internazionale*, cit., p. 467; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., pp. 230-235.

[203] United States Supreme Court, *Medellín v. Texas*, 552 U.S. 491 (2008). On the contrary, Germany had recognized since 2004 that Article 36(b) of the Vienna Convention on Consular Relations created rights for individuals.

[204] In this sense see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 344-348.

[205] Germany is often categorized as a "monist" country because it is a civil law system, where a "special" procedure of incorporation is prescribed for customary international law. In this sense, see: J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., p. 227. In light of the approach taken by German courts towards international law (which shows strong similarities with the Italian one, including the elaboration of the "counter-limits" doctrine), I would classify it as a rather "dualist" State.

[206] Article 10(1) reads as follows: «The Italian legal system conforms to the generally recognised principles of international law». See: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last accessed on 29 May 2018).

[207] On the incorporation of customary international law within the Italian legal system, see, *ex multis*: V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 471-476; B. CONFORTI, M. IOVANE (ed.), *Diritto internazionale*, cit., pp. 351-357; P. IVALDI, *L'adattamento del diritto interno al diritto internazionale (e dell'Unione europea)*, cit., pp. 146-147; 155-156; 159-160.

[208] Article 25 (Primacy of international law) of the German Basic Law reads as follows: «The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory». The official translation in English is available online at: https://www.btg-bestellservice.de/pdf/80201000.pdf (last accessed on 29 May 2018).

incorporated within the internal legal system by means of a legislative act, expressing the parliamentary consent to ratification.[209]

3.3 The rank of international law within domestic legal systems

In order to assess the openness of States *vis à vis* international law, also the rank that incorporated international rules enjoy within domestic legal systems must be taken into account. Compliance with international law is jeopardized when international rules have the same rank as national ordinary legislation, because they can be superseded by subsequent national statutes of opposed content on the basis of the principle *lex posterior derogat priori*. The consequence would be a breach of international law. Conversely, if incorporated international rules enjoy constitutional rank or are covered by national constitutions, they cannot be abrogated by ordinary legislation. What is more, they may constitute a parameter for judging the constitutionality of national laws, so that national legislation found in breach of the State's international obligations may be declared unconstitutional by the competent court.

One would expect that States adhering to the "monist" paradigm attributed a higher rank to international law than "dualist" States, but this is not always the case. For instance, ordinary legislation prevails over general rules of international law not only in "dualist" countries like China and the United Kingdom,[210] but also in "monist" States like France and the Netherlands, where, instead, the supremacy of treaties over national legislation is affirmed in the Constitution.[211] As for the United States of America, both customary international law and treaty law are subordinated to federal legislation. In fact, albeit defined "supreme law of the land" in the Constitution,[212] treaties ratified by the United States prevail over Member States' legislation, but not over federal laws.[213]

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[209] On the incorporation of treaties into the Italian legal order, see, *inter alia*: V. CANNIZZARO, *Diritto Internazionale*, cit., p. 477 ss.; A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 333-335. As for Germany, see: R. WOLFRUM, H. HESTERMEYER, S. VÖNEKY, *The Reception of International Law in the German Legal Order: an Introduction*, in E. DE WET, H. HESTERMEYER, R. WOLFRUM, *The implementation of international law in Germany and South Africa*, Pretoria University Law Press, 2015, Chapter 1 (pp. 2-22).

[210] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 328; A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., pp. 48-59.

[211] Article 55 of the French Constitution (see *supra*, note 196). Article 94 of the Constitution of the Kingdom of the Netherlands provides for the supremacy of international treaties and binding decisions of international organizations over statutory regulations: «Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.».

[212] See *supra*, note 202.

In contrast, in other States of "dualist" tradition the incorporated rules of international law enjoy constitutional rank. As underlined in literature, this is particularly true for States which embraced democracy after having experienced authoritarian regimes and their catastrophic wars, such as Italy and Germany.[214] In these countries, international cooperation and compliance with international law are regarded as constitutional values *per se*, as such in need of special protection. This is clear from Article 11 of the Italian Constitution, which, besides rejecting war, explicitly allows limitations of sovereignty for the purpose of cooperation and encourages participation in international organizations.[215] Also the German Basic Law expresses a clear pacifist intent, insofar as it provides a legal basis for the transfer of sovereign powers to international organizations as well as for membership in systems of collective security «with a view to maintaining peace».[216]

Within the Italian legal system, both customary international law and treaty law enjoy a higher rank than ordinary legislation emanated by the State and the Regions. As already mentioned, general rules of international law enter into the Italian legal system by means of Article 10(1) of the Constitution, thus acquiring constitutional rank.[217] As for treaties, before the constitutional reform of 2001 they enjoyed the same rank as ordinary legislation, with the only exception of conventions on the protection of foreigners, which, according to the interpretation rendered by the Constitutional Court, found a constitutional covering in Article

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[213] Specifically on adaptation to treaties within the U.S. legal system, see: V. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, Milano, Giuffrè Editore, 1991, pp. 28-70; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, cit., pp. 230-232.

[214] On the historical factors influencing States' openness to international law, see: A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., pp. 41-46.

[215] Article 11 reads as follows: «Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends».

[216] Article 24 of the German Basic Law (Transfer of sovereign powers – System of collective security) reads as follows: «(1) The Federation may by a law transfer sovereign powers to international organisations. (1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions. (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration».

[217] The Italian Constitutional Court itself has repeatedly affirmed that the general rules of international law which enter into the Italian legal system by means of Article 10(1) enjoy constitutional rank. The last instance of this jurisprudence is judgment No. 238/2014, paragraph 3.1. In this sense, see: V. CANNIZZARO, *Diritto Internazionale*, cit., p. 473; B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 353 ss.; N. RONZITTI, *Introduzione al diritto internazionale*, cit., p. 253.

10(2).[218] As a consequence, treaty law could be abrogated by national laws on the basis of the principles according to which *lex specialis derogat generalis* and *lex posterior derogat priori*.

A change occurred in 2001, when Constitutional Law No. 3/2001 reforming Part II, Title V of the Constitution introduced at Article 117[219] the obligation to comply with international and EU law as a limit to the legislative power of the Parliament and the Regions.[220] The result is that, nowadays, the international agreements to which Italy is a party are deemed to be "interposed norms".[221] As such, they are subordinated to the Constitution, but at the same time represent a parameter of constitutionality with respect to ordinary legislation, which can be declared unconstitutional by the Consulta if found in breach of Italy's treaty obligations.

As far as Germany is concerned, it is worth noticing that the German Basic Law states not only that general rules of international law «shall be an integral part of federal law»,[222] but also that they take precedence over both federal and Member States' legislation. On the contrary, the rank of ratified treaties is the same of federal acts of Parliament, meaning that the *lex posterior derogat priori* principle applies. However, Germany would breach a treaty to which it is a party only if a subsequent national law cannot be interpreted in conformity with the treaty[223] and if this latter cannot be regarded as *lex specialis*.[224] Still, as affirmed by the German Constitutional Court in a decision rendered in 2015, treaty override by national legislation is allowed under the Basic Law on the basis of the principle of democracy,[225] according to which the German legislator is free to enact new laws, even in breach of treaty

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[218] See: Italian Constitutional Court, Judgment No. 120/1967, 23 November 1967. On this jurisprudence, see, for instance: G. PALMISANO, *Le norme pattizie come parametro di costituzionalità delle leggi: questioni chiarite e questioni aperte a dieci anni dalle sentenze "gemelle"*, in «Osservatorio sulle Fonti», No. 1/2018, p. 2. Article 10(2) of the Constitution reads as follows: «The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence».

[219] Article 117(1) reads as follows: «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

[220] For a concise account of this reform, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 361-362; G. PALMISANO, *Le norme pattizie come parametro di costituzionalità delle leggi: questioni chiarite e questioni aperte a dieci anni dalle sentenze "gemelle"*, cit., pp. 2-4.

[221] My translation from Italian. The original expression is "*parametro interposto*". For a definition see, for instance: R. BIN, G. PITRUZZELLA, *Diritto Costituzionale*, 14th Edition, Torino, Giappichelli Editore, 2013, p. 464.

[222] German Basic Law, Article 25. See *supra*, note 208.

[223] On States' practice of "consistent interpretation", according to which «clashes between domestic constitutional law and international law are reduced to a minimum through consistent interpretation of state constitutions», see: A. PETERS, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, in «Vienna Journal on International Constitutional Law», cit., pp. 177-181. The quotation is taken from p. 177.

[224] R. WOLFRUM, H. HESTERMEYER, S. VÖNEKY, *The Reception of International Law in the German Legal Order: an Introduction*, cit., p. 16.

[225] Bundesverfassungsgericht, Judgment of 15 December 2015, 2BvL 1/12, paragraphs 53-54.

obligations.[226] For this reason and despite the similarities, it can be concluded that the German legal order is less open to international law than the Italian one, where treaty override by contrary national legislation is excluded.

3.4 Degrees of openness to international law

This brief survey on how the problem of adaptation to international law is solved by States is far from being complete. Its aim was simply to provide an overview of the different solutions adopted within few of the major legal systems representing the "internationalist monist" and "dualist" positions. In general terms, "monism" implies the adoption of "special" procedures of adaptation to international law and the attribution of constitutional rank or constitutional covering to the incorporated rules of international law, which, as consequence, prevail over ordinary legislation. On the contrary, "dualist" States – and especially legal systems of common law – are more likely to incorporate international rules by restating them in national statutes that enjoy the same rank as ordinary legislation.

However, as apparent from the previous discussion, the solutions chosen by States are much more diverse. In this regard, it is worth noticing that domestic legal systems adhering to the "dualist" paradigm – and thus insisting on the separation between the internal and the international legal orders – may show a considerable degree of openness *vis à vis* international rules and values, sometimes even greater than countries of "monist" tradition. That is why a surpassing of the traditional distinction between "dualism" and "monism", in favour of a classification of domestic legal systems on the basis of their adherence to a "nationalist" or "internationalist" paradigm, was suggested in literature.[227]

In fact, what distinguishes "dualism" from "internationalist monism" nowadays is not *whether* a domestic legal system should open up to international law, but *to what extent* such openness should be brought. Albeit admitting, in general terms, the supremacy of international law, the "dualist" approach moves from the belief that certain fundamental

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[226] On this decision, see: A. PETERS, *New German Constitutional Court Decision on "Treaty Override": Triepelianism Continued*, 29 February 2016, available online at: https://www.ejiltalk.org/new-german-constitutional-court-decision-on-treaty-override-triepelianism-continued-2/ (last accessed on 18 June 2018).

[227] Alternative classifications ("internationalist" v. "nationalist" ideal-type, "internationalist" v. "constitutionalist" model) were elaborated, respectively, by Antonio Cassese and Enzo Cannizzaro. See: A. CASSESE, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale*, cit., pp. 30-35; V. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, cit., pp. 5-9.

values protected within the domestic legal order cannot be renounced. Following this reasoning, if an international rule is held to be in breach of a national fundamental principle, this latter should prevail. These are the very theoretical foundations of the "counter-limits" doctrine, on which decision No. 238/2014 of the Italian Constitutional Court is based.[228]

4. Restrictions to the domestic incorporation of international law: the "counter-limits" doctrine

4.1 Origins of the doctrine: limitations to sovereignty

The "counter-limits" doctrine is the expression of a dualist approach to international law, entailing a separation between international and domestic law. According to this doctrine, the internal mechanism of adaptation to international law is interrupted in the event of international rules deemed to be incompatible with the fundamental principles embedded in the domestic legal order.[229] This means that compliance with a rule of international law is conditional to the respect of national fundamental principles. If this standard is not met, the relevant international rule cannot be applied within the domestic legal system. This leads to State's non-compliance with an international obligation, engaging its responsibility for internationally wrongful acts.

The "counter-limits" doctrine was firstly developed by the German[230] and Italian[231] Constitutional Courts with respect to the process of European integration, with the aim of avoiding compliance with Communities binding instruments deemed to be in violation of the individual rights protected in national constitutions. In particular, the German Bundesverfassungsgericht regarded as insufficient the standard of protection guaranteed at the level of the then European Communities, whose founding instruments did not even mention

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[228] Italian Constitutional Court, Judgment No. 238/2014, 22 October 2014. This judgment will be the main object of analysis of Chapter 4 of this work.

[229] A similar definition is provided in G. CATALDI, *A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law*, cit, p. 41.

[230] Bundesverfassungsgericht, *Solange I* case, Judgment of 29 May 1974, 2 BvL 52/71.

[231] Italian Constitutional Court, Judgment No. 183/1973, 27 December 1973. For a comment on this case, where the Italian Constitutional Court developed for the first time the concept of "counter-limits", see: M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, Giuffrè Editore, 1995, p. 102 ss.; U. DRAETTA, F. BESTAGNO, A. SANTINI, *Elementi di diritto dell'Unione europea. Parte istituzionale. Ordinamento e struttura dell'Unione europea*, 6th Edition, Milano, Giuffrè Francis Lefebvre, 2018, pp. 337-339; U. VILLANI, *I "contro-limiti" nei rapporti tra diritto comunitario e diritto italiano*, in *Studi in onore di Vincenzo Starace*, Volume II, Napoli, Editoriale Scientifica, 2008, p. 1297 ss.

human rights.[232] That is why, in the famous *Solange I* judgment, the same Court stated that it would review EC legislation as long as the European Community lacked a fundamental rights provision approved by the European Parliament, comparable to the one provided for under German Basic Law.[233] This decision was followed by a serious engagement to human rights protection at the level of EC institutions,[234] so that, twelve years later, the Bundesverfassungsgericht could state that it would give up the review of Community legislation as long as an adequate human rights standard was maintained (*Solange II*).[235]

In the Italian case *Frontini* the Constitutional Court was faced with a more general question, having to assess whether the process of supranational integration was compatible with the constitutional organization of the State. In this regard, the Court excluded that the attribution of normative powers to the European Communities was in violation of the Constitution, whose Article 11 explicitly allows limitations of sovereignty «that may be necessary to a world order ensuring peace and justice among the Nations».[236] Nonetheless, the Court made clear that these limitations do not vest international organizations with the power to breach the fundamental principles or inalienable individual rights asserted in the national Constitution.[237] In the event of such violation, the Consulta reserved the right to review the constitutionality of the law providing for adhesion to the responsible organization – in that particular case, the European Economic Community.[238]

As apparent from this early jurisprudence on "counter-limits", the *ratio* of the doctrine is that States' membership into international organizations cannot be pushed so far as to allow breaches of the fundamental principles of the State, especially when the protection of human rights is at stake. The doctrine thus reflects the belief that the State remains the only sovereign subject under international law, as such free to exercise fully again its sovereignty and even

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[232] On human rights protection at the supranational level at the beginning of the process of European integration, see: M. CARTABIA, *Principi inviolabili e integrazione europea*, cit., p. 20 ss., p. 95 ss.; D. TEGA, *La tutela dei diritti fondamentali nell'Unione europea tra Carta di Nizza e costituzioni nazionali: una poltrona per due?*, in L.S. ROSSI, G. DI FEDERICO (a cura di), *L'incidenza del diritto dell'Unione europea sullo studio delle discipline giuridiche*, Napoli, Editoriale Scientifica, 2008, p. 163 ss.

[233] Bundesverfassungsgericht, *Solange I* case, Judgment of 29 May 1974, 2 BvL 52/71, paragraph I.7. For a comment on this judgment and subsequent jurisprudence, see: M. CARTABIA, *Principi inviolabili e integrazione europea*, cit., p. 120 ss.

[234] In this regard, see the Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the ECHR, 5 April 1977, available at: https://www.cvce.eu/content/publication/2005/6/16/9b6086c8-9763-4355-bf66-3699f1d78b79/publishable_en.pdf (last accessed on 14 February 2018).

[235] Bundesverfassungsgericht, *Solange II* case, Judgment of 22 October 1986, 2 BvR 197/83.

[236] Article 11 of the Italian Constitution. See *supra*, note 215. For the reasoning of the Consulta on this Article, see: Italian Constitutional Court, Judgment No. 183/1973, 27 December 1973, paragraph 4.

[237] Italian Constitutional Court, Judgment No. 183/1973, 27 December 1973, paragraph 9.

[238] *Ibidem.*

withdraw from an international organization if this latter acts in contrast with the fundamental principles enshrined in its domestic legal system. However, as suggested by the Italian Constitutional Court in *Frontini*, the "exit option" – implying the review of constitutionality of the law giving execution to the organization's founding treaty – should be taken into account by domestic courts only in *extrema ratio*, whenever the aforementioned contrast between the acts of the organization, from one side, and the State's fundamental principles, including human rights, from the other, is "aberrant".[239]

4.2 Recent revival of "counter-limits" within the framework of EU law

Following the *Frontini* and *Solange I* judgments, also other national courts such as the Spanish Constitutional Court,[240] the French Conseil Constitutionnel[241] and the Constitutional Court of Lithuania[242] engaged in a judicial dialogue with EU institutions, defending the priority of fundamental constitutional principles over EU law. More recently, the Polish Constitutional Court has affirmed its competence to review EU legislation.[243] In all those cases, however, recourse to "counter-limits" was threatened but never applied. The first actual application of the doctrine by a EU Member State with regard to EU law took place only in December 2015, when the German Constitutional Court refused to execute a European Arrest Warrant deemed to be in violation of the individual rights protected under Article 1 GG.[244]

The limited application of the doctrine can be explained on the basis of the great instrument of cooperation available under EU law, that is the preliminary ruling procedure set forth in Article 267 TFEU. Indeed, this procedure provides national courts with a convenient venue to express their views and concerns before the Court of Justice of the European Union,

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[239] *Ibidem.*

[240] Spanish Constitutional Court, Declaration DTC 1/2004, 13 December 2004, Section II, paragraph 3.

[241] Conseil Constitutionnel, Decision No. 2006-540 DC, 27 July 2006, paragraph 19.

[242] Constitutional Court of Lithuania, Case No. 17/02-24/02-06/03-22/04,14 March 2006, Section III, paragraph 9.4. On this and further practice of "counter-limits" in the field of EU law, see: D. PARIS, *Limiting the 'Counter-limits'. National Constitutional Courts and the Scope of the Primacy of EU Law*, in «Italian Journal of Public Law», Vol. 10, No. 2 (2018), pp. 210-217.

[243] Polish Constitutional Court, Judgment of 16th November 2011, No. SK 45/09, OTK ZU 2001/9A/97. For a comment on this case, see: A. KUSTRA, *The judgment of Polish Constitutional Court in case Supronowicz (SK 45/09): the constitutional borrowing of "Solange" formula and its outcomes for the European judicial dialogue*, in «European Journal of Public Matters», No. 1 (2017), pp. 36-50.

[244] Bundesverfassungsgericht, Judgment of 15 December 2015, BVR 2735/14. The Arrest Warrant had been issued by Italian authorities after a trial *in absentia*. For an account of this and other recent applications of the "counter-limits" doctrine, see: R. CALVANO, *La Corte costituzionale e i "Controlimiti" 2.0*, in «federalismi.it – Focus fonti», No. 1 (2016).

establishing a dialogue among jurisdictions. In other words, it helps «defusing the bomb» of «counter-limits».[245] When this instrument is not available, the dialogue among courts may take a more confrontational tone.[246]

Despite its scarce practice, the "counter-limits" doctrine served the purpose of European integration, reminding that this latter had to be achieved also at the level of values.[247] The result is that the fundamental principles of Member States' Constitutions are now part of EU law. The constitutional structure of Member States is protected under the "identity clause" provided for in Article 4(2) TEU, while those fundamental rights common to the constitutional traditions of Member States have officially acquired the *status* of general principles of EU law under Article 6(3) TEU, albeit being already recognized as such in the early jurisprudence of the Court of Justice of the European Union.[248] The CJEU itself has recently admitted, in the preliminary ruling issued in the so-called *Taricco II* case,[249] that Member States' courts are allowed to disregard a EU obligation whose implementation would jeopardize the respect of a principle of law, such as that of non-retroactivity of criminal law, which is of fundamental importance for both the national and the EU legal orders.

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[245] This expression is used in: M. BASSINI, O. POLLICINO, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, in «VerfBlog», 5 December 2017, https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/ (last accessed on 19 March 2018). On the *Taricco* saga as a positive instance of dialogue among courts, see also: U. DRAETTA, F. BESTAGNO, A. SANTINI, *Elementi di diritto dell'Unione europea. Parte istituzionale. Ordinamento e struttura dell'Unione europea*, cit., p. 342.

[246] In this sense, see: M. NISTICÒ, *Taricco II: il* passo indietro *della Corte di giustizia e le prospettive del supposto dialogo tra le Corti*, in «Osservatorio Costituzionale», no. 1/2018, 17 January 2018.

[247] In this sense, see: M. CARTABIA, *Principi inviolabili e integrazione europea*, cit., p. 136 ss. In more general terms, on the practical value of the "counter-limits" doctrine, see: M. LUCIANI, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, in «Rivista AIC (Associazione italiana dei costituzionalisti)», No. 2/2016, 15 Aprile 2016, pp. 1-20.

[248] See *supra*, note 104.

[249] Court of Justice of the European Union, Case C-42/17, *Criminal proceedings against M.A.S. and M.B.*, Judgment of 5 December 2017, on request for a preliminary ruling from the Italian Constitutional Court. For comments on this decision, see, *ex multis*: BASSINI, M., POLLICINO, O., *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, cit.; G. GAJA, *Alternative ai controlimiti rispetto a norme internazionali generali e a norme dell'Unione europea*, in «Rivista di diritto internazionale», No. 4 (2018), p. 1046 ss.; U. DRAETTA, F. BESTAGNO, A. SANTINI, *Elementi di diritto dell'Unione europea. Parte istituzionale. Ordinamento e struttura dell'Unione europea*, cit., pp. 341-342; KRAJEWSKI, M., *'Conditional' Primacy of EU Law and its Deliberative Value: an Imperfect Illustration From Taricco II*, 18 December 2017, http://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/ (last accessed on 19 March 2018); MORI, P., *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri*, in «Osservatorio Europeo», December 2017; NISTICÒ, M., *Taricco II:* il passo indietro *della Corte di giustizia e le prospettive del supposto dialogo tra le Corti*, cit.; REPETTO, G., *Quello che Lussemburgo (non) dice. Note minime su Taricco II*, 21 December 2017, http://www.dirittocomparati.it/quello-che-lussemburgo-non-dice-note-minime-su-taricco-ii/ (last accessed on 19 March 2018); VITALE, G., L'attesa sentenza '*Taricco bis*': brevi riflessioni, in «European Papers», 8 January 2018, pp. 1-14. On the *Taricco* saga from the perspective of judicial dialogue, see also: A. BERNARDI, C. CUPELLI, (Editors), *Il caso* Taricco *e il dialogo tra le corti. L'ordinanza 24/2017 della Corte Costituzionale*, Napoli, Jovene Editore, 2017.

What is more, the Court of Justice of the European Union itself has implicitly, but clearly relied on the "counter-limits" doctrine in order to safeguard a fundamental human right protected under EU law. This is what happened in the *Kadi I* case, where the CJEU found that the EU Regulation implementing the UN Security Council Resolutions on smart sanctions did not ensure effective judicial protection nor an adequate right to defence to the targeted individuals.[250] In particular, the Court held that obligations imposed by an international agreement «cannot have the effect of prejudicing the constitutional principles of the EC Treaty».[251] From this jurisprudence of the Court, it is apparent that the idea according to which fundamental human rights prevail over conflicting international obligations is deeply rooted not only in Member States' legal systems, but also in the EU legal order.

4.3 Developments of the doctrine with respect to treaty law and international custom

Although the "counter-limits" doctrine was born within the borders of the European Communities, Member States' courts extended its scope to other fields of international law. Again, the *ratio* behind this jurisprudence was that domestic openness to international law had, in some cases, to be sacrificed in favour of the protection of other fundamental constitutional principles. The early jurisprudence of the German Bundesverfassungsgericht and the Italian Constitutional Court is particularly relevant in this respect, as both courts have annulled a number of internal legal acts incorporating treaties because found in violation of the individual rights enshrined in the national constitution.

As far as German case-law is concerned, the Constitutional Court has declared the incompatibility between a treaty and the German Basic Law in two cases concerning bilateral agreements on double taxation concluded with Switzerland. In both judgments, issued respectively in 1971 and 1986, the Bundesverfassungsgericht held that the restriction of individual rights imposed by conventional obligations was disproportionate, because it did not

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[250] The Court of Justice of The European Union challenged only indirectly UN Resolutions No. 1267 (1999), No. 1333 (2000), No. 1390 (2002), No. 1452 (2002) imposing targeted sanctions on alleged terrorists linked to Al-Qaeda, annulling Regulation (EU) No. 881/2002 (implementing UN Resolutions) in so far as it did not ensure an adequate judicial protection to the listed individuals. On the restrictive measures that can be adopted within the framework of the European Union, see: U. DRAETTA, F. BESTAGNO, A. SANTINI, *Elementi di diritto dell'Unione europea. Parte istituzionale. Ordinamento e struttura dell'Unione europea*, pp. 376-378.

[251] Court of Justice of the European Union, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 September 2008, paragraph 285. See also the Opinion of Advocate General Maduro delivered on 16 January 2008, at paragraph 24.

pursue the realization of any relevant international value. Therefore, the individual rights enshrined in the German Basic Law took precedence over treaty law.[252]

Italian instances of review of constitutionality of laws executing treaties are, instead, decisions No. 132/1985[253] and No. 210/1986.[254] In the first case, the Italian Constitutional Court annulled the domestic law giving execution to Article 22 of the 1929 Warsaw Convention on International Carriage by Air,[255] which was found in violation of the right to reparation for loss of life protected under Article 2 of the Constitution.[256] The other judgment declared, instead, null and void the law incorporating ILO Convention No. 89, insofar as it prohibited night work for women employed in industry.[257] According to the Consulta, such prohibition amounted to a discrimination within the meaning of Article 3[258] and 37(1) of the Constitution – this latter provision protecting specifically employed women's rights.[259]

Other issues of incompatibility between international law and the Italian Constitution concerned extradition. With decision No. 54/1979,[260] the Consulta annulled the law executing a treaty concluded with France in 1870, insofar as it allowed extradition for crimes punished with death penalty, prohibited under Article 27(3) of the Italian Constitution.[261] The Court later declared contrary to the Constitution the law giving execution to the Italy-USA extradition agreement signed in Rome in 1973, to the extent that it permitted the extradition of fourteen years old minors.[262] In the same vein, judgment No. 223/1996[263] annulled the

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[252] Bundesverfassungsgericht, Judgments of 10 March 1971 and 14 May 1986. On these cases, see: V. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, cit., pp. 71-72.

[253] Italian Constitutional Court, Judgment No. 132/1985, 6 May 1985. This case, together with subsequent jurisprudence of the Italian Constitutional Court, is reported in B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 366.

[254] Italian Constitutional Court, Judgment No. 210/1986, 24 July 1986.

[255] Article 22 sets a limit to the payment of damage.

[256] Article 2 of the Italian Constitution reads as follows: «The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

[257] See, in particular, Article 3 of ILO Convention No. 89.

[258] Article 3 of the Italian Constitution reads as follows: «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country».

[259] Article 37(1) of the Constitution reads as follows: «Working women are entitled to equal rights and, for comparable jobs, equal pay as men. Working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for the mother and child».

[260] Italian Constitutional Court, Judgment No. 54/1979, 21 June 1979.

[261] Article 27(3), amended by Constitutional Amendment Law No. 1 of 2 October 2007, reads as follows: «Death penalty is prohibited».

[262] Italian Constitutional Court, Judgment No. 128/1987, 15 April 1987.

[263] Italian Constitutional Court, Judgment No. 223/1996, 27 June 1996.

internal legal acts[264] that made enforceable Article IX of the 1983 Italy-USA extradition treaty. In fact, the Constitutional Court found that the extradition towards countries where death penalty is legal, even with the concerned State's guarantee that capital punishment will not be applied in the concrete case at hand, is contrary to Articles 2 and 27 of the Constitution, whose combined reading protects the right to life as the first inviolable human right.

As far as adaptation to customary international law is concerned, instead, two *obiter dicta* of the Italian Constitutional Court are particularly relevant. As early as 1979, the Consulta argued that adaptation to general international law could not lead to violations of fundamental principles of the constitutional order, which is based on popular sovereignty and the rigidity of the Constitution (*Russel* case).[265] In this judgment, however, the Court strangely argued that only those rules of general international law which came into existence after the entrance into force of the Constitution may be in contrast with fundamental principles of the internal legal order.[266]The same idea was expanded in the *Baraldini* judgment, where the Court held that «the tendency of the Italian legal order to be open to generally recognized norms of international law and international treaties is limited by the necessity to preserve its identity; thus, first of all, by the values enshrined in the Constitution»,[267] whose core is the protection of fundamental rights.[268] In other words, the Italian Constitutional Court held that not even customary international law, which normally prevails over the Constitution by virtue of the principle *lex specialis derogat generalis*, can trump the fundamental values enshrined in the Constitution.

4.4 "Counter-limits" applied to the European Convention on Human Rights

A treaty regime with respect to which Member States have frequently made recourse to "counter-limits" is the European system of protection of human rights. Although domestic courts are under the obligation not only to comply with the judgments of the ECtHR issued

[264] Article 698(2) of the Code of Civil Procedure and Law no. 22 of 26 May 1984.
[265] Italian Constitutional Court, Judgment No. 48/1979, 18 June 1979, paragraph 3.
[266] In this sense, see: V. CANNIZZARO, *Diritto Internazionale*, cit., pp. 471-476; P. IVALDI, *L'adattamento del diritto interno al diritto internazionale (e dell'Unione europea)*, cit., pp. 161-162.
[267] Italian Constitutional Court, Judgment No. 73/2001, 22 March 2001, paragraph 3.1.
[268] On these *obiter dicta* of the Italian Constitutional Court, with fundamental importance with respect to Italian domestic incorporation of customary international law, see: G. CATALDI, *A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law*, cit., pp. 39-42.

against their State,[269] but also to abide to the interpretation of the European Convention rendered by the Strasbourg Court even when their State is not a party to the dispute,[270] national judges occasionally take their sovereignty back, especially when they believe that the case law of the ECtHR would jeopardise their national standard of protection. Such rejection of the Court's jurisprudence should not be a matter of surprise, bearing in mind the noteworthy devolution of Member States' powers to the Council of Europe and the effectiveness of the monitoring mechanism embedded in the European Convention and its subsequent Protocols.[271]

The German Constitutional Court firstly put forth the possibility to apply the "counter-limits" doctrine to the case law of the ECtHR with respect to the *Görgülü* case.[272] In particular, the Bundesversaffungsgericht maintained that national courts are bound to «take into account» the ECtHR judgments only if they do not restrict the individual rights protected under the national constitution.[273] In the same vein, in the 2007 so called "twin judgments" nos. 348 and 349,[274] the Italian Constitutional Court specified, with reference to the

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[269] States are bound to comply with the judgments of the Court on the basis of Article 46 of the European Convention on Human Rights.

[270] On the basis of the Statute of the Council of Europe and the combined reading of articles 1, 19 and 32 of the European Convention, States are obliged to apply the Convention as interpreted by the Strasbourg Court. This obligation falls upon national judges, which cannot engage in autonomous interpretations of the Convention (in this sense, see: C. CATALDI, *Gli effetti delle sentenze della Corte europea dei diritti umani nel sistema della Convenzione*, in M. FRAGOLA (Editor), *La cooperazione tra corti in Europa nella tutela dei diritti dell'uomo*, Napoli, Editoriale Scientifica, 2012, p. 57 ss.; V. ZAGREBELSKY, R. CHENAL, L. TOMASI, *Manuale dei diritti fondamentali in Europa,* Bologna, Il Mulino, 2016, pp. 52-53). As repeatedly affirmed by the Italian Constitutional Court, it is not for the national judiciary to review the interpretation of the Convention rendered by the ECtHR (Italian Constitutional Court, Judgment of 16 November 2009, No. 311/2009, paragraph 6). Such prohibition ensures the uniform interpretation of the regional human rights instrument across Member States. For comments on this stance taken by the Italian Constitutional Court, see: E. LAMARQUE, *Gli effetti delle sentenze della Corte europea secondo la Corte costituzionale*, in M. FRAGOLA (Editor), *La cooperazione tra corti in Europa nella tutela dei diritti dell'uomo*, cit., pp. 82-89.

[271] According to Martinico, the application of the "counter-limits" doctrine to the judgments of the ECtHR is a sign of the "supranational nature" acquired by the European Convention. See: G. MARTINICO, *Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of the ECHR and EU Law before National Courts*, in «The European Journal of International Law», Vol. 23, No. 2 (2012), pp. 419-422.

[272] ECtHR, *Case Of Görgülü v. Germany*, Application No. 74969/01, Judgment of 26 February 2004.

[273] Bundesverfassungsgericht, Order of the Second Senate of 14 October 2004, 2 BVR 1481/04, paragraph 32. For details and a critical appraisal of the judgment, see: C. TOMUSCHAT, *The Effects of the Judgments of the European Court of Human Rights according to the German Constitutional Court*, in M. FRAGOLA (Editor), *La cooperazione tra corti in Europa nella tutela dei diritti dell'uomo*, cit., p. 107 ss.

[274] Italian Constitutional Court, Judgments No. 348/2007 and 349/2007, 22 October 2007. For comments on these "twin judgments" in light of the "counter-limits" doctrine see, *ex multis*: G. CATALDI, *Convenzione europea dei diritti dell'uomo e ordinamento italiano. Una storia infinita?*, in G. VENTURINI, S. BARIATTI (Editors), *Liber Fausto Pocar. Diritti individuali e giustizia internazionale*, Milano, Giuffrè Editore, 2009, p. 173 ss.; P. IVALDI, *Convenzione europea sui diritti umani e giurisdizioni nazionali*, in G. VENTURINI, S. BARIATTI (Editors), *Liber Fausto Pocar. Diritti individuali e giustizia internazionale*, cit., p. 399 ss.; M. LUGATO, *Struttura e contenuto della Convenzione europea dei diritti dell'uomo al vaglio della Corte costituzionale*, in G. VENTURINI, S. BARIATTI (Editors), *Liber Fausto Pocar. Diritti individuali e giustizia internazionale*, cit., p. 515 ss.

Convention system, that treaty law incorporated into the internal legal order, albeit prevailing over national ordinary legislation by virtue of the amended Article 117 of the Constitution,[275] is subject to review of constitutionality. Both courts thus made clear that they would not comply with decisions of the ECtHR imposing a standard of protection of human rights lower than the national one.

Unfortunately, "counter-limits" did not always serve the cause of fundamental human rights, but were also used as an excuse to avoid compliance with binding decisions of the Strasbourg Court. An instance in this regard is French courts' disregard for the ECtHR decision in *Poitrimol v. France*:[276] until a change in legislation occurred,[277] they went on applying a rule of criminal procedure that limited the defendant's right to appeal, stating, without further specification, that the rule stemmed from the general principles governing national criminal law.[278] Likewise, in the first and only case in which the Italian Constitutional Court actually rejected a judgment of the Strasbourg Court, the invoked national principle was not a human right. In judgment No. 264/2012, the Consulta found that the execution of the ECtHR decision in *Maggio and Others v. Italy*[279] would have led to a breach of the principles of equality and solidarity inherent to the national pension system.[280] But, since the Italian Constitutional Court failed to clearly identify the violated constitutional provision, it is not unreasonable to suspect that the real interest at stake was the need to respect State's budget requirements. That is why, as pointed out in literature, this was not the proper occasion to make recourse to the "counter-limits" doctrine in light of the 2007 "twin" judgments, since the foundations of the doctrine lie precisely in the protection of individual rights and fundamental principles enshrined in the domestic legal system.[281]

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[275] See *supra*, notes 219-220.

[276] European Court of Human Rights, *Case of Poitrimol v. France*, Application No. 14032/88, Judgment of 23 November 1993.

[277] Law No. 516 of 15 June 2000.

[278] Cour de cassation, chambre criminelle, Judgment of 24 November 1999, No. 97-85694. In the sense that, precisely because such general principles lacked thorough identification, French courts used them as a mere excuse not to comply with international obligations, see: F.M. PALOMBINO, *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, in «ZaöRV», Vol. 75 (2015), p. 510 ss.

[279] European Court of Human Rights, *Case of Maggio and Others v. Italy*, Judgment of 31 May 2008, Application Nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08.

[280] Italian Constitutional Court, Judgment No. 264/2012, 28 November 2012, paragraph 5.3. For criticism on this judgment, see: B. CONFORTI, *La Corte costituzionale applica la teoria dei controlimiti*, in «Rivista di diritto internazionale», Vol. 96, No. 2 (2013), pp. 527-530; G. CATALDI, *La Corte costituzionale e il ricorso ai 'contro-limiti' nel rapporto tra consuetudini internazionali e diritti fondamentali:"oportet ut scandala eveniant"*, in «Diritti umani e diritto internazionale», Vol. 9, No. 1 (2015), pp. 41-50.

[281] In this sense, see: B. CONFORTI, *La Corte costituzionale applica la teoria dei controlimiti*, cit., p. 529.

In general terms, however, the "counter-limits" doctrine provided valuable occasions of judicial dialogue between the ECtHR and national judges. As stated by the UK Supreme Court in the *Horncastle* case,

> There […] will be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[282]

The judgment at hand constituted indeed a useful feedback for the ECtHR, which was then able, in its subsequent *Al-Khawaja* decision,[283] to readjust its position on absent testimony in criminal proceedings.[284] This saga demonstrates that the "counter-limits" doctrine does not constitute in itself a challenge against international law and international institution.[285] Insofar as it serves the purpose of defending core values enshrined within domestic legal system, it might even contribute to the enhancement of the protection of human rights within a treaty regime, and, in more general terms, within the international legal order.

4.5 The primacy of fundamental human rights over conflicting obligations

From our survey on the theory and practice of "counter-limits", it is apparent that recourse to this doctrine by domestic courts – and even supranational courts such as the Court of Justice of the European Union – is not uncommon in Europe. As suggested in literature, this trend

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[282] UK Supreme Court, *R. v. Horncastle and others*, [2009] UKSC 14, Judgment of 9 December 2009, paragraph 11.

[283] European Court of Human Rights, *Case of Al-Khawaja and Tahery v. The United Kingdom* (Grand Chamber), Judgment of 15 December 2011, Applications Nos. 26766/05 and 22228/06.

[284] In the sense that the *Horncastle/Al-Khawaja* saga constitutes a positive instance of judicial dialogue among the ECtHR and national courts, that should be pursued in the future, see: European Court of Human Rights (Grand Chamber), *Case of Al-Khawaja and Tahery v. The United Kingdom (Grand Chamber)*, cit., Concurring opinion of Judge Bratza; N. BRATZA, *The Relationship Between the UK Courts and Strasbourg*, in «European Human Rights Law Review», No. 5 (2011), pp. 511-512.

[285] As theorized by Madsen, Cebulak and Wiebusch, there is indeed a difference between an "ordinary critique" from the part of domestic courts, aimed at changing the international court's case law in a certain area of law, and an "extraordinary critique" that challenges the same institutional set-up of the court. While the first type of resistance takes place within the rule of the game and thus qualifies as a "pushback", the second one amounts to a veritable "backlash" against the international judicial institution. See: M.R. MADSEN, P. CEBULAK, D. WIEBUSCH, *Backlash against international courts: explaining the forms and patterns of resistance to international courts*, in «International Journal of Law in Context», No. 14 (2018), p. 202 ss.

may develop into a regional custom according to which States could invoke constitutional provisions protecting fundamental human rights «as a circumstance capable of precluding the wrongfulness of their failure to comply with conflicting international duties».[286] This would represent a departure from the well-established principle of international law prescribing the irrelevance of domestic law as a justification for the commission of an illicit act, asserted by the Permanent Court of International Justice in the case *Treatment of Polish Nationals*[287] and protected also under Article 27 of the Vienna Convention on the Law of Treaties and Article 32 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.[288]

However, recourse to "counter-limits" by domestic courts may be more easily justified under international law on the basis of the similarities of content between national constitutions and the fundamental principles underlying the international legal order, which are the result of what in literature has been defined "constitutional convergence".[289] This process implied constitutional cross-fertilization both at the horizontal and the vertical level: the mutual influence among States by means of transnational judicial dialogue (horizontal convergence) paralleled the transfer of domestic standards of human rights protection into the international legal sphere, and vice-versa (vertical convergence).[290] The main consequence of constitutional convergence is that the contrast between domestic and international law is only apparent in cases where the invoked national principle is a fundamental human right, because both rules at stake belong to international law.

Therefore, when municipal courts activate "counter-limits" by invoking internationally shared values, in particular general principles of law common to most legal systems, the apparent contrast between national and international law must be redefined in terms of inconsistencies inherent to the international legal system. This situation is due to the "normative ambiguity"[291] characterizing contemporary international law, where the classic model based on State sovereignty coexists and is in competition with a more human rights

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[286] P. DE SENA, *The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law*, cit., p. 31. In this sense, see also: B. CONFORTI, *Diritto Internazionale*, cit., p. 400; R. PISILLO MAZZESCHI, *La sentenza n. 238 del 2014 della Corte costituzionale ed i suoi possibili effetti sul diritto internazionale*, cit., p. 28.

[287] Permanent Court of International Justice, *Treatment of Polish Nationals and Other Persons of Polish Origin and Speech in the Danzig Territory*, Advisory Opinion, 3 February 1932, PCIJ Series A/B No. 44.

[288] See *supra*, note 174.

[289] A. PETERS, S*upremacy Lost: International Law Meets Domestic Constitutional Law*, in «Vienna Journal on International Constitutional Law», Vol. 3, No. 3 (2009), pp. 173-177.

[290] *Ibidem*.

[291] A. NOLLKAEMPER, *Rethinking Supremacy of International Law*, cit., p. 85.

focused perspective. Following this reasoning, the breach of an international obligation in the name of the protection of a fundamental human right seems to be much more coherent with international law than other internationally wrongful acts, so that it could be regarded as an *infra legem*, rather than as a *contra legem* practice.[292]

It could even be maintained that when domestic (or regional) judiciaries react against international institutions in the name of widespread constitutional principles protecting human rights, they are not challenging international law in itself. On the contrary, they reassert values which are fundamental not only for their domestic legal order, but also for the United Nations system meant as a global constitutional framework and, in more general terms, for the international community as a whole.[293] Defending internationally shared values, national courts protect international law against itself, contributing to the international rule of law.[294]

In conclusion, it can be maintained that the disapplication of a rule of international law from the part of a domestic court amounts to a legitimate exercise of State sovereignty, when the rule at stake violates a principle, such as a general principle of law accepted in most domestic legal systems, which is of fundamental importance not only within the internal legal order, but also under international law. This kind of protection of internationally shared principles is not only acceptable under international law, but even desirable if those global institutions in charge of defending the fundamental values underlying the international legal system fail to do so. In absence of effective mechanisms within the international legal system, regional and national judiciaries may act as the enforcement agents of community interests, on behalf of the international community as a whole.[295]

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[292] In this sense, see: O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, cit., pp. 21-22.

[293] The theory of global constitutionalism applied to the United Nations is developed, in particular, by Fassbender. See, *inter alia*: B. FASSBENDER, *The United Nations Charter As Constitution of the International Community*, in «Columbia Journal of Transnational Law», no. 36 (1998), pp. 529-619.

[294] In this sense, see G. CATALDI, *A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law*, cit., pp. 46-47.

[295] On the issue of individual States as enforcers of interests common to the international community, see: C. J. TAMS, *Individual States as Guardians of Community Interests*, in U. FASTENRATH *et al.* (Editors), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011, pp. 379-405.

CHAPTER 2

FROM ABSOLUTE TO FUNCTIONAL IMMUNITY: "SUBSTANCE" AGAINST "PROCEDURE"

1. State immunity: a definition

1.1 Introduction to the rationale and content of the doctrine

As already discussed earlier in this work, the very core of territorial sovereignty is the monopoly of authority over a portion of the globe and the population living thereon. While the external dimension of sovereignty entails the ability to establish agreements with other States, within the State sovereignty implies the exercise of jurisdiction, articulated into jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate. Although territorial sovereignty is a veritable *jus excludendi alios*, it is not unlimited, because it cannot be exercised in a way which is detrimental to the sovereignty of other States.[296] That is why customary international law sets out some traditional limits to the exercise of sovereign authority. State immunity is one of those limits, aimed at protecting the sovereignty of other States.

The immunity of States is articulated into immunity from adjudication, i.e. from civil jurisdiction, and immunity from measures of execution. State immunity from civil jurisdiction, which is the main focus of the present work, «bars the bringing of proceedings in the courts of the territorial State (the *forum* State) against another State».[297] Immunity from measures of execution concerns, instead, enforcement against State owned property, during or after proceedings involving the foreign State. It thus stands as a separate issue, that will be shortly dealt with at the end of this chapter.

The rule of State immunity from adjudication can be construed as an exception to the jurisdiction of the national judiciary. This idea is reflected in the European Convention on State Immunity, where the cases in which a foreign State is entitled to immunity from civil jurisdiction are mentioned only after fourteen articles disciplining the circumstances in which

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[296] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 124.
[297] This is the definition provided in H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 83.

it is not.[298] In Lauterpacht's words, «the basic principle is not the immunity of the foreign State but the full jurisdiction of the territorial State […]».[299] The same view was expressed by the International Court of Justice in the *Jurisdictional Immunities* case, where it was stated that «immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it».[300] Later in its reasoning, however, the Hague Court adhered to a competing concept of State immunity, according to which the immunity of foreign States stands as a general rule of customary international law, for which existence of exceptions must be proved.[301]

As underlined in literature, the doctrine of State immunity from adjudication follows a twofold rationale.[302] On the one hand, it is aimed at avoiding interferences with the sovereign acts of foreign States, so as to protect their equality and independence. As such, the immunity of the State is regarded as a natural consequence of the principle of equality of States, according to which a State cannot exercise its jurisdiction over another sovereign.[303] This idea is clearly expressed in the Latin maxim *par in parem non habet imperium* (or *par in parem*

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[298] The text of this Convention, adopted in 1972 within the framework of the Council of Europe, can be consulted online at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=xqbuIBrL (last accessed on 31 August 2018).

[299] H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, in «British Yearbook of International Law», Vol. 28 (1951), p. 229. In the sense that State immunity is an exception to the general principle of territorial jurisdiction, see also: L.M. CAPLAN, *State Immunity, Human Rights and* Jus Cogens: *a Critique of the Normative Hierarchy Theory*, in «The American Journal of International Law», Vol. 97, No. 4 (October 2003), p. 750 ss.; R. LUZZATTO, I. QUEIROLO, *Sovranità territoriale, "jurisdiction" e regole di immunità*, cit., pp. 199-200; A. SANGER, *State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights*, in «The International and Comparative Law Quarterly», Vol. 65 (January 2016), pp. 213-228.

[300] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Report 99 (2012), paragraph 57.

[301] The two different theorization of State immunity, as a general rule or as an exception to the jurisdiction of the territorial State, are discussed in H. FOX, P. WEBB, *The Law of State Immunity*, cit., pp. 83-84. For criticism on the approach adopted by the International Court of Justice in the *Jurisdictional Immunities* case (State immunity as a general rule), see: M. BOTHE, *Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of States*, in A. PETERS, E. LAGRANGE, S. OETER, C. TOMUSCHAT, (Editors), *Immunities in the Age of Global Constitutionalism*, Leiden/Boston, Brill/Nijhoff, 2015, pp. 101-102; A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, in «Rivista di diritto internazionale», Vol. 95, No. 2 (2012), pp. 378-379; L. MCGREGOR, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, in «The European Journal of International Law», Vol. 18, No. 5 (2007), pp. 912-914. The idea according to which immunity is the exception with respect to the jurisdiction of the territorial State was supported also in the Joint Separate Opinion of judges Higgins, Koojimans and Buergenthal in the *Arrest Warrant* case before the ICJ (paragraph 71).

[302] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 133-134; A. CASSESE, *International Law*, cit., p. 99 ss.

[303] In this sense, see: Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples, 2009, Article II(1), according to which «immunities 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». Italics is my own addition.

non habet judicium).[304] On the other hand, the doctrine of State immunity responds to the need to preserve the separation of powers within the State, so as to avoid interferences of the judiciary branch in the government's conduct of international relations.[305] From a more practical perspective, State immunity serves the purpose of maintaining good relations with other sovereigns.

