

Faculté de droit et de criminologie

State immunity vs. Human Rights:

The Evolution of Jurisprudence in the
Wake of Germany v. Italy and the Debate
Over Humanitarian Exceptions

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Introduction

The law of immunity is often seen as one of the most complex and difficult areas of legal study. We can compare it to an intricate labyrinth with numerous ramifications. It brings us back to fundamental principles of international law – such as the equality and sovereign independence of States – while addressing critical issues of jurisdiction and accountability.¹ The complexity increases as State immunity evolves in response to various challenges. These challenges include, for example, shifts in international relationships, in economic conditions, of environmental concerns, and the overarching global commitment to uphold human rights.²

State immunity has long stood as a fundamental principle in international law. It embodies the concepts of sovereignty and equality among nations. Those are values considered essential for maintaining the delicate balance of international relations. However, these notions are increasingly challenged by the rights of the individuals, such as the right to a fair trial and access to justice, especially in cases involving serious human rights violations. By principle, those two rights are antinomic.³ Although various international organizations have made significant efforts to codify the principles of State immunity and its exceptions, many of these attempts have not fully succeeded. The most recent and notable one is the 2004 United Nations Conventions⁴ on Jurisdictional Immunities of States and Their Property. Although this Convention has yet to enter into force, the efforts undertaken by the UN Commission have greatly increased our understanding.⁵

Unfortunately, the Convention is limited in its scope. It is largely due to the divergent interpretations held by States and the consensus-driven nature of international agreements. The Convention adopts a minimalist approach, leaving several complex legal questions unresolved. This has created a new ‘*no man’s land*’ in the international legal landscape, where unresolved issues persist, leading to a legal battleground where scholars and practitioners continue to debate in a battle of perspectives. These debates keep pushing the boundaries of interpretation.

¹ A. BELLAL, *Immunités et violations graves des droits humains*, 1st ed., Brussels, Bruylant, 2011, p. 38.

² *Ibid.*

³ S. EL SAWAH, *Les immunités des États et des organisations internationales*, 1st ed., Brussels, Larcier, 2011, p. 17.

⁴ United Nations Conventions on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly on 2 December 2004, UN Doc. A/RES/59/38 (not yet in force).

⁵ A. BELLAL, *op. cit.* (note 1), p. 38.

But in recent years, the primary actors who have been shaping customary international law are the States themselves through the growing body of cases brought before national courts. The weight of history, coupled with the resurgence of atrocities in recent years, has forced us to rethink and reshape the law through evolving jurisprudence. The long-standing notion of State immunity has been challenged by the memories of war and the demands for justice.

This flood in legal actions, soaked by the dark chapters of history, reflects a broader trend: courts are becoming more willing to address difficult issues of human rights violations and State responsibility. As we explore these cases, we will examine how courts are navigating – often with difficulty – between the principles of State sovereignty and the imperatives of justice.

When confronted with legal principles that are subject to critique, the jurist's duty is to rigorously examine these doctrines and develop innovative approaches to improve them. His role is not simply to accept or perpetuate questionable traditions but to actively challenge and refine them in the pursuit of justice.⁶ In the context of State immunity, this means not just accepting the established norms but questioning their validity, especially in light of modern values.

It is in this context that this thesis is framed. We will examine the evolving landscape of State immunity in light of recent jurisprudence and the growing demand for accountability in cases of serious human rights violations. And to address these challenges, we will divide our discourse into three chapters. The first one will explore the theoretical foundations of State immunity, explaining the principles that are often difficult to grasp. The second chapter will analyze the pivotal decision of *Germany v. Italy* of the ICJ⁷ that has highlighted the ongoing conflict between State sovereignty and human rights. Finally, the third chapter will examine more recent cases to determine whether there is a discernible modification in the application of State immunity. We will focus on evaluating the possible existence of an emerging trend towards limiting immunity in favor of upholding human rights.

⁶ J.-F. LALIVE, “L’immunité de juridiction des Etats et des organisations internationales”, *R.C.A.D.I.*, 1953, p. 284.

⁷ I.C.J., Jurisdictional Immunity of the State (*Germany v. Italy; Greece Intervening*), Judgment of February 3, 2012, <https://www.icj-cij.org> (August 13, 2024) ; Hereinafter referred to as I.C.J., Jurisdictional Immunity of the State (*Germany v. Italy; Greece Intervening*), *op. cit.* (note 7).

Chapter I. Theoretical Foundations of International Law

Section 1. Principles of State Immunity

In order to understand the discussions about the concept of State immunity, we must go back nearly fifty years ago, in 1977, when the General Assembly firstly proposed that the International Law Commission look into the issue of State immunity.⁸ In 1999, more than twenty years later, the International Law Commission established a Working Group on Jurisdictional Immunities of States and Their Property.⁹ It engaged in extensive discussions on the interaction between State immunity and *jus cogens* norms but concluded that there wasn't enough consensus to pursue a codification on the matter.¹⁰ Both the Third and Sixth Committees did not even analyze deeper the relation between the Convention and *jus cogens* norms, despite the Working Group's recommendations.¹¹ A definitive treatment for this interaction would have been premature, given the objective of the Convention to promote uniformity and clarity.¹² Nevertheless, this situation could potentially result in regressive development in international law¹³.

First, we need to unveil the complexities by clearly distinguishing between immunity from jurisdiction and immunity from execution. Then, we will delineate the concept of State immunity in relation to a closely related concept, jurisdiction¹⁴.

1. Immunity from Jurisdiction

This privilege ensures that a State or an international organization remains free from any interference and immune from being subject to legal proceedings by foreign courts about its exercise of governmental power.¹⁵

⁸ L. MCGREGOR, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly*, vol. 55, n° 2, 2006, p. 437.