The twofold rationale of State immunity can be inferred from the early case-law of domestic courts upholding State immunity from civil jurisdiction. For instance, in *The Parlement Belge* case (1880) the English Court of Appeal granted immunity to Belgium on the following basis:

> the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity – that is to say, *with his absolute independence of every superior authority*.[306]

By the same token, in a case dating back 1897 (*Underhill v. Hernandez)* the U.S. Supreme Court held that

> Every sovereign State is bound *to respect the independence of every other sovereign State*, and the courts of one country cannot sit in judgment on the acts of the government of another done within its own territory.[307]

With regard to this case law, it is worth noticing that domestic courts clearly regarded State immunity as a fundamental principle of international law, whose rationale is to protect the structure of the international society of States, composed by sovereign and independent entities. Despite this, some courts and scholars have challenged the binding nature of State immunity rules, but with no success.

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[304] The maxim is attributed to Medieval author Bartolo di Sassoferrato. In his *Tractatus Repressaliarum* of 1354 (quaestio 1-3, paragraph 1) he spelled out this principle of Roman law in an extended version: «non potest enim una civitas facere leges super alteram, *quia par in parem non habet imperium*». Italics is my own addition. The quotation is reported in R. LUZZATTO, *Stati stranieri e giurisdizione nazionale*, Milano, Dott. A Giuffrè Editore, 1972, p. 157.

[305] See *supra*, note 302.

[306] English Court of Appeal, *The Parlement Belge*, 3 (1880) 5.P.D. 197. Italics is my own addition. For a comment on this case and other application of the absolute doctrine by British Courts, see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 137 ss; R. HIGGINS, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, in «The American Journal of International Law», Vol. 71, No. 3 (July 1977), pp. 423-437.

[307] United States Supreme Court, *Underhill v. Hernandez*, 168 U.S. 250 (1897), paragraph 195. Italics is my own addition. This quotation is reported in A. CASSESE, *International Law*, cit., p. 99.

1.2 The law of State immunity as customary law

Although domestic courts usually refer to the respect of the independence of the foreign State as a reason to grant immunity to it, the language employed in certain national decisions casted doubts on the binding character of the doctrine of State immunity. In particular, U.S. Courts have often mentioned the leading case *Schooner Exchange v. MacFaddon*[308] – the very first case in which immunity was granted to the State as an abstract entity, distinct from its personal ruler – to say that immunity is a matter of grace and comity, and not of international law.[309] Nowadays, however, there is no doubt that the majority of States composing the international community regard State immunity as required by customary international law.[310] A proof of the existence of an *opinio juris* in this sense is the UN General Assembly's adoption by *consensus* in 2004 of the United Nations Convention on Jurisdictional Immunities of States and Their Property,[311] which resulted from a codification work of the International Law Commission that lasted for decades.[312] Not even the parties to the *Jurisdictional Immunities* case contested the binding character of State immunity, as both Germany and Italy agreed that «immunity is governed by international law and is not a mere matter of comity».[313]

Despite the existence of conventional instruments on the subject, the field of State immunity remains largely regulated by customary international law. Indeed, the European Convention on State Immunity, adopted within the framework of the Council of Europe, was not a successful instrument, since only eight European States are parties to it.[314] The codification project carried out within the framework of the Organization of American States has remained

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[308] United States Supreme Court, *The Schooner Exchange v. McFaddon*, 11 U.S. 7 Cranch 116 116 (1812).

[309] See, for instance, United States Supreme Court, *Republic of Austria v. Altmann*, 541 U.S. 677, 688-91 (2004); more recently, United States Supreme Court, *Samantar v. Yousuf*, 560 U.S. 305 (2010). On this jurisprudence of U.S. Courts, which did not even take into account international law, see: L. FISLER DAMROSCH, *Changing the International Law of Sovereign Immunity Through National Decisions*, in «Vanderbilt Journal of Transnational Law», Vol. 44 (2011), pp. 1187-1189.

[310] Y. XIAODONG, *State Immunity in International Law*, Cambridge, Cambridge University Press, 2012, p. 7.

[311] The text of the Convention may be consulted online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last accessed on 20 August 2018). It was adopted by the UN General Assembly with Resolution A/59/508, available online at: https://treaties.un.org/doc/source/docs/A_59_508-E.pdf (last accessed on 30 August 2018).

[312] The topic was on the agenda of the International Law Commission since 1977 (UN General Assembly Resolution No. 32/151 of 19th December 1977, available online at: http://legal.un.org/ilc/guide/4_1.shtml, last accessed on 31 August 2018).

[313] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Report 99 (2012), paragraph. 53.

[314] The list of State parties to the European Convention on State Immunity can be consulted online at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=xqbuIBrL (last accessed on 31 August 2018).

a draft Convention.[315] As for the aforementioned UN Convention on Jurisdictional Immunities of States and Their Property, it has not yet entered into force because of lack of ratifications.[316] These instruments might nevertheless be useful as evidence of custom. That is why they deserve to be taken into account while reconstructing the doctrine of State immunity under customary international law.

It is worth noticing that State immunity is a customary rule of non-peremptory character, therefore not fitting in the category of *jus cogens*. This is apparent for at least two reasons. Firstly, immunity claims are relevant only as far as the foreign State is the defendant, but obviously cannot be raised if the foreign sovereign initiates itself proceedings before a court of the *forum*.[317] Secondly, the foreign State can explicitly renounce its immunity from civil jurisdiction in the following ways, as established at Article 7 of the UN Convention on Jurisdictional Immunities of States and Their Property: by international agreement, in a written contract, by a declaration before the competent court or by a written communication in a specific proceeding.[318] Moreover, a foreign State can be said to implicitly waive immunity when it intervenes in ongoing proceedings or takes any other step concerning the merits of the case, as provided for in Article 8 of the UN Convention.[319]

While there is no doubt on the binding but non-peremptory character of State immunity, its exact content is still disputed. The objective of the present chapter is precisely to reconstruct the rule, answering to three main research questions. Firstly, what is the *ratio* behind the doctrine of "restrictive" or "functional" immunity? Secondly, is it possible, looking at the current practice of States, to identify precise State immunity rules to be applied in commercial

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[315] The text of the Draft Convention, approved by the Inter-American Juridical Committee in 1983, is reproduced in «International Legal Materials», Vol. 22, No. 2 (March 1983), pp. 292-297.

[316] Only 22 States have ratified the UN Convention so far, out of the 30 ratifications required at Article 30 for its entry into force. The list of State parties may be consulted online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last accessed on 31 August 2018).

[317] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 134. This rule is spelled out at Article 8(1) of the UN Convention on Jurisdictional Immunities of States and Their Property (dealing with the effect of participation in a proceeding before a court), which reads as follows: «1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment».

[318] Article 7(1) of the UN Convention (dealing with the express consent to exercise of jurisdiction) reads as follows: «A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding».

[319] See *supra*, note 311.

and labour disputes, or at least a clear trend? Thirdly, do national courts adhere to the "procedural" paradigm of State immunity proposed by the International Court of Justice in the *Jurisdictional Immunities* case, or do they look into immunity issues in a different way? For this purpose, the analysis will focus on the practice of States as well as on the relevant international instruments. Also the legal doctrine – including codification projects carried out by scientific institutions – and international judgments will be taken into account, insofar as they can be useful as subsidiary means for the determination of custom, in the terms of Article 38(d) of the Statute of the International Court of Justice and in accordance with the 2018 Draft Conclusions of the International Law Commission on the identification of customary international law.[320]

2. From absolute to restrictive immunity: the emergence of a new custom

2.1 The absolute immunity doctrine

In the past, the immunity of foreign States from civil jurisdiction was regarded as absolute. No exception was allowed to the principle, so that a foreign State could never be subjected to the jurisdiction of the *forum* State without its consent. This conception of immunity was based on the immunities of kings, who recognized their absolute intangibility among each other.[321] As pointed out by Lauterpacht, early case-law on State immunity often made reference to the "dignity" of the foreign State as a reason to grant immunity to it, as in the above-mentioned *The Parlement Belge* case. But dignity is more an attribute of the crown than of a modern State: it was typical of times when there was no distinction between the State and the person of the king, and the subjects had no legal remedies against the sovereign.[322] In this perspective, State immunity may be regarded as «an inheritance, not as indirect as it may

[320] International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, 2018, available online at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (last accessed on 12 July 2019). See, in particular, Conclusion No. 13(1), according to which «Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules».

[321] R. LUZZATTO, I. QUEIROLO, *Sovranità territoriale, "jurisdiction" e regole di immunità*, cit., p. 190.

[322] A thorough criticism of the doctrine of State immunity as founded on the principle of equality and independence of States is provided in H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., pp. 228-236.

appear, of the principle that the personal sovereign – and subsequently the State – is *legibus solutus*».[323]

The absolute doctrine of State immunity was thus based on an absolute theory of sovereignty.[324] Such theoretical foundations clearly emerge in U.S. Justice Holmes's statement in the case *Kawananakoa v. Polyblank*:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. […] A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends*.[325]

According to the early critics of absolute immunity, the doctrine was unsound under international law. In Lauterpacht's view, the alleged impossibility to subject a foreign State to the jurisdiction of the *forum* did not flow from the principle of equality and independence of States, but was rather an anachronistic heritage of the past.[326] Like Quadri, he even denied that a rule of customary international law obliging States to uphold absolute State immunity had ever existed.[327] Both authors, indeed, regarded the practice of States as clearly contradicting the doctrine of absolute immunity, because of lack of uniformity.[328] As affirmed

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[323] H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 232.

[324] During the 19th century until the first half of the 20th century, the majority of legal scholars supported the absolute doctrine. In this sense, see the bibliography provided in R. LUZZATTO, *Stati stranieri e giurisdizione nazionale*, cit., pp. 155-157. This literature justified the absolute doctrine only in light of considerations of principle, without a careful analysis of the actual practice of States. The only exception in this regard was the study conducted by Anzilotti, who adopted, instead, a positive law approach: D. ANZILOTTI, *L'esenzione degli Stati esteri dalla giurisdizione*, in «Rivista di diritto internazionale», 1910, p. 477 ss.

[325] United States Supreme Court, *Kawananokoa v. Polyblank*, 205 U.S. 349 (1907). Italics is my own addition.

[326] See *supra*, note 315.

[327] H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., pp. 220-272; R. QUADRI, *La giurisdizione sugli Stati stranieri*, Milano, Giuffrè Editore, 1941, 1st Chapter. This criticism to the absolute immunity doctrine is echoed in a recent judgment of the UK Supreme Court that provides a thorough and convincing analysis of the rule of State immunity since its foundations: UK Supreme Court, *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah*, Judgment of 18 October 2017, [2017] UKSC 62, paragraph 40 ss. The idea that customary international law never required States to uphold absolute immunity to foreign States is convincingly supported also in R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford, 2008, Oxford University Press, p. 13 ss.

[328] In particular, Lauterpacht reports a list of judgments denying immunity to foreign States, classified by country, in an appendix to his article published on the British Yearbook of International Law (H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 250 ss.). It is worth noticing that both Lauterpacht and Quadri criticized, in their aforementioned works (2nd Chapter for Quadri), even the doctrine of restrictive immunity based on the distinction between *acta jure imperii* and *acta jure privatorum*, which they considered as an uncertain and unproductive criterion to base decisions on State immunity.

by the Genova Court of Appeal in a case of 1925, the discord among national jurisdiction demonstrated that there was no absolute immunity rule, so that a denial of immunity to the foreign State did not amount to a violation of international law.[329]

Nowadays, only a very limited number of States apply absolute immunity with regard to foreign States and their property, among which China.[330] After the handover of Hong Kong to China, there were doubts as to whether the former British colony would go on following common law countries – applying restrictions to the immunities of foreign States – or adhere to the Chinese approach. With the landmark case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others*,[331] decided by the Court of Final Appeal of Hong Kong, it became clear that matters of immunity now fall within the scope of Chinese law, as issues of foreign affairs to be dealt with exclusively by the central government of the Peoples' Republic of China. As a result, Hong Kong is now compelled by its internal law to apply an absolute notion of State immunity.

Also the Russian Federation used to recognize absolute immunity to foreign States, but it has recently changed its position[332] following condemnation by the European Court of Human Rights. In particular, in the case *Oleynikov v. Russia*[333] the Court held that the upholding of absolute immunity to North Korea with regard to a commercial contract was in breach of the applicant's right of access to justice, protected at Article 6 of the Convention. Even though the aim pursued by Russia, i.e. the friendly maintenance of international relations, was legitimate,[334] the Court found that the means adopted were disproportionate,[335] because customary international law prescribes limitations to the immunity of foreign States, and the Russian government itself had acknowledged the existence of such obligation under general international law by signing the UN Convention on Jurisdictional Immunities of States and

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[329] Genova Court of Appeal, *Governo francese v. Serra, Ceretti* et al., Judgment of 4 May 1925, in «Rivista di diritto internazionale», 1925, p. 540.
[330] R. LUZZATTO, I. QUEIROLO, *Sovranità territoriale, "jurisdiction" e regole di immunità*, cit., p. 190.
[331] Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC*, Judgment of 8 June 2011, [2011] 14 H.K.C.F.A.R. 395.
[332] In particular, a new law entered into force in January 2016, introducing exceptions to immunity largely based on the UN Convention, but at the condition of reciprocity. See: https://www.internationallawoffice.com/Newsletters/Litigation/Russia/Norton-Rose-Fulbright-Central-Europe-LLP/Law-on-jurisdictional-immunities-of-foreign-states-passed (last accessed on 5 September 2018).
[333] European Court of Human Rights, *Case of Oleynikov v. Russia*, Judgment of 14 March 2013, Application No. 36703/04.
[334] *Ivi*, paragraph 64.
[335] Ivi, paragraph 65 ss.

Their Property.[336] Following a legislative change, the Russian Federation currently recognizes exceptions to immunity, but only on the basis of reciprocity.[337]

2.2 The emergence of the principle of restrictive immunity: Italian and Belgian case law

Nowadays, the majority of States agree on the idea that immunities of foreign States need to be restricted at least for certain categories of acts, on the basis of the "restrictive" or "functional" doctrine of immunity. This latter draws a distinction between acts of the foreign State that are the expression of its sovereign functions, defined as *acta jure imperii*, and the conducts performed by the foreign State «in a private capacity as a legal person subject to private law»,[338] also called *acta jure gestionis*. Only acts undertaken in the exercise of sovereign authority are covered by State immunity, while, for instance, contracts stipulated between a foreign State and a private party are subject to the jurisdiction of the State of the *forum*. The problem is thus to understand which kind of acts are the expression of the sovereign powers of the State, and which ones are not.

The issue of the sovereigns' liability for their non-sovereign acts arose in the 19th century in the context of proceedings against foreign ships.[339] The first case decided in England was *The Charkieh* case (1872-75),[340] that involved a collision between a British vessel and an Egyptian ship, this latter engaged in commercial activities. Very significantly, the Admiralty Court observed that

> no principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.[341]

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[336] The Russian Federation signed the UN Convention on 1st December 2006, but has not ratified it yet.
[337] See *supra*, note 332.
[338] A. CASSESE, *International Law*, cit., p. 100.
[339] C.I. KEITNER, *Transnational Litigation: Jurisdiction and Immunities*, in D. SHELTON (Editor), *The Oxford Handbook of International Human Rights Law*, Oxford, Oxford University Press, 2013, p. 797.
[340] High Court of Admiralty, *The Charkieh* case, 1873, [L.R.] 4 A. & E. 59.
[341] *Ivi*, paragraphs 99-100.

However, the first courts to coherently elaborate the notion of restrictive immunity on the basis of the distinction between *acta jure imperii* and *acta jure gestionis* were the Italian[342] and Belgian[343] ones. Between the late 19th century and the beginning of the 20th century they repeatedly denied immunity to foreign States involved in transactions of private nature.

The new paradigm of State immunity emerging from the case law of Italy and Belgium reflected a change in the theories of sovereignty. In the famous case *Typaldos v. Manicomio di Aversa* (1886), the Naples Court of Cassation observed that in the modern State, differently from absolute monarchies, the principle of sovereignty did not encompass anymore all the aspects of the organization of the State.[344] The national administration had become liable before domestic courts for its managerial acts, so that the State acting as a private person did not enjoy the same privileges as the State acting as a sovereign, being subjected to demands of justice by physical and juridical persons. Following this reasoning, the Court found that there was no reason why also the foreign State should not be held accountable in the courts of the *forum* State for its *acta jure gestionis*.[345]

In the view of Italian courts, new economic, social and political conditions made apparent the double function performed by the modern State, as a political entity as well as a civil and juridical entity involved in managerial activities.[346] As affirmed by the Naples Court of Cassation,

> No one can deny that the foundation of international law is [the principle of] the sovereignty and independence of States; and that in consequence of this principle each State, in the exercise of its powers, is exempted from the jurisdiction of other States. But *the fallacy consists in considering the State exclusively and always as a body politic*, although its activity as a civil entity cannot be

[342] Among the relevant decisions, see: Naples Court of Cassation, *Typaldos, Console di Grecia v. Manicomio di Aversa*, Judgment of 27 March 1886, reported in «Il Foro Italiano», Vol. 11, Parte prima: giurisprudenza civile e commerciale (1886), pp. 399-408; Florence Court of Cassation, *Bey di Tunisi rappresentato da Guttieres v. Elmilik*, Judgment of 25 July 1886, reported in «Il Foro Italiano», Vol. 11, Parte prima: giurisprudenza civile e commerciale (1886), pp. 913-922. These decisions are commented and explained, in light of the development of international custom, in L. GRADONI, *Consuetudine e caso inconsueto*, in «Rivista di diritto internazionale», No. 3 (2012), pp. 712 ss., note 20.

[343] For Belgian jurisprudence, see: Court of Cassation, *Rau, Vanden Abeel v. Duruty*, in «Pasicrisie Belge», Vol. II (1879), p. 175 ss.; Court of Cassation, *Chemin de fer Liégeois-Luxembourg v. État néderlandais*, in «Pasicrisie Belge», Vol. I (1903), p. 294 ss.

[344] Naples Court of Cassation, *Typaldos, Console di Grecia v. Manicomio di Aversa*, p. 406.

[345] *Ibidem*.

[346] *Ivi*, pp. 405-406; Florence Court of Cassation, *Bey di Tunisi rappresentato da Guttieres v. Elmilik*, cit., p. 921.

> gainsaid when it performs acts acquiring rights and assuming obligations in private relationships, like any other physical and juristic person being capable of exercising civil rights.[347]

In 1907, in an action against a member State of Brazil, the Court of appeal of Brussels came to similar conclusions:

> Attendu que l'indépendance réciproque des États souverains exige, il est vrai, que l'acte souverain d'un État ne puisse être jugé par un autre; mais que cela revient à rechercher si l'acte, dont les conséquences sont soumises aux tribunaux, émane de la souveraineté de l'État étranger ou relève du droit civil, -- *s'il a été accompli par le souverain ou par une entité exerçant des droits privés*.[348]

Although the theory of the "double personality" of the State may be criticized under international law,[349] what is important is that it clearly reflects a new paradigm of State sovereignty, according to which not every conduct undertaken by the State is to be regarded as a sovereign act. Such change of ideas may be explained on the basis of the pervasive role played by the State in the economic sphere, which became even more apparent after the establishment of the Soviet Union. In other words, immunity was perceived as a privilege that could be justified as long as the establishment of relations of private character between a sovereign and private citizens was exceptional, but not when such circumstance was the rule, as with the monopoly of commerce run by the Soviet State.[350] Under such new conditions, the absolute immunity doctrine was not tenable anymore.[351] As observed by the Genova Appeal Court in the case *Governo francese v. Serra*,[352] the restrictive approach had to be preferred, as it responded to a clear exigence of justice while protecting at the same time the sovereignty of the foreign sovereign as well as the exercise of its sovereign functions.[353]

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[347] Naples Court of Cassation, *Typaldos, Console di Grecia v. Manicomio di Aversa*, p. 405 (comment by Liberatore). This translation in English is provided in H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 252. Italics is my own addition.

[348] Court of Appeal of Brussels, *Feldman v. État de Bahia*, Judgment of 1907, in «Pasicrisie Belge», Vol. II (1908), p. 55 ss. This quotation is reported in H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 253. Italics is my own addition.

[349] In this sense, see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., pp. 404-405; R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 51 ss.

[350] Tribunal of Rome, *Storelli v. Governo della Repubblica francese*, Judgment of 13 February 1924, in «Rivista di diritto internazionale», 1925, p. 244, case-note by Liebman.

[351] *Ibidem.*

[352] See *supra*, note 329.

[353] *Ibidem.* In the sense that the restrictive approach to State immunity was inspired to exigencies of justice for the individuals entering to private transactions with foreign States, see: H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 235.

2.3 Subsequent practice of States

As inherent in the same concept of customary law, a new custom does not arise instantaneously: the practice of States repeated over time is needed.[354] Therefore, it is not a matter of surprise if it took decades for the restrictive approach to the law of State immunity to be adopted by the majority of States. However, it is worth noticing that early codification works carried out by scientific institutions such as the 1891 Resolution of the Institut de Droit International[355] and the 1932 Report of the Harvard Research Project in International Law[356] already called for the application of the doctrine of functional immunity.[357] Moreover, as early as 1926 most of the powerful countries of the time had signed the Brussels Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships. Even though it was not a treaty of codification, States' adhesion to the Brussels Convention showed a general agreement on the necessity to limit sovereign immunities, at least with respect to State-owned vessels employed in commercial activities. Moreover, the rules contained in the Convention were applied also by States not parties to it, which suggests their substantial correspondence to customary international law.[358]

As reported by Lauterpacht,[359] by 1951 the distinction between *acta jure imperii* and *acta jure gestionis* was applied not only in the courts of Italy and Belgium, but also in a number of other States including Egypt,[360] Greece,[361] Romania,[362] Austria,[363] Switzerland,[364] Ireland,[365]

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[354] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 43.

[355] Institut de Droit International, *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*, 1981.

[356] Harvard Law School, Research in International Law, *Competence of Courts in Regard to Foreign States*, in «The American Journal of International Law», Vol. 26 (1932), No. 1 (Supplement).

[357] On projects of codifications by non-governmental bodies, see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 123 ss.

[358] R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 16.

[359] In his article published in the 1951 British Yearbook of International Law, Lauterpacht provided a survey of how domestic courts treated State immunity on country basis. However, in Lauterpacht's view the distinction between *acta jure imperii* and *acta jure gestionis* was applied in such diverse ways that it could not be regarded as customary law. An account of the early practice of these countries is to be found also in the ILC's Commentary to the Draft Articles on Jurisdictional Immunities of States and their property, pp. 36-38, available online at: http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_46_10.pdf&lang=EFSXP (last accessed on 21 September 2018).

[360] Mixed Court of Appeal of Alexandria, *Capitaine Hall v. Capitaine Zacarias Bengoa* , 1920; Mixed Courts of Egypt, *In re Palestine State Railways Administration,* 1942; Commercial Tribunal of Alexandria, *Egyptian Delta Rice Mills Co. v. Comisaria General de Madrid*, 1943.

[361] Court of Athens, *Soviet Republic (Immunity in Greece)* case, 1928; Court of Appeals of Athens, Decision No. 169/1949.

[362] Tribunal de Commerce d'Ilfov (Romania), *Banque Roumaine de commerce et de credit de Prague v. État polonaise*, 1924.

[363] Supreme Court of Austria, *Osterreichisch-ungarische Bank v. Ungarische Regierung*, 1919.

[364] Swiss Federal Court, *Finanzministerium v. Dreyfus*, 1917.

Poland [366] and France.[367] In the 1950 case *Dralle v. Republic of Czechoslovakia*, after careful analysis of international practice, the Austrian Supreme Court held that

> […] it can no longer be said that jurisprudence generally recognizes the principle of exemption of foreign States in so far as concerns claims of a private character, because the majority of courts of different civilized countries deny the immunity of a foreign State, and more particularly because exceptions are made even in those countries which today still adhere to the traditional principle that no State is entitled to exercise jurisdiction over another State […].[368]

The German Constitutional Court came to the similar conclusions in its influential judgment *Empire of Iran,*[369] where it found that the practice of States indicated that, under customary international law, a rule imposing absolute immunity from adjudication and from measures of execution did not exist anymore.[370]

In other countries, domestic courts were more reluctant to adopt the doctrine of restrictive immunity. This was the case of the United States, where, despite contrary instructions from the executive power, courts did not recognize any exception to the immunity of foreign States until a change in legislation occurred. An instance of these divergent positions is the *Pesaro* case.[371] As early as 1921, the Department of State spoke in favour of the restrictive approach in response to a claim of the Italian ambassador regarding the arrest of a ship owned by Italy:

> The Department is of the opinion that vessels owned by a State and engaged in commerce are not entitled, within the territorial waters of another State, to the immunity accorded to vessels of war, and that notwithstanding such ownership these vessels are subject to the local jurisdiction to the same extent as other merchant vessels.[372]

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[365] High Court of Eire, *Ramava* case, 1941.
[366] Supreme Court of Poland, *Anna D. v. Treasury of Czechoslovak Republic*, 1926.
[367] See, for instance: Court of Appeals of Paris, *État Roumain v. Pascalet et Cie,* 1924; Court of Paris, *Société Gostorg et Union des Republiques Socialistes Soviétiques v. Association France Export,* 1926.
[368] Supreme Court of Austria, *Dralle v. Republic of Czechoslovakia,* Judgment of 10 May 1950, paragraph 161.
[369] Bundesverfassungsgericht, *Empire of Iran* case, BVerfGE 16, 1963, 27 2 BvM 1/62.
[370] For a thorough appraisal of German practice concerning issues of State immunity, see: M. NEY, *Sovereign Immunities of States: A German Perspective*, in A. PETERS, E. LAGRANGE, S. OETER, C. TOMUSCHAT, (Editors), *Immunities in the Age of Global Constitutionalism*, cit., pp. 32-39.
[371] United States Supreme Court, *The Pesaro*, Judgment of 28 February 1921, 255 U.S. 216 (1921).
[372] *Ibidem.* This quotation is reported in H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 268.

Nevertheless, U.S. courts preferred to comply with the established judicial precedent. Even after the famous Tate Letter, announcing the Department of State's official endorsement of the restrictive doctrine, [373] domestic courts maintained their stance in favour of an absolute notion of State immunity.[374] It was only following the adoption of the 1976 Foreign Sovereign Immunity Act (FSIA), the first national statute regulating State immunity issues, that foreign sovereigns were denied immunity for acts of a private character.

Also the United Kingdom was reluctant to abandon the paradigm of absolute immunity. Until the 1970s, British courts denied the existence of exceptions to immunity, on the basis of the leading cases *The Parlement Belge* [375] and the *Porto Alexandre*.[376] A radical change came with the signature of the European Convention on State Immunity in 1972, after which there were some cases of denial of State immunity for acts undertaken by the foreign State in a private capacity, as *The Philippine Admiral.*[377] But it was only with the State Immunity Act of 1978, providing for the adaptation to the European Convention, that restrictions to the immunities of foreign States were clearly set forth in UK national legislation.

The reasons calling for a new approach to the law of State immunity were thoroughly explained by Lord Wilberforce in the famous case *I Congreso del Partido:*

> […] (a) it is necessary in the interests of justice to individuals having transactions with States to allow them to bring such transactions before the courts; (b) to require a State to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions.[378]

This extract shows that the restrictive or functional notion of State immunity was preferred to the absolute one on the basis of considerations of justice, as well as of the idea that what is not a sovereign act cannot be covered by State immunity; in other words, that only State activities

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[373] Letter of Jack B. Tate, Acting Legal Adviser of the Department of State, to Acting Attorney General (19 May 1952), reprinted in United States Supreme Court, *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 711 (1976). For comments on this letter, see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., pp. 145-146.

[374] R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 17.

[375] See *supra*, note 306.

[376] UK Court of Appeal, *The Porto Alexandre*, (1920), p. 30.

[377] Privy Council, *The Philippine Admiral*, 64 ILR 90 (1976). For a comment on this case and subsequent jurisprudence of British courts, see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., pp. 142-143; R. HIGGINS, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, cit., pp. 423-437.

[378] House of Lords, *I Congreso del Partido*, [1983] 1 AC 244. This quotation is reported in A. CASSESE, *International Law*, cit., p. 100.

undertaken in the exercise of governmental authority enjoy immunity.[379] Unfortunately, even the distinction between *acta jure imperii* and *acta jure gestionis* brings about some difficulties as far the determination of State immunity issues is concerned, as will be shown in the next section.

3. The distinction between *acta jure imperii* and *acta jure gestionis*

3.1 A feasible criterion?

According to the restrictive doctrine, a national judge must rely on the distinction between *acta jure imperii* and *acta jure gestionis* when deciding questions of immunity. In other words, acts that are not the expression of the sovereign powers of the State do not enjoy the covering of State immunity. But how to define an act undertaken by the State in its private capacity, and how to distinguish it from a sovereign act? Two criteria have been put forward to answer this question.[380] One is the *nature* of the transaction: if this latter is commercial in nature, it will amount to an act *jure gestionis*. The other criterion, instead, is the *purpose* fulfilled by the act: if the purpose is public in nature, also the act is to be regarded as public.[381] Adopting one criterion rather than the other may bring to conflicting results, making the resort to the *jure imperii/jure gestionis* divide particularly problematic.[382]

As noted by Lauterpacht, «courts of different countries – and occasionally courts of the same country – have treated the same kind of activity in different ways».[383] For instance, the purchase of goods for an embassy could be regarded as an act *jure privatorum* on the basis of the nature of the transaction, which is clearly commercial;[384] but, if the criterion employed is that of the purpose of the act, the same transaction could be considered as an act *jure imperii*, if the purchased goods are used to fulfil a public function. An early instance of different treatment for the same action is to be found in the aforementioned *The Pesaro* case. While the

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[379] In the sense that the rationale behind the restrictive doctrine is to protect exclusively the governmental functions of the foreign State, see: R. NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, Milano, CEDAM-Wolters Kluwer, 2018, p. 256 ss.

[380] A. CASSESE, *International Law*, cit., p. 101.

[381] *Ibidem*.

[382] In the sense that the «distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis», see: H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 224 ss.

[383] H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 222.

[384] In this sense see, most recently: Court of Cassation (Sezioni Unite), *Académie de France à Rome v. Mezzi & Fonderia s.r.l.*, Order of 26 November 2018, No. 30527.

U.S. Department of State had considered the activities carried out by the Italian ship as commercial in nature, the U.S. Supreme Court found that the same activities had a public purpose, i.e. the advancement of the welfare of Italian people in peaceful times. Following this argument, it granted immunity to the Italian State.[385]

A classic example that highlights the difficulties inherent in the *jure imperii/jure gestionis* distinction is the purchase of shoes for the army by a foreign State. This kind of transaction was treated very differently by U.S. and Italian courts. In the 1918 case *Kingdom of Roumania v. Guaranty Trust Co. of New York*, a U.S. Appeals Court found that such transaction was an act *jure imperii*, because it pursued the purpose of national defence. According to the Court, while buying shoes for its army the Kingdom of Romania was not «engaged in business, but was exercising the highest sovereign function of protecting itself against its enemies».[386] In contrast, in *Stato di Romania c. Gabriele Trutta* the Italian Court of Cassation held that the purchase of shoes for the army was not a sovereign act, but a commercial transaction for which immunity was not to be uphold.[387]

Another purchase of goods for the army – in this case helicopters – was recently treated by the Italian Court of Cassation in a lawsuit involving the Ministry of Defence of Iraq.[388] Iraq claimed immunity on the basis of the purpose of the act, arguing that the purchased goods were aimed at national defence. The Court, however, took into account only the nature of the transaction, which was clearly commercial. As a consequence, it refused to grant immunity from jurisdiction to Iraq. It is worth pointing out that the same Court had adopted the opposite criterion, i.e. the purpose of the act, in a civil action for damages brought against the U.S (*Cermis* case),[389] where the damages at issue were a direct consequence of the military exercises carried out by U.S. armed forces on Italian territory. In that regard, the Italian Court of Cassation found that military training is an act *jure imperii* not because it is the expression

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[385] United States Supreme Court, *Berizzi Bros v. Pesaro*, 1926.

[386] U.S. Court of Appeals (Second circuit), *Kingdom of Roumania v. Guaranty Trust Co. of New York*, 1918, 250 Fed. 341, paragraph 345. This extract is quoted in R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 31. It is interesting to notice that the same conclusion had been reached by the French Court of Cassation seventy years before, in a similar case. See: French Court of Cassation, *Gouvernement Espagnol v. Casaux*, 1849.

[387] Italian Court of Cassation (Sezioni Unite), *Stato di Romania c. Gabriele Trutta*, Judgment of 13 May 1926, in «Il Foro italiano», Vol. 51, Parte prima: giurisprudenza civile e commerciale (1926), pp. 584-590.

[388] Italian Court of Cassation (Sezioni Unite), *Government and Ministries of Iraq v. Armamenti e Aerospazio S.p.a.* et al., Judgment of 24 November 2005, No. 23893/2005.

[389] Italian Court of Cassation (Sezioni Unite), *Filt-CGIL – Trento* et al. *v. United States of America*, Judgment of 3 August 2000, No. 530/2000.

of the foreign State's sovereign authority, but especially because it fulfils an essential public purpose, that is the protection of the territorial integrity of the State.[390]

The nature of the act is often regarded as the most reliable criterion to determine if a State conduct is the expression of sovereign functions or if, on the contrary, it is carried out in a private capacity.[391] Relying exclusively on the purpose of the transaction could be misleading, since almost every conduct undertaken by States can be said to have a public purpose.[392] As observed in literature, reliance on the purpose of the sovereign act would result in a revival of the absolute doctrine, to the detriment of the individuals' right of access to justice.[393] From this perspective, the criterion of the nature of the act is to be preferred in order avoid disproportionate interferences with the enjoyment of the individual right of access to a court.

On the other hand, the criterion of the nature of the transaction is not entirely convincing when it comes to State activities which, as in the previously discussed cases, are clearly aimed at national defence. As noted by Lauterpacht, it is difficult to say that a State conduct is private in nature, when it is apparent that individuals «do not purchase shoes for their armies; they do not buy warships for the use of the state; they are not, as such, responsible for the management of the national economy».[394] In more general terms, taking into account the purpose of the transaction may be reasonable, when fundamental interests of the convened country are at stake; if, in other words, the foreign State maintains a certain conduct because it is necessary to grant the well-being and the human rights of its population. This dimension of State activities is well illustrated in the Argentinian bonds cases.[395]

3.2 A case study: sovereign bonds

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[390] *Ivi*, paragraph 6.

[391] In this sense, see: V. CANNIZZARO, *Diritto Internazionale*, cit., p. 340. This approach was endorsed by the Italian Court of Cassation itself in its thematic study No. 116 of 14 June 2012, pp. 4-5, available online at: http://www.ca.milano.giustizia.it/ArchivioPubblico/B_179.pdf (last accessed on 25 September 2018). The nature of act is mentioned as the best criterion also in early jurisprudence, for instance in: Tribunal de Commerce d'Ilfov (Romania), *Banque Roumaine de commerce et de credit de Prague v. État polonaise*, cit., paragraphs 582-583.

[392] R. NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, cit. , p. 260 ss.

[393] In this sense, see: A. DE LUCA, *L'immunità degli Stati stranieri dalla giurisdizione civile*, in N. RONZITTI, G. VENTURINI (Editors), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, Padova, CEDAM, 2008, pp. 18-19; R. LUZZATTO, *Stati stranieri e giurisdizione nazionale*, p. 170, note 58.

[394] H. LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, cit., p. 225.

[395] For a critical appraisal of the Argentinian Bonds saga, in the broader context of State practice concerning immunity for sovereign bonds, see: J. BRÖHMER, *State Immunity and Sovereign Bonds*, in A. PETERS, E. LAGRANGE, S. OETER, C. TOMUSCHAT, (Editors), *Immunities in the Age of Global Constitutionalism*, cit., pp. 182-208.

The difficulty to apply the distinction between *acta jure imperii* and *acta jure gestionis* clearly emerges when sovereign bonds are at stake, as in the case of Argentinian *saga*. As is well-known, Argentina has experienced serious economic difficulties in the last decades. Even before its default of 2002, the Argentinian State had failed to honour its bonds issued in the financial markets, with the subsequent rescheduling of the payments. In the attempt to recover their money, foreign private investors filed lawsuits in their domestic courts, but with very different results depending on the *forum* State. In particular, U.S. and Italian courts came to opposed conclusions as far as the upholding of immunity to Argentina for its failure to repay private investors was concerned. In *Argentina v. Weltover Inc.*[396] the U.S. Supreme Court refused to grant immunity to the foreign State, whereas the Italian Court of Cassation did exactly the contrary in the famous case *Borri c. Repubblica Argentina*.[397] The reason of such different outcome is precisely the different weight given to the nature or, in contrast, to the purpose of the relevant State conduct.

In order to protect U.S. creditors from the financial default of foreign sovereigns, U.S. legislation explicitly considers the debts contracted by foreign States as commercial activities.[398] That is why in *Argentina v. Weltover Inc.* the Supreme Court had no doubts on the commercial character of the issuing of bonds by the Argentinian State. The issue was rather the commercial nature of the rescheduling of the maturity dates on the bonds. To answer that question, the U.S. Supreme Court looked into the nature, rather than into the purpose of the activity at issue, because «[...] it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so».[399] According to the Court, also the rescheduling measure was to be regarded as commercial in nature within the meaning of Article 1605(a)(2) FSIA, since it had been taken in connection with the issuing of the bonds.[400] The Supreme Court thus treated also the delaying measures as commercial activities, as such not attracting State immunity.

In contrast, in the case *Borri c. Repubblica Argentina* the Italian Court of Cassation adopted the criterion of the purpose of the act.[401] In particular, the Court observed that, although there

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[396] United States Supreme Court, *Republic of Argentina* et al. *v. Weltover, Inc.*, et al., Judgment of 12 June 1992, No. 91-763.
[397] Italian Court of Cassation (Sezioni Unite Civili), *Borri c. Repubblica Argentina*, Order of 27 May 2005, No. 11225.
[398] D. CARREAU, F. MARRELLA, *Diritto internazionale*, 2nd Edition, Milano, Giuffrè Editore, 2018.
[399] United States Supreme Court, *Republic of Argentina* et al. *v. Weltover, Inc.*, et al., cit., paragraph 617. Italics is my own addition.
[400] *Ivi*, paragraph 608.
[401] This decision, like the *Cermis* case, is at variance with Italian jurisprudence, which normally seems to rely on the nature of the act to determine whether immunity is to be granted or not. See, *inter alia*: Genova Court of Appeal, Judgment of 7 May

was no doubt on the private nature of the issuing of State bonds, it was not the same for the subsequent suspension of payments and debt restructuring decided by the Argentinian State.[402] In its view, such measures were clearly the expression of the sovereign powers of the State, not only because they were provided for in budgetary laws voted by the national parliament,[403] but especially because their purpose was to protect the Argentinian people's primary needs and economic survival in a historical context of serious national emergency.[404] Therefore, according to the Court, the measures adopted by the Republic of Argentina were not *acta jure gestionis*, but acts of government covered by State immunity.

The Italian Court of Cassation was criticized in literature for having revived the purpose criterion, judged obsolete and ineffective to properly distinguish between *acta jure imperii* and *acta jure gestionis*.[405] However, looking into the purpose of States' conduct may shed light on the definition of what is a sovereign function. From this perspective, States' fulfilment of the basic needs of their population can be rightly regarded as the primary scope of sovereignty, as such at the core of State immunity rules. In *Borri c. Repubblica Argentina*, this principle was in competition with the private investors' right of access to justice, which is the very rationale of the restrictive doctrine of State immunity. The Court of Cassation thus implicitly engaged in a balancing exercise between the interests at stake. Prevalence was finally given to the fundamental human rights and basic needs of the Argentinian people, to the detriment of the individual right of access to court. With this decision, the Court thus suggested that State immunity is not only an obstacle to private citizens' right of access to justice, but can be also an instrument to protect the human rights of the community whose State is sued in the courts of the *forum*.

The stance taken by the Italian Court of Cassation in *Borri v. Repubblica Argentina* was recently confirmed by the Court of Justice of the European Union in the *Kuhn* case[406] with

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1994, No. 506/1994 and the thematic study of the Court of Cassation (see *supra*, note 391). For a thorough discussion on Italian case law, especially as far as commercial transactions are concerned, see: A. DE LUCA, *L'immunità degli Stati stranieri dalla giurisdizione civile*, cit., pp. 15-27.

[402] Italian Court of Cassation (Sezioni Unite Civili), *Borri c. Repubblica Argentina*, cit., paragraph 4.

[403] In particular: Laws Nos. 25561 and 25565of 6 January 2002; Resolution No. 73 of 25 April 2002; Laws Nos. 25725 and 25820 of 2003; Law 25827 of 2003.

[404] Italian Court of Cassation (Sezioni Unite Civili), *Borri c. Repubblica Argentina*, cit., paragraph 4.2.

[405] In this sense, see: J. BRÖHMER, *State Immunity and Sovereign Bonds*, cit., pp. 190-192; F. MARONGIU BUONAIUTI, *Rinuncia all'immunità dello Stato estero dale misure coercitive e tutela del diritto di accesso alla giustizia in alcune pronounce recenti della "Cour de Cassation" francese*, in «Diritti umani e diritto internazionale», No. 3 (2013), p. 616.

[406] Court of Justice of the European Union, Case C-308/17, *Hellenische Republik v. Leo Kuhn*, Judgment of 15 November 2018. For a comment on this case, see: P. MANKOWSKI, *The saga of the Greek State bonds and their haircut: Hellas*

respect to Greek sovereign bonds. In 2012, the value of Greek bonds had been reduced by law in order to face the financial crisis affecting the country. The creditors started litigations in domestic courts in order to recover their money. The Supreme Court of Austria, faced with such a claim by Mr. Kuhn, sent a request for preliminary ruling to the CJEU on the applicability of Brussels I*bis* Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The CJEU found that the Greek haircut, «dictated by the necessity, within the framework of an intergovernmental assistance mechanism, to restructure the Greek State's public debt and to prevent the risk of failure of the restructuring plan of that debt, to avoid that State failing to pay and to ensure the financial stability of the euro area»,[407] did not amount to a commercial activity, but rather to an act *jure imperii*. According to the Court, Greece was exercising a public function aimed at safeguarding the interest of the Greek population and of the Eurozone as a whole. Therefore, Brussels I*bis* Regulation was held inapplicable by virtue of its Article 1.[408] This decision had remarkable effects in Austria, whose Supreme Court affirmed not only that Brussels I*bis* Regulation was not applicable to the proceeding which had given rise to the request for preliminary ruling, but also that the Greek haircut attracted immunity in its quality of act *jure imperii*.[409]

From our survey, it is apparent that the practice of courts on the distinction between acts *jure imperii* and acts *jure gestionis* is not uniform. This is because customary international law does not offer a clear-cut criterion to establish what is and what is not a sovereign function. It is precisely to overcome this kind of problems that the existing national legislation and international instruments on State immunity, albeit embracing the restrictive doctrine, do not explicitly mention the *acta jure gestionis* and *acta jure imperii* divide, enumerating,

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triumphans in Luxemburg. Really?, 22 November 2018, available at: http://conflictoflaws.net/2018/the-saga-of-the-greek-state-bonds-and-their-haircut-hellas-triumphans-in-luxemburg-really/ (last accessed on 13 February 2019).

[407] Court of Justice of the European Union, *Hellenische Republik v. Leo Kuhn*, cit., paragraph 40.

[408] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 1, reads as follows: «This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)».

[409] Austrian Supreme Court of Justice, Judgment of 22 January 2019, Case No. 10 Ob 103/18x. For a critical comment on this decision, see: S. WALTER, *The Aftermath of the Court of Justice of the European Union's Kuhn Judgment – Hellas triumphans in Vienna. Really.*, 12 February 2019, available at: http://conflictoflaws.net/2019/the-aftermath-of-the-Court of Justice of the European Unions-kuhn-judgment-hellas-triumphans-in-vienna-really/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+conflictoflaws%2FRSS+%28Conflict+of+Laws+.net%29 (last accessed on 13 February 2019).

instead, a number of cases for which immunity is (or is not) to be upheld.[410] This approach is also known as the "method of the list" or the "multiple immunity criteria" approach, inasmuch it breaks up «the concept of non-sovereign acts in a set of specific descriptions of different categories of activity in regard of which states may be subjected to foreign jurisdiction».[411] The next paragraph will be devoted to the pros and contras of this approach.

3.3 The method of the list

Only few countries in the world regulate State immunity matters by means of national legislation. This is the case of common law countries, whose adaptation to international law, as highlighted in the first chapter of this work, requires the enactment of an internal piece of legislation restating the existing international rule. National legislation providing for a list of non-immune activities based on the multiple criteria approach is into force in the United States, the UK, Australia, Canada, Malaysia, Malawi, Pakistan, South Africa and Singapore.[412] Only the UK adopted its own legislation in order to comply with an international convention. All the other statutes, instead, represent an attempt to codify international custom adapting it to the practice of the country. They substantially reproduce the UK State Immunity act, with the important exception of the US FSIA.

All the existing national statutes as well as the relevant international instruments enlist commercial transactions as non-immune activities. However, the method of the list is not really helpful when it comes to determine the exact scope of the commercial exception to State immunity. In particular, the UN Convention on Jurisdictional Immunities of States and their Property does not clarify whether the nature or purpose of the act should prevail, thus

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[410] The same method is followed in the codification work of the Organization of American States. A different approach is taken, instead, in the Resolution of the Institut de Droit International of 1992 (Resolution on Contemporary Problems Concerning Jurisdictional Immunities of States), which contains two sets of criteria determining the competence or incompetence of the court. This approach, proposed by Brownlie, was criticized for mixing up the precise language of private international law. See: H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 126 ss.

[411] R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 60.

[412] H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 146. For every country, this is, respectively, the existing legislation: Foreign Sovereign Immunities Act 1976 (US); State Immunity Act 1978 (UK); Foreign States Immunities Act 1985 (Australia); State Immunity Act 1982 (Canada); Immunities and Privileges Act 1984 (Malaysia); Immunities and Privileges Act 1984 (Malawi); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Foreign States Immunities Act 1981 (South Africa).

perpetuating the uncertainties detected in the practice of domestic courts. According to Article 2(2) of the UN Convention,

> In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), 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.[413]

The Convention thus proposes a compromise solution which is clearly the outcome of negotiations among government representatives, normally in favour of broader immunities.[414] In contrast, national statutes are clearer on the issue. The U.S. FSIA, for instance, states that the commercial character of States' conduct «shall be determined by reference to the nature of the course of conduct rather than by reference to its purpose».[415]

A positive aspect of the multiple criteria approach is that it permits to extend the list of non-immune activities far beyond the acts *jure privatorum* of the foreign State. An instance in this regard is the so-called "tort exception". This exception, although formulated differently in national statutes, deprives foreign States of immunity for tortious acts, qualified as such under the law of the *loci commissi delicti*, which caused death or injury to a person or damage to property and are strictly connected with the territory of the *forum*. It is codified in both the European Convention on State Immunity[416] and the UN Convention.[417] Given that also an act *jure imperii* can be a tort,[418] this exception is not restricted to commercial or contractual acts

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[413] Article 2(2) of the UN Convention on Jurisdictional Immunities of States and Their Property.

[414] In this sense see: V. CANNIZZARO, *Diritto Internazionale*, cit., p. 341. In his opinion, the negotiated character of the UN Convention explains its regressive approach to State immunity in comparison with customary international law.

[415] Article 1603(d) of the Foreign State Immunity Act (FSIA).

[416] Article 11 of the European Convention reads as follows: «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».

[417] Article 12 of the UN Convention reads as follows: «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».

[418] However, according to the ICJ the conduct of armed forces in the course of conducting an armed conflict does not fall within the tort exception. See: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, paragraph 93. Further discussion on the issue will be provided in the next chapter, when analysing the ICJ judgment.

only. From this perspective, the method of the list does not reflect perfectly the *jure imperii/jure gestionis* divide.

A further area of the law of State immunity for which the method of the list proves to be useful is that of labour disputes between the foreign State and its employees. In fact, the distinction between *jure imperii* and *jure gestionis* activities had not been designed for this kind of controversies.[419] Alternative criteria for solving questions of States immunities, like those set forth in the European Convention on State Immunity, have proved effective in order to provide access to justice to the individuals involved in labour contracts with the foreign sovereign. Unfortunately, the UN Convention proposes a more restrictive approach to labour disputes, which favours the foreign State to the detriment of the individual right of access to courts. The next section of the chapter will provide a closer look to these instruments as well as to national jurisprudence on State immunity for labour disputes. Also the case law of the European Court of Human Rights deserves our analysis as far as labour disputes with foreign States and international organizations are concerned.

4. State immunity from civil jurisdiction in labour disputes

4.1 Relevant international instruments

Nowadays, State immunity for employment matters is one of the most relevant issues in the law of State immunity, considering that «a high proportion of claims made in the national courts of other States against a foreign State or international organization relates to labour disputes».[420] At the same time, it is one of the areas of State immunity where the fastest developments in the sense of protecting the individuals' right of access to justice may be detected. In this regard, particularly delicate is the situation of the nationals of the State of the *forum* or third country nationals who enter into labour arrangements with the foreign State, as part of the staff of diplomatic and consular representations, or of other instrumentalities of the foreign State acting within the territory of the *forum* State, such as cultural institutions or commercial representations.

When the employee involved in a labour dispute is a diplomatic or consular agent of the foreign State, or a national of the foreign State not resident in the State of the *forum*, the

[419] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 271.
[420] H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 436.

shield of State immunity from civil jurisdiction is perfectly reasonable and justified under the restrictive doctrine of immunity, in light of the individual right of access to justice. Indeed, a foreign citizen is naturally subjected to the jurisdiction of her State of nationality, so that a bar from bringing civil actions in the courts of the *forum* would not amount to a disproportionate interference with her right of access to court.[421] Nevertheless, the situation is entirely different for disputes arising between a citizen of the State of the *forum* (or a third country national resident in the State of the *forum*) and the foreign State. As highlighted by Conforti, it is unfair to deny to these people access to their natural judge, at least when patrimonial claims are at issue.[422]

In this respect, the discipline set out in the UN Convention on Jurisdictional Immunities of States and their Property is not particularly favourable to the individuals' right of access to justice. Even though Article 11 excludes State immunity in case of employment disputes, it enumerates a number of exceptions to the exception which *de facto* reinstate the absolute doctrine of State immunity.[423] In particular, Article 11(2)(a) establishes the nature of the working activity as the main criterion to decide whether a foreign sovereign is immune (or not) from the civil jurisdiction of the courts of the *forum*.[424] This means that whenever the working activity performed by the employee relates to the foreign State's exercise of sovereign authority, immunity is uphold. Moreover, the courts of the *forum* cannot exercise their jurisdiction if the subject matter of the dispute is the renewal, recruitment or reinstatement to work of an individual (Article 11(2)(c)),[425] or the dismissal or termination of employment (Article 11(2)(d)),[426] because an inquiry into these issues would represent an

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[421] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale,* cit., p. 277.
[422] *Ibidem.*
[423] H. FOX, P. WEBB, *The Law of State Immunity,* cit., p. 437.
[424] Article 11 of the UN Convention reads as follows: «1. 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 a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State. 2. Paragraph 1 does not apply if: (a) the employee has been recruited to perform particular functions in the exercise of governmental authority; […]; (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual; (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State; […]».
[425] *Ibidem.*
[426] *Ibidem.*

undue interference with respect to the internal organization of the foreign State and, in particular, its «security interests».[427]

In contrast, the European Convention on State Immunity proposes an approach able to enhance the justiciability of workers' rights. Even though the distinction between *acta jure imperii* and *acta jure gestionis* is maintained for other categories of transactions, the European Convention identifies objective criteria of jurisdiction as far as employment disputes are concerned. In particular, Article 5 combines the criterion of the nationality or residence of the employee with that of the place of working. If the employee is a national of the foreign State, immunity is to be uphold; if, in contrast, the employee is a citizen of the State of the *forum* or a third country national and the working activity is performed within the territory of the *forum*, State immunity is excluded.[428] Clearly, this discipline provides safer criteria for establishing if a foreign State enjoys immunity from jurisdiction than the classic distinction between acts *jure imperii* and acts *jure privatorum*.

Even more progressive than the European Convention on State Immunity is the Inter-American Draft Convention on Jurisdictional Immunity of States, which, at Article 6, excludes immunity for labour affairs whenever the work is performed in the State of the *forum*.[429] This means that access to court is always granted to the foreign State's employee working in the territory of the *forum*, independently from her residence, nationality or tasks performed. The workers' residence and nationality are, instead, particularly relevant for determining issues of State immunity from adjudication within the framework of NATO. Indeed, if the civilian employees of a NATO basis are citizens of or residents in the receiving State, the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the *Status* of their Forces leaves to the legislation of the *forum* the regulation of those employees'

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[427] *Ibidem.* See the ILC Commentary to the Draft Articles on Jurisdictional Immunities of States and their property, at paragraph 10, p. 43 ss. See *supra*, note 359.

[428] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale,* cit., p. 278. Article 5 of the European Convention reads as follows: 1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum. 2. Paragraph 1 shall not apply where: (a) the individual is a national of the employing State at the time when the proceedings are brought; (b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or (c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter. 3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2.a and b of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

[429] Article 6(a) reads as follows: «States shall not claim immunity from jurisdiction either: a) in labor affairs or employment contracts between any State and one or more individuals, when the work is performed in the forum State; […]».

working conditions.[430] The specific working activity performed by the concerned individual is thus irrelevant for the determination of State immunity issues.

In conclusion, the discipline set out in international instruments is very diverse. The same diversity can be detected in the practice of States, as will be shown in the next section. From this perspective, it is hard to see how Article 11 of the UN Convention on Jurisdictional Immunities of States and their Property could be regarded as reflecting customary international law at the time of its adoption. Indeed, State immunity in employment matters was one of the outstanding problems identified by the Sixth Committee of the UN General Assembly, as such finalized only in the 2004 draft of the Convention.[431] The UN Convention, however, had a noteworthy influence on the subsequent case law of States as well as of international courts, so that Article 11 is now regarded as codifying customary international law by, *inter alia*, the European Court of Human Rights.

4.2 The practice of States

As observed by Cassese, respect for the equality and independence of foreign States entails that the territorial State must not interfere with or meddle in their internal organization.[432] Following this reasoning, for many years domestic courts have relied on the classic distinction between acts *jure imperii* and acts *jure gestionis* to shield foreign States from labour actions initiated by their staff members. In particular, courts have regarded labour contracts with a foreign State's diplomatic or consular representation or cultural institution as related to the public functions performed by the foreign sovereign, as such attracting immunity.[433] However, State immunity for employment disputes has been progressively eroded in light of the necessity to grant adequate right of access to justice to the foreign States' employees working in the *forum* State.

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[430] On this regime, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 278. Article IX.4 of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces reads as follows: «Local civilian labour requirements of a force or civilian component shall be satisfied in the same way as the comparable requirements of the receiving State and with the assistance of the authorities of the receiving State through the employment exchanges. The conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State. Such civilian workers employed by a force or civilian component shall not be regarded for any purpose as being members of that force or civilian component».

[431] H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 437.

[432] A. CASSESE, *International Law*, cit., p. 102.

[433] *Ibidem*.

Nowadays, most countries adhere to the restrictive doctrine of State immunity as far as employment matters are concerned.[434] Some domestic courts have considered labour contracts involving foreign States as acts of private character, thus falling within the category of *acta jure privatorum*.[435] Early Belgian case law goes in this direction. In *Kingdom of Morocco v. DR*[436] the Brussels Labour Court refused to grant immunity to Morocco for the dismissal of a Portuguese national employed at its embassy as a chauffeur, stating that customary law did not require the upholding of immunity for a transaction which was clearly of a private character, such as an employment contract.[437] This orientation is to be found in other cases decided by the same Court, in particular *François v. State of Canada*[438] and *Rousseau v. Republic of the Upper Volta*.[439] More recently, however, Belgian Courts seem to have settled labour disputes with foreign States on the basis of the function performed by the concerned employee.[440]

Also the courts of Argentina, Czech Republic, Colombia, Greece,[441] Poland, Spain and the U.S. regard labour contracts entered into by a foreign sovereign as acts *jure privatorum.*[442] The Spanish Constitutional Court, in particular, has often relied on Article 5 of the European Convention on State Immunity as indicative of a customary trend towards the restriction of sovereign immunities in employment disputes, although Spain is not a party to the Convention.[443] As for the U.S., differently from the statutes into force in other common law

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[434] Romania is an exception in this regard. See, in particular: Tribunal of Bucharest, *A.S.M. v. The Embassy of P. in Romania*, Judgment of 5 June 2002, reported in G. HAFNER, M. G. KOHEN, S. BREAU (Editors), *State Practice Regarding State Immunities*, Leiden/Boston, Martinus Nijhoff Publishers, 2007, pp. 520-521. On the case law of Romania, see also the Report of the Center for Global Legal Challenges, Yale Law School, *State Practice on Sovereign Immunity in Employment Disputes Involving Embassy and Consular Staff*, 19 December 2015, p. 2.

[435] For an extensive account of State practice on labour disputes, which contain most of the case-law mentioned in this section, see: R. GARNETT, *State Immunity in Employment Matters*, in «The International and Comparative Law Quarterly», Vol. 46, No. 1 (January 1997), pp. 81-124; Report of the Center for Global Legal Challenges, Yale Law School (*supra*, note 394); U. KÖHLER, *State Immunity Regarding Employment Contracts*, in G. HAFNER, M. G. KOHEN, S. BREAU (Editors), *State Practice Regarding State Immunities*, cit., pp. 69-96.

[436] Brussels Labour Court (Sixth Chamber), *Kingdom of Morocco v. D.R.*, 1989. The case is reported in «International Law Reports», Vol. 115 (1999), pp. 421-423.

[437] *Ivi*, p. 422.

[438] Brussels Labour Court (First Chamber), *François v. State of Canada*, 1989. The case is reported in «International Law Reports», Vol. 115 (1999), pp. 418-420.

[439] Brussels Labour Court (Third Chamber), *Rousseau v. Republic of the Upper Volta*, 1983. The case is reported in «International Law Reports», Vol. 82 (1999), p. 118 ss..

[440] See, in particular: Francophone Labour Tribunal of Brussels, *Van Averbeke v. United States*, No. 12/15.954/A, 2015.

[441] Greece Court of Cassation (Areios Pagos), Judgment No. 1398/8, 1989, noted in «Revue Hellénique de Droit International», Vol 43 (1989-90), p. 389 ss.

[442] For details on this case law, see: U. KÖHLER, *State Immunity Regarding Employment Contracts*, cit., p. 78 ss. See also the report of the Center for Global Legal Challenges, Yale Law School, cit.

[443] Spanish Supreme Court, *Emilio B.M. v. Equatorial Guinea*, Judgment of 10 February 1986; Spanish Supreme Court, *Diana Gayle Abbot v. Republic of South Africa*, Judgment of 1 December 1986.

jurisdictions,[444] the Foreign States Immunities Act does not explicitly mention a labour disputes exception to foreign States' immunity from civil jurisdiction. As a consequence, U.S. courts treat employment contracts as commercial or private law transactions within the general exception of commercial activities, even if a certain attention has been paid to the working activity performed by the employee and to the security interests of the foreign State.[445]

Other domestic courts, instead, have drawn a distinction between the working activities which are only ancillary to the exercise of the foreign States' sovereign functions, like those performed by cleaners or drivers, and the working activities which entail a certain involvement in the sovereign functions of the foreign State.[446] According to this distinction, a foreign State enjoys immunity in labour disputes initiated by senior staff members of its embassy, but not if an employment claim is filed by, for instance, an embassy chauffeur. This is the stance taken by Austrian, Dutch and Swiss courts with respect to foreign States not parties to the European Convention on State Immunity.[447] The same criterion has been used by French courts. Following the adoption of the UN Convention, also courts of other countries such as Belgium,[448] Ireland, Portugal and New Zealand have embraced this distinction set out at Article 11(2)(a) of the Convention to solve labour disputes involving foreign States.[449]

In this context, Italian case law deserves particular attention. Since 1989, the Court of Cassation has denied State immunity for labour claims filed by Italian citizens working in Italy, but only with respect to the patrimonial aspects of the contract, to the exclusion of recruitment and reinstatement actions.[450] This criterion has been espoused in subsequent judgments,[451] even if with some inconsistencies such as the juxtaposition with the criterion of the function (auxiliary or governmental) performed by the employee.[452] After the ECHR

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[444] See *supra*, note 412.

[445] On the case law of U.S. in employment disputes with foreign States see: H. FOX, P. WEBB, *The Law of State Immunity*, cit., pp. 439-440.

[446] A. CASSESE, *International Law*, cit., p. 104.

[447] R. GARNETT, *State Immunity in Employment Matters*, cit., pp. 93-96.

[448] See *supra*, note 440.

[449] On this case law, see: Report of the Center for Global Legal Challenges, Yale Law School, cit., pp. 6-17.

[450] Italian Court of Cassation, *British General Consulate in Naples v. Toglia*, Judgment of 15 May 1989, No. 2329.

[451] See, for instance: Italian Court of Cassation, *Quattri v. Embassy of Norway*, Judgment of 28 November 1991, No. 12771.

[452] For an analysis of this case law, see: R. PAVONI, *L'immunità degli Stati nelle controversie di lavoro*, in N. RONZITTI, G. VENTURINI (Editors), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, cit., pp. 29-44. Decisions of Italian courts in application of the criterion of the function performed by the employee, rather than of the distinction between

judgment in the case *Guadagnino v. Italy and France*,[453] the Court of Cassation aligned its position to the discipline of the UN Convention, holding that Article 11, insofar as it makes reference to the function performed by the employee to affirm the jurisdiction of the *forum*, corresponds to the current *status* of international law.[454] In recent decisions, however, the Court of Cassation limited the application of Article 11 of the UN Convention to the reinstatement action proposed by the applicant, affirming the subsistence of Italian jurisdiction with respect to patrimonial aspects[455] and to the claims of nullity of the dismissal pact.[456]

A completely different discipline is into force, instead, in the UK and the other common law jurisdictions which have taken the UK SIA as a model. Although this latter restates Article 5 of the European Convention, it adds an important restriction to the applicability of the objective criteria of jurisdiction established in the European Convention: according to Article 16(1)(a) SIA, State immunity is always to be uphold in proceedings that involve staff employed in consular and diplomatic missions, notwithstanding the nationality, residence and working activity performed by the concerned individuals.[457] Therefore, the absolute doctrine of State immunity is reintroduced for labour disputes initiated by the personnel of foreign embassies and consulates, which is denied access to court. Unfortunately, also Australia, Malawi, Pakistan and South Africa have adopted such restrictive clause.[458]

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patrimonial and reinstatement actions, are discussed also in U. KÖHLER, *State Immunity Regarding Employment Contracts*, cit., p. 89 ss.

[453] European Court of Human Rights, *Case of Guadagnino v. Italy and France*, Judgment of 18 January 2011, Application No. 2555/03. This judgment is recalled later in this section, while discussing the case law of the European Court of Human Rights in employment-related disputes.

[454] Italian Court of Cassation (Sezioni Unite), *Embassy of Spain in Vatican, Holy See v. De la Grana*, Presidential Order of 18 April 2014, No. 9034; Italian Court of Cassation (Sezioni Unite), *L.A. v. Embassy of the United Arab Emirates*, Judgment of 27 October 2014, No. 22744; Italian Court of Cassation (Sezioni Unite), *Ranasinghe Arachchige Neil Rohith v. Embassy of the Republic of South Korea in Vatican, Holy See*, Judgment of 9 June 2016, No. 11848.

[455] Italian Court of Cassation (Sezioni Unite), *Académie de France à Rome v. Galamini de Recanati*, Judgment of 18 September 2014, No. 19674; Italian Court of Cassation (Sezioni Unite), *X v. British Council*, Judgment of 8 March 2019, No. 6684.

[456] Italian Court of Cassation (Sezioni Unite), *Real Academia de España de Bellas Artes en Roma v. E.G.A.*, Presidential Order of 22 December 2016, No. 26661.

[457] Article 16(1)(a) of the UK Sovereign Immunities Act reads as follows: «16.(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and (a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968».

[458] Like the UK SIA, the statutes into force in Australia, Malawi, Pakistan and South Africa exclude the applicability of stable criteria of jurisdiction to the staff employed in diplomatic and consular representations. Restrictive clauses are, in particular: for Australia, Article 12 (5) of the Foreign States Immunities Act of 1985, consolidated version after the amendment of 2016; for Malawi, Article 18(1)(a) of the Immunities and Privileges Act of 1984; for Pakistan, Article 17(1)(a) of the State Immunity Ordinance of 1981; for South Africa, Article 5(29(b) of the Foreign States Immunities Act of 1981.

Against this background, the UK Supreme Court has recently rendered a path-breaking judgment that calls for a reform of the Sovereign Immunities Act.[459] The case originated from labour claims filed by two Moroccan nationals working as cleaning ladies in the embassies of, respectively, Libya and Sudan, alleging violations of UK and EU labour regulations. To establish whether immunity rules set out in the UK SIA constituted or not a reasonable limitation of the applicants' right of access to justice, the Court looked into the current *status* of customary international law. As a result of its analysis, it found that, under customary international law, the only relevant criterion to solve immunity issues in labour disputes is nowadays the function performed by the employee, as codified under Article 11 of the UN Convention on Jurisdictional Immunities.[460] Moreover, the Supreme Court came to the conclusion that there is no binding principle of international law prescribing absolute State immunity for employment matters arising with embassy or consular employees.[461] As a consequence, the Court declared that «so far as sections 4(2)(b) or 16(1)(a) of the State Immunity Act confer immunity, they are incompatible with article 6 of the Human Rights Convention sections».[462]

The *Benkharbouche* decision reflects a strong influence of the case law of the European Court of Human Rights. In fact, questioning the proportionality of the restrictions imposed by the law of State immunity to the rights enshrined in Article 6 ECHR, the UK Supreme Court engaged in a balancing exercise which is typical of the Strasbourg Court. Such reasoning is clearly in contrast with the traditional stance taken by the UK and defended in this case by the Secretary of State, according to which immunity rules do not simply bar the *forum* court from the exercise of its the jurisdiction, but deprive it of its jurisdiction *ab initio*, so that the concerned individuals' right of access to justice is not even taken into account.[463] From this perspective, the *Benkharbouche* judgment may be regarded as a significant step towards the enhancement of human rights protection in the UK. What is more, this case shows that even a regressive provision such as Article 11 can favour the individual right of access to justice in

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[459] UK Supreme Court, *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah*, Judgment of 18 October 2017, [2017] UKSC 62. For a brief comment of this case in light of the case law of the European Court of Human Rights, see: P. ROSSI, *Controversie di lavoro e immunità degli Stati esteri: tra codificazione e sviluppo del diritto consuetudinario*, in «Rivista di diritto internazionale», Vol. CII, No. 1 (2019), pp. 31-33.

[460] *Ivi*, paragraphs 60-68.

[461] *Ivi*, paragraphs 69-74.

[462] *Ivi*, paragraph 76.

[463] *Ivi*, paragraph 30.

contexts where foreign States still enjoy absolute immunity for labour claims filed by their embassy or consular employees.[464]

4.3 The case law of the European Court of Human Rights

As apparent from our survey of State practice, the case law of the European Court of Human Rights is often quoted by domestic courts faced with issues of State immunity. Indeed, since 1999 the Court has rendered a number of judgments on the immunities of States and international organizations in labour disputes, developing its own approach to the subject. In particular, it has tried to find a balance between, on the one hand, the values protected by immunity rules, and, on the other, the individual right of access to court enshrined in Article 6 ECHR. In this regard, the Court has coherently maintained that such right is not absolute, but may be subject to limitations. Since the final decision as to the observance of the Convention's requirements rests with the Court, this latter «must be satisfied that the limitations applied do 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».[465]

In practice, however, in its judgments on the immunity of States and international organizations the European Court of Human Rights has never seriously assessed if the very essence of the right of access to justice was impaired.[466] Rather, the Court has set out two main requirements to verify that a restriction of the right of access to justice imposed by immunity rules is not contrary to the Convention. Firstly, the limitations to the right must pursue a legitimate purpose. In general terms, the Court has been satisfied that immunity rules pursue a legitimate aim, that is the good functioning of an international organization,[467] or compliance with customary international law so as to promote good relations and comity

[464] In the sense that the discipline set out at Article 11 of the UN Convention on Jurisdictional Immunities of States and Their Properties extends the scope of immunity rules for labour disputes beyond what required under customary international law, but is nonetheless able to limit the upholding of State immunity at least in those States which used to grant absolute immunity to the foreign employer State (for instance, the UK) see: P. ROSSI, *Controversie di lavoro e immunità degli Stati esteri: tra codificazione e sviluppo del diritto consuetudinario*, cit., p. 33 ss.

[465] European Court of Human Rights, *Case of Waite and Kennedy v. Germany,* cit., paragraph 59.

[466] In this sense, see: M. I. PAPA, *Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'"Associazione Madri di Srebrenica"*, in «Diritti umani e diritto internazionale», Vol. 8 (2014), No. 1, p. 33.

[467] See, for instance, European Court of Human Rights, *Case of Waite and Kennedy v. Germany,* cit., paragraph 61.

though respect of the sovereignty of other States.[468] Secondly, the very core of the Court's assessment is the proportionality test, which means that the measures undertaken by the State party must be proportioned to the aim pursued. If these two requirements are met, there is no violation of the Convention. According to some scholars, however, this kind of reasoning is biased in favour of State immunity: indeed, immunity rules impose a restriction on the right of access to justice which goes far beyond the ordinary limitations imposed by means, for instance, of procedural rules.[469]

This reasoning was firstly applied to immunities in the famous cases *Waite and Kennedy v. Germany*[470] and *Beer and Regan v. Germany*,[471] both concerning the jurisdictional immunities of the European Space Agency for employment matters. Although this work does not cover the immunities of international organizations, the two judgments are nevertheless relevant for the study of the law of State immunity, because it is precisely in these cases that the European Court of Human Rights formulated the *alternative means of redress* argument, invoked also by the Italian defence in the *Jurisdictional Immunities* case. According to this argument, the proportionality of a restriction of the right of access to justice is secured if the applicants can make recourse to «reasonable alternative means to protect effectively their rights under the Convention».[472] In both cases, the Court found that such remedies were available, since the applicants could sue in courts the private enterprise that had hired them.[473] Interestingly enough, according to the Court the alternative remedy must not be directed necessarily against the subject enjoying immunity. The Court adopted this approach also in the subsequent case *A.L. v. Italy*, concerning an employment-related dispute with NATO.[474]

Following this case law of the European Court of Human Rights, the argument of the unavailability of alternative means of redress was invoked also by domestic courts to deny immunity to international organizations. In particular, domestic courts affirmed that the upholding of State immunity, in absence of a judicial mechanism within the organization,

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[468] See, for instance: European Court of Human Rights, *Case of Fogarty v. the United Kingdom*, Judgment of 21 November 2001, Application no. 37112/97, paragraph 34.

[469] M. I. PAPA, *Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'"Associazione Madri di Srebrenica"*, cit., pp. 33-34 (see, in particular, the bibliography provided by the author at note 18).

[470] See *supra*, note 465.

[471] European Court of Human Rights (Grand Chamber), *Case of Beer and Regan v. Germany*, Judgment of 18 February 1999, Application No. 28934/95.

[472] European Court of Human Rights (Grand Chamber), Case of *Waite and Kennedy v. Germany*, cit., paragraph 68.

[473] *Ivi*, paragraph 70; European Court of Human Rights (Grand Chamber), *Case of Beer and Regan v. Germany*, cit., paragraph 60.

[474] European Court of Human Rights, *Case of A.L. v. Italy*, Judgment of 11 May 2000, Application No. 41387/98.

would have amounted to a violation of the right of access to justice of the concerned individual. This was the reasoning, for instance, of both the Italian Court of Cassation and the French Court of Cassation on the employment-related claims brought, respectively, against the International Plant Genetic Resources Institute (IPGRI)[475] and the African Development Bank.[476] In those cases, the immunity of the international organization was made conditional upon the availability of means of redress set up within the institutional framework of the organization.

Unfortunately, the alternative means of redress argument has been left aside by the European Court of Human Rights in its subsequent jurisprudence on State immunity for labour disputes. In *Fogarty v. the United Kingdom* the Court substantially passed over the issue, even if the applicant, a former administrative assistant of the U.S. embassy in London, had argued that alternative means of redress were not available to her.[477] With regard to the proportionality requirement the Court contented itself to state 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 court as embodied in Article 6(1)».[478] Moreover, the Court observed that, although «there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes»,[479] the practice of States was so diverse that the United Kingdom could not be regarded as violating any international standard in attaching absolute immunity to suits of employees at diplomatic missions.[480]

Almost one decade later, in the case *Cudak v. Lithuania* the Strasbourg Court had to admit that the doctrine of absolute State immunity for employment disputes had been progressively

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[475] Italian Court of Cassation (Sezioni Unite), *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Judgment of 19 February 2007, No. 3718, paragraphs 6.8 and 7. This approach had already been adopted by the Court of Cassation (Sezioni Unite) in: *Colagrossi v. FAO*, Judgment of 18 May 1992, No. 5942*; Carretti v. FAO*, Judgment of 23 January 2004, No. 1237; *Pistelli v. European University Institute*, Judgment of 28 October 2005, No. 20995. On this case law, see: M. DI FILIPPO, *Il rapport tra immunità delle organizzazioni internazionali dalla giurisdizione e diritto del singolo alla tutela giurisdizionale*, in N. RONZITTI, G. VENTURINI (Editors), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, cit., pp. 145-154.

[476] French Court of Cassation, *African Development Bank v. Mister X*, Judgment of 25 January 2005, Appeal No. 04-41012. The case is discussed, *inter alia*, in: P. SCHMITT, *Access to Justice and International Organizations. The Case of Individual Victims of Human Rights Violations*, cit., pp. 106-107.

[477] European Court of Human Rights, *Case of Fogarty v. the United Kingdom*, cit., paragraph 31. For a comment on this judgment and the subsequent case law of the ECtHR on State immunity for employment-related disputes, see: R. NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, cit. , p. 281 ss.

[478] *Ivi*, paragraph 36.

[479] *Ivi*, paragraph 37.

[480] *Ibidem*.

eroded.[481] In the Court's view, the new trend is codified in the United Nations Convention, whose Article 11 reflects customary international law and is thus binding upon the States parties to the European Convention even if they have not ratified the UN Convention on Jurisdictional Immunities of States and their Property. In the case at hand, the Court observed that the applicant, being a switchboard operator at the Polish embassy, did not perform any particular function closely related to the exercise of the foreign State's governmental authority, nor was a diplomatic agent or consular officer, nor a national of the employer State, so that none of the exceptions enlisted at Article 11 of the UN Convention applied to her.[482] Granting absolute immunity to Poland, Lithuania had gone beyond what required under customary international law, thus overstepping its margin of appreciation.

The analysis of current customary law undertaken by the ECtHR in *Cudak* is not entirely convincing. In fact, the Court failed to take into account the practice of States, relying exclusively on the UN Convention as an instrument of codification and apparently forgetting that codification conventions are also meant to contribute to the *progressive development* of international law in accordance with Article 13 of the UN Charter. [483] Despite this flaw in the argumentation, the Strasbourg Court has confirmed its approach to article 11 of the UN Convention in its recent case law, namely in the cases *Guadagnino v. Italy*,[484] *Sabeh El Leil v. France*,[485] *Wallishauser v. Austria*[486] and *Radunovič and Others v.Montenegro*.[487] In all those judgments, the Strasbourg Court found that the courts of the respondent State had failed to take into due account the type of working activity performed by the applicant.[488] Since the concerned individuals performed activities which were only ancillary to the fulfilment of the sovereign functions of the foreign State, the Court concluded that customary international law excluded the upholding of State immunity in those specific cases, even if to the exclusion of reinstatement actions,[489] in accordance with the discipline set out at Article 11 of the UN

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[481] European Court of Human Rights (Grand Chamber), *Case of Cudak v. Lithuania*, Application No. 15869/02, Judgment of 23 March 2010, paragraph 64.
[482] *Ivi*, paragraph 69.
[483] In this sense, see: P. ROSSI, *Controversie di lavoro e immunità degli Stati esteri: tra codificazione e sviluppo del diritto consuetudinario*, cit., p. 16 ss.
[484] See *supra*, note 453.
[485] European Court of Human Rights (Grand Chamber), *Case of Sabeh El Leil v. France*, Judgment of 29 June 2011, Application No. 34869/05.
[486] European Court of Human Rights , *Case of Wallishauser v. Austria*, Judgment of 17 July 2012, Application No. 156/04.
[487] European Court of Human Rights, Case of *Radunovič and others v. Montenegro*, Judgment of 25 October 2016, Applications Nos. 45197/13, 53000/13, 73404/13.
[488] This jurisprudence is thoroughly analysed in D. CARREAU, F. MARRELLA, *Diritto internazionale*, cit., pp. 424-426.
[489] European Court of Human Rights, Case of *Radunovič and others v. Montenegro*, cit., paragraph 76.

Convention. Moreover, in its 2016 judgment on the case *Naku v. Lithuania and Sweden*[490] the Strasbourg Court stressed the obligation, falling upon the courts of the *forum* State prior to the upholding of State immunity, to verify whether the foreign State's employee performed specific duties in the exercise of governmental authorities. According to the Court, the failure to conduct such assessment is in itself a violation of the applicants' right of access to justice.[491]

In the recent case *Ndayegamiye-Mporamazina v. Switzerland*,[492] the Strasbourg Court had the occasion to further develop its position on State immunity for labour-related disputes. Since the applicant was a national of the employer State not permanently resident in the State of the *forum*, there was no need to analyse the functions performed by the applicant in light of Article 11 of the UN Convention.[493] The case, however, raised interesting questions on two separate issues: the waiver of immunity and the *alternative means of redress* argument, this latter neglected by the Court since the cases *Waite and Kennedy* and *Beer and Reagan*.[494] Unfortunately, the Court maintained a rather "statist" stance on both aspects, to the detriment of the right of access to justice.

As far as the waiver of immunity is concerned, the Court held that Article 7 of the UN Convention corresponds to the current *status* of customary international law.[495] In the case at hand, however, the contract clause giving competence to Swiss tribunals for labour-related disputes arising between the applicant and the employer State did not met the requirements set forth at Article 7, because it was not clear enough.[496] On the availability for alternative means of redress, instead, the Court denied that the upholding of State immunity in absence of alternative means of redress could *ipso facto* breach the individual's right of access to justice.[497] To support its finding, it quoted its own decision in *Mothers of Srebrenica*[498] and

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[490] European Court of Human Rights, *Case of Naku v. Lithuania and Sweden*, Application No. 26126/07, Judgment of 8 November 2016.
[491] *Ivi*, paragraphs 94-95.
[492] European Court of Human Rights, Case of *Ndayegamiye-Mporamazina v. Switzerland*, Judgment of 5 February 2019, Application No. 16874/12.
[493] *Ivi*, paragraphs 61-62.
[494] See *supra*, notes 465 and 471.
[495] European Court of Human Rights, Case of *Ndayegamiye-Mporamazina v. Switzerland*, cit., paragraph 57.
[496] *Ivi*, paragraph 59.
[497] Ivi, paragraph 64.
[498] European Court of Human Rights, Case of *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, Application No. 65542/12. For critical remarks on this decision see, *inter alia*: M. I. PAPA, *Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'"Associazione Madri di Srebrenica"*, cit., pp. 27-62; A. SPAGNOLO, *Immunità delle Nazioni Unite per*

the ICJ judgment in the *Jurisdictional Immunities* case, disregarding its earlier case law on the immunity of international organizations for employment disputes. But, despite this affirmation of principle, the Court's decision seems to be influenced by the circumstance that, during the Swiss proceedings, the employer State had assured access to its administrative tribunals to the applicant, without problems of statutory limitations.[499]

The ECtHR's approach to questions of immunity in labour disputes has proved to be very influential, as not only domestic courts, but even the Court of Justice of the European Union have taken the same stance.[500] In a recent preliminary ruling procedure raised by a German labour court, the ECJ has declared EU Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applicable to disputes between foreign embassies and their employees. In particular, the Court affirmed that customary international law does not prevent the court of a Member State from exercising its jurisdiction in disputes involving an embassy and its employee, if the employee does not perform any function falling within the exercise of public powers.[501]

In conclusion, the jurisprudence of the European Court of Human Rights confirms le restrictive doctrine of State immunity for employment-related disputes. The Court based its recent decisions on Article 11 of the UN Convention, thus contributing to the crystallization of a rule of international law which, as highlighted earlier in this chapter, is regressive with respect to the solutions adopted in other international instruments or at the domestic level. At the same time, however, the case law of the Strasbourg Court strengthens the idea that the right of access to courts has to prevail over State immunity in labour-related disputes, at least in those cases where the concerned employee does not perform any governmental function.

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violazioni dei diritti umani commesse nell'ambito di operazioni di peacekeeping e rimedi disponibili per le vittime, in «Diritti umani e diritto internazionale», Vol. 7 (2013), No. 3, pp. 806-812.

[499] European Court of Human Rights, Case of *Ndayegamiye-Mporamazina v. Switzerland*, cit., paragraph 64.

[500] Court of Justice of the European Union, Case C-154/11, *Ahmed Mahamdia v. People's Democratic Republic of Algeria*, Judgment of 19 July 2012.

[501] *Ibidem*. Paragraph 56 of the judgment reads as follows: «[…] in view of the content of that principle of customary international law concerning the immunity of States from jurisdiction, it must be considered that it does not preclude the application of Regulation No 44/2001 in a dispute, such as that in the main proceedings, in which an employee seeks compensation and contests the termination of a contract of employment concluded by him with a State, where the court seised finds that *the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State*». Italics is my own addition. On the potential effects of EU law on the law of State immunity, see: P. WEBB, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, in «The European Journal of International Law», Vol. 27, No. 3, pp. 745-767.

5. Immunity from measures of execution: the problem of enforcing judicial decisions rendered against a foreign State

As mentioned earlier in this chapter, State immunity from enforcement stands as a separate issue under the law of State immunity. This is apparent, for instance, from the fact that the foreign State's waiver of immunity from civil jurisdiction does not imply automatically its consent to waive the immunity of its property from measures of execution; on the contrary, such consent must be specific and explicit. According to the International Court of Justice, immunity from civil jurisdiction and immunity from enforcement are two separate regimes with different rules of customary international law governing them.[502] This distinction is reflected in the UN Convention on Jurisdictional Immunities of States and their Properties, whose Part IV is specifically dedicated to State immunity from measures of constraint in connection with proceedings before a court.

Albeit a separate issue, immunity from measures of execution greatly impacts on the judgments rendered against foreign States, because it is precisely on execution that depends the actual enforceability of such judgments and, as a consequence, of the compensation awarded to the applicants. Even nowadays, there is a substantial asymmetry between immunity from adjudication and immunity from execution, this latter ensuring a more intense protection of the interests of foreign sovereigns. An explanation for this is that States regard execution as a more penetrating intrusion into foreign sovereignty than jurisdiction;[503] as a consequence, on enforcement they apply immunity rules that go beyond what required for adjudication. The result is that individuals may be able to obtain a favourable decision in the *forum* Court, but not actual redress, because the properties of the foreign sovereign are covered by immunity. From this perspective, immunity from enforcement may rightly be regarded as «the last fortress, the last bastion of State immunity».[504]

Until few decades ago, the enforceability of adverse judgments rendered against foreign States was even more problematic, given that absolute immunity from measures of execution was uphold by the majority of States. In fact, rules on immunity from execution developed more slowly than those on State immunity from civil jurisdiction. Even the European

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[502] Int**e**rnational Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening),* cit., paragraph 131.

[503] In this sense, see: A. CASSESE, *International Law*, cit., p. 109; D. CARREAU, F. MARRELLA, *Diritto internazionale*, cit., p. 435.

[504] H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 479. The extract is a quotation of ILC's Special Rapporteur Sucharitkul.

Convention on State Immunity embraces the absolute theory of immunity from execution, with the only exception of express waiver by the foreign State.[505] Despite the early restrictive tendencies registered during the 1920s in Italy[506] and Switzerland,[507] whose legislation subjected enforcement over foreign States' properties to the authorization of the national government, it was not until the 1970s that the restrictive doctrine of immunity from measures of execution was accepted in countries such as France, Germany, Spain, the UK, the U.S. and the other common law jurisdictions that followed the model of the UK SIA.[508]

According to the restrictive doctrine on State immunity from execution, a distinction is drawn between the properties of the foreign State allocated to fulfil a sovereign function, such as the premises of its embassy, and those properties that are not, such as the buildings owned in the *forum* State for investment purposes. Only the second category of property can be subjected to measures of execution by the *forum* State, whereas properties destined to a public function are always covered by immunity, unless the foreign State explicitly renounces to it.[509] The *discrimen* is thus the destination *in concreto* of the property.[510] This rule has been confirmed by the International Court of Justice in the *Jurisdictional Immunities* case, that declared contrary to customary international law the seizure of Villa Vigoni, a building on the Como Lake owned by Germany and destined to cultural functions deemed to be public by the Court.[511] The same principle is enshrined in Article 19 (c) of the UN Convention on State

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[505] Article 23 of the European Convention on State Immunity reads as follows: «No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case».

[506] In Italy, domestic courts had adopted a restrictive approach towards immunity from execution as early as 1887. See, in this regard: Lucca Court of Appeal, *Hamspohn Avv. v. Bey di Tunisi ed Erlanger*, Judgment of 14 March 1887, reported in «Il Foro Italiano», Vol. 12, Parte prima: giurisprudenza civile e commerciale (1887), pp. 474-492. However, restrictive immunity was systematically applied by Italian courts only after the entrance into force of legislative decree. no. 1621 of 1925, converted into law No. 1263 of 1926, then annulled by the Constitutional Court with judgment No. 329/1992. See: A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, in N. RONZITTI, G. VENTURINI (Editors), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, cit., pp. 241-242.

[507] The first Swiss legislation on the subject was law of 12 July 1918, abrogated on 8 July 1926, then followed by law of 24 October 1939, abrogated on 3 September 1948. For early decisions by Swiss courts in favour of a restrictive approach, see: A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, cit., p. 236, note 9.

[508] See A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, cit., pp. 236-237; H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 482 ss.

[509] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 283-284.

[510] A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, cit., pp. 240-241.

[511] Int**e**rnational Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, cit., paragraph 119.

immunity, even if only with regard to post-judgment measures, to the exclusion of pre-judgment measures.[512]

Distinguishing between immune and non-immune properties on the basis of their destination is not, however, an easy task. Although courts adhering to the restrictive approach have generally declared immune the military properties of the foreign State and the premises of foreign embassies,[513] other categories of goods do not allow a straightforward classification. This is the case of the bank accounts owned by diplomatic representations, which are inserted into the list of immune properties by the UN Convention (Article 21) because used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts.[514] But how to determine when bank accounts are used for public purposes?

The recent practice of States is in favour of considering them immune in absence of any clear indication concerning their destination,[515] moving from the presumption that they are allocated to fulfil a public purpose.[516] A recent law passed by the Italian Parliament goes even further, allowing consular and diplomatic representations on the Italian territory to shield their bank accounts from forced execution with a simple declaration of public purpose, not subject to judicial review.[517] This provision clearly represents an attempt to nullify the potential effects of judgment no. 238/2014 of the Italian Constitutional Court, making more difficult to

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[512] Article 19 (c) reads as follows: «No *post-judgment* measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: […] (c) it has been established that the property *is specifically in use or intended for use by the State for other than government non-commercial purposes* and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed». Italics is my own addition. Once again, the UN Convention proves to be regressive in comparison with the practice of States. For instance, Italian case law does not distinguish between immunity from pre-judgment measures and immunity from post-judgment enforcement measures. On this issue, see: A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, cit., p. 246.

[513] As far as the practice of European States is concerned, see: A. REINISCH, *State Immunity from Enforcement Measures*, in G. HAFNER, M. G. KOHEN, S. BREAU (Editors), *State Practice Regarding State Immunities*, cit., p. 161 ss. For the Italian approach, see: A. ATTERRITANO, *Immunità dalle misure esecutive e cautelari*, cit., pp. 242-243.

[514] Article 21(1)(a) of the UN Convention on Jurisdictional Immunities of States and their Properties reads as follows: «1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; […]».

[515] B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 284; C. FOCARELLI, *Diritto Internazionale*, cit., p. 335; A. REINISCH, *State Immunity from Enforcement Measures*, cit., p. 163;.

[516] See, for instance: Swiss Federal Tribunal, *Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, 31 July 1990, reported in «International Law Reports», Vol. 102, p. 205.

[517] Law No. 162/2014, 10 November 2014, Article 19 *bis*.

enforce the judgments rendered against a foreign State (notably, Germany) for gross violations of human rights.[518]

The approach adopted with respect to the bank accounts of diplomatic missions is not but one example of what Cassese called a tendency in the case law to be more generous with foreign States as far as immunity from execution is concerned.[519] Other instances can be discerned in the case law on buildings used for institutional purposes, which led to the absurd result of considering immune, *inter alia*, a building abusively occupied by a commercial representation[520] and a building which was not an embassy anymore but was still used as meeting office by the diplomatic staff.[521] More recently, the Tribunal of Rome upheld the immunity from execution of a foreign State with respect to the building hosting its embassy, even though such occupation was *sine titulo.* The reasoning behind this decision was that the building was used for a public purpose, namely the fulfilment of diplomatic functions in accordance with the Vienna Convention on Diplomatic Relations.[522]

In conclusion, customary international law as it presently stands and is applied by domestic courts strongly limits enforcement against the properties of foreign States. This undermines the effectivity of the restrictive doctrine of State immunity from civil jurisdiction, because a private person which obtains a judgment against a foreign State might not be able to have actual redress. The applicant's capability to obtain a payment from the foreign State actually depends on the judicial activism of the *forum* courts, as the recent U.S. case law on Argentinian bonds shows. The U.S. Supreme Court recently held that «no provision in the FSIA immunizes a foreign sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets»,[523] paving the way for Argentina's creditors to recover their money.

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[518] For criticism on law No. 162/2014, see: B. CONFORTI, *Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione dei conti correnti di Stati stranieri*, in «Rivista di diritto internazionale», Vol. 98, No. 2 (2015), pp. 558-561.

[519] A. CASSESE, *International Law*, cit., p. 109.

[520] Italian Court of Cassation (Sezioni Unite), *Ministero degli affari esteri c. Immobiliare Villa ai Pini s.r.l. e Repubblica popolare di Cina*, Judgment of 17 July 2008, No. 19600/2008. On this decision, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 284-285; A. GIOIA, *Diritto Internazionale*, 6th Edition, Milano, Giuffrè Francis Lefebre, 2019, p. 290.

[521] German Supreme Court, Judgment of 28 May 2003, *Kenyan Diplomatic Residence Case* (Case No IXa ZB 19/03), reported in «International Law Reports», Vol. 128, p. 632. On this decision, see: B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., p. 285.

[522] Tribunal of Rome, *Embassy of Equatorial Guinea v. C.G.*, Judgment of 20 March 2018.

[523] United States Supreme Court, *Republic of Argentina v. NML Capital Ltd*., 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014). In the same sense, see: United States Supreme Court, Order List Jun. 16, 2014, 5. Both cases are commented in: A.C. PORZECANSKI, *The Origins of Argentina's Litigation and Arbitration Saga, 2002-2014*, in «Working Paper Series of the School of International Service», Paper No. 2015-16, 13 May 2015.

In contrast, the enforcement of judgments rendered against foreign States is even more difficult when measures of execution must be authorized by the competent ministry, as is still the case in Greece and Croatia.[524] Indeed, the execution of a judgment could be blocked for the sake of maintenance of good diplomatic relations. This is what happened in the Greek *Distomo massacre* case: although the Supreme Court had dismissed Germany's appeal,[525] so that the judgment rendered by the Court of First Instance of Leivadia (awarding compensation to the victims of the Distomo massacre) became final, the Minister of Justice denied his approval – required under Art. 923 of the Greek Code of Civil Procedure – to the execution of the decision. That is why the applicant, the Prefecture of Vojotia, then tried to obtain the execution of the judgment in Italy, in the wake of the *Ferrini* case law.[526]

The importance of Article 923 within the Greek legal order has recently been confirmed by the Thessaloniki Court of Appeal in a decision concerning the enforcement of a Cypriot judgment rendered against Turkey for unlawful expropriation.[527] According to that Court, the provision whereby compulsory enforcement against a foreign State cannot take place without a prior leave of the Minister of Justice is not in contrast with the applicants' right of access to justice enshrined in Article 6 ECHR, because aimed at avoiding tensions with foreign sovereigns.[528] Therefore, Article 923 of the Code of Civil Procedure remains «the first line of defense for foreign States in Greece».[529]

6. Conclusive remarks: "substance" against "procedure"

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[524] A. REINISCH, *State Immunity from Enforcement Measures*, cit., p. 156.

[525] Greece Supreme Court (Areios Pagos), *Prefecture of Vojotia (Greece) v. Federal Republic of Germany*, Judgment of 4 May 2000, Case No. 11/2000 (288933).

[526] See, in particular, the decision of the Italian Court of Cassation authorizing the enforcement of the Greek judgment because not contrary to public order: Italian Court of Cassation (Sezioni Unite), *Repubblica federale di Germania c. Amministrazione Regionale della Vojotia*, Judgment of 29 May 2008, No. 14199, in «Il Foro Italiano», Vol. 132, No. 5, pp. 1568-1575. Since this case raises the question of State immunity from civil jurisdiction for gross violations of human rights, it will be dealt with in the next chapter of this work.

[527] This 2019 decision of the Thessaloniki Court of Appeal is discussed in: A. ANTHIMOS, *The Thing That Should Not Be: European Enforcement Order Bypassing Acta Jure Imperii*, 20 June 2019, available online at: http://conflictoflaws.net/2019/the-thing-that-should-not-be-european-enforcement-order-bypassing-acta-jure-imperii/ (last accessed on 31 July 2019).

[528] The Thessaloniki Court of Appeal also affirmed the compatibility of Article 923 of the Greek Code of Civil Procedure with Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

[529] A. ANTHIMOS, *The Thing That Should Not Be: European Enforcement Order Bypassing Acta Jure Imperii*, cit.

This chapter had the ambitious aim to discuss the very foundations of the law of State immunity. Albeit with no presumption of completeness, our survey covered the issue from the very first affirmations of the restrictive doctrine of State immunity to its current applications in fields such as commercial transactions and employment-related disputes. What emerges is that the restrictive doctrine of State immunity from adjudication is firmly established under customary international law, notwithstanding the differences registered in the practice of States as well as into the relevant international instruments. The principle of State immunity has been progressively eroded, to the point that nowadays not only commercial transactions, but also labour contracts and torts committed by the foreign State appear, under certain circumstances, in the list of non-immune activities.

Moreover, the analysis of the early judgments upholding a restrictive notion of State immunity permitted to highlight the rationale behind the doctrine, that is the need to grant the right of access to justice to individuals, at least when the foreign State acts *jure privatorum*. In other words, when the conduct undertaken by the State is not the expression of its sovereign powers, it does not deserve the protection of State immunity. *A contrario*, this means that under the restrictive doctrine State immunity is designed to cover *only* the sovereign functions of the State, and not every State conduct. Of course, problems arise as to what can be defined as a sovereign function. However, it is important to notice that the *ratio* behind the restrictive or functional doctrine is not inconsistent with possible further restrictions of State immunity, as long as they do not impair the protection of the very core of State sovereignty.

There is another lesson to be learned from the practice of States. Independently from the criterion chosen, a national court will always look into the subject matter of the dispute to decide whether the relevant conduct carried out by the foreign State amounts to a commercial or private activity, or rather to a sovereign act. In other words, the substance of a case matters. This evidence is clearly in contrast with the argument put forward by the International Court of Justice in the *Jurisdictional Immunities* case, where it was stated that immunity is an exclusively procedural and preliminary issue, for whose determination a national court is not allowed to enter into the merits of the case.[530] Contrary to the finding of the ICJ, States' practice of the doctrine of functional immunity shows that the type of State conduct is always relevant when immunity is at issue. From this perspective, there is no reason why also the gravity of the acts committed by the foreign State should not be taken into account by

[530] Int**e**rnational Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, cit., paragraph 82.

domestic courts when faced with questions of immunity.[531] As pointed out in literature, indeed, «it is certainly true that a decision on immunity presents itself as a procedural problem before a court. Yet, jurisdictional immunities are not mere technical legal devices, as they protect some material interest both in domestic and international law».[532]

What is more, the recent case law of States shows that domestic courts, under the influence of the jurisprudence of the European Court of Human Rights, pay more attention to the individuals' right of access to justice when dealing with cases of State immunity. An instance in this regard is the recent UK case *Benkharbouche*.[533] This trend discards the idea of State immunity as an exclusively procedural issue depriving the *forum* court from its jurisdiction *ab initio*. In more general terms, domestic applications of the law of State immunity suggest that this latter is a principle of non-exclusive procedural nature, whose limitations are aimed at advancing the individual right of access to justice. From the point of view of the actual redress for individuals who suffered a wrong from the part of a foreign State, however, much still needs to be done in order to promote the actual enforceability of the judgments rendered against foreign sovereigns. Indeed, immunity from measures of execution still grants to foreign States a broader protection than State immunity from adjudication.