⁹ *Ibid.* ; A. BELLAL, *op. cit.* (note 1), p. 39.

¹⁰ General Assembly, Convention on jurisdictional immunities of States and their property: Report of the Chairman of the Working Group, A/C.6/54/L.12, 12th November 1999, § 47 ; Seen in L. MCGREGOR, *op. cit.* (note 8), p. 437.

¹¹ L. MCGREGOR, *op. cit.* (note 8), p. 437.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ A. BELLAL, *op. cit.* (note 1), p. 39.

¹⁵ I. PINGEL-LENUZZA, *Les immunités des Etats en droit international*, Bruylant, Brussels, 1997, p. 1 ; A. FRY and F. BOUQUELLE, « Immunité de juridiction » in *Droit du travail tous azimuts* (under the dir. of H. MORMONT), 1st ed., Brussels, Larcier, 2016, p. 936-937.

The phrase ‘*its exercise of governmental power*’ reflects the evolving nature of State immunity concerning *acta iure gestionis*.¹⁶ On this matter, the European Court of Human Rights provided that State immunity was a procedural exception. It only means that State immunity does not cancel the substantial right of the justiciable, but it only prevents national courts from ruling on this right.¹⁷

The *ratione* behind these immunities is rooted in two key beliefs. The first stems from the traditional immunity conferred to sovereigns, based on the dual principles of equality among sovereign States and the inviolability of the monarch.¹⁸ This immunity later extends to the king’s army and, ultimately, to the State itself.¹⁹ The other justification finds its origin in the Latin adage “*Par in parem non habet iurisdictionem*” which can be translated into “*Equals have no authority over one another*”.²⁰ The principle of sovereignty, understood as the supreme authority of the State, taken with the notion of equality, fundamentally rejects the idea that one State could be subject to the jurisdiction of another.²¹ Today, this latter rationale is the most widely accepted one in legal doctrine.²²

A landmark case in American jurisprudence that solidified the concept of absolute immunity is *Schooner Exchange*²³ and is often cited as a key decision that established the principle of absolute immunity.²⁴ It has profoundly influenced subsequent legal rulings. The rationale encapsulated in this case aligns with contemporary legal doctrine.

This principle can be found in the European Convention on State immunity.²⁵ However, its scope is limited to Austria, Belgium, Cyprus, the United Kingdom, Switzerland, the

¹⁶ A. BELLAL, *op. cit.* (note 1), p. 40.

¹⁷ E.C.H.R., *Al-Adsani v. United-Kingdom* of November 21, 2001, n° 35763/97, <https://hudoc.echr.coe.int> (July 20, 2024), §48.

¹⁸ P. VINCENT, “Du droit au juge en cas de violation du droit international humanitaire : la question de l’immunité de juridiction des Etats à la lumière de l’arrêt immunités juridictionnelles de l’État (Allemagne c. Italie) de la Cour internationale de justice du 3 février 2012”, *R.F.D.L.*, 2012/3, p. 344 ; A. MAHIOU, “L’immunité juridictionnelle des États et de leurs biens : breves observations sur la convention de 2004”, in *L’homme dans la Société Internationale – Mélanges en hommage au Professeur Paul Tavernier*, 1st ed., Brussels, Bruylant, 2013, p. 110.

¹⁹ P. VINCENT, *op. cit.* (note 18), p. 344.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ U.S. Supreme Court, February 24, 1812 (*The Schooner Exchange v. McFaddon & others*), 11 U.S. 116, <https://tile.loc.gov> (July 20, 2024).

²⁴ A. BELLAL, *op. cit.* (note 1), p. 43.

²⁵ European Convention on State immunity, adopted by the Council of Europe, signed at Basel, May 16, 1972 ; I. PINGEL-LENUZZA, *op. cit.* (note 15), p. 1 ; A. FRY and F. BOUQUELLE, *op. cit.* (note 15), p. 937.

Netherlands, Luxembourg and Germany, the only signatories.²⁶ When this Convention does not apply, customary international law takes precedence.²⁷

This principle is also established in the UN Convention on Jurisdictional Immunities of States and Their Property. Nevertheless, this Convention has not yet entered into force due to the limited number of ratifications. Still, the judge may refer to the preparatory works and the Convention itself to inform their understanding of international practice.²⁸

2. Immunity from Execution

The corollary of immunity from jurisdiction concerns the protection of a State's assets. It prohibits the seizure of one State's assets located within another State for the purpose of enforcing a judgment.²⁹ This principle ensures that such assets are protected from coercive measures, whether provisional or definitive.³⁰ Unlike immunity from jurisdiction, immunity from execution remains largely absolute. Nonetheless, some scholars argue that, in light of recent developments in case law, exceptions to this rule may emerge.³¹ And we can see a lot of evolution regarding the treatment of State assets. The previous absolute conception of these assets is being progressively beaten by various countries, including the United States of America, Botswana³², South Africa³³, Kenya³⁴, Sweden and Canada.³⁵

Other scholars consider that immunity from execution should be regarded as a component of immunity from jurisdiction, given that the latter, in its most common interpretation, encompasses both aspects.³⁶ In our understanding, this distinction between these two concepts is crucial, particularly when immunity from jurisdiction is interpreted with such strict rigor. The

²⁶ A. FRY and F. BOUQUELLE, *op. cit.* (note 15), p. 937.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ I. PINGEL-LENUZZA, *op. cit.* (note 15), p. 1.

³⁰ A. FRY and F. BOUQUELLE, *op. cit.* (note 15), p. 937.