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[531] In this sense, see: A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., pp. 385-386; B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., pp. 135-142; C. ESPÒSITO, Jus Cogens *and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist",* in «Italian Yearbook of International Law», Vol. XXI (2011), p. 165; G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, in «Rivista di diritto internazionale privato e processuale», Year XLVIII, No. 3 (July-September 2012), pp. 631-632. In the sense that, on the contrary, immunity rules are procedural in nature and that the theory attributing to them substantive character have been surpassed, see: F. MARONGIU BUONAIUTI, *La sentenza della Corte internazionAle di giustizia relativa al caso* Germania c. Italia*: profili di diritto intertemporale*, in «Diritti umani e diritto internazionale», Vol. 6 (2012), No. 2, pp. 338-341.

[532] M. IOVANE, *Conflicts Between State-Centred and Human-Centred International Norms*, cit., p. 218.

[533] See *supra*, note 459.

CHAPTER 3

ACCESS TO JUSTICE FOR THE VICTIMS OF SERIOUS VIOLATIONS OF HUMAN RIGHTS: FROM EARLY STATE PRACTICE TO THE *JURISDICTIONAL IMMUNITIES* CASE

1. Introduction. Why further limitations of State immunity are not incompatible with the restrictive approach

As discussed in the second chapter of this work, the doctrine of State immunity from civil jurisdiction developed over time, leading to the affirmation of the restrictive approach. More recently, further restrictions of the scope of State immunity rules have been proposed both in literature and in legal cases brought before domestic and international courts. The idea that States should not enjoy immunity from civil jurisdiction for gross violations of human rights is particularly recurrent in legal claims, even if rarely accepted by judges – in particular, international ones. Such redefinition of the doctrine, however, would not be incompatible with the rationale behind the restrictive doctrine of State immunity, actually accepted by most States. Two are the main arguments in favour of this proposition: the evolution of the concept of State sovereignty and the role played by the right of access to justice in designing the scope of application of State immunity rules.

From our analysis of early decisions and legal scholarship on State immunity, it is apparent that the limits introduced to State immunity on the basis of the restrictive doctrine responded to a new concept of State sovereignty, not anymore linked to the absolute power of the king.[534] The "personalistic" paradigm of State sovereignty, according to which every act of the prince and his representatives had to be covered by immunity, was surpassed in favour of the "liberal" model, where only the acts performed by the organs and agencies of the State in official capacity, that is the *acta jure imperii*, were regarded as deserving immunity.[535] Since

[534] See *supra*, Chapter 2 of this work, section 2.

[535] In this sense and, in more general terms, on the historical foundations of immunity rules, see: R. NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, cit., p. 11 ss.

immunity derives from sovereignty, it follows that «its meaning, extent and impact must be contingent on the current scope of sovereignty».[536] Nowadays, the concept of sovereignty has further changed, in light of the obligations to protect human rights falling upon States by virtue of both treaty law and customary law, including, in particular, *jus cogens* rules. States are not anymore free to behave as they wish with respect to the individuals subject to their jurisdiction. From this perspective, grave breaches of human rights perpetrated by the State may hardly be regarded as conducts undertaken in order to fulfil the sovereign functions of the State, therefore as acts that deserve to be covered by immunity from civil jurisdiction. As affirmed by Cassese, it would be illogical to grant the application of immunity rules, designed to protect the old paradigm of sovereignty, in situations where fundamental human rights are at issue, since these latter were born precisely to protect the individual against the sovereign.[537]

As for the second argument in favour of further limits to the scope of immunity rules, it is worth recalling that the individual right of access to justice was one of the main justifications for the affirmation of the restrictive doctrine of State immunity from civil jurisdiction. In fact, the rationale behind the restrictive approach was precisely to ensure access to justice to private parties involved into "private" (commercial or labour) transactions with a foreign sovereign in case of breach of contractual obligations, while at the same time safeguarding the exercise of the sovereign powers from the part of the foreign State. Nowadays, the right of access to justice has acquired increasing importance as an instrument of enforceability of human rights: when a State fails to comply with a human rights obligation, a secondary duty arises under international law, that is the duty to repair the consequences of the illicit conduct. The individual whose fundamental right was breached thus holds the right to an effective remedy *vis à vis* the State.[538] Access to justice is the first precondition to obtain such remedy.[539]

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[536] L. MCGREGOR, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, cit., p. 916. A similar argument is put forward in: M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in «Max Planck Yearbook of United Nations Law», Vol. 16 (2012), p. 7.

[537] A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., p. 143.

[538] In this sense, see: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, available online at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx (last accessed on 26/03/2019).

[539] D. SHELTON, *Remedies in International Human Rights Law*, Third Edition, Oxford, Oxford University Press, 2015, p. 17.

The essence of the right of access to justice is «the possibility for the individual to bring a claim before a court and have a court adjudicate it».[540] This guarantee implies a standard of fairness and independence of process, as well as the procedural right to legal aid for the needy, who would otherwise be excluded from access to court.[541] In other words, «access to justice is a concept with many nuances which includes, first and foremost, effective access to an independent dispute resolution mechanism coupled with other related issues, such as the availability of legal aid and adequate redress».[542] Despite the many facets of access to justice, only the basic requirement of access to a tribunal for the determination of a claim is taken into account in this work, insofar as its exercise might be impaired by the jurisdictional immunities of the State.

Being enshrined in most domestic legal systems, the right of access to justice is a «general principle of law recognized by civilized nations» in the terms of Article 38 of the ICJ Statute,[543] therefore it is part of general international law. Interestingly enough, however, «the right of access to justice has not received any express and specific legal basis in human rights instruments, but has rather been associated with other fundamental rights».[544] For instance, in the *Golder* case the European Court of Human Rights creatively interpreted[545] Article 6 of the European Convention as entailing the right of access to justice,[546] noticing that «the fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings».[547] Likewise, Article 14 of the ICCPR on the equality before courts was interpreted by the Human Rights Committee as encompassing the right of access to

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[540] F. FRANCIONI, *The Right of Access to Justice under Customary Law*, in F. FRANCIONI (Editor), *Access to Justice as a Human Right*, Oxford, Oxford University Press, 2007, p. 1.

[541] *Ibidem*.

[542] European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2011, p. 9, available online at: https://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities (last accessed on 7 February 2019).

[543] In this sense, see: B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 141 ss. On the right of access to justice as a fundamental human right protected under customary international law, see: F. FRANCIONI, *Il diritto di accesso alla giustizia nel diritto internazionale generale*, cit., p. 3 ss.

[544] P. SCHMITT, *Access to Justice and International Organizations. The Case of Individual Victims of Human Rights Violations*, Leuven, Edward Elgar Publishing, 2017, p. 91.

[545] In the sense of a creative interpretation, see: W. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, p. 284 ss.

[546] European Court of Human Rights, *Case of Golder v. the United Kingdom*, Judgment of 21 February 1975, Application No. 4451/70, paragraph 36.

[547] European Court of Human Rights, *Case of Golder v. the United Kingdom*, cit., paragraph 35.

courts,[548] while in the American Convention the right of access to justice is protected as part of the right to judicial guarantees and the right to judicial protection.[549]

Although nowadays the right of access to justice amounts to a fundamental human right, based on the concept of the rule of law itself,[550] it is not an absolute right. As apparent from the case law of the European Court of Human Rights on immunity for employment-related disputes, access to justice can be limited by law, provided that such limitations pursue a legitimate aim, the means employed are proportioned to the aim sought to be achieved, and the very essence of the right is not impaired.[551] Indeed, «it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) […] if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons».[552] Likewise, the Human Rights Committee affirmed, with reference to Article 14 ICCPR, that a situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of access to justice.[553]

Even though immunities are in principle accepted by the Strasbourg Court as an "implicit limitation" to the right of access to justice,[554] systemic frustration is what actually happens to human rights claims filed against foreign States. Indeed, a whole category of applications is systematically struck out by the competent domestic court. For this reason, State immunity can be rightly considered as a barrier to justice that impairs the very essence of the right of access to courts. Moreover, it cannot be maintained that the aim of such restriction is legitimate, when the final outcome of the upholding of State immunity from civil jurisdiction is the protection of conducts which amount to grave breaches of international law.

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[548] Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, paragraph 9, available online at: http://hrlibrary.umn.edu/hrcommittee/gencom32.pdf (last accessed on 8 August 2019).

[549] D. SHELTON, *Remedies in International Human Rights Law*, Third Edition, Oxford, Oxford University Press, 2015, p. 17.

[550] European Union Agency for Fundamental Right and Council of Europe, *Handbook on European Law relating to access to justice*, 2016, p. 16.

[551] European Court of Human Rights (Grand Chamber), *Case of Waite and Kennedy v. Germany*, Judgment of 18 February 1999, Application No. 26083/94, paragraph 59.

[552] European Court of Human Rights, *Case of Fayed v. the United Kingdom*, Judgment of 21 September 1994, Application No. 17101/90, paragraph 65.

[553] Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, paragraph 9, cit.

[554] On immunities as an implicit limit to the enjoyment of the right of access to justice enshrined at Article 6 of the European Convention, see: W. SCHABAS, *The European Convention on Human Rights. A Commentary*, cit., pp. 285-287; V. ZAGREBELSKY, R. CHENAL, L. TOMASI, *Manuale dei diritti fondamentali in Europa*, cit., pp. 196-197.

The recent developments in international law, leading to its progressive humanization, support to the idea that human rights transnational litigations should not be barred by immunity rules, at least when no other remedies are available to the victims of human rights violations. This is not incompatible with the very rationale behind the restrictive doctrine as formulated by domestic courts as early as the 19th century, whose purpose was to grant a remedy to private parties involved in "private" transactions with foreign States, while, at the same time, protecting the purely governmental functions of the foreign sovereign from interference from the part of the *forum* State.

These arguments alone, however, cannot bring a change within the law of State immunity. Since governments do not seem willing to regulate the issue of State immunity for human rights violations by means of treaty law – the topic, indeed, was excluded from the Draft Convention on the Jurisdictional Immunities of States and Their Properties because considered «not ripe enough» for codification[555] – what we should look into is the possible development of customary law by domestic courts. For this reason, this chapter will discuss the human rights claims against foreign States decided by national judges in those few States where such a practice exists, as well as the stance taken with respect to this issue by international courts – in particular, the European Court of Human Rights[556] and the International Court of Justice – until the *Jurisdictional Immunities* judgment. Although only the practice of States is a constitutive element of custom, indeed, also international judgments can be referred to as subsidiary means to identify customary international law.[557] This is, in particular, the case of authoritative courts such as the ICJ.

The practice of the United States and of common law countries will be taken into account as first, insofar as those States were the first ones to regulate immunity issues and to decide upon transnational human rights claims. The relevant case law of civil law countries, with a particular focus of the innovative Italian jurisprudence, will be analysed in turn. The experience of those States were reparation claims against foreign States did not take place before domestic courts but at the diplomatic level, as in the case of South Korean requests for

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[555] Report of the Sixth Committee Working Group, 1999, paragraph 47. On the exclusion of exceptions to immunity for human rights violations from the project of the Convention, see: R. VAN ALEBEEK, *Introduction to Part Three: Proceedings in which State Immunity cannot be Invoked*, in R. O'KEFEE, C.J. TAMS (Editors), *The United Nations Convention on Jurisdictional Immunities of States and Their Properties. A Commentary*, Oxford, Oxford University Press, 2013, pp. 161-163.

[556] Only the most relevant cases will analysed in detail, namely the *Al-Adsani* and *Kalogeropoulou* cases. See infra, Chapter 3, paragraph 3.

[557] See *supra*, Chapter 2 of this work, paragraph 1.2.

reparations to Japan,[558] is, instead, excluded from our discussion. The practice of States subsequent to the ICJ decision will be dealt with in Chapter 4.

2. Human rights litigations against foreign States before domestic courts

2.1. The United States of America

The practice of the United States in the field of sovereign immunities for human rights violations deserves particular attention. In fact, the U.S. was the first country in the world to enact legislation that specifically set out a discipline on State immunity from civil jurisdiction, that is the aforementioned Foreign Sovereign Immunities Act (FSIA). Moreover, its case law on sovereign immunities is the richest in the world, amounting to half of the total number of judgments forming the practice of States.[559] Its courts have received a number of human rights claims filed against both foreign State officials and foreign States, on the basis of either the FSIA and the Alien Tort Statute (ATS).[560] This latter is a federal statute adopted in 1789, attributing civil jurisdiction to U.S. courts on torts committed against foreign citizens in violation of international law or of a treaty of the United States. It was originally meant to be applicable only with respect to piracy and offences against ambassadors,[561] but was subsequently amended to include a specific section on the protection of victims of torture, which, however, does not allow to sue foreign sovereigns, but only foreign torturers, in the courts of the United States.[562]

As noticed in literature, «private parties who have suffered damages as a result of foreign states' violations of international law have tried to circumvent the application of the FSIA through the use of the ATS».[563] In fact, the FSIA does not provide for a general exception to

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[558] On the Korean reparation movement led by "comfort women", see: E. HEE-SEOK SHIN, *The "Comfort Women" Reparation Movement: Between Universal Women's Human Right and Particular Anti-Colonial Nationalism*, in «Florida Journal of International Law», Vol. 28, No 1 (2016), pp. 87-158.

[559] R. PAVONI, *American Anomaly: On the ICJ's Selective Reading of United States Practice in* Jurisdictional Immunities of the State, in «Italian Yearbook of International Law», Volume XXI (2011), p. 146.

[560] 28 U.S. Code § 1350.

[561] T.H. SPEEDY RICE, B.L. REISMAN, *Access to Justice for Tort Claims Against a Sovereign in the Courts of the United States of America*, in F. FRANCIONI, M. GESTRI, N. RONZITTI, T. SCOVAZZI, (Editors), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, Milano, Giuffrè Editore, 2008, p. 298.

[562] Torture Victim Protection Act of 1991, Pub. L. 102-256, March 12, 1992, 106 Stat. 73 (28 U.S.C. 1350 note).

[563] M. POTESTÀ, *State Immunity and Jus Cogens Violations: The Alien Tort Statute against the Backdrop of the Latest Developments of the Law of Nations*, in «Berkeley Journal of International Law», Vol. 28, No. 2 (2010), p. 574.

State immunity from civil jurisdiction in case of human rights violations, albeit allowing victims to sue foreign States in the U.S. for claims concerning torts occurred in the United States,[564] for expropriations carried out by foreign States in violation of international law,[565] as well as, since 1996, for acts of terrorism sponsored by foreign States.[566] Outside these codified exceptions, applicants tried to recover monetary damages for violations suffered from the part of foreign States basing their claims either on exceptions to immunity implicitly set out under the FSIA, or on the Alien Tort Statute for facts occurred abroad.

The landmark case that clarified the relationship between the FSIA and the ATS was the *Amerada Hess* case, decided by the Supreme Court in 1989.[567] Two Liberian Corporations had filed a lawsuit against Argentina for the bombing of a Liberian oil tanker in international waters during the Falkland/Malvinas war, in breach of international law. While the Appeals Court had affirmed U.S. jurisdiction on the basis of the Aliens Tort Statute, the Supreme Court reversed the judgment, affirming that the sole legal basis for denying immunity to foreign States was the FSIA.[568] In the words of the Court, «the ATS cannot be used to override the presumption of immunity granted to foreign states by the FSIA»,[569] implying that a breach of international law from the part of the foreign State does not prevent immunity from civil jurisdiction from being applied.

An opposite conclusion on breaches of international law was reached, instead, by the U.S. Court of Appeals in the *Filartiga v. Peña-Irala* case.[570] Even if this case did not concern the immunity of the State itself, but the criminal liability of a foreign official for a private act unratified by the foreign State, the definition of torture given by the Court is worth mentioning. Indeed, the Appeals Court described torture not only as an unlawful conduct under international law,[571] but also as an act which exceeds the scope of governmental

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[564] 28 U.S. Code § 1605(a)(5).

[565] *Ivi*, § 1605(h)(2).

[566] The 1996 amendment, which was part of the Antiterrorism and Effective Death Penalty Act, ensured the civil liability of foreign States for acts of State sponsored terrorism. For more details, see: L. FISLER DAMROSCH, *Changing the International Law of Sovereign Immunity Through National Decisions,* cit., note 27 at p. 1192. This new part of the U.S. Code was subsequently amended following the entry into force of the Justice Against Sponsors of Terrorism Act in 2016. See *infra*, Chapter 4, Section 2.1 of this work.

[567] United States Supreme Court, *Argentine Republic v. Amerada Hess*, Judgment of23 January 1989, 488 U.S. 428 (1989).

[568] *Ivi*, paragraph 434.

[569] M. POTESTÀ, *State Immunity and Jus Cogens Violations: The Alien Tort Statute against the Backdrop of the Latest Developments of the Law of Nations*, cit., p. 576.

[570] United States Court of Appeals (Second Circuit), *Filartiga v. Peña-Irala*, Judgment of 30 June 1980, 630 F.2d 876 (2d Cir. 1980).

[571] *Ivi,* paragraph 884.

authority,[572] and therefore falls outside the scope of immunity rules. For this reason, the Court affirmed its jurisdiction on the basis of the ATS. The argument that violations of international law, in particular *jus cogens* rules, do not qualify as sovereign acts for the purpose of State immunity was accepted also in the cases *Letelier v. Republic of Chile*[573] and *Liu v. Republic of China*[574].[575] However, since both cases concerned wrongful killings perpetrated in the territory of the United States, the competent courts affirmed U.S. jurisdiction on the basis of the "tort exception" provided under the FSIA, rather than of a distinct exception to State immunity.

On the contrary, U.S. courts upheld State immunity in cases where the alleged wrong had been committed outside the territory of the United States. For instance, in *Siderman De Blake v. Republic of Argentina*[576] the Court of Appeals of the Ninth Circuit held that, even if torture qualified as a *jus cogens* violation, the gravity of the violation was not a sufficient ground to confer jurisdiction upon U.S. courts, in absence of an exception in this sense set out in the FSIA. Likewise, in *Princz v. Republic of Germany*[577] the Appeals Court of the District of Columbia dismissed the application filed by a Holocaust survivor on the ground that breaches of international law do not imply a waiver of immunity from the part of the foreign State. Although the *amici curiae* insisted that «interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred would reconcile the FSIA with accepted principles

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[572] In this sense, see: V. CANNIZZARO, B.I. BONAFÉ, *Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights*, in U. FASTENRATH *et al*. (Editors), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, cit., p. 836.

[573] United States District Court, District of Columbia, *Letelier v. Republic of Chile*, Judgment of 11 March 1980, 488 F. Supp. 665 (D.D.C. 1980).

[574] United States Court of Appeals, Ninth Circuit, *Liu v. Republic of China*, Judgment of 29 December 1989, 892 F.2d 1419 (9th Cir. 1989).

[575] In this sense, see: R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 337.

[576] United States Court of Appeals, Ninth Circuit, *Siderman De Blake v. Republic of Argentina* , Judgment of 22 May 1992, 965 F.2d 699 (9th Cir. 1992). For an account and brief comment of this case, see: M. POTESTÀ, *State Immunity and Jus Cogens Violations: The Alien Tort Statute against the Backdrop of the Latest Developments of the Law of Nations*, cit., p. 577; R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 316 ss.

[577] United States Court of Appeals, District of Columbia Circuit, *Princz v. Federal Republic of Germany*, Judgment of 14 April 1993, 998 F.2d 1 (D.C. Cir. 1993). For comments on this case and the implied waiver of immunity argument, see: M. POTESTÀ, *State Immunity and Jus Cogens Violations: The Alien Tort Statute against the Backdrop of the Latest Developments of the Law of Nations*, cit., pp. 578.579; N. RONZITTI, *L'eccezione dello* ius cogens *alla regola dell'immunità degli Stati dalla giurisdizione è compatibile con la Convenzione delle Nazioni Unite del 2005?*, in F. FRANCIONI, M. GESTRI, N. RONZITTI, T. SCOVAZZI, (Editors), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, cit., p. 51; R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, cit., p. 328 ss. The case is reported also in A. CASSESE, *International Law*, cit., p. 105.

of international law»,[578] the Court found that at no point the German government had indicated its amenability to suit,[579] which, in the opinion of who writes, is absolutely reasonable due the intentionality requirement inherent to a waiver.[580] The same conclusion was later reached by the District Court of Columbia in *Doe and Others v.Israel*.[581]

Judge Wald dissented from the conclusion reached by the majority in the *Princz* case. She based her reasoning on the gravity of the violations, stating that, by engaging in such conduct in breach of *jus cogens* norms, Germany had implicitly renounced to immunity.[582] She also took into account the circumstance that a lawsuit in U.S. courts was Mr. Princz's last resort in order to obtain reparation, since Clinton's attempt to act in diplomatic protection had failed due to Germany's refusal to enter into a settlement.[583] From our perspective, the last resort argument is more convincing than the implied waiver of immunity argument, in light of the fundamental importance that the right of the access to justice has acquired under international law, as a human right and a general principle of law. And in fact, notwithstanding the influential dissenting opinion of Judge Wald, the argument of the implied waiver had no success in subsequent litigations before U.S. courts.[584]

As apparent from our discussion, U.S. courts have been unwilling to admit a general exception to State immunity for human rights violations, in particular acts of torture, in absence of an explicit rule within the national statute regulating State immunity. This is consistent with the approach maintained by the executive, which, when adhering to the Convention against Torture in 1994, made an interpretative declaration (also on behalf of the Senate) that excluded the applicability of Article 14 of the Convention – granting access to justice to the victims of torture – to acts of torture occurred outside the jurisdiction of the *forum* State.[585]

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[578] United States Court of Appeals, District of Columbia Circuit, *Princz v. Federal Republic of Germany*, cit., paragraph 1174.

[579] *Ibidem*.

[580] In this sense, see: T.H. SPEEDY RICE, B.L. REISMAN, *Access to Justice for Tort Claims Against a Sovereign in the Courts of the United States of America*, cit., p. 265; C. TOMUSCHAT, *The International Law of State Immunity and Its Development by National Institutions*, in «Vanderbilt Journal of Transnational Law», Vol. 44 (2011), pp. 1122-1123.

[581] United States District Court, District of Columbia, *Doe and others v. Israel*, Judgment of 10 November 2005, 400 F. Supp. 2d 86 (D.D.C. 2005).

[582] United States Court of Appeals, District of Columbia Circuit, *Princz v. Federal Republic of Germany*, cit., paragraph 1180.

[583] *Ivi*, paragraphs 1177-1178.

[584] See, *inter alia*: United States Court of Appeals, Second Circuit, *Smith v. Socialist People's Libyan Arab Jamahiriya*, Judgment of 26 November 1996, 101 F.3d 239 65 USLW 2374.

[585] Convention Against Torture, Declaration of the United States of America upon Ratification, Paragraph II(3): «it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only

In contrast, since an amendment was introduced by Congress in 1996,[586] the U.S. *forum* has been open to all those claims filed by the victims of acts of terrorism sponsored by foreign States, provided that the State at issue was designated as such by the Department of State, and that the claimant or victim was a national of the United States. As observed in literature, this rule – later confirmed by the Justice Against Sponsors of Terrorism Act (JASTA), adopted, in particular, to allow the relatives of the victims of the Twin Towers Attack to sue Saudi Arabia for its support to Al Qaeda[587] – has been able to put pressure on States which had committed wrongful acts under international law, leading to a settlement and reparations for the victims.[588] At the same time, such legislation can be regarded as emblematic of the unilateralism permeating U.S. foreign policy, as it seems to be an affirmation of U.S. sovereignty against international law rather than an attempt to promote the development of customary international law.[589] As observed in literature, however, national judicial decisions denying immunity to foreign States on the basis of national legislation not only amount to relevant practice for the formation of international custom, but are also expression of an *opinio juris* from the part of that State.[590]

Besides the so-called "terrorism exception", another category of claims against foreign States has been successful in U.S. courts, i.e. expropriation claims. This is because the FSIA affirms U.S. jurisdiction in situations «in which rights in property *taken in violation of international law* are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state [...]».[591] Although this provision was a novelty when introduced by Congress in 1976, as it did not codify any pre-existing international custom, the expropriation exception has given rise to a noteworthy practice in the United States. An instance of this

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for acts of torture committed in territory under the jurisdiction of that State Party». The text of the Declaration is available online at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (last accessed on 30 July 2019).

[586] See *supra*, note 566.

[587] After having overridden the veto of then President Obama on 28 September 2016, the Justice Against Sponsors of Terrorism Act, amending the FSIA and the Antiterrorism and Effective Death Penalty Act, became Public Law No. 114-222. See *infra*, Chapter 4, Section 2.1 of this work.

[588] This was the case of Libya, which finally instituted a fund for the benefit of the Lockerbie victims. In this sense, see: L. FISLER DAMROSCH, *Changing the International Law of Sovereign Immunity Through National Decisions*, cit., p. 1195.

[589] In this sense, see: P. VERONESI, *Colpe di Stato. I crimini di guerra e contro l'umanità davanti alla Corte costituzionale*, Milano, Franco Angeli, 2017, pp. 14-15.

[590] C. GREENWOOD, *The Development of International Law by National Courts*, cit., pp. 205-206.

[591] See *supra*, note 565. Italics is my own addition.

case-law is the *Altmann* case,[592] in which the Supreme Court held that denying immunity to foreign States for claims concerning expropriations carried out in breach of international law – in the present case, as a step in the genocide planned against Jews – «did not violate international law, even in absence of a prior international practice of treaty expropriation as coming under an exception to immunity from national judicial jurisdiction».[593]

In conclusion, from our discussion on the practice of the United States it is apparent that the U.S. judiciary, albeit regarding torture and other grave breaches of international law as acts not falling within the category of sovereign conduct, has been unwilling to read a general exception to State immunity for human rights violations within the lines of the FSIA, thus refusing to provide access to justice for the victims of grave breaches of international law. Nonetheless, U.S. courts have consolidated practices in favour of the restriction of the scope of State immunity rules at least for certain specific categories of claims, on the basis of the aforementioned terrorism and expropriation exceptions. In the *Jurisdictional Immunities* decision, the ICJ downplayed the importance of the first exception, noticing that it has not counterpart in other States,[594] while completely disregarding the existence of the expropriation exception provided under the FSIA. As will be discussed in the last chapter of this work, this practice of U.S. courts is still ongoing nowadays, possibly leading to further changes in customary international law.

2.2 The United Kingdom

Similarly to the United States, also the United Kingdom regulates the immunities of foreign States by means of national legislation. Like its U.S. counterpart, the UK Sovereign Immunities Act (SIA) does not provide any explicit exception to State immunity for human rights violations, so that, in absence of an instrument comparable to the U.S. ATS, human rights transnational litigations have been so far quite rare. The first claim to raise the issue of State immunity for serious violations of international law before a British Court was the one filed for acts of torture by Mr. Al-Adsani, a dual national of the United Kingdom and Kuwait, against the State of Kuwait and a Kuwaiti Sheik. Bringing a civil action before UK courts,

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[592] United States Supreme Court, *Republic of Austria v. Altmann*, Judgment of 7 June 2004, 541 U.S. 677.
[593] L. FISLER DAMROSCH, *Changing the International Law of Sovereign Immunity Through National Decisions*, cit., p. 1195.
[594] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Report 99 (2012), paragraph 88.

Mr. Al-Adsani tried to obtain reparation for the physical and psychological damages suffered.[595]

According to the first Court of Appeal that heard the case, the purpose of the SIA is to codify the principles of international law. Therefore, the national statute cannot be considered in isolation, but has to be interpreted against the background of public international law. The Court held that, since torture is a prohibited conduct under customary law as well as treaty law, in particular under the UN Convention Against Torture, the SIA had to be interpreted and applied in accordance with such principle of international law.[596] The first Court of Appeal thus engaged in a systematic interpretation of the SIA in light of the developments of international law. Following this reasoning, the Court concluded that Mr. Al-Adsani's claim was not barred by the immunity of the foreign State.[597]

In contrast, the second Court of Appeal, albeit admitting that torture is prohibited under international law, affirmed that the Sovereign Immunity Act establishes a comprehensive regime which does not allow for any implicit exception to State immunity, not even for major violations of international law which amount to breaches of *jus cogens* rules.[598] By so doing, the Court of Appeal adopted the same stance already taken by U.S. Courts with respect to the comprehensiveness of the discipline set out in the relevant national statute, which does not allow implicit exceptions to State immunity. Moreover, since the alleged torture had been committed abroad, the Court excluded the applicability of the *forum* tort exception. As a consequence of this judgment, the victim was left without any remedy nor compensation, «diplomatic channels having born no fruit due to the United Kingdom government's refusal to assist».[599] That is why Mr. Al-Adsani subsequently filed an application against the UK to the European Court of Human Rights, whose decision will be discussed later in this chapter.

Another relevant proceeding with regard to State immunity and accountability for serious violations of international law was, albeit a criminal case, the *Pinochet* case.[600] Spain had

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[595] For a summary of the history of the national proceedings in the *Al-Adsani* case, see: European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, Application No. 35763/97, paragraphs 14-19.

[596] UK Court of Appeal (Civil Division), *Suleiman Al-Adsani v Government of Kuwait and Others*, Judgment of 21 January 1994.

[597] *Ibidem*.

[598] UK Court of Appeal, *Al-Adsani v. Government of Kuwait and Others* (No. 2), Judgment of 29 March 1996, 107 ILR 536.

[599] R.S. BROWN, *Access to Justice for Victims of Torture*, in FRANCIONI, Francesco (Editor), *Access to Justice as a Human Right*, cit., p. 205.

[600] This case gave rise to three distinct decisions. The first one, by the UK High Court, upheld Pinochet's immunity (High Court of Justice (Queen's Bench Division), *Re: Augusto Pinochet Ugarte*, Judgment of 28 October 1998, CO/4074/98); the second one, by the House of Lords, set aside the High Court judgment (House of Lords, *Regina v. Bartle and the*

requested UK authorities to extradite the Chilean former head of State, temporarily on British territory for medical reasons, in order to prosecute him for the international crimes committed while in office. With its 1999 decision, the House of Lords allowed Pinochet's extradition, on the basis that he did not enjoy immunity under the Convention against Torture. As noticed in literature, «even though extradition was only granted in connection with the treaty-based crime of torture, the denial of functional immunity was justified on the basis of general international law».[601] In particular, Lords Hutton and Phillips observed that acts of torture were not «the official functions of the head of State»,[602] thus supporting the idea that serious breaches of international law do not qualify as sovereign acts for the purpose of State immunity rules.

Unfortunately, eight years later the House of Lords upheld the opposite view. In the famous case *Jones v. Saudi Arabia*,[603] brought into UK courts by the victims of torture allegedly suffered in Saudi Arabia upon the orders of State officials, the responsible individuals were deemed to enjoy immunity from civil jurisdiction on the basis of the functional theory, in contrast with the conclusions reached in *Al-Adsani* in this regard. According to the House of Lords, the acts of torture were performed in an official capacity, and therefore amounted to official State conduct covered by immunity. In the words of Lord Bingham, it is «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».[604] This stance reversed the decision taken in the appeals phase, where, in contrast, Lord Phillips had recalled the *Pinochet* precedent to state that torture cannot fall within the official acts of government performed by a State official, so that the responsible person is liable from both a criminal and civil perspective.[605]

Commissioner of Police for the Metropolis and others ex parte Pinochet / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte *Pinochet*, decision of 25 November 1998); the last decision by the House of Lords denied Pinochet's immunity, thus granting extradition to Spain (House of Lords, *Regina (the Crown) v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others* ex parte *Pinochet*, Judgment of 24 March 1999).

[601] V. CANNIZZARO, B.I. BONAFÉ, *Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights*, cit., p. 830.

[602] H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 552.

[603] UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, [2006] UKHL 26.

[604] *Ivi*, paragraph 19.

[605] UK Court of Appeal (Civil Division), *Jones v. the Kingdom of Saudi Arabia*, Judgment of 28 October 2004, [2004] EWCA Civ. 1394, paragraph 112 ss.

Most importantly, in *Jones* the House of Lords further developed the stance taken by the second Court of Appeal in *Al-Adsani*, confirming that foreign States enjoy immunity from civil jurisdiction for gross violations of international law, if those breaches are committed outside the territory of the United Kingdom and thus do not fall within the *forum* tort exception.[606] Basing their opinion on the *Arrest Warrant* judgment of the International Court of Justice,[607] Lord Bingham and Lord Hoffmann affirmed that a violation of *jus cogens* rules does not automatically imply the setting aside of immunities and the consequent conferral of jurisdiction.[608] The reason is that, as theorized by Hazel Fox, immunity rules are procedural in nature, as such completely detached from substantive international law.[609] As a consequence, there is no conflict between the two sets of rules. In the words of Lord Hoffmann,

> 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.[610]

After a survey of treaty law and the practice of courts, the Lords concluded that international law had not yet changed in that direction,[611] notwithstanding the case law of Greek and Italian courts, whose reasoning was regarded as ill-founded.[612] The analysis of the House of Lords, however, may be contested for its selectiveness of the arguments in favour of State immunity[613] and the failure to recognize that this area of the law of sovereign immunities was in a state flux.[614]

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[606] UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, cit., paragraph 24.
[607] International Court of Justice, *Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic Of The Congo v. Belgium)*, Judgment of 14 February 2002, paragraph 60.
[608] UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, cit., paragraph 48.
[609] *Ibidem*.
[610] *Ivi*, paragraph 45.
[611] *Ivi*, paragraph 46 ss.
[612] *Ivi*, paragraphs 62-63. In particular, the House of Lords found the reasoning underlying the *Ferrini* judgment of the Italian Court of Cassation "syllogistic".
[613] In this sense see, for instance: E. STEINERTE, R.M. WALLACE, *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia. Case No. [2006] UKHL 26*, in «The American Journal of International Law», Vol. 100, No. 4 (October 2006), p. 904.
[614] As mentioned before, the same Working Group for the UN Convention on the Jurisdictional Immunities of States and Their Properties found that the topic of State immunity from civil jurisdiction for gross violations of human rights law and humanitarian law was not yet ripe for codification, due to the scarce and contradicting practice. See *supra*, note 555.

This brief survey of the practice of the United Kingdom shows that British courts, when faced with issues strictly related to State immunity rules, adopted quite a restrictive stance, refusing to read an exception to State immunity for gross violations of international law within the Sovereign Immunities Act. In particular, the *Jones* case is extremely relevant to the extent that it anticipates the procedural concept of State immunity later uphold by the International Court of Justice in the *Jurisdictional Immunities* case. In fact, this was the first case where the principle according to which a violation of *jus cogens* is not a sufficient basis for conferring jurisdiction upon a court, affirmed by the ICJ in the *Arrest Warrant* [615] and *Armed Activities*[616] cases, was applied to State immunity from civil jurisdiction. The despicable result of the distinction between substance and procedure, however, was that victims of torture were left without means of redress.[617] Even admitting that State immunity is a mere procedural rule – which is contestable, as discussed in Chapter 2 – it has nonetheless a substantive impact on the right of access to justice of the individuals concerned.

2.3 Other common law jurisdictions

As mentioned in the previous chapter of this work, also other common law countries such as Australia, Canada and New Zealand regulate issues of State immunity from civil jurisdiction by means of national legislation. Similarly to the UK Sovereign Immunities Act, the Canadian Federal State Immunity Act (SIA), following a legislative reform introduced in 2012, allows the victims of terrorism to sue in Canadian courts the foreign States considered as sponsors of terrorism,[618] but does not provide for any general exception to State immunity in case of human rights violations. Nonetheless, there have been few cases of victims of illicit acts not related to terrorism trying to sue foreign States or State officials in order to obtain civil

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[615] See *supra*, note 607.

[616] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, paragraph 64.

[617] In the sense that the distinction between substance and procedure affirmed by the House of Lords leads to *de facto* impunity, because the victims of gross violations of international law have no other means to vindicate their rights, see: A ORAKHELASHVILI, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, in «The European Journal of International Law», Vol. 18, No. 5 (2007), p. 969.

[618] Canadian State Immunity Act, 6.1(2)(a), as amended by the Justice for Victims of Terrorism Act, 13 March 2012, S.C. 2012, c. 1, s. See also: Order Establishing a List of Foreign State Supporters of Terrorism (SOR/2012-170), available online at: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-170/page-1.html (last accessed on 17 April 2019). See *infra*, paragraphs 2.1 and 2.2 of Chapter 4 of this work.

remedies for the wrongs suffered. Particularly important are the *Bouzari* and *Kazemi* cases, both involving the immunity of the Islamic Republic of Iran.

The first case on State immunity for violations of international human rights law dealt with by Canadian courts was *Bouzari v. Islamic Republic of Iran*.[619] The plaintiff, who had been allegedly subjected to torture at the orders of Iranian officials, sought the payment of damages from the part of Iran. His claim, however, was not successful, as both the Ontario Superior Court of Justice and the Court of Appeal for Ontario upheld the immunity of the foreign State. In particular, the Court of Appeal framed the problem distinguishing between two main issues: firstly, whether the Canadian SIA allowed exceptions to State immunity rules for breaches of international law; secondly, whether customary or treaty law binding upon Canada obliged it to allow civil actions for damages brought against foreign States.

As far as the first issue was concerned, the Court of Appeal for Ontario observed that the only exceptions to State immunity from civil jurisdiction enshrined in the Federal SIA were the ones explicitly stated therein, that is the commercial[620] and tort[621] exceptions. The commercial exception was not relevant to the present case, since the contested conduct, although related to the applicant's business, was not commercial in nature, amounting instead to torture within the context of State policing.[622] As to the tort exception, Mr. Bouzari argued that it applied to his case, because, albeit the alleged offence had occurred in Iran, his sufferings continued in Canada and thus constituted injury occurring in Canada under the terms of Article 6 of the SIA.[623] According to the Court of Appeal for Ontario, however, «the SIA requires that the physical breach of personal integrity giving rise to the claim takes place in Canada»,[624] which was not the case of Mr. Bouzari.

The Court then went through the public international law issue. As for treaty law, it held that the Convention Against Torture does not compel States parties to deny immunity from civil jurisdiction to States responsible of torture. In particular, it interpreted Article 14[625] of

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[619] Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, Judgment of 30 June 2004. For a critical comment on this case, see: N.B. NOVOGRODSKY, *Immunity from Torture: Lessons from* Bouzari v. Iran, in «The European Journal of International Law», Vol. 18, No. 5 (2007), pp. 939-953.

[620] State Immunity Act, R.S.C., 1985, c. S-18, Article 5.

[621] *Ivi*, Article 6.

[622] Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, cit., paragraphs 49-51.

[623] *Ivi*, paragraph 46.

[624] *Ivi*, paragraph 47.

[625] Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows: «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

the Torture Convention as not obliging States to exercise universal civil jurisdiction over acts of torture, but as simply requiring States to provide a civil remedy for torture committed within their jurisdiction.[626] As for international custom, the Court interestingly observed that it is a source of law directly applicable in the Canadian legal order, provided that there is no contrary national statute.[627] Nonetheless, relying on the analysis of foreign and international practice carried out by the Superior Court, the Appeals Court found that there was no rule of customary international law obliging Canadian courts to exercise adjudicative jurisdiction over foreign States for non-commercial acts. According to the Court, the practice of States did not point into this direction, with the only exception of Italian jurisprudence.[628] Moreover, the Court dismissed the relevance as a precedent of the *Pinochet* case, because it dealt with criminal proceedings rather than with civil remedies.[629] In the words of the Court, «the peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant».[630]

Despite the conclusions reached, the Court of Appeal for Ontario showed at least some sympathy towards the denial of access to justice suffered by Mr. Bouzari. As the Court put it while analysing the issue of *forum non conveniens* from the perspective of Canadian law,

> […] there are several circumstances that make the presumptive conclusion of no jurisdiction troubling. First, the action is based on torture by a foreign State, which is in violation of both international human right and peremptory norms of public international law. As the perpetrator, Iran has eliminated itself as a possible forum, although it otherwise would be the most logical jurisdiction. […] Second, *if Ontario does not take jurisdiction, the appellant will be left without a place to sue*.[631]

Notwithstanding this circumstance, the Court found that the current balance struck out in contemporary international law between, on the one hand, the principle of equality and

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compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law».

[626] Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, cit., paragraph 74.

[627] *Ivi*, paragraph 65.

[628] *Ivi*, paragraph 94.

[629] *Ivi*, paragraph 91.

[630] *Ivi*, paragraph 94.

[631] Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, cit., paragraphs 36-37.

independence of States, and, on the other, the right of access to justice for the victims of international crimes was still in favour of State sovereignty.[632]

More recently, it was the Superior Court of Quebec to apply the Canadian SIA with respect to Iran, in the case of *Kazemi v. Islamic Republic of Iran, Ayatollah Khamenei and others.*[633] Zahra Khazemi was a Canadian citizen who had died as a result of the mistreatments, sexual violence and torture suffered while illegally detained in Iran. Her son, living and residing in Canada at the time of his mother's death, filed a claim against the Iranian State and the responsible organs in order to obtain the payment of civil damages for the human rights violations suffered by his mother as well as for his own loss. As in *Bouzari*, the Superior Court found that none of the exceptions to State immunity from civil jurisdiction set out in the SIA applied to the case. In particular, the acts of torture and the death itself of Ms. Kazemi had taken place abroad, so that they clearly did not amount to **"***forum* torts" excluding the immunity from civil jurisdiction of the foreign State.[634]

An entirely different approach was instead adopted with regard to the damage reported by Ms. Kazemi's son.[635] The Court considered that, since the trauma deriving from his mother's imprisonment, torture and death had taken place in Canada, and such mental suffering constituted "physical damage" within the terms of Article 6(a) FSIA, Canadian courts could exercise jurisdiction over his claim on the basis of the *forum* tort exception.[636] By extensively interpreting the requirements for a tort exception set out under the SIA, the Superior Court of Quebec thus provided an avenue for justice to the applicant. Unfortunately, the Court was less progressive in its analysis of current international law on the immunities of States and State officials: quoting the *Bouzari* precedent and the decision of the UK House of Lords in *Jones*, the Court stated that not only the immunity of States and State officials is absolute for their *acta jure imperii*, but also that torture in the present case was part of a State policy, thus falling within the categories of the governmental acts of a State.[637] Foreign States' absolute

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[632] In this sense, see: Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, cit., paragraph 95.
[633] Superior Court of Quebec, *Kazemi v. Islamic Republic of Iran, Ayatollah Khamenei and others*, Judgment of 25 January 2011. For a summary and comment to this case, see: C. FOCARELLI, *Diritto Internazionale*, 2nd Edition, Padova, CEDAM, 2012, Volume II: *Prassi (2008-2012)*, 132-134.
[634] *Ivi*, paragraph 53.
[635] *Ibidem*.
[636] *Ivi*, paragraph 83.
[637] *Ivi*, paragraphs 100-102.

immunity for *acta jure imperii* was later confirmed in the Supreme Court's judgment of 2014.[638]

The expansive view of State immunity uphold in UK and Canadian practice was embraced also by the domestic courts of New Zealand and Australia. Albeit mostly related to the immunity of foreign State officials, the case *Fang v. Jiang*[639] is interesting from the point of view of State immunity from civil jurisdiction, insofar as the High Court of New Zealand found that the UN Jurisdictional Immunities Convention did not contain any exception for torture and that the common law of New Zealand– not providing any torture exception from State immunity rules – actually reflected customary international law.

In Australia, the New South Wales Court of Appeal affirmed that the national statute sets out a comprehensive regime of immunities which does not allow to infer from international law any additional exception to the main rule.[640] Moreover, according to the Court the Immunities Act encompasses the immunity of the individual officers, including the heads of State and government.[641] In the subsequent phase of the proceedings, the Supreme Court of New South Wales confirmed that the former Chinese President enjoyed State immunity for torture committed while in office, [642] meaning that such breach of international law was regarded as an official conduct to be attributed to the State, rather than to the individual. In other words, the Court affirmed that the acts of torture were covered by the immunity of the foreign State, which incidentally shielded from civil jurisdiction also the responsible State organ. As a result of such confusion between the concepts of State immunity and functional immunity of the organs and agencies of the State, the responsible individual was granted impunity.

As apparent from our discussion, the case law of other common law countries has largely confirmed the decision of the UK House of Lords in *Jones v. Saudi Arabia*.[643] Common law jurisdictions following the model of the UK SIA have proved to be not very sensitive with regard to demands of justice coming from individuals who suffered serious violations of their

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[638] Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, Judgment of 10 September 2014. See *infra*, Chapter 4, Section 2.2 of this work.

[639] High Court of New Zealand, *Fang v. Jiang*, Judgment of 21 December 2006, [2007] NZAR 420.

[640] New South Wales Court of Appeal, *Zhang v. Zemin and others*, Judgment of 5 October 2010, [2010] NSWCA 255, paragraphs 71-72.

[641] *Ivi*, paragraph 153.

[642] Supreme Court of New South Wales, *Zhang v. Jiang Zemin*, Judgment of 14 November 2008. This case is reported in: R. NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, cit., p. 346.

[643] In this sense, see: C.I. KEITNER, *Transnational Litigation: Jurisdiction and Immunities*, cit., p. 807.

human rights from the part of foreign States and had no other remedy available. An explanation for this relies in the same nature of the legal systems of common law, where the adaptation to international law always takes place by means of "ordinary" procedures.[644] Since the national statutes regulating State immunity are regarded as comprehensive regimes, domestic courts are less likely to look into the new developments of international law in order to solve immunity issues. And when they did so, as the House of Lords in *Jones*, they took a quite conservative stance, relying on domestic precedents rather than on new tendencies emerging in contemporary international law.

2.4 Greece

Civil law countries, because of the same nature of their domestic legal systems, have adopted a completely different approach with respect to questions of State immunity from civil jurisdiction. In absence of specific national laws disciplining the immunities regime, domestic courts have directly applied international law, engaging in an exercise of identification of the relevant rules of international law. This is the case of Greek courts: as Greece is not a party to any international agreement on the subject, when faced with issues of State immunity national courts have always looked into customary international law, which is part of the Greek legal order by means of Article 28(1) of the Constitution and enjoys a superior force than ordinary legislation.[645] Greek judges have thus framed the problem of sovereign immunities in terms of what is the applicable rule under customary international law.

The landmark case as far as Greek practice is concerned is *Prefecture of Voiotia v. Federal Republic of Germany*,[646] also known as the *Distomo massacre* case. The facts of the case date back to German occupation of Greek territory during World War II. In 1944, Nazi armed forces destroyed the village of Distomo and killed more than three hundred civilians as a retaliation against the partisans' actions. After the war, both Greece and Germany left the

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[644] On the procedures of incorporation of international law within domestic legal systems, see Chapter 1 of this work, at paragraph 3.2.

[645] Article 28(1) of the Constitution of the Hellenic Republic reads as follows: «The 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». See: https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (last accessed on 9 May 2019).

[646] Greece Court of Cassation (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, Judgment of 4 May 2000, reported in «International Law Reports», No. 129, pp. 513-524.

victims without redress. That is why, fifty years later, the relatives of the victims instituted proceeding against Germany before Greek Courts, claiming compensation for their losses and consequent psychological suffering. Germany did not take part in the proceedings. With a ground-breaking default judgment, the Court of First Instance of Livadia awarded damages to the victims' successors, on the basis that the defendant State had implicitly waived its immunity from civil jurisdiction because the acts for which it was sued amounted to *jus cogens* violations. [647] The Federal Republic of Germany then appealed the Court of Cassation (Areios Pagos) on the ground that State immunity from civil jurisdiction covers all the *acta jure imperii* undertaken by a State, including the conduct of its armed forces.[648]

The Court of Cassation confirmed the judgment of the Court of Livadia on two main grounds, the first to be discussed being the *forum* tort exception. According to the Court, current customary law provides for the so called *forum* tort exception, codified in the European Convention on State Immunity, the only existing treaty on the immunities of States at the time of the judgment. The Court found that Article 11, granting jurisdiction to the *forum* State over torts committed in its territory by foreign sovereigns, was applicable to the present case,[649] in spite of Article 31 of the same Convention excluding its applicability to the conduct of armed forces.[650] The reason for disregarding Article 31 was that, according to the Court of Cassation, the massacre of Distomo was not connected to the ongoing armed conflict, as the civilians involved had nothing to do with the military operations.[651] But this is a rather unsound argument, considering, as pointed out by the dissenting judges,[652] that the killings of civilians were committed by the occupying armed forces in times of war as a retaliation against Greek armed resistance.

Secondly, the Areios Pagos condemned Germany to pay civil damages to the victims on the basis of the implicit waiver of immunity argument,[653] also raised before the Appeals Court of the District of Columbia in the aforementioned *Princz* case.[654] The Greek Court of Cassation rightly underlined that the conduct undertaken by German armed forces amounted to a

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[647] Court of First Instance of Livadia, Judgment 30 October 1997, No. 137/1997.
[648] Greece Court of Cassation (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, cit., p. 514.
[649] *Ivi*, p. 519.
[650] Article 31 of the European Convention on State Immunity reads as follows: «Nothing in this Convention 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*». Italics is my own addition.
[651] Greece Court of Cassation (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, cit., p. 519.
[652] *Ivi*, p. 522.
[653] *Ivi*, p. 521.
[654] See paragraph 2.1 of this Chapter.

violation of *jus cogens*, in particular of Article 46 of the Regulations on the Laws and Customs of War Annexed to the Fourth Hague Convention of 1907, and that, for this reason, those acts were in excess of State sovereign powers. From the correct premise that violations of *jus cogens* are no acts of sovereign power, however, the Court derived the incongruous conclusion that Germany had implicitly waived its immunity from civil jurisdiction. As pointed out earlier in this work, this argument can be criticized to the extent that it underestimates the importance of express consent entailed by the concept of "waiver" itself.[655] Notwithstanding the flaws in the argumentation, however, this judgment is particularly relevant, as it is the first national decision to recognize the existence of a specific exception to State immunity in case of gross violations of humanitarian law.

Unfortunately, the successors of the victims of the Distomo massacre were not able to enforce in Greece the judgment rendered in their favour. Germany refused to pay the damages, whereas the Greek Ministry of Justice – responsible, under Article 923 of the Greek Code of Civil Procedure, to give permission to the forced execution over the properties of foreign States located in Greece – never responded to their application.[656] Lacking the ministerial authorization, the judgment was stayed by domestic courts. In this regard, the Greek Court of Cassation affirmed that such denial of enforcement was a proportionate restriction of the applicants' right of access to justice, because it pursued the legitimate aim of avoiding disturbances in international relations.[657] The Areios Pagos then submitted a similar case to the Special Supreme Court competent to decide questions of interpretation of international law. On 17 September 2002, the Special Court held that international law as it presently stood still vested foreign sovereigns with immunity from civil jurisdiction even in cases of *jus cogens* violations,[658] thus contradicting the decision in *Prefecture of Voiotia v. Federal Republic of Germany.*

Unsatisfied of this outcome, the applicants filed a suit against Germany and Greece before the Strasbourg Court alleging the violation of their right of access to justice, but with no

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[655] See *supra*, note 580.

[656] For a reconstruction of the procedural history of the enforcement proceedings, see: European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, Judgment of 12 December 2002, Application No. 59021/00, ECHR 2002-X, pp. 2-3.

[657] Greece Court of Cassation (Areios Pagos), Judgments of 28 June 2002, Nos. 36/2002 and 37/200228.

[658] Greek Special Supreme Court (Anotato Eidiko Dikasterio), *Margellos and others v. Federal Republic of Germany*, Judgment of 17 September 2002, No. 6/2002.

success.[659] The judgment of the Areios Pagos was finally declared enforceable in Italy in the wake of the *Ferrini* decision,[660] and constituted one of the grounds on which the Federal Republic of Germany seized Italy before the International Court of Justice. It is thus apparent from this discussion that the judgment of the Court of Livadia had a noteworthy impact on other courts' case law in the field of State immunity from civil jurisdiction, as well as from measures of execution. The relevant Italian decision and the judgment of the European Court of Human Rights in the case of *Kalogeropoulou and Others v.Greece and Germany* will be further dealt with later in this chapter.

2.5 Italy

2.5.1 The *Ferrini* case

The first case brought to Italian courts concerning the payment of civil damages for Nazi crimes was the well-known *Ferrini* case. Mr. Ferrini was a civilian deported to Germany for forced labour in 1944. In 1998, he filed a suit against the Federal Republic of Germany in the Tribunal of Arezzo in order to obtain reparation for the harm suffered during his imprisonment in a concentration camp. Both the first instance tribunal and the Florence Court of Appeal dismissed his petition, on the ground that Germany enjoyed immunity from suits for acts committed *jure imperii*, including the unlawful conduct carried out by its armed forces during World War II. The Court of Cassation reversed the findings of the inferior courts with a ground-breaking judgment issued in March 2004, holding that Mr. Ferrini was entitled to civil damages because immunity rules could not be applied with respect to grave breaches of peremptory norms of international law. [661]

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[659] European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, Judgment of 12 December 2002, cit. For a comment specifically devoted to this case, see, *inter alia*: S. VRELLIS, *The World War II Distomo Massacre of Greek Civilians by German Armed Forces and the Right to Effective Judicial Protection*, in *A Commitment to Private International Law. Essays in honour of Hans Van Loon*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 631-642.

[660] See *supra*, note 526.

[661] Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, No. 5044, reported in «Diritto e giustizia» (16 March 2004). For comments on this case, see, *inter alia*: A. BIANCHI, *Ferrini v. Federal Republic of Germany*, in «The American Journal of International Law», Vol. 99, No. 1 (January 2005), pp. 242-248; P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in «The European Journal of International Law», Vol. 16, No. 1 (2005), pp. 89-112; C. FOCARELLI, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, in «The International and Comparative Law Quarterly», Vol. 54, No. 4 (October 2005), pp. 951-958; A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision*,

The reasoning of the Court of Cassation is mainly based on the nature of the crimes of which Mr. Ferrini was a victim. According to the Court, there was no doubt that the forced displacement of civilians and their reduction into slavery amounted to international crimes prohibited by customary international law.[662] In this regard, the Court noted that those acts, which had already been declared unlawful under the 1907 Hague Convention on the Laws and Customs of War on Land,[663] are nowadays regarded by the community of nations as acts that undermine the peaceful coexistence among States. For this reason, such crimes are not subject to statutes of limitation[664] and can be punished on the basis of universal jurisdiction, which, according to the Court, can be exercised with regard to both criminal and civil proceedings.[665] The Court of Cassation further underlined that the recognition of immunity from civil jurisdiction to States responsible of such internationally wrongful acts is clearly in contrast with the protection of inviolable human rights entailing the prohibition of international crimes. According to the Court, this antinomy must be solved by giving prevalence to the

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in «Journal of International Criminal Justice», No. 3 (2005), pp. 224-247; G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, in «Rivista di diritto internazionale privato e processuale», Year XLV, No. 3 (July-September 2009), pp. 605-628.

[662] *Ivi*, paragraph 6.3.

[663] In particular, Article 52 allowed the occupying State to require services from civilian population under its control only for what strictly necessary to the military operations and upon payment. The text of the Convention is available online at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf (last accessed on 17 May 2019). In this regard, the Italian Court of Cassation in *Ferrini* refers to the analysis of the applicable law undertaken by the Nuremberg Tribunal (Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, cit., paragraphs 7.2-7.4).

[664] On the non-applicability of statutes of limitation to international crimes, see: P. ACTIS PERINETTO, L. PASQUET, *Immunità e prescrizione come estreme difese degli stati autori di gravi crimini internazionali: il caso dei deportati italiani*, ISPI Analysis No. 2 (February 2010). Although the doctrine agrees on the definition of such crimes as imprescriptible, many scholars cast doubts on whether such conducts were already prohibited under *jus cogens* at the time of World War II. See, in particular: F. MARONGIU BUONAIUTI, *La sentenza della Corte internazionAle di giustizia relativa al caso* Germania c. Italia*: profili di diritto intertemporale*, cit., pp. 342-343; C. FOCARELLI, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, pp. 955-956; G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, cit., pp. 627-628.

[665] Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, cit., paragraph 9 (quoting paragraphs 155-156 of the judgment of the International Criminal Tribunal for Former Jugoslavia in the *Furundzija* case). Albeit the exercise of universal criminal jurisdiction over individuals responsible of piracy or international crimes is admitted under customary international law, provided that the accused is present on the territory of the *forum* State at the beginning of the prosecution and no other State pretends to exercise its jurisdiction (B. CONFORTI, M. IOVANE (ed.), *Diritto Internazionale*, cit., pp. 224-225), the same cannot be maintained for the exercise of universal civil jurisdiction. In fact, the U.S. Supreme Court has recently excluded the jurisdiction of U.S. courts for illicit conduct committed abroad (U.S. Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, Judgment of 17 April 2013, 569 U.S. (2013)). More recently, also the European Court of Human Rights has denied the existence of a rule of customary international law imposing the duty upon States to exercise universal civil jurisdiction in case of torture (European Court of Human Rights (Grand Chamber), *Case of Naït-Liman v. Switzerland*, Judgment of 15 March 2018, Application No. 51357/07). Both the mentioned judgments will be thoroughly taken into account in Chapter 4 of the present work.

hierarchically higher principle at stake, that is the respect of fundamental human rights,[666] nowadays a fundamental principle of the international legal order.[667]

The Court of Cassation has been criticised both in literature [668] and by other domestic courts [669] for strictly applying the hierarchy of norms theory, «whereby the *formal* supremacy of the *jus cogens* norms gives them prevalence over all clashing non-peremptory norms, and therefore also over norms concerning sovereign immunity».[670] But the reasoning of the Italian Court of Cassation was more subtle than this: what the Court did was to engage in a systematic interpretation of the applicable rules of international law, moving from the belief that they cannot be interpreted separately, as they complement and influence each other in their application.[671] According to the Court, the same holds true for customary rules: as they are part of the international legal order, they can be correctly understood only if put into the context of the other norms belonging to the same system.[672] From this perspective, it is irrelevant that an exception to the existing rules on State immunity is not provided under customary international law, given that this latter must be applied in light of the other rules of international law.[673]

Instead of strictly applying the hierarchy of norms theory, the Court thus carried out a balancing exercise between the principles at stake, giving prevalence to the need to protect the fundamental values underlying contemporary international law.[674] From this perspective, the criticism of "syllogistic" reasoning moved by the UK House of Lords[675] is misplaced, to the extent that the *Ferrini* decision does not affirm that a *jus cogens* norm necessarily prevails over State immunity, but rather underlines the need not to interpret international rules in the *vacuum*. As pointed out in literature, no problem of syllogism arises

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[666] *Ivi*, paragraph 9.1.
[667] *Ivi*, paragraphs 9.1-9.2.
[668] In the sense that the reasoning of the Court of Cassation is totally syllogistic, see: A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision*, cit., p. 230.
[669] See, in particular: UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, cit., paragraph 63.
[670] P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, cit., p. 101.
[671] Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, cit., paragraph 9.2.
[672] *Ibidem*.
[673] *Ibidem*.
[674] In this sense: P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, cit., p. 100 ss.
[675] See *supra*, note 612.

> […] in arguing either that a serious violation of a peremptory norm may entail non-recognition of immunity under the law of state responsibility or that in interpreting the scope of application of jurisdictional immunities, one needs to take into account, and eventually yield to, the systemic need of assuring the implementation of the values underlying peremptory norms.[676]

Consistently with its systematic approach, the Court of Cassation rejected the implicit waiver of immunity argument uphold by the Greek Areios Pagos in *Prefecture of Voiotia v. Federal Republic of Germany*, stating that a waiver cannot be envisaged in the abstract, but only detected in concrete.[677]

After this well-reasoned argument, the Court further justified the affirmation of Italian jurisdiction over Nazi crimes on the basis of the so-called *forum* tort exception. In this regard, the Court of Cassation affirmed that the traditional distinction between *acta jure imperii* and *acta jure gestionis* is increasingly inadequate with respect to civil tort claims, as demonstrated by a general trend, ascertained in common law countries as well as in international instruments, to deny immunity to the foreign State for torts committed on the territory of the *forum*.[678] Italian courts could therefore exercise jurisdiction over offences such as those experienced by Mr. Ferrini, given that part of the contested acts – namely, the unlawful arrest and deportation – had taken place in Italy. This reasoning is in contradiction, however, with the argument of the peremptory character of the violated norms, insofar as it limits its applicability only to torts committed in the *forum* State.[679]

Furthermore, the Court put forward as a cumulative argument the parallel between the immunity of States and functional immunity, stating that, since it is nowadays generally accepted that the organs of the State that commit international crimes do not enjoy functional immunity, there is no valid reason for upholding the immunity of States for the same conduct.[680] Although one may agree in principle with this statement, it is worth noticing that the Court reiterated here its failure, which characterized the whole judgment, to properly

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[676] A. BIANCHI, *Ferrini v. Federal Republic of Germany*, cit., p. 247.

[677] Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, cit., paragraph 8.2.

[678] *Ivi*, paragraphs 10.1-10.2.

[679] This critical remark is strongly expressed in A. CASSESE, *International Law*, cit., p. 108. In the sense that, instead, the Ferrini judgment only marginally relied on the forum tort argument, upholding the principle of universal civil jurisdiction for *jus cogens* violations, see: P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, cit., pp. 96-97.

[680] Italian Court of Cassation (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, cit., paragraph 11. The same argument is supported in literature by Cassese and Gaeta. See: A. CASSESE, *International Law*, cit., p. 108; P. GAETA, *International Criminalization of Prohibited Conduct*, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2008, pp. 63-74.

distinguish between the categories of international crimes attributable to individuals and of illicit acts engaging the international responsibility of States.[681] Nonetheless, this reasoning can be appreciated if we consider that it «was not intended to establish a *legal definition* for a given act, but to show its *gravity*».[682]

Despite the above mentioned inconsistences and the uneasiness of the Court at discarding its precedents,[683] the *Ferrini* judgment provided a valuable contribution to international law. This is because the Court of Cassation did not limit its analysis to the existing national practice and international instruments on State immunity, but put the immunity regime into the context of general international law, including human rights law, international humanitarian law and the law of State responsibility.[684] In other words, it carried out a systematic interpretation of contemporary international law, giving primacy to the value of human rights protection over the principle of sovereign equality of States, in light of the progressive development of international law towards a "humanized" model. For this reason, the argumentation of the Italian Court of Cassation is better grounded from a logical point of view than the reasoning behind the *Princz* decision of the District of Columbia or the judgment of the Greek Areios Pagos in *Distomo*, both based on the frail implicit waiver of immunity argument.[685]

2.5.2 Subsequent case law of Italian courts

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[681] A. BIANCHI, *Ferrini v. Federal Republic of Germany*, cit., p. 245; A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision*, cit., p. 229.

[682] P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, cit., p. 99.

[683] It is worth noticing that the Court of Cassation was at unease in distinguishing the *Ferrini* case from its precedents (in this sense: A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision*, cit., p. 228). For instance, in the *Cermis* case (see Chapter 2, paragraph 3.1 of the present work; in particular, note 375) the Court had uphold the immunity of the foreign State for the tortious conduct of its armed forces. In *Ferrini* it tried to justify a revirement of its case law, but the argument whereby the acts of the U.S. army, occasioning the death of more than twenty civilians, lacked a criminal nature is not entirely convincing. Even less convincing is the way the Court of Cassation dismissed the relevance of the *Markovič* judgment (Italian Court of Cassation (Sezioni Unite), *Markovic v. Italian Presidency of the Council of Ministers and the Ministry of Defence*, Order of 5 June 2002, No. 8157). In that case, dealing with the award of damages to the civilian victims of NATO bombings over Belgrade, the Court had affirmed the unquestionableness of the Italian government's decisions on the conduct of hostilities as «the expression of a function of political direction». According to the Court, the facts in *Markovič* were different from *Ferrini* because they did not involve the violation of fundamental principles of international law protecting human rights. However, «it is hard to see why, in the minds of the supreme judges, the plaintiffs in *Markovič* could not in any case have made an even tenuously plausible argument that the conduct of the Italian government amounted to a crime» (A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision*, cit., p. 229).

[684] A. BIANCHI, *Ferrini v. Federal Republic of Germany*, cit., p. 245.

[685] In this sense, see: P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, cit., p. 111.

The *Ferrini* decision had a strong impact on Italian case law. The Italian Court of Cassation confirmed its findings in a number of further decisions,[686] even though relying on slightly different arguments from case to case. Such jurisprudence led to an increasing number of civil actions for damages brought against the Federal Republic of Germany, so that, when this latter seized Italy before the International Court of Justice, twenty-four proceedings were pending before first instance tribunals and appeals courts. [687] The actions had been initiated by four categories of applicants: Italian civilians who, like Mr. Ferrini, had been deported to Germany and subjected to forced labour; Italian soldiers who were denied the *status* of prisoners of war and used as slave labour force; the victims of massacres committed by German armed forces on Italian territory; Greek citizens seeking to enforce the judgment issued by the Areios Pagos in *Distomo*.[688]

The arguments put forward in *Ferrini* were further clarified in *Mantelli*.[689] With that decision, the Italian Court of Cassation refused to uphold the immunity of the Federal Republic of Germany for the deportation and enslavement of a number of Italian citizens during World War II, on the basis that the principle of State immunity had to be applied in light of the parallel principle whereby international crimes are a threat to humanity as a whole and undermine the peaceful coexistence among States.[690] The *Mantelli* decision thus reinforced the "systematic" approach adopted in *Ferrini*, entailing a balancing of values rather than the application of a strict hierarchy of norms.[691] The reasoning of the Court was even more coherent than in the *Ferrini* judgment, because such systematic approach was adopted irrespective of the place where the harmful conduct had taken place. Indeed, no reference was made to the *forum* tort exception.

There are two further reasons why the *Mantelli* decision is worth recalling, dealing, respectively, with the potential impact of Italian case law on the development of international

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[686] See, in particular: Italian Court of Cassation (Sezioni Unite Civili), *Federal Republic of Germany v. Mantelli and others*, Order of 29 May 2008, No. 14201, reported in «Rivista di diritto internazionale privato e processuale», Year XLV, No. 3 (July-September 2009), p. 651 ss. On the same day, the Court of Cassation released other eleven identical orders concerning proceedings against the Federal Republic of Germany pending in other Italian tribunals. See: G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, cit., p. 605, note 1.

[687] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)*, Application Instituting Proceedings, filed in the Registry of the Court on 23 December 2008, paragraph 12.

[688] *Ivi*, paragraphs 7-10.

[689] Italian Court of Cassation (Sezioni Unite Civili), *Federal Republic of Germany v. Mantelli and others*, Order of 29 May 2008, cit.

[690] *Ibidem*.

[691] F. DE VITTOR, *Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli*, in «Diritti umani e diritto internazionale», Vol. 2, No. 3 (2008), pp. 632-637; G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, cit., p. 624.

custom and with the concept of sovereignty underlying such case law. Firstly, the Court of Cassation affirmed that, albeit no exception to the rule of State immunity in case of gross violations of human rights and humanitarian law existed under customary international law,[692] the Italian practice could contribute to the emergence of a new rule of customary law restricting the scope of the State immunity regime.[693] The Court was therefore aware of the potential impact of its jurisprudence. Secondly, the Court suggested, as we did at the beginning of this chapter, that international crimes do not properly qualify as sovereign acts. In the words of the Court of Cassation, «it would be incongruous to uphold the civil jurisdiction of the *forum* State for commercial matters involving foreign sovereigns, while denying access to justice to the victims of acts that go far beyond what is normally considered to be *a tolerable exercise of sovereignty*».[694]

On the same date of the *Mantelli* decision and other eleven identical orders,[695] the Court of Cassation declared enforceable in Italy[696] the *Distomo* judgment, issued by the Greek Areios Pagos in 2000.[697] In this regard, it is worth mentioning that the same Greek judgment had not been executed in Germany because contrary to the German public order.[698] The points of law raised by the Federal Republic of Germany were dismissed by the Italian Court of Cassation on two main grounds. Firstly, the Court found that the lack of ministerial authorization for the enforceability of the *Distomo* judgment in Greece did not prevent the same decision from being executed in Italy, given that such authorization did not confer validity to the judgment, but implied it.[699] Secondly, the Court of Cassation held that the execution of the foreign decision was not incompatible with the Italian public order, because the freedom and dignity of persons, which limit the applicability of immunity rules to international crimes, are

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[692] Italian Court of Cassation (Sezioni Unite Civili), *Federal Republic of Germany v. Mantelli and others*, Order of 29 May 2008, cit.

[693] *Ibidem*. More precisely, the Court affirmed that such new rule was already part of international custom, so that the Italian Court of Cassation was only contributing to its emergence. This is, nonetheless, a rather illogical assumption: how could a rule be already part of customary international law, if it is still in the process of formation? In this sense, see: G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, cit., pp. 625-626.

[694] *Ibidem*. My own translation from Italian. Italics is my own addition.

[695] See *supra*, note 686.

[696] Italian Court of Cassation (Sezioni Unite Civili), *Repubblica federale di Germania c. Amministrazione Regionale della Vojotia*, Judgment of 29 May 2008, cit.

[697] Greece Court of Cassation (Areios Pagos), *Prefecture of Vojotia (Greece) v. Federal Republic of Germany*, Judgment of 4 May 2000, cit.

[698] German Federal Supreme Court, *Distomo Massacre case*, Judgment of 26 June 2003, III ZR 245/98, in «International Law Reports», Vol. 129 (2007), p. 556.

[699] Italian Court of Cassation (Sezioni Unite Civili), *Repubblica federale di Germania c. Amministrazione Regionale della Vojotia*, Judgment of 29 May 2008, cit., paragraph 5.1.

fundamental values characterizing the Italian legal system.[700] As a consequence of this order, measures of constraints were taken against Villa Vigoni, a German property on the Como Lake used for cultural, non-commercial activities.[701]

Another important decision of the Court of Cassation that confirmed the trend initiated in 2004 is the *Milde* judgment.[702] Mr. Milde, a commander of German armed forces during World War II, had been condemned *in absentia* to life imprisonment by the Military Tribunal of La Spezia for the killing, out of military necessity, of more than two hundreds civilians resident in the Italian villages of Civitella, Cornia and San Pancrazio. With the same judgment, the Federal Republic of Germany was held liable to pay compensation to the successors of the victims of the massacre, appeared as civil parties in the proceedings. Following an unsuccessful appeal to the Military Court of Appeal, the Federal Republic of Germany appealed the Court of Cassation arguing that the lower courts erred in law because, *inter alia*, customary international law does not foresee any exception to State immunity from civil jurisdiction for gross violations of human rights, as affirmed by other national and international courts.[703]

In this regard, the Criminal Section of the Court of Cassation rightly maintained that the reconstruction of international custom cannot be based on a mere quantitative analysis: the task of who interprets and applies customary law is not to count the judgments in favour or against a certain practice, but to verify the interdependence among different rules and how they interact, also in terms of hierarchy and coherence.[704] As underlined in literature, the Court stressed «the importance of case-by-case judicial interpretation and law making as indispensable to safeguard human values against conflicting norms».[705] According to the Court, the customary principle of State immunity is to be read in conjunction with the necessity to punish conducts which amount to abuses of sovereign power, as in the case of

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[700] *Ivi*, paragraph 5.2.

[701] The Italian Court of Cassation has recently confirmed the public function of Villa Vigoni, excluding it from measures of execution. See: Italian Court of Cassation (Terza Sezione Civile), *Regione Sterea' Ellada c. Presidenza del Consiglio dei Ministri e Repubblica Federale di Germania*, Judgment of 8 June 2018, No. 14885/2018. This judgment will be further dealt with in Chapter 4 of this work, while discussing the Italian case law subsequent to the ICJ *Jurisdictional Immunities* judgment.

[702] Italian Court of Cassation (First Criminal Section), *Milde* case, Judgment of 13 January 2009, No. 1072, reported (in summary) in C. FOCARELLI, *Diritto Internazionale*, 2nd Edition, Padova, CEDAM, 2012, Volume II, Prassi (2008-2012), p. 124 ss.

[703] *Ivi*, Procedural history of the case.

[704] *Ivi*, paragraph 4.

[705] M. IOVANE, *Conflicts Between State-Centred and Human-Centred International Norms*, cit., p. 215.

gross violations of human rights and humanitarian law.[706] In order to preserve the consistency of international law, a breach of the peremptory norms protecting the dignity of the person must be followed by an adequate response.[707]

Following this reasoning, the Criminal Section conducted a balancing between the conflicting principles, confirming the primacy of the protection of human rights over the obligation to grant immunity from jurisdiction to the foreign State. In comparison with other decisions subsequent to the *Ferrini* judgment, particular attention was paid to the right of access to justice of the victims, which was taken into account as a determining factor in the balancing exercise undertaken by the Court. This latter, indeed, stated that «it would be meaningless to affirm the primacy of fundamental rights, while inconsistently denying access to justice to the individuals, depriving them of the necessary means to ensure the effectiveness and primacy of the rights violated by the wrongful conduct of the responsible State».[708]

Although they do not specifically deal with the issue of the immunity of States in case of serious violations of human rights, there are further decisions of the Court of Cassation that confirm the *Ferrini* precedent. In *Lozano*, a case on the criminal responsibility of a U.S. soldier for the killing of two Italian officials and a journalist, the Court (First Criminal Section) extended the applicability of the conclusions reached in *Ferrini* to the functional immunity of foreign State officials, affirming that such immunity cannot be granted when the concerned official is responsible of international crimes.[709] Another instance is the aforementioned *Argentinian bonds* case, where the Court of Cassation affirmed that the exercise of sovereignty cannot be covered by State immunity when it amounts to acts against the dignity of the person. This was not the case, however, of the rescheduling of the payment of the sovereign bonds.[710] Likewise, in *U.S. v. Tissino and others* the Court found that the only exception to the immunity from civil jurisdiction of the foreign State for *acta jure imperii* is when the contested conduct qualifies as an international crime, which was not the

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[706] Italian Court of Cassation (First Criminal Section), *Milde* case, Judgment of 13 January 2009, No. 1072, cit., paragraph 5.
[707] *Ivi*, paragraph 6.
[708] *Ivi*, paragraph 7. My own translation from Italian.
[709] Italian Court of Cassation (Sezione I Penale), *Lozano* case, Judgment of 19 June 2008, No. 31171/2008, paragraph 6. Quite surprisingly, the Court did not refer in this case to the practice of other tribunals in this regard (like, for instance, the *Arrest Warrant* judgement by the International Court of Justice), basing its findings on the *Ferrini* jurisprudence. In this case, however, the Court of Cassation found that the contested conduct did not amount to an international crime, as it lacked sufficient gravity. M. Lozano was therefore declared under the exclusive jurisdiction of the national State of the battalion, that is the U.S., and not of the *forum* State, i.e. Iraq).
[710] Italian Court of Cassation (Sezioni Unite Civili), *Borri c. Repubblica Argentina*, Order of 27 May 2005, cit., paragraph 2. This case is analysed in detail in Chapter 2, paragraph 3.2 of the present work.

case, though, of the mere presence of nuclear weapons on Italian territory on the basis of an international agreement. [711]

From the analysis of the *Ferrini* case and the subsequent jurisprudence of the Court of Cassation, it is apparent that the Italian case law before the judgment of the International Court of Justice was consistent in its denial of State immunity to Germany. Contrary to what affirmed by the UK House of Lords, this approach did not amount to a strict application of the normative hierarchy theory, nor was based on the alleged existence of an exception to State immunity for acts *jure imperii* under customary international law. The Italian attitude towards State immunity issues was rather based on a systemic approach to international law, according to which every rule, including customary rules, must be interpreted in light of a broader context. Nonetheless, the Italian Court of Cassation was also well aware of the potential impact of its case law on the further development of international law, as clearly stated in *Mantelli*.

2.6 Other civil law jurisdictions

In other civil law countries, the civil claims brought against foreign States for gross human rights violations were not as successful as in Italy. An interesting case which goes against the trend inaugurated with the *Distomo* judgment is *A.A. v. Germany*, decided by the Slovenian Constitutional Court as early as 2001.[712] Also this case concerned the conduct of German armed forces during World War II. According to the applicant, there was under customary international law a *jus cogens* exception to State immunity from civil jurisdiction for *acta jure imperii*. In this regard, the Court admitted that there was evidence of a developing trend in international law towards the limitation of State immunity in cases of alleged human rights violations, but that, however, such evidence «was not demonstrative of general State practice recognised as a law and thus creating such a rule of customary international law».[713] Moreover, the Slovenian Constitutional Court held that the upholding of State immunity to

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[711] Italian Court of Cassation (Sezioni Unite Civili), *United States of America v. Tissino and others*, Judgment of 25 February 2009, No. 4461, reported in «Il Foro Italiano», Vol. 132, No. 7/8 (July-August 2009), pp. 2103-2110.

[712] Slovenian Constitutional Court, *A.A. v. Germany*, Judgment of 8 March 2001, No. IP-13/99. This case is reported as relevant practice in: European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Judgment of 14 January 2014, Application Nos. 34356/06 and 40528/06, paragraphs 148-149.

[713] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Judgment of 14 January 2014, Application Nos. 34356/06 and 40528/06, paragraph 148.

Germany amounted to a legitimate and proportionate interference with respect to the applicant's right of access to justice, protected under Article 6 of the European Convention.[714]

In France, the Court of Cassation dismissed similar civil applications, albeit with a much less articulated reasoning. In *Bucheron v. Germany*, a case initiated by a civilian who during World War II had been enslaved on the basis of a compulsory work scheme imposed by the Republic of Vichy, the Federal Republic of Germany was granted immunity from civil jurisdiction because of the *jure imperii* character of the conduct at stake.[715] In the view of the Court, indeed, the circumstances of the case «[…] n'étaient pas de nature à faire échec au principe de l'immunité juridictionnelle de la RFA selon la pratique judiciaire française».[716] The national judicial precedent was thus determinative for the Court's decision. The Court of Cassation confirmed this position in *Grosz v. Germany*.[717] Mr. Grosz later brought a claim against France for denial of access to justice before the European Court of Human Rights,[718] but obtained no remedy, as will be further discussed in this chapter.

As reported by the International Court of Justice,[719] also lower instance tribunals in Serbia[720] and Brazil[721] granted immunity from civil jurisdiction to Germany for wrongful conduct committed during World War II. The rationale behind those decisions was that customary international law requires absolute immunity for acts *jure imperii* committed by foreign States, independently from the fact that the underlying conduct had taken place in the territory of the *forum* and thus amounted to a "territorial tort". The subject matter of the Brazilian judgment – the sinking of a Brazilian fishing vessel from the part of a German submarine – is particularly relevant since it gave rise to a number of subsequent applications before the Supreme Federal Tribunal[722] and culminated in an extraordinary appeal of constitutional relevance,[723] as will be discussed later in this work.

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[714] *Ivi*, paragraph 149.
[715] French Court of Cassation, *Bucheron v. Germany*, Judgment of 16 December 2003, No. 02-45961.
[716] *Ibidem*.
[717] French Court of Cassation, *Grosz v. Germany*, Judgment of 3 January 2006, No. 04-475040.
[718] European Court of Human Rights, *Case of Grosz v. France*, Decision of 16 June 2009, Application No. 14717/06.
[719] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 74.
[720] Court of First Instance of Leskovac, Judgment of 1 November 2001.
[721] Federal Court, Rio de Janeiro, *Barreto v. Federal Republic of Germany*, Judgment of 9 July 2008.
[722] The Supremo Tribunal Federal issued few monocratic decisions affirming the immunity of Germany on the basis of the restrictive doctrine of State immunity: RO 66/RJ, Rel. Ministro Fernando Gonçalves, Judgment of 19 May 2008; RO 72/RJ, Rel. Ministro João Otávio De Noronha, Judgment of 8 September 2009; AgRg no RO 110/RJ, Rel. Ministra Maria Isabel Gallotti, Judgment of 24 September 2012.
[723] Supremo Tribunal Federal, Recurso Extraordinário com Agravo 954.858 – RJ. See *infra*, Chapter 4, Section 2.2 of this work.

A more recent case decided by a civil law high court – namely, the Supreme Court of Poland – is *Natoniewski v. the Federal Republic of Germany*.[724] The applicant had survived a massacre perpetrated by German occupying forces during World War II, but reported to have suffered severe health problems for all his life as a result of the attack. For this reason, he claimed the payment of damages from the part of Germany. The Supreme Court of Poland dismissed the appeal on different grounds. Its reasoning is particularly interesting insofar as it tackles, on the one hand, the problem of the right way to deal with war reparations and, on the other, the compatibility between the recognition of immunity to the foreign State and the applicant's right of access to justice.

The starting point of the Court's reasoning was to assume that a *forum* tort exception exists under customary international law,[725] but that it does not apply to the conduct of armed forces, because wars are characterized by an inter-State structure reflected also on the issue of war reparations.[726] According to the Court, reparations are therefore to be regulated by means of peace treaties among States, rather than through individual claims brought before domestic judges.[727] This position, later supported by Germany before the International Court of Justice, can be criticised to the extent that an evolutionary trend towards the limitation of States' power to waive reparations claims can be detected under the law of State responsibility.[728] As observed in literature, in case of gross violations of humanitarian law that amount to breaches of *jus cogens*, «the injured State cannot entirely dispose of the more general interest of the international community as a whole»[729] to find a settlement with the wrongdoer State. Moreover, although international humanitarian law does not directly confer rights upon individuals because of its non-self-executing nature, an individual right to reparations exists at

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[724] Supreme Court of Poland, *Natoniewski v. the Federal Republic of Germany*, Decision of 29 October 2010, No. IV CSK 465/09, reported (in summary) in «Polish Yearbook of International Law», Vol. XXX (2010), pp. 299-303. For a comment on this decision in light of the right of access to justice, see: R. NOWOSIELSKI, *State Immunity and the Right of Access to Court. The* Natoniewski *Case Before Polish Courts*, in «Polish Yearbook of International Law», Year XXX (2010), pp. 263-276.

[725] *Ivi*, p. 300.

[726] *Ivi*, p. 301.

[727] This is the position supported by Tomuschat and defended by Germany before the International Court of Justice. See, *inter alia*: C. TOMUSCHAT, *The Case of Germany v. Italy before the ICJ*, in A. PETERS, E. LAGRANGE, S. OETER, C. TOMUSCHAT, (Editors), *Immunities in the Age of Global Constitutionalism*, cit., pp. 87-98; C. TOMUSCHAT, *The International Law of State Immunity and Its Development by National Institutions*, cit., pp. 1131-1132.

[728] For a well-founded analysis of this evolutionary trend, see: A. BUFALINI, *On the Power of a State to Waive Reparation Claims Arising From War Crimes and Crimes against Humanity*, in «ZaöRV», Vol. 77 (2017), pp. 447-470.

[729] *Ivi*, p. 447.

the national level,[730] limiting the power of the State to settle war reparation issues without taking properly into account the interest of victims.

As for the existence of a human rights exception to the rule of State immunity from civil jurisdiction, the Supreme Court of Poland held that, even though «there appears to be a trend in international and domestic law towards limiting State immunity in respect of human rights abuses»,[731] that practice is by no means universal. Therefore, no established rule of customary international law can be said to limit the scope of State immunity for *acta jure imperii*. According to the Supreme Court, such restriction of the applicant's right of access to justice was not disproportionate, because other means of redress were available to the claimant, namely the institution of proceedings in Germany.[732] Albeit referring to the alternative means of redress argument proposed by the European Court of Human Rights in *Waite and Kennedy v. Germany*,[733] however, the Polish Supreme Court did not conduct any serious analysis of Mr. Natoniewski's prospects of success in Germany, where similar claims (including Mr. Ferrini's) had always been dismissed.

In conclusion, from our survey of transnational human rights litigations before national courts, it is possible, despite the scarcity of the practice of States, to detect a number of different approaches to State immunity from civil jurisdiction in case of human rights violations. Given the variety of the practice as well as of the arguments for which immunity was refused or uphold, it can at least be stated that the law of State immunity was in a state of flux before the ICJ issued the *Jurisdictional Immunities* judgment. Indeed, even the domestic courts deciding in favour of immunity, like the Supreme Court of Poland, recognized an emerging trend towards a new rule of customary international law. Unfortunately, the judgment of the International Court of Justice had a negative impact on this development, as will be discussed later in this chapter.

3. The case law of the European Court of Human Rights

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[730] N. RONZITTI , *Access to Justice and Compensation for Violations of the Law of War*, in F. FRANCIONI (Editor), *Access to Justice as a Human Right*, cit., p. 111.
[731] Supreme Court of Poland, *Natoniewski v. the Federal Republic of Germany*, Decision of 29 October 2010, cit., p. 303.
[732] *Ibidem*.
[733] European Court of Human Rights (Grand Chamber), *Case of Waite and Kennedy v. Germany*, cit. For an analysis of this case, see Chapter 2, paragraph 4.3 of this work.

Although the case law of the Strasbourg Court on access to justice and State immunity in case of grave violations of human rights is less rich than its jurisprudence on labour-related disputes, it has been particularly influential on the practice of States. Indeed, domestic courts have often referred to it in order to demonstrate that there is no humanitarian exception to State immunity from civil jurisdiction for gross human rights violations.[734] The most quoted judgment is the well-known *Al-Adsani v. the United Kingdom*.[735] As discussed earlier in this chapter, Mr. Al-Adsani had been subject to torture in Kuwait by the hands of State officials. In the United Kingdom, his claim against Kuwait for acts of torture had been dismissed by the second Court of Appeal, which decided in favour of the immunity of the foreign State. Mr. Al-Adsani then filed an application before the ECtHR, claiming that the United Kingdom had violated the prohibition of torture, enshrined in Article 3 of the European Convention, and his right of access to justice, protected under Article 6. As for the allegations of torture, the Strasbourg Court plainly agreed that no violation could be attributed to the United Kingdom, since the mistreatment had taken place abroad, outside the jurisdiction of the Member State.[736] In contrast, much more difficult was to decide on the issue of access to justice.

With a slight majority of nine votes against eight, the European Court of Human Rights concluded that no violation had occurred, reiterating its understanding of immunities as inherent limitations to the right of access to justice[737] and thus completely failing to assess if the very essence of Mr. Al-Adsani's right of access to justice had been impaired. In accordance with its aforementioned jurisprudence, the Court held that the right of access to justice can be restricted by Member States, provided that such restriction pursues a legitimate aim and is proportionate to it. In this regard, the Court found that the granting of immunity to a foreign sovereign in a civil proceeding «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».[738] With respect to the proportionality of the restriction, it was observed 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

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[734] See, *inter alia*: UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, cit., paragraph 18; Supreme Court of Poland, *Natoniewski v. the Federal Republic of Germany*, Decision of 29 October 2010, cit.

[735] European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit.

[736] *Ivi*, paragraph 40.

[737] *Ivi*, paragraph 56. On State immunity from civil jurisdiction as an inherent limitation to the right of access to justice, see *supra*, note 554.

[738] *Ivi*, pararaph 54.

as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6».[739]

Once again, as in the Strasbourg case law on employment related disputes, the restriction of the applicant's right of access to justice was considered to be legitimate and proportionate simply because of its congruence with customary international law.[740] In this respect, the ECtHR noted that, notwithstanding the peremptory character of the prohibition of torture, there is no firm basis under international law to assume that such prohibition entails an obligation falling upon States to deny immunity from civil jurisdiction to the responsible foreign State.[741] This quite formalistic argument,[742] however, did not exclude that a new rule preventing the applicability of immunity to acts of torture could emerge in the future,[743] nor undermined in any way «the freedom of States to deny sovereign immunity to other States or their functionaries in civil proceedings».[744]

The reasoning of the Court can be criticized on two main grounds. Firstly, the aim pursued by immunity rules might be legitimate in the abstract, but this is not necessarily the case in every circumstance.[745] In particular, it can be maintained that immunity was not designed to shield abuses of sovereign powers from the part of the foreign State, as in the case of torture. Secondly, a restriction of the applicant's right of access to justice can hardly be regarded as proportionate, when the offence suffered by the foreign State is very grave and no other remedy, even non-judicial, is available. [746] Indeed, the United Kingdom had been unwilling to

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[739] *Ivi*, paragraph 56.

[740] For a more detailed analysis of the legitimate aim and proportionaly test developed by the European Court of Human Rights with respect to restrictions of the right of access to justice based on recognition of State immunity from civil jurisdiction, see *supra*, Chapter 2, paragraph 4.3 of this work.

[741] European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit., paragraph 61.

[742] In the sense that the decision of the majority was formalistic, see: European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit., *Dissenting Opinion of Judge Ferrari Bravo.*

[743] European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit., paragraph 66.

[744] R.S. BROWN, *Access to Justice for Victims of Torture*, cit., p. 209.

[745] In this sense, with regard to the *Kalogeropoulou* jugment, see: S. VRELLIS, *The World War II Distomo Massacre of Greek Civilians by German Armed Forces and the Right to Effective Judicial Protection*, cit., p. 635.

[746] The *Al-Adsani* judgment has been criticized, *inter alia*, for its failure to consider the availability of alternative remedies for the applicant. In this sense, see: L. MCGREGOR, *State Immunity and Human Rights. Is there a future after Germany v. Italy?*, in «Journal of International Criminal Justice», No. 11 (2013), p. 127; M. TOMONORI, *Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means*, in «The Modern Law Review», Vol. 71, No. 5 (September 2008), p. 734. According to part of the legal doctrine, however, only judicial means are alternative means, so that diplomatic protection cannot be regarded as an effective remedy. See infra, Chapter 4, paragraph 1.1 of this work, in particular footnotes 858 and 859.

take up the case of Mr. Al-Adsani at the diplomatic level, and Mr. Al-Adsani's claim was very unlikely to be successful in Kuwait, the torturer State.

The ruling of the majority was harshly contested in the opinion of judges Rozakis and Caflisch, joined by judges Wildhaber, Costa, Cabral Barreto and Vajić, who regretted the fact that Mr. Al-Adsani, after having suffered such serious violations of his human rights, could not obtain any remedy. In particular, they relied on the *jus cogens* nature of the prohibition of torture to state that such prohibition prevails over every hierchically lower rule, including immunity rules.[747] Following this reasoning based on the normative hierarchy theory, it is meaningless to distinguish between criminal and civil suits, since the breach of a *jus cogens* rule from the part of a foreign State implies the denial of immunity to both its officials and the State itself.[748] More convincing, however, was the dissenting opinion of judge Loucaides, who observed that Article 6 of the European Convention is violated anytime the immunity of States is uphold as a blanket immunity without conducting a proper balancing of the competing principles at stake, independently from the *jus cogens* nature of the breach.[749] Of course, when the violations underlying a civil claim are so serious as in Mr. Al-Adsani's case, providing access to justice to individuals is even more compelling.

In *Kalogeropoulou and Others v.Greece and Germany*,[750] decided one year after the *Al-Adsani* judgment, the European Court of Human Rights came to similar conclusions as in its precedent. The case was brought before the Court by the relatives of the victims of the Distomo massacre, who sued Germany for its failure to comply with the default judgment of the Livadia Court of First Instance, and Greece for its refusal to enforce that decision.[751] According to the applicants, the conduct of the two States amounted to an infringement of their right of access to justice and of their right to peacefully enjoy their possessions, protected, respectively, under Article 6 of the Convention and under Article 1 of Protocol No. 1. With regard to Germany, the European Court of Human Rights declared the application inadmissible, because the applicants had never been under German jurisdiction, the

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[747] European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit., Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto And Vajić, paragraph 3.

[748] *Ivi*, paragraph 4.

[749] European Court of Human Rights (Grand Chamber), *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, cit., Dissenting Opinion of Judge Loucaides.

[750] European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, Judgment of 12 December 2002, cit.

[751] Court of First Instance of Livadia, Judgment 30 October 1997, No. 137/1997. On this judgment, see *supra*, paragraph 2.4 of this Chapter.

underlying proceedings having taken place entirely in Greece.[752] For what concerns Greece, the application was also held inadmissible, because, in the opinion of the Court, no violations could be detected.

Although the case dealt with immunity from execution, and not immunity from jurisdiction, the Strasbourg Court followed the same reasoning as in *Al-Adsani*. Therefore, it carried out the usual legitimacy and proportionality test in order to assess whether the Greek Ministry of Justice's refusal to execute the *Distomo* decision constituted an indebt interference with the applicants' right of access to justice.[753] As always, the Court found that the recognition of immunity, as a general principle of international law, pursues a legitimate aim, that is the maintainance of good international relations.[754] Furthermore, it cannot be regarded as a disproportionate interference, since it reflects the current *status* of customary international law.[755] Therefore, the Court considered that «although the Greek courts ordered the German State to pay damages to the applicants, this did not necessarily oblige the Greek State to ensure that the applicants could recover their debt through enforcement proceedings in Greece».[756]

As observed in literature, a proportionality test should entail the analysis of the particular circumstances of the case: «the proportionality has to be examined between the aim of the means (granting immunity in order to secure relations with States) and the extent of the tolerable restriction of the right of access to a tribunal (taking into account the importance of the restricted fundamental human right)». [757] On the contrary, in this case, as in *Al-Adsani*, the European Court of Human Rights weighted the measure taken by the State against its own goal, rather than assessing whether it was proportionate to the competing interest at stake, namely the applicants' right of access to justice in order to obtain redress for the grave human rights violations suffered.[758] Had the Court engaged in a serious balancing exercise, it would have likely come to opposite conclusions.

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[752] European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, Judgment of 12 December 2002, cit., p. 13.
[753] European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, cit., Judgment of 12 December 2002, p. 8.
[754] *Ibidem*.
[755] *Ibidem*.
[756] *Ivi*, p. 9.
[757] S. VRELLIS, *The World War II Distomo Massacre of Greek Civilians by German Armed Forces and the Right to Effective Judicial Protection*, cit., p. 639.
[758] *Ibidem*.

The Court applied the same reasoning to the applicants' right to property. The well-established jurisprudence of the ECtHR, indeed, allows restrictions of this right, provided that the limitation is prescribed by law, pursues a public interest[759] and is proportionate to the aim sought to be achieved. In the Court's opinion, the refusal of the Greek executive branch to enforce the *Distomo* judgment pursued the legitimate aim to avoid disturbances in the relations with Germany, and was proportionate because the Greek government could not be obliged to override the principle of State immunity against its will.[760] It is apparent that, once again, the Court did not take into proper consideration the particular circumstances of the case while conducting the legitimacy and proportionality test, this time applied to the legitimacy of State interferences with the right to property.

The European Court of Human Rights further confirmed its stance towards State immunity and the right of access to justice in the aforementioned case *Grosz v. France*.[761] Following the dismissal of his claim by French courts on the basis of Germany's immunity from civil jurisdiction, Mr. Grosz had filed an application to the Strasbourg Court, alleging that France had violated his right of access to justice by refusing to hear his claim on the merits. The ECtHR relied on its precedents *Al-Adsani* and *Kalogeropoulou* to state that measures taken by a Member State which reflect generally recognized rules of international law such as immunity rules cannot be regarded as imposing a disproportionate restriction of the applicant's right of access to justice. With particular regard to the compensation of slave labour, the Court mainted that, although a softening of the principle of State immunity had taken place in Greece, the recognition of immunity to the foreign State even in case of slavery corresponded to the current *status* of customary international law. For this reason, Mr. Grosz's application was declared manifestly ill-found.[762]

In conclusion, the case law of the European Court of Human Rights demonstrates quite a conservative stance with regard to State immunity. It is true that the Court did not exclude in principle a further evolution of international law, nor limited in any way the freedom of States to deny immunity to foreign sovereigns for their wrongful acts. Nonetheless, by failing to

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[759] The "public interest" and "prescribed by law" requirements are set out in Article 1(1) of Protocol No. 1 to the European Convention on Human Rights, which reads as follows: «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».

[760] European Court of Human Rights, *Case of Kalogeropoulou and Others v. Greece and Germany*, cit., Judgment of 12 December 2002, p. 11.

[761] European Court of Human Rights, *Case of Grosz v. France*, Decision of 16 June 2009, cit., reported in «Information Note on the Court's case-law», No. 120 (June 2009), pp. 18-19.