³¹ A. PELLET, A. MIRON, M. FORTEAU, Q.D. NGUYEN, and P. DAILLIER, *Droit international public*, Paris, LGDJ, 1999, p. 448.

³² The Industrial Court of Botswana, November 28, 2005 (*Amadou Oury Bah v. Libyan Embassy*), n° 956/2005, *Botswana Law Reports*, vol. 22, p. 25, § 21.

³³ Supreme Court of South Africa (Appellate Division), November 12, 1993 (*The Shipping Corporation of India Ltd. v. Evdomon Corporation and The President of India*), case n° 686/9, <https://www.saflii.org> (July 23, 2024), pp. 38-39.

³⁴ Court of Appeal of Nairobi, December 2, 2016 (*UNICOM Limited v. Ghana High Commission*), <https://kenyalaw.org> (July 23, 2024), §§ 18-24.

³⁵ Y. HAMULI KABUMBA, "L'immunité de l'État et l'objecteur persistant en droit international. Retour sur l'affaire FG Hemisphere c. République démocratique du Congo", *Louvain Law Review*, 2017/3, p. 419.

³⁶ A. MAHIOU, *op. cit.* (note 18), p. 117.

absence of immunity from execution is considered so severe that even if a State has waived its immunity from jurisdiction by a Convention, by a contract, or by appearing in court, this does not automatically imply a waiver of immunity from execution.³⁷ Furthermore, if a judgment denies immunity from jurisdiction, it does not automatically negate immunity from execution.³⁸ The party who obtains such judgment cannot directly enforce it against the State's assets. It must obtain a specific waiver on that point³⁹.

It is also important to note the possibility given by the UN Convention on Jurisdictional Immunities of States and Their Property to permit the seizure of State assets when they are linked to commercial activities.⁴⁰

3. Interaction Between Jurisdiction and Immunity from Jurisdiction: Concept and Challenges

*“The term jurisdiction is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons”.*⁴¹ We can draw from this definition the necessary elements to distinguish those two different concepts. The rules of jurisdiction serve to delineate the individuals or territory over which a State may exercise its sovereign powers, while immunity from jurisdiction serves to protect a party from being subject to the court's authority.⁴²

In the *Yerodia* case law of the ICJ, it is established that immunity from jurisdiction can only be invoked before a court that has asserted its jurisdiction⁴³: *“(...) it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction”.*⁴⁴

This distinction is not only a linguistic one; it has led to significant confusion and continues to have consequences. The combination of these concepts frequently gives rise to numerous

³⁷ *Ibid.*

³⁸ A. BELLAL, *op. cit.* (note 1), p. 40.

³⁹ A. MAHIOU, *op. cit.* (note 18), p. 117.

⁴⁰ A. BELLAL, *op. cit.* (note 1), p. 41.

⁴¹ B. H. OXMAN, “Jurisdiction of States”, *The Max Planck Encyclopedia of Public International Law*, vol. 10, 1987, p. 552.

⁴² A. BELLAL, *op. cit.* (note 1), p. 41.

⁴³ *Ibid.*

⁴⁴ I.C.J., Arrest warrant (Democratic Republic of the Congo v. Belgium), Judgment of February 14, 2002, *I.C.J. Reports*, 2002, § 46.

debates, and in particular when it comes to the accountability of States for violations of international law.

This adds another layer of complexity when pursuing States or State officials accused of serious crimes, such as war crimes or crimes against humanity. As we have seen, the assertion of jurisdiction by a court is a necessary criterion for challenging immunity. But even when the jurisdiction is established, the State or State official can still invoke immunity to shelter themselves from legal responsibility.

Section 2. Main Exceptions to State Immunity: From Absolute to Restrictive Doctrine

1. The Evolving Doctrine of State Immunity: The Acta Jure Gestionis Exception

State immunity is no longer considered absolute in modern international law. Over the years, we have witnessed a growing number of exceptions to what was once absolute. One such exception is the *acta jure gestionis* doctrine, which reflects this shift. Scholars often refer to this as the ‘*restrictive doctrine*’, contrasting it to the longstanding absolute doctrine that prevailed for centuries.⁴⁵

The earliest traces of this shift in State immunity can be found in Belgian and Italian case law.⁴⁶ The crucial distinction between *acta jure imperii* and *acta jure gestionis* emerged in the first half of the twentieth century. The former, concerning actions taken by a State in its sovereign capacity, still confers immunity when the claims arise from these governmental acts. The latter, involving commercial activities or transactions governed by private law, no longer offers the same protection from legal claims. The most logical explanation for this shift in the State immunity lies in its very rationale. If we truly view immunity as essential for protecting a State’s sovereignty, then it follows that immunity becomes unnecessary when that sovereignty is not at risk.⁴⁷

The challenge arises when we need to delimitate *acta jure imperii* and *acta jure gestionis*, as no clear definition exists to guide us. Moreover, two schools of thought complicate the matter even

⁴⁵ S. KNUCHEL, “State Immunity And The Promise Of Jus Cogens”, *Northwestern Journal of International Human Rights*, vol. 9, 2011, p. 151 ; C. I. KEITNER and S. DODSON, “Jam v. International Finance Corp.”, *The American Journal of International Law*, vol. 113, n° 4, 2019, p. 806.

⁴⁶ A. CASSESE, *International Law*, 2nd ed., Oxford, Oxford University Press, 2005, p. 100.