[762] *Ibidem*.

properly assess the legitimacy and proportionality of the restriction of the right of access to courts caused by the upholding of State immunity from civil jurisdiction, the ECtHR *de facto* justified the denial of access to justice to the victims of gross human rights violations, which is quite an unexpected outcome from a human rights court. In more general terms, it can be maintained that the case law of the Court hindered the development of the practice of States in the sense of further restricting the scope of State immunity rules, since many national courts relied on the authoritativeness of ECtHR decisions to uphold the immunity of the foreign State even in case of serious breaches of human rights and humanitarian law, amounting to violations of peremptory rules of international law.

4. The judgment of the International Court of Justice in the *Jurisdictional Immunities* case

4.1 The subject matter of the dispute and the positions of the parties

The issue of State immunity from civil jurisdiction in case of grave human rights violations finally came before the International Court of Justice in 2008. Its judgment of 2012, much criticized in literature,[763] is undoubtedly a landmark decision, especially in light of the authoritativeness of the judgments of Hague Court.[764] In fact, even though the decisions of the ICJ do not establish obligations beyond the parties to a dispute and are not a source of international law, nonetheless they can contribute to the progressive evolution of international

[763] For criticism of the judgment of the International Court of Justice see, *inter alia*: M. BOTHE, *Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of States*, cit., pp. A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., pp. 374-398; B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., pp. 135-142; M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, cit., pp. 1-34; L. MCGREGOR, *State Immunity and Human Rights. Is there a future after Germany v. Italy?,* cit., pp. 125-145; R. PISILLO MAZZESCHI, *Il rapporto fra norme di* ius cogens *e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, in «Diritti umani e diritto internazionale», Vol. 5, No. 2 (2012), pp. 310-326; G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., pp. 617-646;

[764] See, for instance, the aforementioned ILC *Draft conclusions on identification of customary international law, with commentaries*, Commentary to Conclusion 13 (Decisions of Courts and Tribunals), p. 145: «Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction». Also the Italian Constitutional Court, for instance, defined the ICJ as the most qualified body to identify and interpret international custom. See: Italian Constitutional Court, Judgment No. 238/2014, 22 October 2014, paragraph 3.1.

law, or, on the contrary, reinforce the law as it stands. This is because, in order to apply the relevant rules of customary international law, the Court proceeds to their interpretation and assesses whether there are gaps in the existing law.[765] The following sections will provide both an account and critical remarks on the *Jurisdictional Immunities* judgment, with particular regard to the potential impact that it may have on further developments of the customary international law of State immunity.

In the aftermath of the Italian case law denying immunity to Germany for World War II crimes, the Federal Republic of Germany filed an application to the International Court of Justice. As a basis for the ICJ jurisdiction, the Federal Republic of Germany relied on Article 1 of the European Convention for the Peaceful Settlement of Disputes, ratified, respectively, by Italy in 1960 and by Germany in 1961.[766] Germany claimed that Italy had violated its sovereign immunities on three main grounds: firstly, by allowing civil claims based on violations of international humanitarian law to be brought against Germany; secondly, by taking measures of constraint against Villa Vigoni, a German State property used for public purposes; thirdly, by allowing the execution in Italy of the Greek *Distomo* judgment.[767] In the following sections, only the first ground will be analysed in detail.[768]

Italy did not contest the jurisdiction of the International Court of Justice,[769] presenting, instead, a counter-claim to the Court, as permitted under Article 80 of the Rules of Court.[770]

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[765] A. PELLET, *Decisions of the ICJ as Sources of International Law?*, in *Decisions of the ICJ as Sources of International Law?,* Gaetano Morelli Lectures Series, Vol. 2 (2018), Rome, International and European Papers Publishing, 2018, Chapter 1, p. 42 s.

[766] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy)*, Application Instituting Proceedings, filed in the Registry of the Court on 23 December 2008, paragraph 1.

[767] *Ivi*, paragraph 14.

[768] As to the other two grounds, it is sufficient to remind that the ICJ held Italy liable for violating both Germany's immunity from measures of execution, given the *jure imperii* destination of Villa Vigoni, and Germany's immunity from civil jurisdiction, as also for a decision on *exequatur* the competent Italian court had to assess whether the foreign judgment breached Germany's immunity (which was actually the case, since the execution in Italy of a judgment of a third State had the effect of depriving Germany of immunity for acts *jure imperii*). See, respectively, paragraphs 119 and 130-131 of the ICJ judgment. On the issue of the execution in Italy of foreign judgments, see: O. LOPES PEGNA, *Breach of the Jurisdictional Immunity of a State by Declaring a Foreign Judgment Enforceable?*, in «Rivista di diritto internazionale», Vol. 95, No. 4 (2012), pp. 1074-1088.

[769] As underlined in literature, the reason might be that the Italian defense wanted the counter-memorial to be accepted. Moreover, it would have been difficult for Italy to oppose the referral of the dispute to the ICJ, after the joint German-Italian Declaration of 18 November 2008, with which the two States agreed to the peaceful settlement of their dispute by judiciary means. See: *Joint Declaration, Adopted on the Occasion of German-Italian Governmental Consultations*, Trieste, 18 November 2008, reported as an annex to the German application to the International Court of Justice. On the point see: G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 624.

[770] Article 80 provides as follows: «1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party. 2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissioms contained therein. The right of the other party to present

In its counter-memorial of 22 December 2009, the Italian defense argued that the agreements concluded with Germany in 1961 did not imply in any way Italy's renonciation to reparation schemes in favour of its citizens.[771] As a consequence, Germany was under the obligation to provide reparations to a number of Italian victims, the failure to do so for over sixty years after the war engaging Germany's international responsibility.[772] In fact, the establishment of the "Remembrance, Responsibility and Future" Foundation in 2000 had left out entire categories of victims such as the Italian Military Internees, while German courts had refused to hear civil applications for damages brought by Italian victims.[773] In light of the inadequacy of the existing reparation schemes, the victims had thus no other remedy available if not to sue Germany before the Italian judiciary. In other words, «it is because of the absence of any alternative mechanism for reparation that Italian victims of Nazi crimes brought their claims before Italian judges; and it is because of Germany' s failure to offer effective reparation that Italian judges have lifted State immunity».[774]

With its counter-memorial, Italy thus tried to put the German application to the International Court of Justice into the broader context of war reparations, pointing out Germany's obligations under international humanitarian law and the law of State responsibility. Unfortunately, the Hague Court rejected Italy's counter-claim because the German-Italian Agreements of 1961, containing the contested reparation waiver clauses, had been concluded before the entry into force of the European Convention for the Peaceful Settlement of

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its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings. 3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties».

[771] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), Counter-Memorial of Italy*, 22 December 2009, Counter-claim, paragraph 7.4.

[772] *Ivi*, paragraph 7.10.

[773] After the establishment of the Foundation, around 130000 Italian Military Internees applied for reparations, but their requests were refused on the basis of an expert opinion released by Professor Tomuschat to the Federal Ministry of Finance. Professor Tomuschat proposed a rather formalistic reasoning, affirming that the German Reich had not been able, under the rules of international law, to unilaterally change the *status* of the Italian prisoners of war; therefore, the Italian Military Internees had never lost such *status* and were excluded from the scope of the law establishing the Foundation (see: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), Counter-Memorial of Italy*, 22 December 2009, paragraph 2.29) Following this further denial of justice, the Italian Military Internees filed a number of lawsuits before German courts, but with no success. See, in particular: *Verwaltungsgericht Berlin*, Decisions of 28 February 2003, Case No. VG 9 A 435.02 and Case No. VG 9 A 336.02; High Administrative Court of Berlin, Decision of 18 June 2003, case No. 6 S 35.03; Bundesverfassungsgericht, Decision of 28 June 2004, Case no. 2 BvR 1379/01.

[774] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), Counter-Memorial of Italy*, 22 December 2009, Counter-claim, paragraph 7.11.

Disputes.[775] According to the Court, the subsequent facts did not change the position of Germany.[776] It thus came to the conclusion that it lacked jurisdiction on the issue and declared the counter-claim inadmissible.[777] As a consequence, the *Jurisdictional Immunities* judgment did not tackle the problem of war reparations and the victims' right of access to justice, strictly limiting its analysis to the customary law of sovereign immunities. The issue of the lack of effective remedy for the victims of Nazi crimes came up, however, in the arguments proposed by the Italian defense in the main proceedings.

Italy, for its part, requested the Court to adjudge Germany's claims to be unfounded, apart from the submission regarding the measures of constraint taken against Villa Vigoni,[778] already suspended while the proceedings before the International Court of Justice were pending.[779] In particular, Italy maintained that Germany was not entitled to immunity from civil jurisdiction for the wrongful conduct of its armed forces in the period from 1943 and 1945, albeit admitting that such conduct qualified as *jure imperii*.[780] Being aware that a general humanitarian exception to State immunity from civil jurisdiction did not exist under customary international law, the Italian defense tried to justify the case law of its domestic courts on two specific exceptions. In this regard, it is worth noticing that the Italian executive unfortunately abandoned the systematic approach maintained by the Italian Court of Cassation in *Ferrini,* framing the problem, instead, in terms of exceptions to immunity from civil jurisdiction.

Firstly, for the cases in which the wrongful conduct of Germany had taken place in whole or in part on Italian territory, like in *Milde*, the Italian defense relied on the *forum* tort exception, whereby «immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the *forum* State».[781] Secondly, for every case decided against Germany by Italian courts, it argued that Germany was not entitled to immunity because the contested acts amounted to grave breaches of rules of international law of a peremptory character for which no alternative means of redress were

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[775] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim*, Order of 6 July 2010, paragraph 30.
[776] *Ivi*, paragraph 29.
[777] *Ivi*, paragraph 31.
[778] *Ivi*, paragraph 38.
[779] See, in particular: Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011.
[780] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 60.
[781] *Ivi*, paragraph 61.

available.[782] The three strands of the argument, namely the gravity of the conduct, the *jus cogens* nature of the violated rules and the unavailability of alternative means of redress had to be taken into account all together, in a cumulative way.[783]

4.2 General framing of the problem by the International Court of Justice

The starting point of the reasoning of the International Court of Justice was the aknlowledgement of the wrongful nature of German conduct, found to be a serious violation of the international law of armed conflicts applicable in 1943-1945, a point which was not contested by the parties.[784] However, according to the Court, the dispute did not concern the gravity of the violations – and, as a consequence, the right to reparation invoked in Italy's counter-claim. Rather, the problem at issue was to establish «whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity».[785] As both parties agreed that immunity is governed by international law and is not a mere matter of comity,[786] and no treaty on the matter was applicable between them, the Court had thus to look into customary international law.[787] The Court considered that the relevant rules of international law were the ones existent at the times of the internal judicial proceedings against Germany, and not, as argued by this latter, the law into force at the time of the underlying conduct, that is World War II.[788]

Particularly interesting is the way the International Court of Justice framed the problem. As a basic premise, the Court recognized that there are two ways to look into immunity issues: on the one hand, exceptions to the immunity of the foreign State represent a departure from the principle of sovereign equality; on the other hand, immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[789] But, albeit acknowledging the exceptional character of immunity with respect to the territorial

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[782] *Ivi*, paragraph 80.
[783] *Ibidem*.
[784] *Ivi*, paragraph 52.
[785] *Ivi*, paragraph 53.
[786] *Ibidem*. On State immunity from civil jurisdiction as a matter of international law and not of mere comity, see *supra*, Chapter 2, paragraph 1.2 of this work.
[787] *Ivi*, paragraph 54.
[788] *Ivi*, paragraph 58.
[789] *Ivi*, paragraph 57.

jurisdiction of the *forum* State, the Court did not further pursue this reasoning, referring, instead, to State immunity as a *general* rule of international law along the whole judgment. This assumption is only apparently neutral. In fact, it entails that exceptions to the rule must be proved, so that «the contention that Germany is not entitled to to immunity in the cases complained of would have to be proved as an exception, with all the difficulties that this implies».[790]

Another non-neutral premise on which the judgment is based is that the acts committed by German armed forces from 1943 to 1945, notwithstanding their unlawfulness, amounted to *acta jure imperii* for which immunity had to be automatically uphold. It is true that the *jure imperii* nature of the conduct was not contested by the parties, but the Hague Court could at least have acknowledged the increasing inadequacy of the traditional distinction between *acta jure imperii* and *acta jure gestionis* in solving particular kinds of disputes, such as labour-related ones. Most importantly, as pointed out earlier in this chapter, serious breaches of human rights and humanitarian law by States are increasingly regarded as acts which go beyond the simple exercise of the sovereign powers of the State. Quoting Judge Cançado Trinidade's dissenting opinion to the judgment of the majority,

> 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.[791]

In other words, it is not peaceful that serious breaches of international law can be labelled automatically as *acta jure imperii*.[792] The fact that the Court did not even take this into

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[790] A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., p. 379. For criticism on the conception of immunity as a general rule of international law see *supra*, Chapter 2 of this work, paragraph 1.1, note 299.

[791] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Cançado Trinidade, paragraph 178.

[792] A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., p. 381.

consideration contributes to the general impression that the Court chose the more suitable approach to reach a pretermined solution of the case,[793] in light of a State-centered approach.

4.2.1 The *forum* tort exception

As already mentioned, the first argument relied on by Italy was the *forum* tort exception. According to the Italian defense, this exception to State immunity is nowadays enshrined in international customary law as codified at Article 11 of the European Convention on State Immunity and at Article 12 of the United Nations Convention, and is applicable to torts committed by foreign sovereigns independently from their *jure imperii* nature, incuding, as a consequence, also the conduct of foreign armed forces. Italy acknowledged that the European Convention contains a provision excluding its applicability to the conduct of armed forces,[794] but maintained that «this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the *status* of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State».[795]

Morever, Italy maintained that neither the UN Convention nor seven (out of nine) of the existing national istruments providing for a *forum* tort exception to immunity explicitly excluded their applicability to the conduct of armed forces during an armed conflict, thus constituting, in the second case, «significant State practice asserting jurisdiction over torts occasioned by foreign armed forces».[796] On the contrary, Germany argued that Article 11 of the European Convention and Article 12 of the UN Convention were not intended to codify customary international law. As evidence of the non-existence of a *forum* tort exception under customary law, Germany brought the practice of many domestic courts which granted immunity also for torts occurred within the territory of their State.[797]

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[793] For such a criticism towards the methodological approach adopted by the Court, with particular reference to its analysis of customary international law, see: G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 636.

[794] Article 31 of the European Convention on State Immunity reads as follows: «Nothing in this Convention 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».

[795] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 62.

[796] *Ibidem*.

[797] *Ivi*, paragraph 63.

The International Court of Justice considerably narrowed the problem at stake, framing the question in terms of the existence of a territorial tort principle applicable to the conduct of foreign armed forces, rather than trying to assess whether customary international law sets out a general *forum* tort exception to State immunity for *acta jure imperii*.[798] To this purpose, the Court analysed the aforementioned Article 11 of the European Convention and Article 12 of the UN Convention, concluding that none of the two instruments was meant to cover the conduct of foreign troops.[799] While the European Convention explicitly excludes its applicability to the conduct of armed forces, the UN Convention does not contain any similar express provision; nonetheless, the Court relied on certain affirmations made within the International Law Commission, in particular by the Chairman of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property, to affirm that the UN Convention excludes from its scope the acts of armed forces.[800]

This conclusion, however, can be contested on different grounds. As observed by Judge *ad hoc* Gaja in his dissenting opinion, the European Convention on State Immunity can hardly be regarded as a codyfing instrument, giving the very limited number of ratifications obtained.[801] As to the United Nations Convention, «there is nothing in the text of the UN Convention or in the preparatory work that suggests that the "tort exception" should not apply when the foreign State acts *jure imperii*».[802] In any case, the weight to be attributed to the Chairman's statement is limited. In fact, it is not part of the "context" of the UN Convention within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, but is rather to be included in the category of *travaux préparatoires* having only a subsidiary function for the purpose of interpreting a treaty.[803]

The International Court of Justice then examined the relevant State practice in the form of national legislation. Albeit recognizing that the few existing domestic statutes regulating the State immunity regime set out the *forum* tort exception, the Court observed that such domestic

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[798] *Ivi,* paragraph 65.
[799] *Ivi*, paragraphs 67-69.
[800] Professor Hafner, in presenting to the Sixth Committee of the General Assembly the Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property, affirmed that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p. 6, para. 36). On this statement, see: G. HAFNER, *Historical Background to the Convention*, in R. O'KEEFE, C.J. TAMS, (Editors), *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, cit., p. 11.
[801] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., Dissenting Opinion of Judge *ad hoc* Gaja, paragraph 2.
[802] *Ivi*, paragraph 5.
[803] In this sense, see: A. DICKINSON, *Status of Forces under the UN Convention on State Immunity*, in «The International and Comparative Law Quarterly», Vol. 55, No. 2 (April 2006), p. 428.

legislation either excludes its applicability to the conduct of foreign troops,[804] or had never been applied in cases involving hostilities.[805] As observed in literature, however, «none of the legislative acts referred to contains a general exclusion in relation to situations involving armed conflicts or military activities»,[806] the saving clauses referring only to the immunity of foreign armed forces present on the national territory by consent of the State.[807] But, as underlined by Judge *ad hoc* Gaja, there is much difference between the acts of a belligerent foreign army during an armed conflict and the conduct of troops present on the territory of the forum State by its consent:

> […] when the forum State gives its consent to the presence on its territory of foreign troops, a specific, and more favourable, régime of immunities is understandable. This will normally be established by an agreement between the States concerned. It is more difficult to understand why there should be a favourable régime for a hostile State that would prevail over the sovereign right of the territorial State to exercise its jurisdiction concerning conduct taking place on its territory».[808]

As to the judicial practice of States, the ICJ carried out a rather biased analysis, trying to demonstrate the isolation of Italian jurisprudence. Indeed, besides taking into account the national case law on troops present on the national territory with the consent of the territorial State, the Hague Court relied on few national decisions – namely, the *Bucheron* and *Grosz* judgments by the French Court of Cassation, the judgment of the Slovenian Constitutional Court in *A.A. v. Germany* and the *Natoniewski* case adjudicated by the Supreme Court of Poland[809] – to conclude that there is no *forum* tort exception for the *jure imperii* conduct undertaken by foreign armed forces during the course of hostilities.[810] Moreover, the Court lessened the importance of the *Distomo* judgment by underlining the subsequent

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[804] In particular, two States – namely, the United Kingdom and Singapore – have a national legislation which excludes the applicability of the *forum* tort exception to the conduct of foreign armies in general, whereas three other States (Australia, Canada and Israel) have domestic statutes excluding the applicability of such exception only to the conduct of foreign armed forces present in the *forum* State with its consent. See: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 71.

[805] *Ibidem*.

[806] A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., p. 383.

[807] See *supra*, note 798.

[808] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., Dissenting Opinion of Judge *ad hoc* Gaja, paragraph 9.

[809] For an account of these judgments, see *supra*, Chapter 3 of this work, paragraph 2.6.

[810] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraphs 73-74.

pronounciation of the Greek Special Supreme Court,[811] while completely omitting any reference to U.S. practice – for instance, the *Letelier* case – which could have strenghtened the Italian argument.[812] To support its findings, the ICJ even quoted the case law of the Strasbourg Court,[813] even if it does not amount to relevant State practice nor excluded further evolutions in the law of State immunity, as affirmed by the ECtHR itself in the *Al-Adsani* and *Kalogeroupoulou* cases.[814]

State practice and *opinio juris*, however, can be interpreted in different ways, according to the choice of value made by the interpreter.[815] From this perspective, particularly convincing is the criticism raised by Judge *ad hoc* Gaja with respect to the reasoning of the Court.[816] In his opinion, the judges of the majority undertook a selective and only partial reconstruction of the existing practice of States, failing to take into debt account the variety of approaches to the *forum* tort exception existing among States.[817] This particular field of the customary international law of State immunity, indeed, is a "grey area" where «States may take different positions without necessarily departing from what is required by general international law».[818] Therefore, according to judge Gaja, there is no establiblished rule of customary law in this area of the law of State immunity, meaning that a State may or may not recognize immunity with respect to the territorial torts committed by foreign armed forces without committing an internationally wrongful act.

4.2.2 The three strands argument

[811] See *supra*, note 658. The subsequent judgment of the Special Court, however, does not constitute a reversal of the *Distomo* decision, as the two courts – or, better, the two sections of the Areios Pagos – enjoy the same rank within the Greek legal system.

[812] On the case law of U.S. courts and, in particular, on the *Letelier* case, see *supra*, Chapter 3 of this work, paragraph 2.1. According to Professor Pavoni, the International Court of Justice failed to take into proper account U.S. practice in the field of sovereign immunities, which could have supported the Italian position as to the existence of a tort exception (applicable also to the territorial torts committed by foreign armed forces). See: R. PAVONI, *American Anomaly: On the ICJ's Selective Reading of United States Practice in* Jurisdictional Immunities of the State, cit., p. 152 ss.

[813] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 72.

[814] See *supra*, Chapter 3 of this work, section 3.

[815] M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in «Max Planck Yearbook of United Nations Law», Vol. 16 (2012), pp 21-22.

[816] In this sense, see also: A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., pp. 382-384; G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 630.

[817] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., Dissenting Opinion of Judge *ad hoc* Gaja, paragraph 9.

[818] *Ibidem*.

As mentioned before, Italy's second argument was related to the nature of the acts forming the subject matter of the applications filed within Italian courts and to the circumstances in which the claims were made. In particular, it was contended that Germany was not entitled to immunity because of three circumstances to be considered together: firstly, the wrongful acts committed during World War II amounted to grave violations of humanitarian law; secondly, the norms breached by the Third Reich belonged to *jus cogens*; thirdly, the victims had no other remedies available if not to sue the foreign State in the courts of the *forum*.[819] The Italian defense thus construed a very narrow exception to State immunity whose existence under customary international law was extremely difficult to prove, instead of supporting the systematic approach inaugurated with *Ferrini*.

As a contestable starting point, the International Court of Justice decided to consider separately the three strands of the Italian argument,[820] which were consequently weakened. Particularly despicable is the reasoning put forward by the Court to deny that the subject matter of a dispute is relevant for deciding on jurisdiction. According to the ICJ, an exception to State immunity based on the gravity of the conduct would be illogical, because such gravity should be assessed by entering into the merits of the case, whereas immunity is a preliminary issue.[821] But the distinction between merits and jurisdiction set forth by the Court is too rigid and does not correspond to the way national judges decide on State immunity issues: in fact, as already underlined earlier in this work, even to assess whether a State conduct is *jure imperii* or *jure gestionis* it is necessary to take into account the subject matter of the dispute.[822] In other words, «the idea that State immunity is preliminary in nature does not entail that national judges are not able and obliged to make a *prima facie* consideration of the elements of the case, which may perfectly reflect the gravity of the violations of international law involved».[823]

Notwithstanding this strict distinction between procedural and substantial issues, the ICJ proceeded nonetheless to assess whether customary law had developed to the point that the

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[819] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 80.
[820] *Ibidem*.
[821] *Ivi*, paragraph 82.
[822] This point is raised by Judge Yusuf in his dissenting opinion. See: International Court of Justice, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012, Dissenting Opinion of Judge Yusuf, paragraph 37. For literature supporting his criticism, see *supra*, note 531.
[823] C. ESPÒSITO, Jus Cogens *and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist",* cit., p. 165.

gravity of the violation could determine a decision on jurisdiction.[824] To this purpose, it undertook a rather rapid analysis of the practice of States in the form of national decisions[825] and legislation,[826] quoting only those judgments that pointed to the isolation of Italian jurisprudence and diminishing the relevance of State practice which went into a different direction, like the U.S. Antiterrorism and Effective Death Penalty Act.[827] Moreover, once again the case law of the Strasbourg Court[828] was regarded as supporting «the conclusion that under customary international law a State is not deprived of immunity in relation to the alleged commission of serious violations of human rights or humanitarian law»,[829] even though the Strasbourg decisions had a much limited scope and did not exclude *a priori* further developments in the law of State immunity.

The most formalistic argument, however, was underpinned by the Court to dismiss the second strand of Italy's argument, namely the breach of *jus cogens* norms. In this respect, the ICJ pointed out that no conflict exists between the rules of *jus cogens*, which are substantial in nature, and State immunity rules, which are exclusively procedural and therefore confined to determine whether the courts of a State can exercise jurisdiction over the acts of a foreign sovereign. In the ICJ's opinion, the two set of norms amount to completely separate regimes, so that the breach of a peremptory rule of international law does not produce any effect on State immunity.[830] The ICJ thus confirmed its exclusively procedural understanding of immunities, already apparent from the *Arrest Warrant* case.[831] By so doing, it considerably reduced the relevance of *jus cogens* norms under international law, depriving them of practical effects in absence of a specific exception set forth under customary international law.[832]

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[824] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 83.
[825] *Ivi*, paragraphs 84-85.
[826] *Ivi*, paragraph 88.
[827] On this instrument see *supra*, Chapter 3 of this work, paragraph 2.1. The topic will be further dealt with in Chapter 4, while discussing the most recent practice (both judicial and legislative) of the U.S.
[828] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 90.
[829] A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., p. 386.
[830] *Ivi*, paragraph 93.
[831] International Court of Justice, *Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic Of The Congo v. Belgium)*, Judgment of 14 February 2002. As is well-known, in this judgment the International Court of Justice denied that, under customary international law, the commission of an international crime (which was, as a consequence, a breach also of jus cogens rules) deprived a Minister of Foreign Affairs of its personal immunity.
[832] In this sense, see: G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 638.

As to the third strand of Italy's argument, the International Court of Justice spent only few words on the last resort principle, stating that «whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation».[833] Besides relying on this formalistic reasoning, the Court further noted that the national and international practice did not support the argument whereby the upholding of State immunity depends on the availability of alternative means of redress for the victims.[834] To obtain this result, the Court omitted any reference to the early case law of the European Court of Human Rights with respect to the immunity of international organizations and to national decisions – like the *Natoniewski* judgment – where immunity was granted because the applicant had other remedies at her disposal.[835] As observed in literature, however, the Hague Court seemed not to be at ease with its own conclusion on the matter.[836] This is suggested by the affirmation, referred to the Italian Military Internees, whereby «it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims»,[837] as well as by the invitation to the parties to take up negotiations on reparation schemes.[838]

Although the judges of the majority easily dismissed the last resort argument, three judges affirmed their support to an exception to State immunity from civil jurisdiction based on the availability of alternative means of redress for the victims.[839] Of particular interest is the separate opinion of Judge Bennouna, who construed his opposition to the majority's reasoning precisely on the individual right of access to justice. Albeit agreeing with the main findings of ICJ, he held that «the question of jurisdictional immunity raises fundamental ethical and juridical problems for the international community as a whole, which cannot be

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[833] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 100.
[834] *Ivi*, paragraph 101.
[835] In the sense that it is not true that there is no practice supporting the last resort argument, see: B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 139 ss.
[836] A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., p. 388.
[837] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 99.
[838] *Ivi*, paragraph 104.
[839] Besides the Separate Opinion of Judge Bennouna, see: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Cançado Trinidade, paragraph 130 ss.; International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Yusuf, paragraph 9.

evaded simply by characterizing immunity as a simple matter of procedure».[840] This means that the immunity regime cannot be completely kept apart from the rules on State responsibility, especially when the victims of wrongful conduct are left without a remedy.

Following this reasoning, the victims' right of access to justice deserved to be taken properly into account by the ICJ, in light of the trend affirming the centrality of the individual under international law and the progressive receding of the Wesphalian concept of State sovereignty.[841] In this regard, Judge Bennouna pleaded for a narrow exception to State immunity, whereby the right of the individuals concerned to have access to justice in their own country would take precedence in case the foreign State refused to grant reparation.[842] When dealing with immunity issues, indeed, judges «should always remain vigilant to ensure that ultimate precedence is given to law and justice».[843] In the words of Professor Higgins, «an exception [sovereign immunity] to the normal rules of jurisdiction should only be granted when international law requires – that is to say, when it is consonant with justice and with the equitable protection of the parties. *It is not to be granted 'as a right'*».[844]

4.3 A critical appraisal of the judgment in light of the method of identification and the structure of customary international law

The judgment of the ICJ in the *Jurisdictional Immunities* case is particularly problematic for its potential impact on customary international law. On the one hand, indeed, the Court adopted a method of identification of custom which has been much criticized in literature. On the other hand, from the perspective of future developments of international law, the decision of the Court hindered the evolution of the customary law of State immunity in the sense of further restrictions to the scope of immunity rules. Both aspects will be analysed in turn.

For what concerns the method of identification of customary international law, the Court based its whole analysis on vitiated premises, deciding to look into the regime of State

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[840] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Separate Opinion of Judge Bennouna, paragraph 9.
[841] *Ivi*, paragraph 17.
[842] *Ivi*, paragraph 15.
[843] *Ivi*, paragraph 17.
[844] R. HIGGINS, *Certain Unresolved Aspects of the Law of State Immunity*, in «Netherlands International Law Review», Vol. 29, 1982, p. 271. This extract is quoted in: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Separate Opinion of Judge Bennouna, paragraph 17.

immunity from civil jurisdiction as if immunity for acts *jure imperii* was the general rule, rather than an exception from the territorial jurisdiction of the *forum* State. But, even assuming that the immunity of foreign States is a general rule of international law, this does not necessarily mean that it was applicable to the dispute at stake: as suggested in literature, custom does not apply to unusual cases[845] for which the practice of States is scarce and diverse.[846] Therefore, the ICJ should have refrained from applying the customary doctrine of restrictive immunity to the case of serious breaches of human rights and humanitarian law,[847] recognizing, instead, that that particular area of the law is still in a state of flux.

Morever, the Court undertook a rather selective analysis of State practice, focusing its attention only on the case law and national legislation that supported its predeterminate conclusions.[848] That is why the decision of the majority has been criticized as an exercise of "cherry-picking":

> There is indeed considerable divergence in the manner in which the scope and extent of such immunity is interpreted and applied in the practice of States, and particularly in the judicial decisions of their courts. It is not therefore very persuasive to characterize some of the exceptions to immunity as part of customary international law, despite the continued existence of conflicting domestic judicial decisions on their application, while interpreting other exceptions, similarly based on divergent domestic courts' decisions, as supporting the nonexistence of customary norms. This may give the impression of cherrypicking, particularly where the number of cases invoked is rather limited on both sides of the equation.[849]

Furthermore, the Court's method of ascertainment of custom can be criticized to the extent that it merely consisted in weighting off the number of decisions in favour or against the upholding of State immunity, without properly assessing whether an *opinio juris* was associated to the practice of States.[850] It is also worth noting that the Court attributed a

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[845] L. GRADONI, *Consuetudine e caso inconsueto*, cit., pp. 704-720.

[846] This is the case of the law of State immunity for violations of human rights, as apparent from our discussion on national practice. As pointed out by Judge Yusuf, «State immunity is, as a matter of fact, as full of holes as Swiss cheese». See: International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Yusuf, paragraph 26.

[847] In this sense, see: L. GRADONI, *Consuetudine e caso inconsueto*, cit., pp. 713-714.

[848] In this sense, see: R. PISILLO MAZZESCHI, *Il rapporto fra norme di* ius cogens *e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, cit., p. 310.

[849] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Yusuf, paragraph 23.

[850] L. MCGREGOR, *State Immunity and Human Rights. Is there a future after Germany v. Italy?*, cit., p. 129; R. PISILLO MAZZESCHI, *Il rapporto fra norme di* ius cogens *e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla*

disproportionate importance as evidence of *opinio juris* to the case law of the European Court of Human Rights, which, however, only dealt with the issue of State immunity from the perspective of Article 6 of the European Convention, without entering into the details of the customary law of State immunity.

The most critical aspect of the judgment of the ICJ, however, is its potential impact on the development of international law. International adjudication, indeed, may have a restraining effect on the evolution of custom.[851] This is due to the structure of custom itself: customary law evolves over time thanks to the deviating behaviours of States acting as "fore-runners",[852] as was the case of Italian and Belgian courts when they launched the restrictive doctrine of State immunity.[853] Depending on how the other States react – accepting the breach as required by law or, on the contrary, rejecting it as unlawful conduct – what was initially a violation of the law can become the new rule. An early adjudication by an international court does not leave States enough time to respond to the deviation, encouraging them to remain attached to the old rule.[854] That is why the International Court of Justice should have refrained from "freezing" the traditional understanding of the law of State immunity, recognizing that there is a trend under international law towards enhancing the protection of the individual *vis à vis* the State, to the detriment of the immunities regime.

On the contrary, by affirming the traditional rule of State immunity, the ICJ promoted a State-centered view of international law focused on the "fundamental rights of the State"[855] which left no room to individual rights, in particular the victims' right of access to justice.[856] This approach is in contrast with the previous jurisprudence of the Hague Court, which, in other areas of customary law, has provided a noteworthy contribution to the development of

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sentenza della Corte internazionale di giustizia del 3 febbraio 2012, cit., p. 310; G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 638.

[851] S. KATZENSTEIN, *International Adjudication and Custom Breaking by Domestic Courts*, in «Duke Law Journal», Vol. 63, No. 3 (December 2012 – Special Symposium Issue on Custom and Law), pp. 671-705.

[852] This expression had been used by Professor Tomuschat before the ICJ to affirm that «judges cannot be front-runners» (see: ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting held on Monday 12 September 2011, Verbatim Record No. 22. In contrast, Professor Krajevski and Professor Singer use it to underline that it is precisely by behaviours deviating from the rule that customary law evolves. See: M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, cit., p. 30.

[853] See *supra*, Chapter 2, paragraph 2 of this work.

[854] S. KATZENSTEIN, *International Adjudication and Custom Breaking by Domestic Courts*, cit., p. 673.

[855] P.-M.- DUPUY, *From a Community of States Towards a Universal Community?*, cit., p. 62.

[856] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Yusuf, paragraph 21. In this sense, see also: A. CIAMPI, *The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes*, cit., pp. 397-398; R. PISILLO MAZZESCHI, *Il rapporto fra norme di* ius cogens *e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, cit., p. 311.

the law in light of the increasing importance of human rights.[857] Also in this case, to quote Judge Bennouna, it was incumbent on the ICJ, in its analysis of international customary law, to note the existence of a new trend, and to anticipate its impact on the formation of international law.[858] Instead, the Hague Court avoided to take position on extremely important problems of contemporary international law,[859] in particular the weight to be attributed to the right of access to justice in questions of immunity. As the Court failed in this task, it is now up to domestic courts to overcome the excessive conservatism of the ICJ.[860] Deviations from the rule identified by the International Court of Justice – whereby States are entitled to immunity nothwithstanding the unlawfulness of their conduct and the unavailability of alternative means of redress for the victims – may be able to advance the protection of the individual right of access to justice *vis à vis* State immunity. In other words, domestic judges could act, once again, as fore-runners, contributing to the development of customary international law in a more human rights focused direction.

[857] In the *Jurisdictional Immunities* case, the International Court of Justice adopted a "statist" stance, more favourable to States than to individuals. On the contrary, The Hague Court has seriously taken into account individual rights in its recent case-law concerning diplomatic protection, even though it is not a human rights body. See, in particular: *Lagrand Case (Germany v. United States Of America)*, Judgment of 27 June 2001; *Case Concerning Avena And Other Mexican Nationals (Mexico v. United States Of America)*, Judgment of 31 March 2004; *Case Concerning Ahmadou Sadio Diallo (Republic Of Guinea v. Democratic Republic Of The Congo)*, Judgment of 30 November 2010. On the evolution of the institute of diplomatic protection by the ICJ, see *supra*, note 80. Also in other areas of customary law, for instance with respect to the existence of *erga omnes* obligations, the ICJ introduced considerable innovations. In this sense, see: B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 137; C. ZANGHÌ, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, cit., p. 18 ss.

[858] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, Separate Opinion of Judge Bennouna, paragraph 34.

[859] G. SERRANÒ, *Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle immunità giurisdizionali dello Stato*, cit., p. 639.

[860] B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 142.

CHAPTER 4

STATE IMMUNITY V. THE RIGHT OF ACCESS TO JUSTICE: TOWARDS A NEW CUSTOMARY RULE?

1. Italian practice in the aftermath of the ICJ judgment in the case *Jurisdictional Immunities of the State*

1.1 The obligation to comply with the judgment of the ICJ

As stated in Article 60 of the ICJ Statute, the judgments of the Hague Court have the value of *res judicata*.[861] States that agree to submit their disputes to the International Court of Justice are under the obligation to comply with the verdict on the basis of Article 94 of the UN Charter.[862] If any party to a litigation fails to do it, «the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment».[863] Therefore, following the ICJ's judgment in the *Jurisdictional Immunities* case, Italy was (and still is) bound to ensure that the decisions and measures infringing Germany's jurisdictional immunities cease to have effect, and that the effects which have already been produced by those decisions and measures be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established.[864] At the national level, Italy was obliged to comply with the judgment on the basis of Law No. 848/1957, incorporating Article 94 of the United Nations Charter.[865]

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[861] Article 60 of the Statute of the International Court of Justice reads as follows: «The judgment is final and without appeal. […]».

[862] As stated at Article 59 of the ICJ Statute, a judgment of the Court «has no binding force except between the parties and in respect of that particular case»,[862] meaning that it has no *ultra partes* effect and that the Court does not abide to the *stare decisis* principle. As pointed out in the previous chapter, however, this does not mean that the judgments of the Court have no effect at all on third parties, insofar as they may be declarative of customary international law and contribute (or not) to its progressive development. In this sense see: C. FOCARELLI, *Diritto Internazionale*, 5th Edition, Milano, CEDAM-Wolters Kluwer, 2019, p. 720.

[863] United Nations Charter, Article 94(2).

[864] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., paragraph 137.

[865] Law No. 848/1957, *Gazz. Uff.* 238 (25 September 1957).

Notwithstanding the binding nature of the judgments of the Hague Court, it is necessary to distinguish their effect at the international level from that within the State's internal legal system.[866] States cannot justify their failure to comply with an international obligation by relying on their internal legal order,[867] but it is disputed whether international judgments are directly applicable or can be directly invoked by individuals at the national level.[868] For instance, the U.S. judiciary excluded the direct applicability of the judgment rendered by the International Court of Justice in the *LaGrand* case.[869] As for the Italian legal system, it has been authoritatively argued that, since every organ of the State against which the judgment is rendered is compelled to abide to the ICJ's judgment, including the domestic judiciary,[870] this latter must directly apply the decisions of the International Court of Justice.[871] This view, substantiated by the "limitation of sovereignty" clause enshrined in Article 11 of the Italian Constitution,[872] was confirmed by the Tribunal of Florence in its 2012 *Manfredi* decision, which upheld the verdict of the Hague Court by recognizing Germany's sovereign immunity.[873]

In absence of any specific internal legislation providing for execution, Italian courts adopted different creative solutions in order to ensure compliance with the ICJ judgment. In the aforementioned *Manfredi* decision, the Tribunal of Florence held that the *Jurisdictional Immunities* judgment, bearing direct effect on the margin of appreciation left to the national judge, had to be treated as *jus superveniens* that prevailed on the decision on jurisdiction issued by the Court of Cassation in the same case.[874] Therefore, the Tribunal declared its lack of jurisdiction. In contrast, in the case *Federal Republic of Germany v. De Guglielmi*[875] the Court of Appeal of Turin affirmed its jurisdiction to hear the case, as decided by the Supreme Court, but abstained to decide on the merits because, in its opinion, a review would have been

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[866] C. FOCARELLI, *Diritto Internazionale*, cit., p. 721.
[867] See *supra*, note 174.
[868] C. FOCARELLI, *Diritto Internazionale*, cit., pp. 721-722.
[869] See *supra*, note 203.
[870] C. FOCARELLI, *Diritto Internazionale*, cit., p. 722; F. SALERNO, *Diritto internazionale. Principi e norme*, cit., pp. 600-601.
[871] C. FOCARELLI, *Diritto Internazionale*, cit., p. 722.
[872] See *supra*, note 215.
[873] Tribunal of Florence, *Manfredi v. Federal Republic of Germany*, Judgment of 28 March 2012, published in «Rivista di diritto internazionale», Vol. XCV (2012), No. 2, p. 583 ss.
[874] *Ivi*, p. 586. For comments on this decision, see: F.M. PALOMBINO, *Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?,* in «The Italian Yearbook of International Law», vol. XXII (2012), p. 194 ss.
[875] Court of Appeal of Turin, *Federal Republic of Germany v. De Guglielmi*, Judgment of 3 May 2012, published in «Rivista di diritto internazionale», Vol. XCV (2012), No. 3, p. 916 ss.

in contrast with the ICJ judgment. By so doing, the Appeals Court made a clumsy attempt to «reconcile the irreconcilable – that is, the observance of both Italian jurisdiction as affirmed by the Court of Cassation and the ICJ decision».[876]

With decision No. 32139/2012 of its First Criminal Section, also the Supreme Court implemented the ICJ judgment by denying Italian jurisdiction on Nazi crimes.[877] Although it remained convinced of the rightfulness of the *Ferrini* case law and criticized the ICJ judgment for the formalistic distinction between substance and procedure,[878] the Court of Cassation acknowledged that the Italian jurisprudence that had denied immunity to foreign States for gross violations of international law had remained isolated at the international level. [879] The Court thus embraced the analysis of the international customary law of State immunity undertaken by the International Court of Justice, in light of its authoritativeness.[880] Differently from the Tribunal of Florence, however, the Supreme Court excluded the direct applicability of the ICJ's judgment on the basis that the subject matter of the case – a criminal proceeding against a Nazi military official – was different from that underlying the dispute before the ICJ.[881] The Supreme Court relied on this precedent to recognize the immunity of Germany in a later civil case that concerned the *Fosse Adreatine* massacre.[882]

The variety of arguments used in Italian case law to execute the ICJ decision «are evidence that such decisions are difficult to operate of themselves without the aid of any further legislation».[883] A legislative solution was then adopted by the Parliament in conjunction with the law of adhesion to the UN Convention on Jurisdictional Immunities of States and Their Property.[884] Such law set out, at Article 3, a mechanism that obliged the Italian judge to deny its jurisdiction over the claims of reparation for Nazi crimes, in accordance with the decision issued by the ICJ in *Germany v. Italy*. More precisely, the judge hearing a case had to affirm

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[876] G. CATALDI, *The Implementation of the ICJ's Decision in the* Jurisdictional Immunities of the State *case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?*, in «ESIL Reflections», Vol. 2, No. 2 (24 January 2013), available online at: https://esil-sedi.eu/wp-content/uploads/2013/01/Cataldi-Reflections_0.pdf (last accessed on 8 January 2020).

[877] Court of Cassation (Sezione I Penale), *Criminal Proceedings v. Albers and others*, Judgment of 9 August 2012, No. 32139.

[878] *Ivi*, paragraph 5.

[879] *Ivi*, paragraph 6.

[880] *Ibidem*.

[881] *Ibidem*.

[882] Court of Cassation (Sezioni Unite Civili), Judgment of 21 February 2013, No. 4284.

[883] F.M. PALOMBINO, *Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?*, cit., p. 196.

[884] Law No. 5/2013, *Gazz. Uff.* 24 (29 January 2013), available online (in its original version) at: https://www.difesa.it/Giustizia_Militare/rassegna/Bimestrale/2013/Documents/2_2013/02_LEGGE_GAZZETTA.pdf (last accessed on 11 July 2019).

the lack of jurisdiction in every stage of the proceedings, even when a decision had already been passed, which was not final but had the effect of *res judicata* with respect to the issue of jurisdiction.[885] This meant that, in an ongoing case, a lower tribunal or the Court of Cassation itself had to affirm the lack of Italian jurisdiction, even if jurisdiction had been already asserted in that specific case. Law No. 5/2013 took into account also the finalised decisions constituting *res judicata* that were in contrast with the ICJ judgment. In particular, Article 3(2) provided that such decisions, even if passed before the international verdict, could be reconsidered not only on the basis of Article 395 of the Italian Code of Civil Procedure,[886] but also due to lack of jurisdiction.[887]

As observed in literature, infringements of the autonomy of the judiciary from the part of the legislative branch might be justified for compelling reasons of public interest, such as the maintenance of good international relations.[888] Nonetheless, the limitation of sovereignty clause enshrined in Article 11 of the Constitution cannot in any way lead to a breach of fundamental constitutional principles, as affirmed by the Italian Constitutional Court in the *Frontini* case.[889] It is in this light that the mechanism of adaptation to the *Jurisdictional Immunities* judgment was criticized in literature, on two main grounds.

Firstly, it has been observed that a law removing the effects of a prior decision with *res judicata* authority breaches the legitimate reliance of the successful party on the final decision, in violation of the principles of *res judicata* and of non-retroactivity of the law.[890] Secondly, the practical effect of such legislation was to deprive the victims of gross violations of human rights law and humanitarian law of their right to be heard by a court, in breach of Article 24 of the Italian Constitution.[891] Three categories of Italian victims would have been denied access to justice and reparation: military internees, who were not accorded by Germany the standard of treatment of prisoners of war prescribed under international

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[885] *Ivi*, Article 3(1).

[886] Article 395 of the Italian Code of Civil Procedure sets out the grounds of annulment of finalized decisions.

[887] Law No. 5/2013, *Gazz. Uff.* 24 (29 January 2013), Article 3(2).

[888] F.M. PALOMBINO, *Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?*, cit., p. 198.

[889] Italian Constitutional Court, Judgment No. 183/1973, 27 December 1973. On this judgment, the first one where the Italian Constitutional Court stated the "counter-limits" doctrine, see *supra*, Chapter 1, paragraph 4.1 of this work.

[890] See *supra*, note 888.

[891] See, *inter alia*: G. CATALDI, *L'esecuzione nell'ordinamento italiano della sentenza della Corte internazionale di giustizia nel caso "Germania c. Italia": quale equilibrio tra obblighi internazionali e tutela dei diritti fondamentali?*, in «Diritti umani e diritto internazionale», Vol. 7, No. 1 (2013), pp. 137-146; G. CATALDI, *The Implementation of the ICJ's Decision in the* Jurisdictional Immunities of the State *case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?*, cit.; F.M. PALOMBINO, *Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?*, cit., p. 198 ss.

humanitarian law; civilians brought to concentration camps and held in slavery in Germany, like Mr. Ferrini; and the victims of the massacres perpetrated against the civilian population.

In its first decision concerning the application of Law No. 5/2013,[892] however, the Court of Cassation did not put into question the compatibility between that law and the Italian Constitution. On the contrary, it observed that the mechanism set out at Article 3 of Law No. 5/2013, providing for the execution of the ICJ judgment, constituted an application of Article 94 of the UN Charter. According to the Court, the obligation to comply with the decisions of the International Court of Justice is constitutionally protected at Article 11 of the Italian Constitution, that allows «limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations».[893] Therefore, the Court declared the lack of Italian jurisdiction with respect to the case at issue – which, ironically, was that same *Ferrini* case which had been the occasion for developing its innovative case law one decade before.

Differently from the Supreme Court, when faced with the issue of the application of the *Jurisdictional Immunities* decision, the Tribunal of Florence suspended the ongoing proceedings and raised three distinct questions of constitutionality before the Constitutional Court.[894] The first one concerned the constitutionality of the customary rule of State immunity as interpreted by the World Court and incorporated within the Italian legal system by means of Article 10(1) of the Constitution, which provides for the adaptation to general international law. The second and third questions, instead, revolved around the constitutionality of the internal legal acts prescribing compliance with the *Jurisdictional Immunities* decision, namely Article 1 of Law No. 848/1957, executing Article 94 of the United Nations Charter,[895] and the aforementioned Article 3 of the law of adhesion to the United Nations Convention on Jurisdictional Immunities of States and Their Property (Law No. 5/2013).[896] Constitutional parameters were Articles 2 and 24 of the Constitution, protecting, respectively, fundamental human rights and the individual right of access to justice.[897]

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[892] Italian Court of Cassation (Sezioni Unite Civili), Judgment of 21 January 2014, No. 1136.
[893] See *supra*, note 215.
[894] Tribunal of Florence, Orders No. 84/2014, 85/2014 and 113/2014, 21 January 2014.
[895] Law No. 848/1957, *Gazz. Uff.* 238 (25 September 1957).
[896] Law No. 5/2013, *Gazz. Uff.* 24 (29 January 2013).
[897] For Article 2, see *supra*, note 252. Article 24 reads as follows: «Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts. The law shall define the conditions and forms of reparation in case of judicial errors».

In response to the addressed questions, the Italian Constitutional Court issued a historic decision[898] – namely, judgment No. 238/2014 – that, relying on the "counter-limits" doctrine,[899] prevented Italy's compliance with the judgment rendered by the International Court of Justice in the *Jurisdictional Immunities* case. The next paragraphs will be devoted to the analysis of the arguments put forward by the Constitutional Court, as well as of the impact that this decision had both at the domestic and international levels.

1.2 Judgment No. 238/2014 of the Italian Constitutional Court

Before entering into the merits of the case, the Constitutional Court had to tackle the preliminary objections laid down by the Avvocatura dello Stato. Its resoning deserves particular attention, to the extent that it clarifies a controversial matter such as the review of constitutionality of customary norms. In this respect, the Constitutional Court discarded the principle affirmed in the 1979 *Russel* case, whereby only customary norms that came into existence after the entry into force of the Constitution can be subject to constitutional review.[900] On the contrary, the Court found that customary norms subsequent to the Italian Constitution «have the same legal force as customs previously formed, and both [types of customary law] are limited by the respect of the identifying elements of the constitutional order, i.e. the fundamental principles and inviolable human rights».[901] In this respect, the Court further maintained that, within a centralized review system, it is the only competent judge to rule on the compatibility of norms with the Constitution, even in case of customary rules.[902]

As for the merits of the case, the Constitutional Court firstly reminded that, according to its well-established case law, the right to judicial protection enshrined in Article 24 of the Constitution is one of the supreme principles of the national legal order, instrinsically

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[898] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, reported in in «International Legal Materials», Vol. 54, No. 3 (2015), pp. 471-506, with a comment by Alessandro Chechi.

[899] The "counter-limits" doctrine is explicitly mentioned at paragraph 3.2 of judgment No. 238/2014 of the Italian Constitutional Court. It is worth mentioning that this was the first time the Court applied the "counter-limits" doctrine with respect to customary international law, despite having advanced this possibility in the *Russel* and *Baraldini* judgments (on these decisions, see: Chapter 1, paragraph 4.3 of this work).

[900] Italian Constitutional Court, Judgment No. 48/1979, 18 June 1979. See *supra*, Chapter 1, paragraph 4.3 of this work. On the surpassing on the principles set forth in the *Russel* case, see: L. GRADONI, *Giudizi costituzionali del quinto tipo. Ancora sulla sentenza 238/2014 della Corte Costituzionale italiana*, in «Quaderni di SIDIBlog», Vol. 1 (2014), p. 211.

[901] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, cit., paragraph 2.1.

[902] *Ivi*, paragraph 3.2.

connected to the principle of democracy itself and to the duty to ensure a judge and a judgment to anyone, anytime and in any dispute.[903] The Court accepted in principle that the right of access to court can be limited, provided that the restriction pursues a legitimate aim and is proportionate to the aim sought to be achieved, but this was not the case of the restrictions flowing from the application of the rule of State immunity identified by the ICJ, for two main reasons.[904]

Firstly, the sacrifice of the right to judicial protection was hold to be untenable because of the gravity of the war crimes committed by German troops, which was clearly an *axiological* consideration.[905] It was thus ruled out that «acts such as deportation, slave labor, and massacres, recognized to be crimes against humanity, can justify the absolute sacrifice in the domestic legal order of the judicial protection of inviolable rights of the victims of those crimes».[906] Secondly, the Consulta relied on the *logical* argument according to which acts of the State that amount to grave breaches of international humanitarian law and human rights law cannot be regarded as legitimate acts of government deserving the upholding of State immunity from civil jurisdiction.[907] This consideration echoed judge Cançado Trinidade's view, expressed in his dissenting opinion attached to the ICJ judgment, that such conducts do not fall within the category of *acta jure imperii*, but of *delicta imperii*.[908] Clearly, the basic idea behind the decision of the Constitutional Court was that States must be accountable for their illicit conducts directed against individuals, so that immunity does not lead to impunity.[909]

Following this reasoning, the Consulta found that the effect of the application of the ICJ judgment, affirming State immunity from actions for damages suffered as a consequence of international crimes committed by German armed forces during World War II, amounted to a breach of Articles 2 and 24 of the Constitution, whose combined reading protects the justiciability of fundamental human rights. Therefore, the "procedural" rule of State immunity

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[903] *Ivi*, paragraph 3.4, quoting Judgments No. 18/1982 and No. 82/1996.

[904] R. PAVONI, *Simoncioni v. Germany*, in «The American Journal of International Law», Vol. 109, No. 2 (April 2015), p. 404; P. VERONESI, *Colpe di Stato. I crimini di guerra e contro l'umanità davanti alla Corte costituzionale*, cit., pp. 204-205.

[905] In this sense, see: P. DE SENA, *The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law*, cit., p. 19.

[906] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, paragraph 3.4.

[907] *Ibidem*.

[908] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, cit., Dissenting Opinion of Judge Cançado Trinidade, paragraph 185 ss.

[909] The equation between immunity and impunity was made by Judge van der Wyngaert in her dissenting opinion in the *Arrest Warrant* case. See: *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 Feb. 2002, Dissenting Opinion of Judge van der Wyngaert, paragraph 34.

identified by the ICJ could not enter the Italian legal order, because the respect of the fundamental principles of the national legal system, such as the right of access to justice for the victims of international crimes, is «the limit that indicates the receptiveness of the Italian legal order to the international and supranational order».[910] The Consulta thus declared ill-founded the first question raised by the referring tribunal.[911] For the same reason, the Court declared null and void both the law incorporating article 94 of the UN Charter and the law of adhesion to the UN Convention on Jurisdictional Immunities of States and Their Property, insofar as they obliged Italy to comply with the *Jurisdictional Immunities* judgment.[912]

The Constitutional Court adopted a much less formalistic reasoning than the International Court of Justice and the European Court of Human Rights in the *Al-Adsani* and *Kalogeropoulou* decisions. By surpassing the distinction between substance and procedure drawn by the International Court of Justice in the *Jurisdictional Immunities* case, the Italian Consulta took into account the concrete impact that the upholding of State immunity could have on individual rights. It thus undertook a balancing exercise between the principles at stake, namely the need to comply with international law in order to maintain good international relations with other States, and, on the other hand, the necessity to guarantee the justiciability of fundamental human rights. Balancing is, indeed, one of «the ordinary tasks» that the Constitutional Court is asked to undertake in all cases within its competence.[913] In the present case, the Court found that the right of access to justice belonging to the victims of grave breaches of human rights law and humanitarian law could not be completely sacrificed in the name of States' interest, because, in the words of the Court, «it would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection».[914]

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[910] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, paragraph 3.4.
[911] *Ivi*, paragraph 3.5.
[912] *Ivi*, paragraphs 4 and 5.
[913] *Ivi*, paragraph 3.1. In the sense that the Italian Constitutional Court actually carried out a balancing exercise, see: P. FARAGUNA, *La sentenza costituzionale 238/2014: tra illecito internazionale e controlimiti*, in «Studium Iuris», No. 3 (2015), p. 272 ss.; R. PAVONI, *Simoncioni v. Germany*, cit., p. 404; E. SCISO, *La regola sulla immunità giurisdizionale dello Stato davanti alla Corte costituzionale*, in «Diritti umani e diritto internazionale», Vol. 9, No. 1 (2015), pp. 73-74. In particular, according to Gradoni, immunity is not a rule but a principle, as such subject to balancing exercises as done by the Constitutional Court. See: L. GRADONI, *Un giudizio mostruoso. Nuove istantanee della sentenza 238/2014 della Corte costituzionale italiana*, in «Quaderni di SIDIBlog», Vol. 1 (2014), pp. 235-255.
[914] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, paragraph 3.4.

1.3 A critical appraisal of the judgment

From the perspective of constitutional law, judgment No. 238/2014 has been criticized for the way it theorizes "counter-limits" as limits to the entrance of customary rules of international law within the internal legal system. As pointed out in literature, the judgment results in an atypical decision of the Constitutional Court,[915] whose competence includes the review of «laws and enactments having force of law issued by the State and Regions»,[916] but not of norms external to the system. However, it must be noted that, when the Court prevents incompatible international rules from entering the Italian legal order, it scrutinizes them *as though* they had already entered and displayed effects within the domestic legal system. In other words, «the constitutional review *takes place anyways*, although it is "hidden" behind the idea that the relevant international rule has not entered the system. This "picture" of "non-entrance" is a fiction that leads to many incongruities».[917] In fact, had the international norm not entered the Italian legal order, a balancing exercise between the competing interests at stake would had been impossible.[918]

From an internationalist perspective, Judgment No. 238/2014 has been criticized in literature on different grounds, in particular as a challenge against the International Court of Justice and the United Nations system. Actually, the Constitutional Court did not directly criticize the content of the *Jurisdictional Immunities* decision, reminding, on the contrary, that the Hague Court is the most qualified body to identify and interpret customary international

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[915] In this sense, see: L. GRADONI, *Giudizi costituzionali del quinto tipo. Ancora sulla sentenza 238/2014 della Corte Costituzionale italiana*, cit.

[916] Article 134 of the Italian Constitution reads as follows: «The Constitutional Court shall pass judgement on: – controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions; – conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions; – charges brought against the President of the Republic, according to the provisions of the Constitution».

[917] C. FOCARELLI, *International Law*, cit., p. 252.

[918] According to part of the doctrine, this was precisely the reason why it was impossible for the Court to balance the competing interests at stake. In this sense see, *inter alia*: P. DE SENA, *Norme internazionali generali e principi costituzionali fondamentali, fra giudice costituzionale e giudice comune (ancora sulla sentenza 238/2914)*, in «Quaderni di SIDIBlog», Vol. 1 (2014), pp. 226-234; P. DE SENA, *Spunti di riflessione sulla sentenza 238/2014 della Corte Costituzionale*, in «Quaderni di SIDIBlog», Vol. 1 (2014), pp. 197-205; A. LANCIOTTI, M. LONGOBARDO, *La Corte costituzionale risponde alla Corte di Giustizia internazionale: l'ordinamento italiano non si adatta alla regola sull'immunità degli Stati*, in «federalismi.it – Focus Human Rights», No. 2 (2015), 3 April 2015, available online at: https://www.federalismi.it/focus/index_focus.cfm?FOCUS_ID=49 (last accessed on 1 August 2019), p. 10.; M. LONGOBARDO, *«Il non-essere non è e non può essere»: brevi note a margine della sentenza 238/2014 della Corte costituzionale rispetto all'adattamento dell'ordinamento italiano al diritto internazionale consuetudinario,* in «Quaderni di SIDIBlog», Vol. 1 (2014), pp. 220-234; C. PINELLI, *Decision no. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles*, in «Questions of International Law», Zoom Out II (2014), p. 40.

law.[919] In other words, the Consulta did not challenge the validity of the international judgment, but its application within the national legal system.[920] Moreover, decision No. 238/2014 did not constitute *per se* a violation of the ICJ judgment, because only the actual refusal to uphold the immunity of Germany, like in *Ferrini*, could be regarded as an infringement of the international verdict.[921] But, beyond this surface of deference, it is true that the decision of the Constitutional Court was the first national one in which the "counter-limits" doctrine was applied with respect to the Hague Court, which until that moment had been shielded from this kind of judicial dialogue by the eminently political nature of the cases brought before it.[922]

According to some authors, the defiance expressed by the Italian Consulta is very dangerous for the authority of the International Court of Justice and, in more general terms, of international courts,[923] because abiding in good faith to the verdict of an international tribunal belongs to the very foundations of the international adjudication system as well as of the international rule of law.[924] On the other hand, the annulment of the internal legal act giving execution to Article 94 of the United Nations Charter entails an at least partial "opting out" from the UN adjudicating system, realizing the "exit option" suggested by the Italian Constitutional Court in *Frontini*, back in 1973.[925] Therefore, it can rightly be maintained that the Constitutional Court challenged the authority of the International Court of Justice, even

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[919] *Ivi*, paragraph 3.1. As underlined in literature, however, international judgments are only subsidiary means to identify customary international law, and are binding only upon the parties to the dispute. In this sense, see: M.I. PAPA, *Il ruolo della Corte Costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014*, in «Rivista AIC», No. 3 (2015), p. 9 ss.

[920] F. SALERNO, *Diritto internazionale. Principi e norme*, cit., p. 469.

[921] This is the case of the Italian case law in application of judgment No. 238/2014, which will be dealt with in the next paragraph. In this sense, see: E. SCISO, *Brevi considerazioni sui primi seguiti della sentenza della Corte costituzionale 238/2014*, in «Rivista di diritto internazionale», Vol. 98, No. 3 (2015), p. 888.

[922] U.S. Courts' refusals to comply with the judgments rendered by the International Court of Justice cannot be regarded as applications of the "counter-limits" doctrine, because in those cases the same binding nature of the relevant international decisions was contested (see, for instance, the case *Medellín v. Texas, supra*, note 193). In contrast, the Italian Constitutional Court recognized both the binding character and the authority of the *Jurisdictional Immunities* judgment, but decided not to comply with it because of issues of incompatibility with fundamental constitutional principles.

[923] In this sense, see: V. CANNIZZARO, *Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014*, in «Rivista di diritto internazionale», Vol. 98, No. 1 (2015), pp. 126-134; C. FOCARELLI, International Law, cit., p. 375; R. KOLB, *The relationship between the international and the municipal legal order: reflections on the decision no. 238/2014 of the Italian Constitutional Court*, in «Questions of International Law», Zoom Out II (2014), pp. 5-16; A. TANZI, *Un difficile dialogo tra la Corte Internazionale di Giustizia e Corte Costituzionale*, in «La Comunità Internazionale», No. 1 (2015), pp. 13-36.

[924] R. KUNZ, *The Italian Constitutional Court and "Constructive Contestation". A Miscarried Attempt?*, in «Journal of International Criminal Justice», No. 14 (2016), p. 626.

[925] On the *Frontini* case, see *supra*, Chapter 1, paragraph 4.1 of this work.

though this might not be detrimental to international law from the perspective of its further development in a more human rights centred direction.

Another criticism often directed to the Constitutional Court is to have overlooked a possible diplomatic solution to the dispute between Italy and Germany, suggested by the International Court of Justice.[926] In this regard, however, it is worth pointing out that, in light of the principle of separation of powers, the Consulta could not have obliged the executive branch to act in protection of the Italian victims of Nazi crimes. Most importantly, the recourse to diplomatic protection cannot be regarded as an effective remedy, as it is not a right of the individual, but remains within the discretionary power of States[927] notwithstanding the existence of a trend within national legal systems affirming States' obligation to act in diplomatic protection of their citizens.[928]

Furthermore, from the perspective of the relations between national and international law, the judgment of the Italian Constitutional Court has been criticized as an extreme instance of dualism proposing a divorce between international and municipal law.[929] In particular, it has been pointed out how the Italian Constitutional Court restrained its analysis to domestic law, basing its final decision only on the alleged incompatibility between the customary rule on State immunity and the relevant constitutional provisions. Even scholars who admit the legitimacy of domestic courts' "constructive resistance" to international law have found that such a domestically-focused decision does not serve the purpose of the enhancement of the international rule of law.[930] In particular, it has been maintained that judgment No. 238/2014, lacking a proper review of applicable international law, can hardly contribute to the

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[926] L. GRADONI, *Corte Costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile*, in «Quaderni di SIDIBlog», Vol. 1 (2014), p. 195.

[927] According to part of the legal doctrine, only judicial means are alternative means, so that diplomatic protection cannot be regarded as an effective remedy: being a right of the State, and not of the individual, the action of the State of nationality in diplomatic protection does not amount to an alternative means of redress. In this sense see: M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, cit., pp. 31-32; L. MCGREGOR, *State Immunity and Human Rights. Is there a future after Germany v. Italy?*, cit., pp. 125-145.

[928] In favour of the existence of this trend (an example of practice of States is, for instance, the British legislation on the subject), which would allow the institute of diplomatic protection to overcome the *impasse* between Germany and Italy after the *Jurisdictional Immunities* judgment, see: P. PALCHETTI, *Judgment 238/2014 of the Italian Constitutional Court: In search of a way out*, in «Questions of International Law», Zoom Out II (2014), p. 45 ss.

[929] R. KOLB, *The relationship between the international and the municipal legal order: reflections on the decision no. 238/2014 of the Italian Constitutional Court*, cit., pp. 11-12.

[930] In this sense, see: R. KUNZ, *The Italian Constitutional Court and "Constructive Contestation". A Miscarried Attempt?*, cit., pp. 621-627.

international judicial dialogue, even less to further developments of the State immunity rule.[931]

In contrast, it is hereby argued that judgment no. 238/2014 of the Italian Constitutional Court may have a relevant impact on the customary law of State immunity. This is because, albeit avoiding to openly criticise the *Jurisdictional Immunities* decision, the Consulta assessed the compatibility between the State immunity regime and the Italian Constitution in light of a principle which does not belong exclusively to the national legal order, but also to international law itself.[932] Indeed, as underlined earlier in this work, besides being a fundamental human right, the right of access to justice is part of general international law, as it can be regarded as a «general principle of law recognized by civilized nations» in the terms of Article 38 of the ICJ Statute.[933] Being based on the primacy of a principle belonging also to the international legal system, judgment No. 238/2014 can thus contribute to the further clarification and development of international law, in particular customary law. This was the hope of the Constitutional Court,[934] but the concrete impact of the judgment will depend on how other States respond to it and to the subsequent case law of Italian courts.

1.5 Subsequent case law of Italian Courts

The first court to give application to decision No. 238/2014 was the Tribunal of Florence, which had raised the questions of constitutionality before the Consulta. At first, in the case *Alessi v. Federal Republic of Germany*,[935] it made an effort of conciliation between the parties to the dispute by means of the procedure set forth at Article 185 of the Code of Civil

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[931] *Ivi*; A. PETERS, *Let Not Triepel Triumph: How to Make the Best Out of Sentenza No. 238/2014 of the Italian Constitutional Court for a Global Legal Order*, 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/ (last accessed on 2 July 2018); M. SCHEININ, *The Italian Constitutional Court's Judgment 238 of 2014 Is Not Another* Kadi *Case*, cit., p. 618.

[932] The same argument is supported by Cedric Ryngaert, according to whom «domestic court practice, rejecting an appeal to immunity for reasons of incompatibility with the constitutional principle of access to justice, may be relevant practice for the further development of international law, as the latter principle also exists under international law». See: C. RYNGAERT, *Sources of International Law in Domestic Law: Relationship between International and Municipal Law Sources*, in S. BESSON, J. D'ASPREMONT (Editors), *The Oxford Handbook on the Sources of International Law*, cit., p. 1148.

[933] In this sense, see: B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, cit., p. 141 ss.

[934] The customary law-making function pertaining to national jurisprudence was explicitly mentioned by the Constitutional Court itself, with reference to the distinction between *acta jure imperii* and *acta jure gestionis* introduced by Italian and Belgian judiciaries at the beginning of the XX century to restrict the scope of application of State immunity rules. See: Italian Constitutional Court, Judgment No. 238/2014, paragraph 3.3.

[935] Tribunal of Florence (Seconda Sezione Civile), *Alessi and others v. Federal Republic of Germany*, Order of 23 March 2015.

Procedure. In particular, the Tribunal proposed to the applicants to renounce to their claims of reparation in exchange of a paid period of study in Germany, which was plainly an attempt to avoid the commission of an internationally wrongful act from the part of Italy,[936] as well as to pave the way to the negotiated solution favoured by the Hague Court.[937] A voluntary payment by Germany, indeed, was more likely to bring effective redress to the victims than a judicial decision ordering to pay the damages, due to the difficulties to subject foreign properties to forced execution.[938]

Few months later, however, noting that the conciliative effort had not been accepted by Germany,[939] the same Tribunal refused to grant immunity to Germany in two of the four proceedings suspended for constitutional review, *Bergamini*[940] and *Simoncioni*.[941] The twin decisions reflected the belief that, even from an internationalist perspective, the complete sacrifice of the judicial protection of fundamental human rights would have brought much worse consequences than the denial of Germany's jurisdicitional immunity, in light of the importance of human rights under international law.[942] The same conclusion was later reached with respect to the civil proceeding initiated against the German State and two former Nazi officials – already condemned by the Military Court of Appeal in 2007[943] – by the descendants of a civilian killed by German armed forces in the context of a retaliation against the civilian population.[944] Also in that case, the Federal Republic of Germany was hold civilly liable and ordered to pay reparations to the victims.

Particularly worth of notice is the Tribunal's response to the request, advanced in *Bergamini*, to repeal the measures of execution pending on the properties of the Federal Republic of Germany. Although the Tribunal of Florence admitted that a refusal of the

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[936] *Ibidem*.
[937] *Ivi*, p. 2.
[938] In this sense, see, *inter alia*: P. FARAGUNA, *La sentenza costituzionale 238/2014: tra illecito internazionale e controlimiti,* cit., p. 275; E. SCISO, *Brevi considerazioni sui primi seguiti della sentenza della Corte costituzionale 238/2014*, cit., p. 891; A. TANZI, *Un difficile dialogo tra la Corte Internazionale di Giustizia e Corte Costituzionale*, cit., p. 22. It is worth noting that judgment No. 238/2014 was not about immunity from measures of execution, so that the effects of the *Jurisdictional Immunities* judgment – as far as immunity from enforcement is concerned – withn the Italian legal order remain unclear.
[939] Tribunal of Florence (Seconda Sezione Civile), *Bergamini v. Federal Republic of Germany*, Judgment of 6 July 2015, No. 2468, paragraph 3.
[940] *Ibidem*.
[941] Tribunal of Florence (Seconda Sezione Civile), *Simoncioni v. Federal Republic of Germany*, Judgment of 6 July 2015, No. 2469.
[942] Tribunal of Florence (Seconda Sezione Civile), *Bergamini v. Federal Republic of Germany*, Judgment of 6 July 2015, No. 2468, paragraph 3.
[943] Military Court of Appeal, Judgment of 13 November 2007, No. 37.
[944] Tribunal of Florence (Seconda Sezione Civile), *Donati v. Scheungraber, Stommel and the Federal Republic of Germany*, Judgment of 22 February 2016, paragraph 3 (in particular, p. 17).

request of annulment would normally amount to a wrongful act from the part of Italy, it held that the principle of irrelevance of the national legal order as a justification for a wrongful conduct does not apply when the protection of fundamental rights is at stake, because the constitutional obligation to respect those rights establishes a "state of necessity".[945] It can thus be maintained that the decision is based on the principle of primacy of human rights over conflicting obligations, discussed in the first chapter of this work.[946]

Italian courts have subsequently confirmed the jurisprudential trend initiated with judgment No. 238/2014 in a number of decisions on the merits.[947] Likewise, the Court of Cassation has affirmed Italian jurisdiction on the civil actions for damages filed against Germany by military internees and other victims of deportation.[948] In *Gamba and Others v. Federal Republic of Germany*, the Supreme Court relied on two arguments put forward by the Constitutional Court to conclude that the sacrifice of the victims' right of access to justice was untenable, namely: on the one hand, the unavailability of alternative means of redress for the victims, whose only possibility to obtain reparation was to sue Germany before Italian courts;[949] on the other, the purpose of immunity rules, which are aimed at protecting the governmental functions of a State, and not behaviours which go beyond what is regarded as the legitimate expression of sovereign powers.[950]

Another aspect of the dispute between Germany and Italy on which judgment No. 238/2014 has displayed its effects is the execution in Italy of the Greek decision *Prefecture of Voiotia v. Federal Republic of Germany*, that condemned Germany to pay reparations to the victims of the *Distomo* massacre. Following the *Jurisdictional Immunities* judgment, Germany appealed

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[945] Tribunal of Florence (Seconda Sezione Civile), *Bergamini v. Federal Republic of Germany*, Judgment of 6 July 2015, No. 2468, paragraph 4.6.

[946] As mentioned earlier in this work, it has been observed in literature a regional European trend whereby the defense of fundamental human rights enshrined in the national legal order prevails over conflicting obligations. In particular, the protection of human rights is used as a justification of an illicit conduct, in derogation from the principle of irrelevance of national law for the determination of State responsibility. On this trend and the relevant bibliographical references, see *supra*, Chapter 1, paragraph 4.5 of this work, note 275.

[947] Tribunal of Rome, Judgment No. 11069/2015; Tribunal of Piacenza, Judgment of 28 September 2015, No. 1462/2015; Tribunal of Ascoli Piceno, Order No. 112/2016; Tribunal of Sulmona, Judgment of 2 November 2017, Application no. 20/2015. For a comment on this last decision, see: G. BOGGERO, *Ancora sul seguito della sentenza n. 238/2014: una recente pronuncia del Tribunale di Sulmona*, 20 November 2017, http://www.dirittocomparati.it/ancora-sul-seguito-della-sentenza-n-2382014-una-recente-pronuncia-del-tribunale-di-sulmona/, (last accessed on 10 September 2018).

[948] Italian Court of Cassation (Sezioni Unite Civili), *Gamba and others v. Federal Republic of Germany*, Judgment of 29 July 2016, No. 15812, reported in «Rivista di diritto internazionale», Vol. 99, No. 4 (2016), p. 1277 ss.; Italian Court of Cassation (Sezioni Unite Civili), *Parrini and others v. Federal Republic of Germany*, Judgment of 13 January 2017, No. 762, reported in «Rivista di diritto internazionale privato e processuale», Year LIV , No. 3 (2018), p. 739 ss.

[949] Italian Court of Cassation (Sezioni Unite Civili), *Gamba and others v. Federal Republic of Germany*, Judgment of 29 July 2016, No. 15812, cit., paragraph 8(a).

[950] *Ivi*, paragraph 8(b).

to the Court of Cassation asking to revoke the enforcement decisions of the Florence Court of Appeal, later confirmed by the same Court of Cassation,[951] on the basis of Article 395 of the Code of Civil Procedure, as amended by Law No. 5/2013.[952] Given the subsequent declaration of unconstitutionality of that provision insofar as it obliged Italy to abide to the verdict of the International Court of Justice, the Court of Cassation rejected the German claim, thus confirming the enforceability of the Greek decision.[953] Its execution, however, is still far from being effective, as confirmed by the recent judgment of the Court of Cassation declaring Villa Vigoni immune from measures of enforcement because of its public destination.[954]

As apparent from our discussion, the case law of Italian courts in the aftermath of judgment No. 238/2014 has been consistent in denying immunity from civil jurisdiction to Germany for the gross violations of human rights and humanitarian law commited from 1943 to 1945. The Court of Cassation has recently applied this restrictive concept of State immunity, excluding States' gross breaches of international law from the covering of immunity from civil jurisdiction, also to foreign States other than Germany. In this respect, of particular interest are the cases *Opačić Dobrivoje*[955] and *Flatow.*[956]

The fist case had been brought before the criminal section of the Court of Cassation by Mr. Opačić and the Republic of Serbia.[957] This latter had been hold civilly liable by the Rome

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[951] Italian Court of Cassation (Sezione I Civile), Judgment of 20 May 2011, No. 11163/2011.

[952] Law No. 5/2013, *Gazz. Uff.* 24 (29 January 2013).

[953] Italian Court of Cassation (Sezioni Unite Civili), Judgment of 6 May 2015, No. 9097, reported in «Rivista di diritto internazionale», Vol. 98, No. 3 (2015), p. 1039 ss.; Court of Cassation (Sezioni Unite Civili), Judgment of 6 May 2015, No. 9098. For a comment on these decisions, see: O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, cit., pp. 14.15; E. SCISO, *Brevi considerazioni sui primi seguiti della sentenza della Corte costituzionale 238/2014*, cit., pp. 888-889.

[954] Italian Court of Cassation (Terza Sezione Civile), *Regione Sterea' Ellada c. Presidenza del Consiglio dei Ministri e Repubblica Federale di Germania*, Judgment of 8 June 2018, No. 14885/2018. This judgment did not imply the invalidity of the enforcement title, but only the impossibility to proceed with enforcement measures on Villa Vigoni, in compliance with the *Jurisdictional Immunities* judgment. In this respect, it is worth pointing out that judgment No. 238/2014 did not deal with the immunity of States from measures of execution, but only with immunity from civil jurisdiction. See: O. LOPES PEGNA, *Giù le mani da Villa Vigoni: quale tutela «effettiva» per le vittime di gravi crimini compiuti da Stati esteri?*, in «Rivista di diritto internazionale», Vol. 101, No. 4 (2018), pp. 1237-1245.

[955] Italian Court of Cassation (Sezione I Penale), *Opačić Dobrivoje* Case, Judgment of 15 September 2015, No. 43696/2015. For the problems raised by this judgment, see: M. SARZO, *La Cassazione penale e il crimine di guerra di Podrute: un divorzio dal diritto internazionale?*, in «Rivista di diritto internazionale», Vol. 99, No. 2 (2016), pp. 523-529; O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, cit., pp. 15-17.

[956] Italian Court of Cassation (Sezioni Unite Civili), *Flatow v. Iran*, Judgment of 28 October 2015, No. 21946. For a comment on this judgment, see: O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, cit., pp. 17-18.

[957] With respect to the responsibility of the Republic of Serbia, the Court of Cassation completely failed to undertake an analysis of applicable international law, disregarding both the problem of succession to the Federal Socialist Republic of Jugoslavia and the international agreements regulating the monitoring mission. For this reason, the judgment has been

Appeals Court for the shooting of an international monitoring aircraft belonging to the European Community Monitor Mission, and condemned to pay reparation to the families of the victims. The Court of Cassation confirmed the appeal decision by relying on judgment No. 238/2014, but its resoning raises doubts of consistency with respect to the constitutional verdict. The Court, indeed, completely failed to consider whether alternative remedies for the victims were available in Serbia, in spite of the weight that the Constitutional Court had attributed to the "last resort" argument in its decision No. 238/2014.[958] In this regard, the Court observed that the unavailability of alternative means of redress had been taken into account by the Consulta only as an aggravating circumstance, because the principle of immunity must always give way to the protection of fundamental values.[959] Moreover, the Supreme Court disregarded the "gravity of the conduct" test suggested by the Constitutional Court and previously applied in *Ferrini*, stating that a murderous but isolated incident amounted to a war crime that could not be covered by State immunity.[960]

Further doubts on the correct interpretation of judgment No. 238/2014 were raised by the decision of the Court of Cassation in *Flatow v. Iran*. The case concerned the execution in Italy of a U.S. decision condemning the Islamic Republic of Iran to pay civil damages to an American victim of a terrorist attack claimed by Hamas, for which Iran was regarded as directly responsible.[961] In the aftermath of the *Jurisdictional Immunities* judgment, the Appeals Court of Rome had uphold the immunity of Iran.[962] The Court of Cassation rejected this solution by holding that, on the basis of judgment No. 238/2014, immunity rules do not apply to terrorist acts amounting to international crimes in violation of *jus cogens*.[963] In the present case, however, the Court refused to grant the *exequatur* because the U.S. judge was not competent in light of the jurisdictional requirements set forth in the Italian legislation on

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referred to in literature as a "divorce from international law". See: M. SARZO, *La Cassazione penale e il crimine di guerra di Podrute: un divorzio dal diritto internazionale?*, cit., p. 524 ss.

[958] Particularly convincing is Pavoni's reading of judgment No. 238/2014, according to which the only two requirements for the unconstitutionality of the upholding of State immunity are: a grave breach of human rights or humanitarian law from the part of the foreign State, and the unavailability of alternative means of redress for the victims, independently from the *locus commissi delicti*. See: R. PAVONI, *How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?*, in «Journal of International Criminal Justice», Vol. 14 (2016), No. 3, pp. 573-585.

[959] Italian Court of Cassation (Sezione I Penale), *Opačić Dobrivoje* Case, Judgment No. 43696/2015, paragraph 5.2.1, p. 31.

[960] *Ivi*, paragraph 5.2.1., pp. 29-30.

[961] United States District Court for the District of Columbia, *Flatow v. Islamic Republic of Iran*, Judgment of 11 March 1998, No. 97-396 (RCL).

[962] Rome Court of Appeal, Judgment of 8 July 2013, No. 3909.

[963] Italian Court of Cassation (Sezioni Unite Civili), *Flatow v. Iran*, Judgment of 28 October 2015, No. 21946, paragraph 5.

private international law.[964] According to the Court, indeed, judgment No. 238/2014 did not create a new criterion for establishing jurisdiction nor affirmed the principle of civil universal jurisdiction: its applicability is limited to civil actions for the damages deriving from international crimes committed in Italy, i.e. the *forum* State.[965] By so doing, the Court thus operated a clear distinction between the principles of State immunity and universal civil jurisdiction.[966]

From the *Opačić Dobrivoje* and *Flatow* judgments, it is apparent that many questions remain open concerning the concrete implementations of judgment No. 238/2014 within the internal legal order, in particular whether the availability of alternative remedies, the gravity of the illicit conduct, as well as the *locus commissi delicti* are relevant criteria for deciding against the upholding of State immunity. This circumstance undermines the consistency of Italian judicial practice for the purposes of the formation of a new rule of customary international law, as well as for the qualification of Italy as a persistent objector if it is admitted that a rule of customary law prescribing immunity from civil jurisdiction even for grave breaches of human rights and international law when alternative means of redress are not available does exist. The potential impact on international customary law of the case law of Italian courts is further weakened by the positions maintained by the executive and legislative branches,[967] as will be discussed in the next paragraph.

1.4 The position of the other branches of power

After the International Court of Justice issued the *Jurisdictional Immunities* judgment, both the Government and the Parliament proved to be willing to comply with it in good faith, taking the necessary steps also to ensure the adhesion of Italy to the United Nations Convention on the Jurisdictional Immunities of States and Their Property. To this purpose,

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[964] Article 64 of the Italian law on private international law (Law No. 218/1995) provides that a foreign judgment can be declared enforceable in Italy if it respects the jurisdictional requirements set forth in the Italian legal order (Article 64(a)) and, in particular, the right to defense has not been violated (Article 64(b)). In the present case, the Islamic Republic of Iran had not been represented before the District Court of Columbia, due to the breaking of Iran-U.S. diplomatic relations since 1979. Moreover, the *locus commissi delicti* was not the United States, i.e. the State of nationality of the judge, but Israel.

[965] Italian Court of Cassation (Sezioni Unite Civili), *Flatow v. Iran*, Judgment of 28 October 2015, No. 21946, paragraph 6.6.

[966] R. PAVONI, *How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?*, cit., p. 584.

[967] In this sense, see: M.I. PAPA, *Il ruolo della Corte Costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014*, cit., p. 15 ss.

the Parliament passed the above-mentioned law of adhesion to the UN Convention, whose Article 3 explicitly provided for the execution of the judgments of the ICJ and allowed to repeal internal final decisions in contrast with the verdicts of the Hague Court.[968] As mentioned earlier in this chapter, with judgment No. 238/2014 the Constitutional Court annulled that provision because in breach of Articles 2 and 24 of the Constitution.

Even after judgment No. 238/2014, the Parliament maintained a rather favourable stance with respect to the privileges of foreign States. Few days after the constitutional decision, it enacted the aforementioned law No. 162/2014, whose Article 19 *bis* allows consular and diplomatic representations on Italian territory to shield their bank accounts from forced execution with a simple declaration of public purpose, not subject to judicial review.[969] It is worth noting that this regulation, adopted in observance of Article 21 of the UN Convention,[970] goes beyond the obligations set forth under customary international law.[971] Given the timing of its issuing, it is legitimate to believe that such legislation was an attempt, likely suggested by the executive branch, to nullify the potential effects of decision no. 238/2014,[972] depriving the victims of gross human rights violations of a reparation for the damage suffered. Moreover, this anachronistic provision could be at the origin of a new question of constitutionality, as it is in contrast with a landmark judgment of the Constitutional Court[973] that subtracted the decisions on execution to the executive power, subjecting them to judicial scrutiny.[974] According to an authoritative opinion, the circumstance that the evaluation of public purpose is left in the hands of the foreign State

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[968] Law No. 5/2013, *Gazz. Uff.* 24 (29 January 2013), Article 3.

[969] Law No. 162/2014, 10 November 2014, Article 19 *bis*.

[970] Article 21(1)(a) of the UN Convention on Jurisdictional Immunities of States and Their Property reads as follows: «1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences».

[971] B. CONFORTI, *Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione dei conti correnti di Stati stranieri*, cit., p. 560. In the sense that, on the contrary, Article 19 *bis* of Law No. 162/2014 was a timely measure to implement in good faith the content of the UN Convention on Jurisdictional Immunities of States and Their Property, see: E. SCISO, *Brevi considerazioni sui primi seguiti della sentenza della Corte costituzionale 238/2014*, cit., p. 893.

[972] B. CONFORTI, *Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione dei conti correnti di Stati stranieri*, cit., p. 559.

[973] Italian Constitutional Court, Judgment of 15 July 1992, No. 329/1992.

[974] B. CONFORTI, *Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione dei conti correnti di Stati stranieri*, cit., p. 559-560.

rather than in those of the Italian government does not remove, but worsens the breach of the right of access to justice caused by Law No. 162/2014.[975]

As for the executive branch, it is worth recalling that it had never supported the *Ferrini* jurisprudence: in all the relevant proceedings, the Avvocatura dello Stato had stood by the German government, opposing the denial of immunity from the part of domestic courts. Even before the International Court of Justice, the government structured its defense differently from the reasoning of the Court of Cassation,[976] so as to obtain an authoritative rejection of the thesis whereby a humanitarian exception to State immunity exists. As observed by Gallo, a judge of the Court of Cassation, Italy only pretended to oppose Germany's argument, but in fact supported it. The Italian government – all the governments that followed it – regarded the *Ferrini* case law as an intereference with diplomatic relations; therefore, it pretended to oppose Germany before the ICJ, but actually wanted to lose the litigation.[977]

In the aftermath of the *Jurisdictional Immunities* judgment, the government, as mentioned before, adhered to the UN Convention on Jurisdictional Immunities of States and Their Property. In this respect, it is worth pointing out that at the moment of ratification it issued an interpretative declaration excluding the applicability of the Convention – and therefore of the *forum* tort exception – to the conduct of armed forces, clearly contradicting the Italian position before the International Court of Justice.[978] The Italian government further showed to be willing to abide in good faith to the judgment of the International Court of Justice by subscribing the optional clause enshrined in Article 36 of the ICJ Statute,[979] thus accepting the compulsory jurisdiction of the Court «*ipso facto* and without special agreement, in relation to any other state accepting the same obligation».[980] Moreover, soon after the adoption of the aforementioned Law. No. 162/2014, the Ministry of Foreign Affairs promptly put itself at the

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[975] *Ibidem*.

[976] M.I. PAPA, *Il ruolo della Corte Costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014*, cit., pp. 16-17.

[977] Judge Gallo's comment is reported in: L. BAIADA, *Tribunale di Firenze e crimini di guerra: i semi evolutivi mettono radici*, *Questione Giustizia*, 6 April 2016, available online at: http://www.questionegiustizia.it/stampa.php?id=989 (last accessed on 12 July 2019).

[978] According to the interpretative declaration, «[…] Italy states its understanding that the Convention does not apply to the activities of armed forces and their personnel, whether carried out during an armed conflict as defined by international humanitarian law, or undertaken in the exercise of their official duties […]». The text is available online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last accessed on 1 August 2019).

[979] Declaration of 25 November 2014 recognizing the jurisdiction of the International Court of Justice as compulsory, in accordance with Article 36(2) of its Statute, available online at: https://www.icj-cij.org/en/declarations/it (last accessed on 9 January 2020).

[980] Statute of the International Court of Justice, Article 36(2).

disposal of foreign States and international organizations having a representation in Italy, asking them to indicate which of their bank accounts had a public destination and were consequently immune from measures of enforcement.[981]

The attitude of the Italian executive branch *vis à vis* State immunity rules became definitely clear in the first judicial applications of judgment No. 238/2014, where the government intervened to openly endorse the German position before domestic courts, asking for the upholding of State immunity. In more general terms, the Italian executive branch demonstrated to be unwilling to support the victims' demands of reparation *vis à vis* the German State. To date, the negotiated solution suggested by the International Court of Justice has not yet been pursued by the two governments involved. The lack of any effort in this sense from the part of Germany as well, however, plays in favour of the Italian government: having disattended the suggestion of the ICJ – albeit there was no legal obligation to initiate negotiations , it is unlikely that Germany will sue again Italy before the Hague court.[982] In this respect, it is worth mentioning another deterrent against further litigations: the German Constitutional Court itself, like the Italian Consulta, adopts a dualistic approach to international law and has recently refused to abide to an international obligation – namely, the execution of a European Arrest Warrant – because in contrast with a fundamental constitutional principle.[983] As observed in literature, Germany would be trapped in a principled contradiction, should it attack judgment 238/2014 on the international plane because of non-compliance with the ICJ's verdict.[984] Therefore, the Italian government will be likely spared from defending again in an international courtroom a position it openly disagrees with.

As apparent from this discussion, there is a fundamental divergence between the judicial branch and the other constitutional powers of the State as far as State immunity is concerned. This weakens the consistency of Italian practice: as affirmed in the Draft Conclusions of the International Law Commission on the identification of customary international law, if the

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[981] Ministry of Foreign Affairs and International Cooperation, Diplomatic note of 1 December 2014. See: B. CONFORTI, *Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione dei conti correnti di Stati stranieri*, cit., p. 560.

[982] In this sense, see: F. PERSANO, *Il rapporto fra immunità statale e tutela dei diritti fondamentali dell'individuo nella sentenza n. 238/2014 della Corte Costituzionale italiana*, in «Responsabilità civile e previdenza», Vol. 3 (2015), p. 822.

[983] Bundesverfassungsgericht, Judgment of 15 December 2015, BVR 2735/14. See *supra*, note 244. In this sense, see: A. VON ARNAULD, *German concerns after Sentenza 238/2014: Possible reactions – possible solutions*, in «Verfblog», 11/05/2017, http://verfassungsblog.de/german-concerns-after-sentenza-2382014-possible-reactions-possible-solutions/ (last accessed on 13 December 2019).

[984] A. VON ARNAULD, *German concerns after Sentenza 238/2014: Possible reactions – possible solutions*, cit.

practice of a State varies, the weight to be given to it in light of its contribution to the general practice of States might be reduced.[985] This is what happens when «different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time»,[986] as in the case of Italian practice following the *Jurisdictional Immunities* judgment.

Nevertheless, all these circumstances do not undermine the potential impact that judgment No. 238/2014 and, in more general terms, judicial decisions in application of the "counter-limits" doctrine may have on further evolutions of international law. Judgment No. 238/2014, indeed, had the merit to show that a conflict between competing principles of international law, namely State immunity and the justiciability of fundamental human rights, can be solved in favour of human rights. Even though domestic courts' resistance to a State-centered aprroach to international law does not necessarily provoke immediate changes, it may raise awareness about the system's present shortcomings and finally lead to developments of the law. In particular, the judgment of the Italian Constitutional Court and the subsequent judicial practice of Italy may be able to promote changes in the law of State immunity in the long run, encouraging domestic courts to follow the same reasoning, and advancing the idea of the primacy of fundamental human rights protected by general principles of law over conflicting obligations.

2. The practice of other States after the *Jurisdictional Immunities* judgment

2.1 The United States of America

During the last years, Italian courts have not been the only ones to deny immunity to foreign States for wrongful acts traditionally regarded as *acta jure imperii*. As discussed earlier in this work, U.S. legislation affirms the jurisdiction of domestic courts over certain specific categories of *jure imperii* acts imputable to foreign States. Before dealing with those specific exceptions to State immunity, however, it is worth mentioning that the U.S. Supreme Court has recently expressed its authoritative opinion on the scope of application of the Aliens Tort

[985] International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, 2018, available online at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (last accessed on 12 July 2019), Conclusion No. 7, paragraph 2.
[986] *Ivi*, Conclusion No. 7, Comment No. 4.

Statute as amended by the Torture Victim Protection Act. In its decision in *Kiobel v. Royal Dutch Petroleum Co.*,[987] which concerned a claim brought by Nigerian nationals against foreign corporations for the violation of the law of nations in Nigeria, the Court excluded that the Statute could be applied to wrongful State conduct committed outside the territory of the United States. Due to the strong presumption found by the Court against the extra-territorial application of the Statute, the ATS cannot be regarded anymore as a basis for affirming universal civil jurisdiction over offences committed abroad, and therefore for circumventing the immunities of foreign States.

In contrast, on the basis of the FSIA are not immune from the civil jurisdiction of U.S. courts the *jure imperii* torts causing death or injury in the territory of the United States, nor the expropriations carried out by foreign States in violation of international law. As affirmed in recent case law, although expropriation is, in general terms, an intrastate matter that does not affect international law, the situation is entirely different when expropriation is part of a genocide project to isolate and physically destruct a certain group of people, and therefore amounts to a breach of international law.[988] Since the *Altmann* case,[989] this exception to State immunity has become a solid basis for affirming U.S. jurisdiction over claims brought against foreign States by Holocaust survivals for the unlawful expropriation of their property, in particular artworks.[990]

Furthermore, immunity from jurisdiction is refused to foreign sovereigns designated as sponsors of terrorism by the executive branch, 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»[991] for such acts, if the victims were nationals, government

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[987] U.S. Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, Judgment of 17 April 2013, 569 U.S. 108 (2013).

[988] United States Court of Appeals for the District of Columbia Circuit, *Rosalie Simon and Others v. Republic of Hungary*, Judgment of 29 January 2016, 812 F.3d 127 (2016). For a comment on this decision and, in general terms, on U.S. case law on the expropriation exception, see: M. WELLER, *Genocide by Expropriation – New Tendencies in US State Immunity Law for Art-Related Holocaust Litigations*, 13 September 2018, available online at: http://conflictoflaws.net/2018/genocide-by-expropriation-new-tendencies-in-us-state-immunity-law-for-art-related-holocaust-litigations/ (last accessed on 25 July 2019). The definitions of "expropriation exception" and "genocide" provided in *Simon* has recently been confirmed by the same Court: United States District Court of Appeals for the District of Columbia Circuit, *Alan Philipps* et al. *v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz*, Judgment of 10 July 2018, No. 17-7064.

[989] See *supra*, Chapter 3, Section 2.1 of this work, in particular note 592.

[990] See: United States Court of Appeals for the District of Columbia Circuit, *De Cspel and others v. Republic of Hungary*, Judgment of 20 June 2017, 859 F.3d 1094 (2017); United States Court of Appeals for the District of Columbia Circuit, *Philipp and others v. Federal Republic of Germany and Stiftung Preussischer Kulturbesitz*, Judgment of 10 July 2018, No. 17-7064.

[991] 28 U.S. Code § 1605A(a)(1), as amended by the Antiterrorism and Effective Death Penalty Act, Public Law No. 104-132, Section 221(a).

employees or members of the armed forces of the United States,[992] independently from the State where the wrongful conduct took place, provided that the foreign State was afforded a reasonable opportunity to arbitrate the claim.[993]

The terrorism exception to State immunity from civil jurisdiction led to a considerable number of litigations against foreign States regarded as sponsors of terrorism,[994] of which the aforementioned *Flatow v. Iran* judgment – subject to enforcement proceedings in Italy – is an early instance.[995] Another example is the cluster of judgments condemning Iran to pay damages to the injured soldiers and to the families of the victims of the 1983 bombing of the U.S. barracks in Beirut, for a total amount of over eight billion dollars.[996] Likewise, the Syrian government has recently been hold liable for the extrajudicial killing of the American war journalist Mary Colvin, occurred during a deliberate bombing attack against a journalist post in Homs.[997] The District Court for the District of Columbia ordered Bashar Al-Assad's regime to pay punitive damages to Colvin's relatives, on the basis of section 1605(A) of the FSIA as amended by the 1996 Antiterrorism and Effective Death Penalty Act.

In order to facilitate the enforcement of this kind of decisions, the Congress passed a number of legislative measures which narrowed the scope of immunity from execution granted to foreign States. In particular, the Terrorism Risk Insurance Act of 2002 provided that the blocked assets of a State sponsor of terrorism could be subject to measures of execution.[998] The possibility to enforce judgments issued against Iran and Syria was further expanded by the Iran Threat Reduction and Syria Human Rights Act. Enacted by Congress in 2012, this piece of legislation permits to attach the assets of those countries' central banks deposited in the United States,[999] which would otherwise be immune from measures of

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[992] 28 U.S. Code § 1605A(a)(2)(A)(ii).

[993] 28 U.S. Code § 1605A(a)(2)(A)(iii) reads as follows: «[…] in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration».

[994] Four countries currently fall into the category of "sponsors of terrorism", namely North Korea, Sudan, Iran and Syria. See: https://www.state.gov/state-sponsors-of-terrorism/ (last accessed on 22 July 2019).

[995] United States District Court for the District of Columbia, *Flatow v. Islamic Republic of Iran*, Judgment of 11 March 1998, No. 97-396 (RCL).