⁴⁷ P. VINCENT, *op. cit.* (note 18), p. 344.

further. The traditional view holds that the qualification should be determined by the forum State.⁴⁸ The second doctrine argues that the distinction should be based on common principles of international law.⁴⁹ However, this debate seems purposeless as both usually come to the same conclusion.⁵⁰ The character of a foreign State's act is generally determined by its nature rather than its purpose.⁵¹

Due to the lack of clarity, numerous discrepancies in application quickly emerged between State's practices, resulting in legal uncertainty.⁵² Some States, especially the common law States, have replaced this delicate situation with national immunity legislations.⁵³

I. Codification: Analysis of the European and the UN Convention

We have also seen various Conventions attempt to codify and define these exceptions.⁵⁴ Chronologically, the first attempt was the European Convention on State Immunity⁵⁵ which is currently binding on only eight States⁵⁶. This Convention was more than just an effort to codify existing customs; it represented a real attempt to unify the diverse State practices regarding State immunity.⁵⁷ The structure of this Convention is particular. The first fourteen Articles detail the exceptions to immunity from jurisdiction, while the principle of immunity itself is only introduced in the fifteenth Article. This Article is worded as follows: "*A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear*"

We can find the *acta jure gestionis* exception in Article 7, but there is no mention of a *jus cogens* exception. This omission aligns with the Convention's objective of achieving uniformity and

⁴⁸ C.-T. EBENROTH, "Reviewed Work: Staatenimmunität und Gerichtszwang", *The American Journal of International Law*, vol. 81, n° 4, 1987, p. 966.

⁴⁹ H. DAMIAN, *Staatenimmunität und Gerichtszwang*, Berlin Heidelberg New York Tokyo, Springer Berlin, 1985, p. 261.

⁵⁰ C.-T. EBENROTH, *op. cit.* (note 48), p. 966.

⁵¹ *Ibid.*

⁵² P. VINCENT, *op. cit.* (note 18), p. 345.

⁵³ L. M. CAPLAN, "State immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", *The American Journal of International Law*, vol. 97, n° 4, 2003, p. 743 ; We can name the U.S. Foreign Immunities Act (F.S.I.A.) of 1976 and the UK State Immunity Act (S.I.A.) of 1978.

⁵⁴ P. VINCENT, *op. cit.* (note 18), p. 346.

⁵⁵ European Convention on State immunity, adopted by the Council of Europe, signed at Basel, May 16, 1972.

⁵⁶ See *supra* Chapter I, Section I, point 1, A.

⁵⁷ P. VINCENT, *op. cit.* (note 18), p. 346.

consensus among member States. At the time, the concept of *jus cogens* was not developed as it is today. Introducing *jus cogens* norms into the discussion would have likely complicated the consensus-building process and raised politically sensitive issues.

The second attempt refers to the UN Convention we have previously discussed. It is important to reiterate, as often as necessary, that this Convention is not yet in force.⁵⁸ The principle of State immunity is articulated in Article 5: “*A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention*”.

We can find a few exceptions in the Convention, including the *acta jure gestionis* exception, which is specifically mentioned in Article 10.

In drafting the Convention, all pertinent doctrines, treaties, case law, and national legislation were thoroughly considered. Yet, it is noteworthy that the majority of the sources used date back to the late 1970s and early 1980s, a period during which courts predominantly upheld claims of sovereign immunity.⁵⁹ Although some discussions continued up until 2004, the year the Convention was opened for signature, subsequent developments and case laws that emerged in the intervening years were not addressed.⁶⁰ The current legal landscape may differ substantially from the one at the time of the Convention’s adoption. Recent jurisprudence and broader developments on the right to reparation taken together seem to have shifted the conception of State immunity, granting an exception in cases concerning *jus cogens* norms.⁶¹

The legal principles behind this Convention are often regarded as a useful summary of customary international law, although this view is not universally accepted.⁶² While the Convention aims to codify customary practices, it has faced criticism from both scholars⁶³ and judicial decisions⁶⁴.⁶⁵ Notably, the European Court of Human Rights uses this Convention as

⁵⁸ To date, this Convention counts only 28 signatories and 23 parties. It requires 30 ratifications to come into effect.

⁵⁹ L. MCGREGOR, *op. cit.* (note 8), p. 438.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² P. VINCENT, *op. cit.* (note 18), p. 349.

⁶³ S. EL SAWAH, *op. cit.* (note 3), p. 305.

⁶⁴ Cass. fr., December 16, 2003 (Bücheron c. État allemand), *Bull.* I, p. 206.

⁶⁵ P. VINCENT, *op. cit.* (note 18), p. 349.

customary international law.⁶⁶ Whereas the International Court of Justice does not grant it the same status⁶⁷. This contrast highlights the divergent opinions regarding the Convention's effectiveness and acceptance in reflecting customary practices.

Though ambitious, the UN Convention faces criticisms. Established nearly two decades ago, it may reflect perspectives and practices that have since evolved. Recent legal developments have shifted expectations and standards, particularly concerning human rights and international norms. As a result, the Convention might not adequately address contemporary challenges, leaving certain aspects of international law outdated.

From examining these two Conventions, it is clear that the principle of immunity from jurisdiction is no longer absolute and has been subject to numerous exceptions and reinterpretations due to the evolution of international legal standards. Among the most notable exceptions, a State can always waive its immunity, and immunity does not apply to acts of a commercial or administrative nature.⁶⁸ It is also important to note that States still have the discretion to grant other States a greater immunity than what is provided under the Conventions.⁶⁹

II. State Immunity Under Belgian Law

In Belgian law, State immunity is addressed in Article 1412^{quinquies} of the Belgian Judicial Code. This article outlines the scope of State immunity within Belgian jurisdiction, specifically addressing the seizure of property belonging to foreign powers or supranational or international

⁶⁶ E.C.H.R., *Guadagnino v. Italy and France* of January 18, 2011, n° 2555/03, <https://hudoc.echr.coe.int> (August 1, 2024), § 70: “As the principles enshrined in article 11 of the 2004 Convention form an integral part of customary international law, they are binding on Italy even though it has not ratified the Convention. (...)” (translated from french) ; E.C.H.R., *Sabeh El Leil v. France* of June 29, 2011, n° 34869/05, <https://hudoc.echr.coe.int> (August 1, 2024), §18: “State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 (“the 2004 Convention”). The principle is based on the distinction between acts of sovereignty or authority (*acte jure imperii*) and acts of commerce or administration (*acte jure gestionis*).”