[996] See, in particular: United States District Court for the Southern District of New York, *Peterson and others v. Islamic Republic of Iran*, Judgment of 13 March 2013, No. 10 Civ. 4518 (KBF), note 1.

[997] United States District Court for the District of Columbia, *Cathleen Colvin and others v. Syrian Arab Republic*, Judgment of 30 January 2019, No. 16-1423 (ABJ).

[998] Terrorism Risk Insurance Act, H.R.3210, 23 January 2002, Section 201.

[999] Iran Threat Reduction and Syria Human Rights Act, Public Law 112–158, 10 August 2012. See, in particular, section 502, which reads as follows: «[…] notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset […] shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages

execution because of their public destination. This law, uphold by the Supreme Court in 2016,[1000] made possible for the victims of the 1983 Beirut bombing to recover the damages awarded by U.S. courts against Iran in the merits proceedings.[1001]

The seizure of the assets of the Iranian Central Bank, also known as Bank Markazi, convinced Iran to start litigations before the International Court of Justice, alleging, *inter alia*, that the United States had violated the 1955 Treaty of Amity between the two countries by allowing private lawsuits against Iran to be decided on the merits by domestic courts and to proceed to the execution phase, in breach of Iran's immunity both from civil jurisdiction and from measures of enforcement.[1002] The International Court of Justice, however, has recently affirmed that it lacks jurisdiction on the question of sovereign immunities, because this latter does not fall within the scope *ratione materiae* of the Treaty of Amity.[1003] As a consequence, the Hague Court will not have the opportunity to reconsider its judgment in the *Jurisdictional Immunities* case, as only certain aspects related to the qualification and protection of Bank Markazi as a State-owned company will be dealt with on the merits.

It is worth noting that, nowadays, U.S. legislation limiting the scope of sovereign immunities for States regarded as sponsors of terrorism cannot be dismissed anymore as an isolated practice, as the International Court of Justice did in the *Jurisdictional Immunities* judgment.[1004] Few weeks after the ICJ decision, indeed, Canada introduced an amendment to the State Immunity Act based on the model of U.S. Antiterrorism and Effective Death Penalty

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awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act».

[1000] Supreme Court of the United States, *Bank Markazi, Aka Central Bank of Iran v. Peterson and others*, Judgment of 20 April 2016, 578 U. S. (2016). The constitutionality of the Iran Threat Reduction and Syria Human Rights Act had been challenged on the ground that «it usurped the judicial role of determining the result in a pending proceeding». See: C. KEITNER, *World Court Rules on Iran Challenge to US Suits for Acts of Terrorism: An Explainer*, 19 February 2019, available online at: https://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/ (last accessed on 22 July 2019).

[1001] United States Court of Appeals, Second Circuit, *Peterson and others v. Islamic Republic of Iran, Bank Markazi and others*, Judgment of 21 November 2017, No. 15-0690. For a comment on this decision within the broader context of U.S. legislation on sovereign immunities and counter-terrorism, see: K. DAUGIRDAS, J.D. MORTENSON, *U.S. Supreme Court Upholds Law Facilitating Compensation for Victims of Iranian Terrorism*, in «The American Journal of International Law», Vol. 110 (2016), No. 3, pp. 555-562.

[1002] International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Application Instituting Proceedings, filed in the Registry of the Court on 14 June 2016, paragraph 33(d).

[1003] International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment on Preliminary Objections, 13 February 2019, paragraph 74. For comments on this decision, see: P. JANIG, S. MANSOUR FALLAH, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, in «German Yearbook of International Law», Vol. 59 (2016), pp. 355-389; C. KEITNER, *World Court Rules on Iran Challenge to US Suits for Acts of Terrorism: An Explainer*, cit.

[1004] International Court of Justice, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Report 99 (2012), paragraph 88.

Act.[1005] The new statute allows private parties to file civil actions for damages against States sponsors of terrorism,[1006] provided that the victim is a national or permanent resident of Canada, or that the action has a real and substantive connection with Canada.[1007] The amended State Immunity Act also provides for the recognition of foreign judgments condemning foreign sovereigns for their support to transational terrorism.[1008] This was done, for instance, by the Ontario Superior Court of Justice with respect to twelve U.S. judgments issued against the Islamic Republic of Iran for eight distinct terrorist incidents that took place outside the territory of the United States.[1009]

The antiterrorism legislation into force in the U.S. was further consolidated by the adoption of the Justice Against Sponsors of Terrorism Act, hereinafter JASTA, in 2016. Enacted against the veto of the executive branch, which was worried about the negative repercussions on diplomatic relations and the security of U.S. officials abroad,[1010] this statute was mainly designed to allow the victims of 11 September 2001 to recover monetary damages from Saudi Arabia, regarded as one of the States supporting the attacks.[1011] A considerable number of actions for damages were consequently filed against Saudi Arabia, whose immunity was recently lifted by the U.S. District Court for the Southern District of New York in its decision on the cluster of cases *In Re: Terrorist Attacks on September 2001*.[1012]

[1005] Justice for Victims of Terrorism Act, 13 March 2012, S.C. 2012, c. 1, s. 2, amending Section 6.1 of the 1985 Canadian State Immunity Act.

[1006] Namely, Syria and Iran. The updated list of States defined as "sponsors of terrorism" is available at: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-170/page-2.html#h-784158 (last accessed on 25 July 2019).

[1007] Justice for Victims of Terrorism Act, 13 March 2012, cit., Section 4(2) (Cause of Action).

[1008] *Ivi*, Section 4(5) (Judgments of foreign courts). In order to obtain recognition and enforcement in Canada, the State condemned by the foreign court must, nonetheless, be enlisted in the "States sponsors of terrorism" list.

[1009] Ontario Superior Court of Justice, *Tracy v. The Iranian Ministry of Information and Security*, Judgment of 9 June 2016, 2016 ONSC 3759.

[1010] These were the main reasons for Obama's veto of 23 September 2016. See: https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 (last accessed on 25 July 2019). In the sense that the JASTA would put at risk U.S. staff working abroad, see the Statement from CIA Director John O. Brennan Regarding the "Justice Against Sponsors of Terrorism Act" of 28 September 2016, available online at: https://www.cia.gov/news-information/press-releases-statements/2016-press-releases-statements/statement-from-director-brennan-on-justice-against-sponsors-of-terrorism-act.html (last accessed on 25 July 2019). In Brennan's opinion, «the "Justice Against Sponsors of Terrorism Act" (JASTA) will have grave implications for the national security of the United States. The most damaging consequence would be for those US Government officials who dutifully work overseas on behalf of our country. The principle of sovereign immunity protects US officials every day, and is rooted in reciprocity. If we fail to uphold this standard for other countries, we place our own nation's officials in danger».

[1011] Explicit reference to the 11 September 2001 attacks is made at Section 7 of the JASTA, dealing with the statute's applicability *ratione temporis*: «The amendments made by this Act shall apply to any civil Action (1) pending on, or commenced on or after, the date of enactment of this Act; and (2) arising out of an injury to a person, property, or business *on or after September 11, 2001*» (italics is my own addition).

[1012] United States District Court for the Southern District of New York, *In Re: Terrorist Attacks on September 2001*, Decision of 28 March 2018.

Although it did not radically change U.S. antiterrorism legislation, the JASTA broadened the scope of domestic courts' jurisdiction so as to include private lawsuits against foreign States for physical injuries or death caused in the United States by: «(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred».[1013] The main novelty is that the State against which the civil action for damages is brought does not need to be previously qualified as "sponsor of terrorism" by the Department of State, potentially opening U.S. courts to claims against any State.

The rationale behind the JASTA is therefore slightly different from the previous antiterrorism legislation: its aim is not to punish a State regarded as an "enemy" of the United States, as in the case of the Antiterrorism and Effective Death Penalty Act, but rather to grant access to justice and effective protection to the victims of terrorist attacks occurred either in or outside the territory of the United States.[1014] From this perspective, the JASTA and its first jurisprudential applications are particularly relevant to the extent that they give preminence to the victims' right of access to justice over the interest of foreign States – not only traditionally "enemy" States – and the need to maintain good diplomatic relations with them. Unfortunately, the concrete impact of the statute is mitigated by the fact that, on the one hand, it does not affect immunity rules on measures of execution, so that enforcement is difficult; [1015] and that, on the other hand, proceedings against a foreign State may be suspended indefinitely if negotiations are taking place.[1016]

In conclusion, from our discussion on the most recent legislation and case law of the United States, partly emulated by Canada, it is apparent that there is a rich national practice that consistently denies immunity to foreign States for wrongful acts of non-commercial nature, even if restricted only to particular categories of illicit conduct, namely *forum* torts, expropriations in violation of international law and terrorist attacks. Despite being based on national legislation, such practice is nonetheless relevant from the perspective of international

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[1013] 28 U.S. Code § 1605B(b), as amended by Section 3 (Responsibility of Foreign States for International Terrorism Against the United States) of the JASTA.

[1014] In this sense, see: N. COLACINO, *La revoca dell'immunità giurisdizionale agli Stati sponsor del terrorismo.* Another brick off the wall?, in «Questione Giustizia», 18 January 2017, available online at: http://questionegiustizia.it/articolo/la-revoca-dell-immunita-giurisdizionale-agli-stati-sponsor-del-terrorismo-another-brick-off-the-wall__18-01-2017.php (last accessed on 25 July 2019).

[1015] *Ibidem*.

[1016] Justice Against Sponsors of Terrorism Act, Public Law No. 114-222, Section 5 (Stay of Actions Pending State Negotiations).

law insofar as it restricts the scope of immunity from civil jurisdiction well beyond what required by the customary rule identified by the Hague Court in the *Jurisdictional Immunities* case. In fact, as observed in literature,

> The fact that different organs of the State in question – its legislature in the enactment of the statute and the court in the interpretation of that statute – have asserted jurisdiction and denied immunity amounts to at least an implied assertion that the forum State is entitled under international law to take jurisdiction over another State in those circumstance. There is, therefore, both an instance of State practice and implicit *opinio juris*.[1017]

2.2 Other national practice: Canada, Luxembourg and Brazil

As discussed in the previous paragraphs, the practice of Italian courts and of the U.S. following the *Jurisdictional Immunities* judgment clearly goes into the direction of restricting the scope of State immunity from civil jurisdiction for acts traditionally regarded as *jure imperii*. In contrast, a recent judicial decision in Luxembourg shows a tight adhesion to the rule of State immunity from civil jurisdiction as identified by the International Court of Justice, whereas other countries among the few to have decided on the question of State immunity for gross human rights violations after the verdict of the Hague court – namely, Canada and Brazil – have adopted a less straightforward approach, as will be shown in this section.

The Tribunal d'Arrondissement de Luxembourg has recently excluded that two U.S. default decisions condemning Iran to pay civil damages to the relatives of the victims of 11 September 2001[1018] could obtain recognition and enforcement within the domestic legal order.[1019] To reach this conclusion, the first instance tribunal heavily relied on the ICJ's decision in the *Jurisdictional Immunities* case. Being Luxembourg a civil law country, indeed, there is no domestic statute codyfing the law of State immunity, so that the Tribunal had look into general international law in order to determine the applicable rule. In this respect, the Tribunal found that nor a terrorist exception, nor a *jus cogens* exception to State immunity are

[1017] C. GREENWOOD, *The Development of International Law by National Courts*, cit., p. 206.
[1018] U.S. District Court for the Southern District of New York, *In Re: Terrorist Attacks on September 11, 2001*, Judgments of 12 October 2012 and of 12 September 2013.
[1019] Tribunal d'Arrondissement de Luxembourg, Judgment of 27 March 2019, 2019TALCH01/00116.

provided for under general international law.[1020] As for the *forum* tort exception, the Tribunal admitted, instead, that it is part customary international law, but held that it was not applicable to the present case because the alleged responsible organ – namely, the Iranian Central Bank – was not present on the territory of the United States at the time of the illicit act.[1021]

In contrast, Canada has recently amended the national statute regulating State immunity issues – namely, the State Immunity Act – so as to exclude terrorist acts carried out by States designated as "sponsors of terrorism" from the scope of immunity rules, following the model of U.S. antiterrorism legislation. The "terrorism exception" set forth under Canadian law, however, is much narrower than its U.S. counter-part. Differently from the U.S. Antiterrorism and Effective Death Penalty Act, the Canadian act grants jurisdiction to domestic courts only for episodes strictly qualifying as terrorist attacks, excluding the acts of torture committed by a foreign sovereign enlisted in the "sponsors of terrorism" list.[1022] This explains why claims alleging torture from the part of Iran – as in *Kazemi v. Iran*[1023] – were not successful in Canada, even after the adoption of the Justice for Victims of Terrorism Act in 2012 and the designation of Iran as a "State sponsor of terrorism".

Apart from acts of terrorism, every other non-commercial act undertaken by foreign States outside the territory of Canada is covered by State immunity from civil jurisdiction. This is what the Court of Appeals for Ontario stated in *Steen v. Islamic Republic of Iran*,[1024] a decision on the recognition of two U.S. judgments in application of the Antiterrorism and Effective Death Penalty Act. Since the proceedings in Canada had started before the enactment of the 2012 amendment to the State Immunity Act, the new legislation could not be invoked, even if the underlying conduct of the foreign State consisted in a number of terrorist incidents. Faced with the question of the existence under international law of an exception to State immunity for *jus cogens* violations,[1025] the Court of Appeal for Ontario confirmed its verdict in *Bouzari v. Iran* by affirming the absolute character of State immunity from civil jurisdiction for *acta jure imperii*. According to the Court, the ICJ's decision in *Jurisdictional*

[1020] *Ivi*, paragraph 1.1.2.2.2.4.
[1021] *Ivi*, paragraph 1.1.2.2.2.3.
[1022] 28 U.S. Code § 1605A(a)(1), as amended by the Antiterrorism and Effective Death Penalty Act, Public Law No. 104-132, Section 221(a).
[1023] Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, Judgment of 10 September 2014. For a comment on this decision, see: B. BATROS, P. WEBB, *Domesticating the Law of Immunity: The Supreme Court of Canada in Kazemi v Iran*, 7 November 2014, available online at: https://www.ejiltalk.org/domesticating-the-law-of-immunity-the-supreme-court-of-canada-in-kazemi-v-iran/ (last accessed on 26 July 2019).
[1024] Court of Appeal for Ontario, *Steen v. Islamic Republic of Iran*, Judgment of 21 January 2013, 2013 ONCA 30.
[1025] *Ivi*, paragraph 16.

Immunities of the State reinforced this finding[1026] based on the exhaustive discipline set forth in the State Immunity Act.[1027]

The same conclusion was reached by the Canadian Supreme Court in the last phase of the *Kazemi* proceedings. The 2014 decision is particularly relevant in light of the scarce weight that the Court attributed to the right to an effective remedy as understood by the Committee Against Torture. According to the Committee's General Comment No. 3, published after the *Jurisdictional Immunities* judgment,[1028] Article 14 of the Torture Convention is to be interpreted as establishing States' obligation to provide an effective remedy to the victims of torture, independently from the State under whose jurisdiction the wrongful conduct took place.[1029] The Supreme Court, however, placed heavy reliance on its precedent and on the decision of other common law courts, in particular British ones,[1030] to state that Article 14 only refers to torture committed within the jurisdiction of the *forum* State, although the international treaty body had already criticized Canada for failing to ensure access to justice to the victims of torture.[1031]

Another interesting question discussed in *Kazemi* was the compatibility of the State Immunity Act with the right of access to justice enshrined in the Canadian Bill of Rights.[1032] The coincidence is striking, if we consider that this case was decided only one month and a

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[1026] *Ivi*, paragraph 36.

[1027] *Ivi*, paragraph 27. In the words of the Court, «the exceptions to state immunity in Canadian positive law are those set out in the SIA, not in some remnant of a hypothetical common law doctrine that would coexist with the Act, or in some rule of customary international law that might modulate the interpretation of a statutory phrase which in fact is in no need of interpretation».

[1028] Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, Judgment of 10 September 2014, paragraph 147 ss.

[1029] Committee Against Torture, General Comment No. 3 on the Implementation of Article 14 by States Parties, 13 December 2012, paragraph 22, available online at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11 (last accessed on 30 July 2019). In the words of the Committee, «[…] 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».

[1030] The most frequently quoted national decision was *Jones* by the UK House of Lords. See, in particular paragraphs 141 ss. of the *Kazemi* judgment.

[1031] B. BATROS, P. WEBB, *Domesticating the Law of Immunity: The Supreme Court of Canada in Kazemi v Iran*, cit.

[1032] Article 2(e) of the Canadian Bill of Rights reads as follows: «Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to […](e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations». The text is available online at: https://laws.justice.gc.ca/eng/acts/C-12.3/page-1.html (last accessed on 31 July 2019).

half before decision No. 238/2014 of the Italian Constitutional Court. The response of the two courts, however, could not have been more different: according to the Supreme Court of Canada, the right to a fair trial is not breached when a hearing on the merits is barred by the procedural rule of State immunity,[1033] because the Bill of Rights does not create «a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process».[1034] The Supreme Court thus missed a judicial opportunity to take a stance in favour of the victims' right of access to justice.

The Supreme Court, however, reminded that it is a responsibility of the Parliament to modify the scope of immunity rules applied in Canada. According to the Court, indeed, immunity is not only a rule of customary international law of which the State Immunity Act should be a codification, but also «reflects domestic choices made for policy reasons».[1035] As a consequence, national legislation may depart from international law if national instances so require. In particular, the legislative branch is vested with the power to further amend the State Immunity Act, as already done with the "terrorism exception" to State immunity from civil jurisdiction[1036] and as called for by human rights experts.[1037] The Court, instead, kept for itself the residual role to verify whether developments in international law – and especially in international human rights law – make the SIA in contrast with the fundamental rights protected within the Canadian legal system.[1038]

Another State where important developments in the law of State immunity are expected is Brazil. Being a civil law country, Brazil lacks a national legislation on State immunity, so that issues of sovereign immunities are solved with reference to international law and, in particular, customary international law. As mentioned earlier, the bombing and sinking of Brazilian fishing vessels from the part of German armed forces formed the subject matter of a number of civil actions for damages brought before Brazilian courts. In its decisions of 2008, 2009 and 2012 the Supreme Federal Tribunal had uphold the immunity of the Federal Republic of Germany on the basis of the restrictive doctrine of State immunity.[1039] With its decision of 11 May 2017, however, the Supreme Tribunal decided by majority that the claim

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[1033] Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran*, Judgment of 10 September 2014, paragraph 118.
[1034] *Ivi*, paragraph 116.
[1035] *Ivi*, paragraph 45.
[1036] *Ivi*, paragraphs 44; 56; 170.
[1037] In this sense, see Frédéric Mégret's Opinion, published on 17 October 2014 on the Montreal Gazette: http://www.montrealgazette.com/news/Opinion+Supreme+court+upholding+state+immunity+Kazemi+case+makes+clear+Parliament+should+change/10300118/story.html (last accessed on 31 July 2019).
[1038] B. BATROS, P. WEBB, *Domesticating the Law of Immunity: The Supreme Court of Canada in Kazemi v Iran*, cit.
[1039] See *supra*, note 722.

presented by the descendants of one of the victims involved a question of constitutional relevance, namely if immunity is absolute even when the act *jure imperii* undertaken by the foreign State results in a breach of fundamental human rights.[1040]

According to the Supreme Federal Tribunal, this question is particularly relevant because it involves the protection of fundamental human rights, i.e. one of the principles on which Brazil's conduct in international relations is based.[1041] For the same reason, the Rapporteur to the case admitted the Brazilian Federal Government to take part in the proceedings as *amicus curiae*, in light of the repercussions of the case on international relations.[1042] The decision on the merits is currently pending, and could have a path-breaking impact if the judges adopted a human rights centered approach, as they seem to have done in the preliminary decisions. In the meanwhile, however, the Supremo Tribunal de Justiça has uphold the immunity of Germany on the basis that acts of war, notwithstanding their unlawfulness, fall within the category of *acta jure imperii* deserving the covering of State immunity from civil jurisdiction.[1043] Therefore, as in Canada, the judiciary branch has maintained its traditional position with respect to immunity issues, while waiting for possible developments at the constitutional – while, for Canada, parliamentary – level.

3. The recent case law of the European Court of Human Rights: the cases *Jones v. the United Kingdom* and *Naït-Liman v. Switzerland*

The European Court of Human Rights had a new occasion to tackle the issue of the right of access to justice *vis à vis* State immunity from civil jurisdiction in the case *Jones and Others v.the United Kingdom*,[1044] decided on the merits in January 2014. As is well known, the applicants had initiated proceedings in the United Kingdom seeking justice for the torture

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[1040] Supremo Tribunal Federal, Recurso Extraordinário com Agravo 954.858 – RJ, Tema de Repercussão General No. 944, Decision of 11 May 2017.

[1041] *Ivi*, p. 7. The reference is, in particular, to Article 4(II) of the Federal Constitution adopted in 1988, which reads asfollows: «The international relations of the Federative Republic of Brazil are governed by the following principles: […] II – prevalence of human rights». The text of the official translation in English is available online at: http://english.tse.jus.br/arquivos/federal-constitution (last accessed on 1 August 2019).

[1042] Supremo Tribunal Federal, Recurso Extraordinário com Agravo 954.858 – RJ, Tema de Repercussão General No. 944, Decision of 29 September 2017, No. 227.

[1043] Superior Tribunal de Justiça, STJ - Recurso Ordinário: RO 208 RJ 2018/0112290-5, Judgment of 29 August 2018.

[1044] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014.

suffered in Saudi Arabia, but the House of Lords had granted immunity to both the foreign State and the officials responsible for the crimes.[1045] Mr. Jones and the other victims thus filed an application with the European Court of Human Rights, claiming that their right of access to justice had been violated. In particular, they argued that the upholding of immunity in favour of the torturer State amounted to a disproportionate restriction of their right of access to court,[1046] given the unavailability of alternative means of redress.[1047] Unfortunately, the Strasbourg Court confirmed the conclusions of the House of Lords on both the immunity of States and on the organs of the State, because «neither manifestly erroneous nor arbitrary».[1048]

When dealing with the issue of State immunity from civil jurisdiction, the Court based its reasoning on the general principles developed in its well-established jurisprudence. In this respect, it recalled that the right of access to justice enshrined in Article 6 of the Convention is not an absolute right, but may be subject to limitations provided that the purpose is legitimate, the means employed are proportionate to the aim sought to be achieved, and the very essence of the right is not impaired.[1049] The Court, however, failed to properly carry out the legitimacy and proportionality test, simply restricting its analysis to a restatement of the reasoning in its precedents.[1050] By so doing, it oversimplified the delicate balancing exercise between the competing principles at stake[1051] – on the one hand, immunity and the respect of general international law, and, on the other, the right of access to justice – to come to a conclusion clarly biased in favour of the immunity of foreign States.

As for the legitimacy test, the ECtHR reiterated the view whereby the upholding of State immunity from civil jurisdiction is a legitimate limitation of the individual right of access to court because aimed at promoting comity and good relations among countries through the respect of States' sovereignty,[1052] that is to say that a rule of international law pursues a

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[1045] UK House of Lords, *Jones v. the Kingdom of Saudi Arabia*, Judgment of 14 June 2006, [2006] UKHL 26. On this decision, see *supra*, Chapter 3, Section 2.2 of this work.

[1046] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 168.

[1047] *Ivi*, paragraph 167.

[1048] *Ivi*, paragraph 214.

[1049] *Ivi*, paragraph 186.

[1050] See, in particular: *ivi*, paragraphs 190-192.

[1051] In this sense, see: R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, in «Diritti umani e diritto internazionale», Vol. 8 (2014), No. 1, p. 216.

[1052] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 188.

legitimate purpose just because it is a rule of international law.[1053] On the proportionality of the restriction, instead, the Court repeated the circular reasoning of *Al-Adsani* and *Kalogeropoulou*, whereby «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)».[1054] Moreover, the Court bypassed the argument, raised by the applicants, of the unavailability of alternative means of redress, thus completely failing to assess whether or not the very essence of the plaintiffs' right of access to court had been impaired. As observed in literature, «this approach damages the integrity of Article 6(1) and fails to take into account the challenges faced by alleged victims of human rights violations seeking to secure access to a court where no other remedy exists».[1055]

Once established that granting immunity from civil jurisdiction to a foreign State amounts to a legitimate and proportionate restriction of the right of access to justice, the Court found that the sole remaining question was the exact content and scope of State immunity under customary international law. According to the Court, the only reason for departing from its precedent in *Al-Adsani* could be the development, at the time of the relevant British decisions, of a new international custom providing for a torture exception to the doctrine of State immunity.[1056] As observed in literature, however, the *Al-Adsani* precedent was not so firmly established to be regarded as inviolable, being a decision based on a slight majority.[1057]

To deny that international law had developed to the point of restricting the scope of immunity rules in case of torture, the Strasbourg Court heavily relied on the ICJ's findings in *Jurisdictional Immunities*, so that the *Jones* decision may be rightly regarded as one of the negative consequences of the litigation before the International Court of Justice. In particular, the ECtHR held, with respect to the recent practice of States in the field of sovereign immunities, that

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[1053] R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, cit., p. 216.

[1054] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 189.

[1055] L. MCGREGOR, *Jones v. UK: A Disappointing End*, 16 January 2014, available online at: https://www.ejiltalk.org/jones-v-uk-a-disappointing-end/ (last accessed on 2 August 2019).

[1056] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 196.

[1057] R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, cit., p. 218.

> it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the ICJ 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.[1058]

In other words, the European Court renounced to carry out its own analysis of contemporary international law.

This attitude can be criticized on two main grounds. Firstly, in the absence of any hierarchy among international tribunals, the ECtHR is not obliged by any rule of international law to respect the judgments of the International Court of Justice. On the contrary, a withdrawal from the exclusive control over Member States' compliance with the European Convention and its Protocols may even constitute a breach of the principle of autonomous jurisdiction enshrined in Article 19 ECHR.[1059] Secondly, the Strasbourg Court was expected to adopt a different perspective – centered on the effectiveness of the right of access to court – than the ICJ, whose "clients" are almost exclusively States. Indeed, although it is true that the Strasbourg Court must interpret the Convention in harmony with the other rules of international law,[1060] the specificities of the Convention system, which, it is worth recalling, is aimed at protecting fundamental human rights, should pave the way to human rights focused solutions.[1061]

Even more conservative was the position maintained by the European Court with respect to the compatibility between the right of access to justice and the immunity of the organs of the State. Differently from the issue of State immunity from civil jurisdiction, this was a new problem for the Court, which was not bound to any precedent. Therefore, it could have been the occasion to provide a valuable contribution to the clarification of current customary international law. Unfortunately, the Court espoused an outdated conception of functional immunity, stating that the immunity of States from civil jurisdiction is an umbrella concept

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[1058] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 198.

[1059] In this sense, see: P. PUSTORINO, *Immunità dello Stato, immunità degli organi e crimine di tortura: la sentenza della Corte europea dei diritti dell'uomo nel caso* Jones, in «Rivista di diritto internazionale», Vol. 97, No. 2 (2014), p. 497.

[1060] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 189.

[1061] P. PUSTORINO, *Immunità dello Stato, immunità degli organi e crimine di tortura: la sentenza della Corte europea dei diritti dell'uomo nel caso* Jones, cit. , p. 496. In this sense, with reference to the most recent case law of the Strasbourg Court on the right of access to justice (in particular, the case *Naït-Liman v. Switzerland*), see also: R. PAVONI, *Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso* Naït-Liman, in «Rivista di diritto internazionale», Vol. 101, No. 3 (2018), p. 895.

which also covers the immunity of the organs. Therefore, according to the Court, a limitation of the right of access to justice based on the recognition of immunity to a foreign State official pursues a legitimate purpose and is proportionate, as if immunity was conceded to the State itself.[1062] This assumption is clearly in contrast with the currently prevailing theorization and practice of international law, whereby State officials' immunity *ratione materiae* stands as a separate issue from State immunity,[1063] especially in light of the affirmation of the concept of individual criminal responsibility under international law.[1064]

To support such vitiated premises, the Court tried to demonstrate that the immunity of State officials is prescribed by the same rules which grant immunity to the foreign State, and that there are no exceptions to it. The analysis of the doctrine and practice of States carried out by the Court, however, amounts to a cherry-picking exercise, since only few judgments of common law countries where the two immunity regimes were confused[1065] were taken into account.[1066] On the issue of the immunity of State organs from civil jurisdiction, the Court «noted but did not engage with the debates about the understanding of the definition of torture, the relationship between attribution and immunity, and the territorial scope of the Torture Convention».[1067] In conclusion, albeit admitting that this particular area of international law is in a State of flux, the Court found that the functional immunity of State organs is absolute, «to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead».[1068] As observed by Judge Kalaydjieva in her dissenting opinion, this position is particularly regrettable, as it is in contrast with the basic principles of international law concerning the personal accountability of torturers.[1069]

[1062] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 200.

[1063] P. WEBB, *Jones v UK: The re-integration of State and official immunity?*, 14 January 2014, available online at: https://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/ (last accessed on 3 August 2019).

[1064] In this sense, see: R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, cit., p. 219. According to authoritative Italian doctrine, there is no simmetry between the immunity of States and the immunity of State officials, precisely because these latter do not enjoy immunity *ratione materiae* for international crimes (including torture) on the basis of their international criminal responsibility. Every international treaty on the punishment of international crimes, indeed, provided for a clause of irrelevance of the immunity of the person accused of an international crime (lastly, Article 27(1) of the Statute of the International Criminal Court). See: A. CASSESE, M. FRULLI (ed.), *Diritto Internazionale*, cit., pp. 147-149.

[1065] For instance, the Australian judgment analysed in Chapter 3, Section 2.3 of this work: New South Wales Court of Appeal, *Zhang v. Zemin and others*, Judgment of 5 October 2010, [2010] NSWCA 255.

[1066] In this sense, see: R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, cit., pp. 220-221.

[1067] P. WEBB, *Jones v UK: The re-integration of State and official immunity?*, cit.

[1068] European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, paragraph 213.

[1069] *Ivi*, Dissenting Opinion of Judge Kalaydjieva.

The European Court further confirmed its conservative approach in the more recent case of *Naït-Liman v. Switzerland*.[1070] The applicant had allegedly suffered torture in Tunisia, his home country. He then fled to Switzerland, where he obtained political asylum and later sought redress against the torturer State and the responsible official. The Swiss Federal Supreme Court, however, found that there was no need to analyse the issue of immunities, because there was no sufficient *rattachemen*t with Switzerland for establishing the jurisdiction of Swiss courts.[1071] This decision was upheld by the European Court of Human Rights with its judgment of 2016, where the restriction of the applicant's right of access to justice from the part of Swiss courts was deemed to be legitimate and proportionate.[1072] The case was then referred to the Grand Chamber.[1073]

Although it did not deal with immunity from civil jurisdiction, the decision of the Grand Chamber is relevant because the ECtHR responded for the first time to the question, preliminary with respect to the issue of State immunity, of the existence of an international rule imposing upon States the obligation to provide criteria for the exercise of universal civil jurisdiction.[1074] Indeed, once established that the limitation of the applicant's right of access to justice pursued the legitimate aim of granting the proper administration of justice and the effectiveness of judicial decisions,[1075] the Court restricted the proportionality test to the determination of the margin of appreciation left to States.[1076] In this regard, it found that there is no rule of international law obliging States to exercise universal civil jurisdiction in order to provide redress to the victims of torture. As a consequence, according to the Court, Member

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[1070] European Court of Human Rights (Grand Chamber), *Case of Naït-Liman v. Switzerland*, Judgment of 15 March 2018, Application No. 51357/07.

[1071] Swiss Federal Supreme Court, Judgment of 22 May 2007, paragraph 4.

[1072] European Court of Human Rights, *Case of Naït-Liman v. Switzerland*, Judgment of 21 June 2016, Application No. 51357/07. For a summary and comment of this judgment, see: E. BENVENUTI, *Quale tutela del diritto di accesso alla giustizia civile per le vittime di gravi violazioni dei diritti umani? Riflessioni a mergine della decisione della Grande camera della Corte europea nel caso* Naït-Liman, in «Ordine internazionale e diritti umani», No. 3 (2018,) pp. 323-326.

[1073] The applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention. The request was granted on 28 November 2016 by a panel of the Grand Chamber.

[1074] The other question analysed by the Court concerned the jurisdictional criterion of *forum necessitates*. For a thorough discussion of this aspect of the case, that will not be dealt with in this work, see: R. PAVONI, *Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso* Naït-Liman, cit., pp. 888-896.

[1075] The legitimacy test carried out by the Court can be criticized to the extent that it only took into account practical concerns such as the difficulties of executing a judgment issued against a foreign State, or the "*forum* shopping" which would have resulted from the affirmation of Swiss courts' jurisdiction. As underlined in literature, it is doubtful that access to justice can be subordinated to such *a priori* considerations. See: C. DE MARZIIS, *Diritto di accesso a un giudice e giurisdizione civile universale dinanzi alla Corte europea dei diritti umani*, in «Diritti umani e diritto internazionale», Vol. 12 (2018), No. 3, p. 695.

[1076] European Court of Human Rights (Grand Chamber), *Case of Naït-Liman v. Switzerland*, Judgment of 15 March 2018, Application No. 51357/07, paragraphs 173 ss.

States enjoy a wide margin of appreciation: they are free to establish jurisdictional criteria for the exercise of universal jurisdiction, but are not bound to do so by any rule of customary[1077] or conventional law.[1078]

As for the practice of States, the Court observed that only few States in the world have a legislation providing for the exercise of universal civil jurisdiction. Among Member States, this is the case of the Netherlands,[1079] while, outside the Council of Europe, only of Canada and the United States.[1080] The Court, however, noted that the scope of application of the U.S. Aliens Tort Statute had been considerably reduced by the Supreme Court's judgment in *Kiobel*.[1081] As for treaty law, the Court restrictively interpreted Article 14 of the Convention Against Torture, holding that, notwithstanding its General Comment No. 3, the practice of the Committee is less straightforward in individual applications concerning access to justice for victims of torture committed outside the territory of the *forum*.[1082] According to the Court, the conclusion that there is no international rule obliging States to exercise universal civil jurisdiction is confirmed by the wording of the 2015 Resolution of the Institut de Droit International Law,[1083] according to which a domestic court "should", not "shall", exercise jurisdiction when no other State has stronger connections with the claim and the plaintiff has no other remedy available.[1084]

Although the decision of the Grand Chamber leaves in principle the States parties to the European Convention free to exercise universal civil jurisdiction, it might compromise future developments of customary international law in the sense of providing access to justice for the

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[1077] *Ivi*, paragraph 187.
[1078] *Ivi*, paragraph 188.
[1079] *Ivi*, paragraph 183.
[1080] *Ivi*, paragraph 184.
[1081] *Ivi*, paragraph 185.
[1082] *Ivi*, paragraph 190. For a critical appraisal of this argument put forward by the Court, see: R. PAVONI, *Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso* Naït-Liman, cit., pp. 891-892. According to Pavoni, although the States parties to the Convention Against Torture seem indeed unwilling to attribute to Article 14 extra-territorial effect, they should have amended the Convention in that sense. In absence of any move of this kind, it is reasonable to believe that the Torture Convention requires States to exercise universal civil jurisdiction in *extrema ratio*, when no other alternative remedy is available to the victims of torture.
[1083] European Court of Human Rights (Grand Chamber), *Case of Naït-Liman v. Switzerland*, Judgment of 15 March 2018, Application No. 51357/07, paragraph 195. For criticism on this approach to the Tallinn Resolution of the Institut de Droit International, see: E. BENVENUTI, *Quale tutela del diritto di accesso alla giustizia civile per le vittime di gravi violazioni dei diritti umani? Riflessioni a margine della decisione della Grande camera della Corte europea nel caso* Naït-Liman, p. 327.
[1084] Institut de Droit International, *Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes*, Tallinn, 2015. Article 2(1) reads as follows: «A court *should* exercise jurisdiction over claims for reparation by victims provided that: a) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or b) even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State». Italics is my own addition.

victims of torture. In particular, the *Naït-Liman* judgment might constitute a precedent for restrictive interpretations of Article 14 of the Convention Against Torture.[1085] That is why, as pointed out in literature, the Court would have done better to limit its analysis to the *forum necessitatis* principle, avoiding to rule on universal civil jurisdiction[1086] – a matter that the applicant had not even raised. Given the breadth of authority and relevance of the Strasbourg decisions, the inherent risk of such conservative jurisprudence is the freezing of international law, on whose basis are justified the findings of non-violation of Article 6 ECHR.[1087]

In conclusion, while in the past the Strasbourg Court had at least tried to balance the interests at stake when dealing with restrictions of the right of access to justice,[1088] its most recent case law on State immunity from civil jurisdiction and universal civil jurisdiction shows a conservative and State-centred attitude.[1089] This is even more surprising in light of the approach adopted by the Court in employment-related disputes,[1090] where the right of access to courts normally prevails over State immunity, at least in those cases where the concerned employee does not perform any governmental function. In more general terms, the approach adopted by the Court in *Jones* and *Naït-Liman* contradicts its previous efforts – of which the *Al-Dulimi* judgment is an instance[1091] – to reconcile the Convention with other rules of international law in a way that ensures effective access to justice for individuals.

[1085] C. DE MARZIIS, *Diritto di accesso a un giudice e giurisdizione civile universale dinanzi alla Corte europea dei diritti umani*, cit., p. 701.

[1086] *Ivi*, p. 699.

[1087] R. PAVONI, *Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso* Naït-Liman, cit., p. 895.

[1088] This is true, in particular, for the cases *Waite and Kennedy* and *Beer and Regan*, where the ECtHR developed the test of the availability of alternative means of redress. See *supra*, Chapter 2, paragraph 4.3 of this work.

[1089] In this sense, see: R. PISILLO MAZZESCHI, *Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso* Jones *dinanzi alla Corte europea dei diritti umani*, cit., p. 223.

[1090] In this sense, see: European Court of Human Rights, *Case of Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgmentof 14 January 2014, Dissenting Opinion of Judge Kalaydjieva. In her opinion, it is «[…] difficult to accept that this Court had no difficulties in waiving the automatic application of State immunity and finding violations of the right of access to a court concerning disputes over employment (see *Cudak v. Lithuania* [GC], no. 15869/02, ECHR 2010, and *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011), but not concerning redress for torture – as in the present case».

[1091] European Court of Human Rights (Grand Chamber), *Al-Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, Application No. 5809/08. This decision concerned, as the *Kadi* judgment, the smart sanctions regime established by the United Nations Security Council. Differently from the CJEU, the European Court of Human Rights found that the UN Resolutions did not prevent States from establishing adequate judicial guarantees for the accused persons. Switzerland was thus found in violation of Article 6 ECHR. For a comment on this decision, see: L. SICILIANOS, *The European Court of Human Rights Facing the Security Council:Towards Systemic Harmonization*, in «International and Comparative Law Quarterly», Vol. 66 (2017), pp. 783-804.

4. The denial of immunity in case of serious violations of human rights as an *infra legem* practice

As underlined in literature, the international legal system faces a problem of coexistence among rules and principles protecting very different interests, such as the interest of collectives organized into States and the interest of the individual.[1092] The main research question behind this work was to verify if, within the international legal system, fundamental human rights can prevail over conflicting obligations, in particular over the rules of international law aimed at protecting sovereignty. With the *Jurisdicional Immunities* judgment, the International Court of Justice excluded this possibility: by adhering to an exclusively procedural notion of immunities, it stated that customary international law as it presently stood did not allow for any exceptions to State immunity from civil jurisdiction for *acta jure imperii*. From 2012 onwards, however, the few States which have dealt with State immunity in case of grave breaches of international law have shown a tendency – despite the inconsistencies of their practice – towards the limitation of the scope of immunity rules.

Of course, it is too early to talk about a formed new rule of customary law obliging States to exercise their jurisdiction on foreign sovereigns for gross breaches of human rights and humanitarian law. The practice in this area of the law of State immunity is too scarce, given the short time left to States to respond to the verdict of the Hague Court and its subsequent breach by the Italian judicial branch.[1093] Moreover, potentially groundbreaking judicial decisions are still pending, as in the case of the extraordinary appeal before the Federal Supreme Tribunal of Brazil. Despite these circumstances – and the conservative stance maintained by the European Court of Human Rights in the meanwhile – the relevance of judicial decisions denying immunity to foreign States for their wrongful acts must not be underpinned.

It is worth recalling that such State practice is not incoherent with the rationale behind the restrictive doctrine of State immunity. As discussed in the second chapter of this work, the limits introduced to the jurisdictional immunities of foreign States in accordance with the "functional" or "restrictive" doctrine of State immunity responded to a changed concept of State sovereignty, not linked anymore to the absolute power of the king, against whom the

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[1092] M. IOVANE, *Conflicts Between State-Centred and Human-Centred International Norms*, cit., p. 206.

[1093] In the sense that time is a fundamental factor for States to renspond to a breach of customary international law, which may subsequently being accepted as legal and become the new rule, see: S. KATZENSTEIN, *International Adjudication and Custom Breaking by Domestic Courts*, cit., pp. 671-705.

subjects themselves did not enjoy any remedy. The *ratio* of the restrictive doctrine was, therefore, to protect the exercise of the properly sovereign functions of the foreign State, while, at the same time, granting individuals' access to justice with respect to State conduct. In the face of today's notion of sovereignty, increasingly linked to the protection of rights, it is believed that particularly serious acts such as war crimes and crimes against humanity do not deserve, *a fortiori*, the coverage of immunity intended for legitimate acts of government, especially if the victims do not enjoy alternative jurisdictional remedies.

Actually, what domestic courts or national legislators propose while affirming the primacy of fundamental human rights over State immunity rules is a new concept of sovereignty, whose core is the protection of the individual. This is apparent from judgment No. 238/2014 of the Italian Constitutional Court, which explicitly excluded that gross violations of humanitarian law such as the massacre of civilian population and the enslavement of prisoners of war could amount to legitimate acts of government deserving the upholding of State immunity.[1094] What emerges from this kind of reasoning is a new notion of State sovereignty, not anymore based on the Westphalian model. Indeed, the empty exercise of authority by the State is surpassed in favour of what the Tribunal of Florence, in one of the first applications of the judgment of the Constitutional Court, referred to as «the sovereignty of internationally shared fundamental values».[1095] This humanized paradigm of State sovereignty is in line with the progressive development of international law, leading to the affirmation of the legal subjectivity of the individual under international law.[1096]

Even admitting that the refusal to uphold State immunity from civil jurisdiction for wrongful *jure imperii* acts is actually a breach of international law, as found by the International Court of Justice, it must be recognized that there are much worse breaches of the law.[1097] When a State organ – in particular, a domestic court – deviates from what is perceived as the established international rule in order to protect a fundamental human right enshrined in both the domestic and the international legal order, it is actually defending a fundamental value of the international community, so that its conduct can be defined as *infra*

[1094] Italian Constitutional Court, Judgment No. 238/2014, 22 October 2014, paragraph 3.4.

[1095] Tribunal of Florence (Sezione II Civile), *Bergamini v. Federal Republic of Germany*, Application No. 14049/2011, Judgment of 6 July 2015, No. 2468/2015. My translation from Italian. The original expression is «*sovranità dei valori* fondamentali internazionalmente riconosciuti».

[1096] See *supra*, note 90.

[1097] In this sense, with specific reference to the "counter-limits" doctrine applied by the Italian Constitutional Court in judgment No. 238/2014 and to the subsequent case law of Italian courts, see: O. FERRAJOLO, *La sentenza n. 238/2014 della Corte Costituzionale e i suoi seguiti: alcune osservazioni a favore di un approccio costruttivo alla teoria dei "contro-limiti"*, cit., p. 22.

legem, rather than as *contra legem*.[1098] From this point of view, dualist legal orders – as the Italian one – have an added value with respect to systems adhering to monism: albeit open to international law, they are able to express a reasoned resistance against international rules, which is a constructive attitude for promoting changes in the law.

Judgment No. 238/2014 of the Italian Constitutional Court and the subsequent case law of the Italian judiciary provide a further contribution to international law: as underlined in literature, national judicial decisions bear the "power of the example" to the extent that they help to identify general principles of law, namely principles belonging to the *foro domestico* but which are relevant also for the international legal system.[1099] This was the case of judgment No. 238/2014: besides affirming that access to justice is a fundamental principle of the domestic legal order, the Italian Constitutional Court suggested that «the right to a judge and to an effective judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times».[1100]

The primacy enjoyed by the right of access to court within domestic legal systems is in line with the most recent developments of human rights law and international criminal law in the sense of providing access to justice to the victims of gross human rights violations. An instance in this regard is the particular attention devoted to victims within the framework of the International Criminal Court.[1101] Moreover, non-binding instruments such as the aforementioned General Comment No. 3 to the Convention against Torture[1102] and the 2015 Tallinn Resolution of the Institut de Droit International[1103] may be regarded as evidence of an *opinio juris* in favour of States' obligation to provide effective access to justice to the victims of international crimes, independently from the place where the offence took place.

Therefore, even though the practice of States subsequent to the *Jurisdictional Immunities* judgment might not lead to the establishment of a new rule of State immunity in the short run,

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[1098] *Ibidem*.

[1099] On this function performed by national judicial decisions, see: C. GREENWOOD, *The Development of International Law by National Courts*, cit., p. 210.

[1100] Italian Constitutional Court, Judgment of 22 October 2014, No. 238/2014, cit., paragraph 3.4, quoting its previous judgments No. 26/1999, No. 120/2014, No. 386/2004, No. 29/2003.

[1101] Victims' participation in the proceedings and their right to reparation are protected under a number of provisions of the Rome Statute, in particular: Article 68 (Protection of the victims and witnesses and their participation in the proceedings); Article 75 (Reparations to victims); Article 79 (Trust Fund). See: https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (last accessed on 9 August 2019).

[1102] Committee Against Torture, General Comment No. 3 on the Implementation of Article 14 by States Parties, 13 December 2012, paragraph 22. See *supra*, note 973.

[1103] Institut de Droit International, *Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes*, Tallinn, 2015. See *supra*, note 1084.

at least it strenghtens the idea that the right of access to justice is a fundamental principle of the international legal order that must be properly balanced against conflicting principles of general international law.[1104] In other words, national legislation and judicial decisions denying immunity to foreign States for gross violations of international law are part of the observed trend, mentioned earlier in this work, to make human rights, protected by general principles of law, prevail over conflicting obligations, of which the *Kadi* judgment of the Court of Justice of the European Union is a clear example.[1105] It is correct, indeed, to speak of "primacy" with respect to the right of access to court: although it is not an absolute right, it must prevail over conflicting obligations in all those cases where limitations to it would entail its complete impairment, which is clearly the case when the victims of grave human rights violations are left without a remedy.

In conclusion, State practice providing effective access to justice to the victims of human rights violations to the detriment of foreign States' immunity may have a strong impact on the structure itself of international law, insofar as it proposes a better coordination between State-centred and human-centred international norms. The contrast between the two categories of norms deserves one last consideration. It is true that, as underlined by the Italian Court of Cassation in the famous case *Borri c. Repubblica Argentina*,[1106] behind the abstract entities of States are in fact national communities, so that State-centred norms such as immunity rules reflect the interest of collectives. On this basis, it has often been argued that it is unjust to make people – i.e. the standard tax contributor – pay for individual reparations, especially if the wrongful conduct has been committed in the past, as in the case of Nazi crimes.[1107]

Nonetheless, it must be noted that the sacrifice imposed on the national community of the wrongdoer State when immunity is refused is a diffused one, whereas, in case of a restriction of the individual right of access to justice, the sacrifice imposed on the victim of a serious breach of fundamental human rights is considerable. That is why, in a correct balancing operation, the individual right should have priority. The reduction of the scope of immunity rules would bring about a further benefit: if national communities were obliged to pay for the atrocities committed by their rulers, they would probably make sure that persons with

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[1104] In this sense, see: M.I. PAPA, *Il ruolo della Corte Costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014*, cit., p. 18.

[1105] Court of Justice of the European Union, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 September 2008. See *supra*, note 251.

[1106] Italian Court of Cassation (Sezioni Unite Civili), *Borri c. Repubblica Argentina*, Order of 27 May 2005, No. 11225.

[1107] In this sense see, *inter alia*: C. TOMUSCHAT, *The Case of Germany v. Italy before the ICJ*, cit.

positions of responsibility do not commit serious violations of human rights on behalf of the State. In other words, less immunity means stronger accountability, for the benefit of the international community as a whole.

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