⁶⁷ I.C.J., *Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening)*, *op. cit.* (note 7), § 54: “(...) Neither State is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the “United Nations Convention”), which is not yet in force in any event (...)” We can observe that the ICJ does not address the Convention's role as a summary of customary law but rather focuses on its inapplicability to the case at hand, as neither of the States are parties to this Convention.

⁶⁸ P. VINCENT, *op. cit.* (note 18), p. 349.

⁶⁹ *Ibid.* ; Countries of the former Soviet Union have opted for a broader immunity, not distinguishing between *acta jure imperii* and *acta jure gestionis*

organizations governed by public law. According to this article, such property is principally exempt from seizure, with certain exceptions.⁷⁰

However, it is important to note that this provision does not impact the analysis or conclusions of this thesis. The primary focus remains the potential recognition of an exception to State immunity in cases of serious human rights violations. This brief look into Belgian law is mainly because this thesis is developed at the University Catholic of Louvain, a Belgian university.

2. Jus Cogens Norms and the Interplay with Human Rights Violations

1. Jus cogens: The ‘Empty Box’ of Peremptory Norms in International Law

The principle of *jus cogens*, described by Georges Abi-Saab⁷¹ as “*an empty box that remains useful because without it, it cannot be filled*” reflects the enduring criticisms that were raised against the Article 53 of the Vienna Convention on the Law of Treaties⁷². This article has been left intentionally ambiguous, a decision that led to some considerable debate. This ambiguity is somewhat understandable given the ambiguous phrasing chosen for this article. It does not specify any criteria required for a norm to be deemed peremptory, nor does it provide an exhaustive list of such norms. While some principles, such as the prohibition of torture, slavery and genocide, are widely accepted as mandatory standards, the absence of a clear list has led to a certain number of judicial debates.

It is important to notice that, even prior to the adoption of the VCLT, human rights were perceived as intrinsic to *jus cogens* norms, standing in contrast to *jus dispositivum*⁷³. This perception can be found in many ways, and one of them is the dissenting opinion of Judge Tanaka in the South West Africa case: “*If we can introduce in the international field a category of law, namely jus cogens, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to jus dispositivum, capable of being changed by*

⁷⁰ On this particular subject cf. J. VANDERSCHUREN, “La saisie des biens appartenant à une puissance étrangère en droit belge”, *R.D.I.A.*, n° 1, 2018, pp. 324-358.

⁷¹ A. BIANCHI, “Human Rights and the Magic of Jus Cogens”, *E.J.I.L.*, vol. 19, n° 3, 2008, p. 491.

⁷² *Ibid.*, p. 492 ; G. ABI-SAAB, “The third World and the Future of the International Legal Order”, *Revue Egyptienne de Droit International*, 1973, p. 53.

⁷³ A. BIANCHI, *op. cit.* (note 71), p. 492.

way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the jus cogens”⁷⁴.

To the question whereas we could create a *jus cogens* norm by a treaty, it clashes with the idea that it can only emerge by customary law. This last point of view is based on Article 53 of the VCLT, which mentions explicitly that peremptory norms are part of general international law.

In contrast, regarding human rights, some scholars consider that their establishment as general rules of international law arise not from customary law but from general principles.⁷⁵ Although the processes underlying these two concepts are related, they remain different. General principles surface not from traditional State practice, but from diverse moral and humanitarian considerations that manifest in legal form.⁷⁶

II. Navigating the Grey Area: Defining Serious Human Rights violations

Identifying what falls under the conception of ‘*human rights violations*’ presents a significant challenge, mostly due to the difficulty of formulating a definition that is both precise and concise.⁷⁷ However, it is possible to sharpen the blurred edges of this concept. Legal doctrine and jurisprudence help us understand that ‘*serious violation of human rights*’ pertain to breaches of rights safeguards by peremptory norms of international law.⁷⁸ Yet, this ambiguity is viewed by M. HAFNER, former president of the UN Committee on the negotiation of the UN Convention, as a significant obstacle to adopting an exception to State immunity for such violations: “*To remove immunity, we must prosecute the individual person or persons responsible for the serious violations and this can be undertaken in other fields but not in the context of this Convention. Anyway, what is meant by «serious violations of human rights»? What would be the scope of any such exception? Is denial of freedom of speech a serious violation? There would be significant problems of interpretation and this was also a reason why we did not take up the issue.* »⁷⁹.

⁷⁴ I.C.J., South West Africa (Ethiopia v. South Africa), Dissenting Opinion of Judge TANAKA’s, Judgment of July 18, 1966, <https://www.icj-cij.org> (August 3, 2024) ; Seen in A. BIANCHI, *op. cit.* (note 71), p. 492.

⁷⁵ A. BIANCHI, *op. cit.* (note 71), p. 493.

⁷⁶ *Ibid.*

⁷⁷ M. COLOMBO, *Dossier: Qu’est-ce qu’est une violation grave des droits humains ?*, <https://www.humanrights.ch> (July 29, 2024), p. 1.

⁷⁸ A. BELLAL, *op. cit.* (note 1), p. 64.

⁷⁹ *Ibid.*

Fortunately, certain texts provide clarity on which human rights are included in this category.⁸⁰ The UN International Law Commission, in its commentary on the Articles on State Responsibility, emphasized that: “*Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination*”.⁸¹ We can find a similar perspective in other documents, such as the UN General Assembly Resolution on the 2005 World Summit Outcome, which categorizes serious human rights violations as crimes like genocide, crimes against humanity, war crimes, and ethnic cleansing.⁸² The Inter-American Commission on Human Rights has even recognized forced disappearances and the death penalty for minors as violations of peremptory norms.⁸³ United States goes even further by recognizing in the *Restatement (Third) of the Foreign Relations Law of the United States* a high number of human rights norms that have attained peremptory status.⁸⁴ Notably, in paragraph 702, under the heading ‘Customary International Law of Human Rights’, the Restatement broadens this recognition by stating: “*A state violates international law if, as a matter of state policy, it practices, encourages or condones: (...) g) a consistent pattern of gross violations of internationally recognized human rights*”.⁸⁵

Andrea Bianchi even states rightfully that: “*In fact, to think of both human rights and jus cogens at the same time is an almost natural intellectual reflex. It is as if human rights were a quintessential part of jus cogens*”.⁸⁶

We can see that this close connection between human rights and *ius cogens* norms is further underscored by the relationship they share. Human rights are not merely legal obligations but are strongly embedded in the collective and individual conscience of the international community, granting them a powerful force named by Bianchi ‘magical’ force.⁸⁷ This intrinsic

⁸⁰ *Ibid.*

⁸¹ United Nations, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, *Report of the International Law Commission on the work of its fifty-third session*, 2001, p. 85 ; I.C.J., East timor (Portugal v. Australia), Judgment of June 30, 1995, *I.C.J. Reports*, 1995, p. 90-102 §29 ; I.C.J., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, *I.C.J. Reports* 1996, p. 226-258, §83.

⁸² M. COLOMBO, *op. cit.* (note 77), p.1.

⁸³ Inter-American Commission on Human Rights, Michel Domingues v. United States of America, Report of October 22, 2002, n° 12.285, § 49 ; Seen in A. BELLAL, *op. cit.* (note 1), p. 64.

⁸⁴ American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, 1987, <https://iow.eui.eu> (August 4, 2024).

⁸⁵ *Ibid.*, §702.

⁸⁶ A. BIANCHI, *op. cit.* (note 71), p. 495.

⁸⁷ *Ibid.*

link explains why human rights norms are so central to discussions on *jus cogens*. The norms recognized as peremptory are not just protected by law, they are seen as fundamental moral imperatives that bind the international community together. As such, violations of human rights are not merely breaches of legal norms, but direct attacks on the shared values of the international legal order. Understanding the almost ‘magical’ power of these norms helps us comprehend their role in shaping both international law and the global moral framework.⁸⁸

III. State Immunity vs. Human Rights: Divergent Legal Traditions

Given the importance of *jus cogens* norms in safeguarding fundamental human rights, it is essential to examine how different legal systems approach State immunity in the context of serious human rights violations, considering their respective legal traditions.

Common law States, having opted for specific legislation on the matter, generally uphold State immunity in a strict way, even in case of *jus cogens* violations⁸⁹. This strict approach is rooted in a legal philosophy that emphasizes State sovereignty and the importance of protection of States from foreign litigation⁹⁰.

In contrast, civil law countries, which often lack specific statutes on State immunity, base their legal reasoning on customary international law. This reliance on customary law allows for a more flexible approach, where State immunity can be set aside in cases of serious breaches of *jus cogens* norms.⁹¹

This divergence can be attributed to the fact that common law systems have evolved throughout the centuries under a stringent emphasis on State sovereignty and State immunity. Conversely,

⁸⁸ *Ibid.*, p. 492.

⁸⁹ A. BELLAL, *op. cit.* (note 1), p. 38.

⁹⁰ E.g. U.S. Supreme Court, November 30, 1992 (*Saudi Arabia v. Nelson*), 507 U.S. 349, <https://supreme.justia.com> (August 4, 2024). In 1983, an American citizen was hired through a job offer to oversee the proper functioning of machines. Although he was employed by a U.S. agency, his work was conducted on behalf of a hospital in Saudi Arabia. Several months later, the Saudi government arrested him, and he alleged that he was beaten, tortured, and subjected to arbitrary detention. He was released 39 days later. Since all the events took place outside US territory, the Foreign Sovereign Immunities Act (FSIA) could not be applied. The hospital was, in fact, owned by the Saudi government. The Court of Appeals found that the circumstances of the case were so closely tied to Nelson’s employment at the hospital that a territorial link to the United States was established. Additionally, the court considered the fact that he was hired by a U.S. agency as a relevant factor. However, the Supreme Court rejected this argument. It upheld Saudi Arabia’s immunity, ruling that no exception under the FSIA applied to this case.

⁹¹ A. BELLAL, *op. cit.* (note 1), p. 38.

civil law systems apply these principles more flexibly, influenced by international law principles and universal norms. These systems mostly prioritize fundamental rights, which can lead to a point where State immunity is seen as secondary in cases of severe human rights violations.

However, these differences are not solely due to legislative choices or historical evolution, they are also influenced by the underlying judicial philosophies of these legal systems. One of many key aspects is the presence of dualism in certain legal orders. In dualist systems, international law and domestic law are considered separate and distinct spheres. It then requires a formal incorporation of international norms into domestic law. This separation can lead to a more rigid application of State immunity, where international norms must be recognized and enforced by domestic law to have effect.

Conversely, in monist systems, where it does not require such formal incorporation, there is often greater receptivity to applying international norms directly, including those that challenge State immunity. This difference in judicial philosophy can explain the divergent approaches to State immunity.

To conclude, examining State immunity in relation to peremptory human rights norms leads to a broader questioning of the structure of the legal order. It challenges us to find the ways in which international and domestic laws interact in the pursuit of justice.⁹²

⁹² *Ibid.*

Chapter 2: Germany v. Italy: A Turning Point in the Evolution of State Immunity and Human Rights Jurisprudence

Section 1. Historical Background of the ICJ Decision: The Clash Between State Immunity and the Quest for Justice

In order to fully understand the facts of this case, we must revisit a tragic chapter of our history: the Second World War. The *Germany v. Italy*⁹³ case, decided by the International Court of Justice (ICJ) in 2012, represents the confrontation between the principle of State immunity and the pursuit of justice for heinous war crimes (serious violations of human rights). This case intertwines threads of history, international law, and the enduring human quest for redress for wrongs committed during one of the darkest chapters of the twentieth century.

Among the countless victims were Italian civilians and soldiers who were subjected to forced labor, massacres, and other brutalities. The descendants of those Italians captured by the Nazi regime during the Second World War on Italian territory began to bring Germany before the Italian Courts to obtain compensation. These horrors, deeply embedded in the collective memory of Italy, came to haunt the legal landscape decades later.

Fast-forward to the twentieth century, the Italian courts, moved by the pleas of survivors and their descendants, began to challenge the legal immunity that Germany long claimed to avoid civil remedies for its wartime acts. Plus, the Peace Treaty with Italy of 1947, under its Article 77(4) states that: “*Italy waive[d] on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945*”⁹⁴.⁹⁵ A few years later, in 1953, the German Federal Compensation Law Concerning Victims of National Socialist Persecution⁹⁶ allowed some avenues of compensation but did not satisfy a large number of Italian citizens.⁹⁷ In 2000, a German federal law provided more means of compensation, but the

⁹³ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7).

⁹⁴ Article 77(4) of the Treaty of Peace with Italy, 1947.

⁹⁵ A. ORAKHELASHVILI, “Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)”, *The American Journal of International Law*, vol. 106, n° 3, 2012, p. 609.

⁹⁶ Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung September 18, 1953, *Bundesgesetzblatt*, I, 1387, amended by Zweites Änderungsgesetz zum Bundeszusatzgesetz zur Entschädigung von Opfern der nationalsozialistischen Verfolgung (Federal Law for Compensation of Victims of National Socialist Persecution of September 18, 1953, Federal Law Gazette, I, 1387, amended by the Second Amendment to the Federal Supplementary Law for Compensation of Victims of National Socialist Persecution), 1955, *Bundesgesetzblatt*, I, p. 506.

⁹⁷ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 609.

German authorities interpreted this law as not extending to POWs (prisoners-of-war).⁹⁸ After this, many Italians remained uncompensated.⁹⁹

Luigi Ferrini, who had endured the horrors of war, was arrested and deported to work under threat. He initially attempted to bring a claim in Germany.¹⁰⁰ But the German courts dismissed his case, citing that it did not fall within the terms of a domestic statute providing for reparation claims arising out of the Second World War.¹⁰¹

Ferrini brought a claim before the Italian courts, and the case went up to the Italian *Corte di Cassazione*. The Court rejected Germany's claim to immunity, reasoning that no State immunity should apply in the face of serious *jus cogens* violation.¹⁰² The *Corte di Cassazione* held that serious violations of human rights, like those perpetrated by the Nazis, constituted breaches of *jus cogens* norms, thereby overriding the usual protection of State immunity, even though Germany's military actions were considered *acta jure imperii*, which normally enjoy immunity.¹⁰³

The Court even recognized that, although these acts were carried out on official duties, crimes recognized under international law can nonetheless result in both civil and criminal liability for those responsible.¹⁰⁴ After examining international precedents on individual criminal liability, the Court considered that deportation and forced labor constituted indeed war crimes and thus violations of international law, even at the time those acts were committed.¹⁰⁵

One of the central arguments put forth by the *Corte di Cassazione* was that State immunity directly conflicted with the fundamental values deemed essential by the international community.¹⁰⁶ According to the Court reasoning, this tension between State immunity and universal values should be resolved in favor of the higher normative principles, as echoed in

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ L. MCGREGOR, *op. cit.* (note 8), p. 439.

¹⁰² Corte Suprema di Cassazione (Italian Supreme Court of Cassation), *Ferrini c. Repubblica Federale di Germania* (Ferrini v. Federal Republic of Germany), March 11, 2004, n° 05044, *Rivista di diritto internazionale*, 2004, p. 658.

¹⁰³ L. MCGREGOR, *op. cit.* (note 8), p. 439.

¹⁰⁴ A. BELLAL, *op. cit.* (note 1), p. 106.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

the dissenting opinion of judges in the *Al-Adsani*¹⁰⁷ case.¹⁰⁸ This conclusion is further justified by recognizing that human rights are fundamental principles of the international legal order, which inevitably impacts the interpretation of other norms within this system. Notably, it affects the principle of sovereign equality between States, given that such a principle derives solely from conventional or customary law.¹⁰⁹

This landmark decision by the Italian courts triggered a wave of subsequent claims.¹¹⁰ In the *Criminal Proceedings Against Milde* case¹¹¹, the Italian *Corte di Cassazione* reaffirmed the position it had taken in *Ferrini*.¹¹²

Fearing a flood of litigation, Germany turned to the ICJ to assert its rights on December 23, 2008. Germany's action was based on several alleged violations by Italy: failing to respect Germany's jurisdictional immunity under international law, allowing enforcement proceedings against German property, and the execution and recognition of Greek judgments relating to the German forces' massacre in Distomo in 1944.¹¹³

Section 2. State Immunity v. Jus Cogens Norms: Analysis of the ICJ ruling

Germany invoked the European Convention for the Peaceful Settlement of Disputes as the basis for the Court's jurisdiction. The Court confirmed its jurisdiction in the first part of the judgment.¹¹⁴ Due to the fact that there was no treaty between Italy and Germany on State immunity, the ICJ stated that any entitlement to immunity could only derive from customary international law.¹¹⁵ And the customary international law is based on settled State practice,

¹⁰⁷ E.C.H.R., *Al-Adsani v. The United Kingdom* of November 21, 2001, Joint Dissenting Opinion of Judges ROZAKIS and CAFLISCH joined by Judges WILDHABER, COSTA, CABRAL BARRETO and VAJIĆ, n° 35763/97, <https://hudoc.echr.coe.int> (August 9, 2024).

¹⁰⁸ A. BELLAL, *op. cit.* (note 1), p. 106.

¹⁰⁹ *Ibid.*

¹¹⁰ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 609.

¹¹¹ Corte Suprema di Cassazione (Italian Supreme Court of Cassation), *Procedimento penale contro Milde* (Criminal proceedings against Milde), January 13, 2009, n° 1072, 92 *Rivista di diritto internazionale (R.D.I.)*, 2009, p. 618.

¹¹² A. ORAKHELASHVILI, *op. cit.* (note 95), p. 610 ; In reality, Italy has had multiple opportunities to reaffirm its position on this matter. For the record, here are some notable cases: Corte Suprema di Cassazione (Italian Supreme Court of Cassation), *Luca Borri c. Repubblica Argentina* (Luca Borri v. Republic of Argentina), May 27, 2006, n° 11225, *Rivista di diritto internazionale*, 2005, p. 856 ; Corte Suprema di Cassazione (Italian Supreme Court of Cassation), *Repubblica Federale di Germania c. res. cons. ministri, Marocco e altri* (Federal Republic of Germany vs. Council of Ministers, Morocco and others, May 29, 2008, n° 14201, <https://www.asser.nl> (August 6, 2024).

¹¹³ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 610.

¹¹⁴ I.C.J., *Jurisdictional Immunity of the State* (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), §§ 27-51.

¹¹⁵ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 610.

based on the ruling of the Court in 1969 in the *North Sea Continental Shelf*¹¹⁶ case.¹¹⁷ The Court recognized the importance of analyzing national legislation and national judgments: “*In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention*”¹¹⁸. The first step of the Court’s analysis was to determine whether torts committed by States are entitled to immunity.

The Court began by distinguishing the well-known distinction between *acta jure imperii* and *acta jure gestionis*.¹¹⁹ Even though considered completely illegal, the acts carried out by Germany still remain *acta jure imperii* acts.¹²⁰ It was even acknowledged by Italy: “*The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted acta jure imperii. The Court notes that Italy, in response to a question posed by a Member of the Court, recognized that those acts had to be characterized as acta jure imperii, notwithstanding that they were unlawful*”.¹²¹ If we follow the current position on State immunity at that time, we should then come to the conclusion that Germany enjoyed immunity.¹²² However, the Court had to deal with two main arguments submitted by Italy.¹²³

¹¹⁶ I.C.J., *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands), Judgment of February 20, 1969, <https://www.icj-cij.org> (August 6, 2024), § 77.

¹¹⁷ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 610.

¹¹⁸ I.C.J., *Jurisdictional Immunity of the State* (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 55.

¹¹⁹ X. YANG, “Absolute immunity of foreign armed forces from tort proceedings”, *The Cambridge Law Journal*, vol. 71, n° 2, p. 283-284.

¹²⁰ *Ibid.*, p. 284 ; I.C.J., *Jurisdictional Immunity of the State* (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), §§ 60-65.

¹²¹ I.C.J., *Jurisdictional Immunity of the State* (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 60.

¹²² X. YANG, *op. cit.* (note 119), p. 284.

¹²³ *Ibid.*

1. The First Argument of Italy: The Tort Exception

Conscious of the lack of support for the general exception to immunity in cases of serious international crimes, Italy proposed other justifications to the ICJ. One of the justifications was the *tort exception*, applicable at the same time to *acta jure imperii* and *acta jure gestionis*.¹²⁴ The *tort exception* is an exception that exists notably in the United States Foreign Sovereign Immunities Act (FSIA) 1978 and the United Kingdom State Immunity Act (SIA) 1978.¹²⁵ This concept is also reflected in Article 11 of the 1972 Basel Convention, though notably, it explicitly excludes the activities of armed forces from its application. It is also reflected in Article 12 of the 2004 United Nations Convention, although it remained silent on its applicability to the military activities of foreign States, whether conducted within the forum State or during armed conflicts. This omission raises the questionable relevance of the provision in such ambiguous and unresolved contexts. Even though the United Nations Convention may help understand the general practice of customary international law, we must recall that the ICJ, in contrast to the legal teachings of the ECHR, does not rely at all on this Convention: “(...) *Neither State is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the “United Nations Convention”), which is not yet in force in any event (...)*”.¹²⁶

This principle is an exception to the principle of State immunity and allows compensation for damages caused to the person or their property for damages occurring within the forum State’s territory, even though the act in question was performed *acta jure imperii*.¹²⁷ The ICJ observed that such an exception to State immunity originated in cases involving road accidents and similar insurable incidents.¹²⁸ While national laws providing for this exception do not differentiate between acts performed *jure imperii* and *jure gestionis*, the Court avoided engaging in such discussion.¹²⁹ It did, however, acknowledge that some States have explicitly rejected such distinction, as evidenced by the Supreme Court of Canada in *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*.¹³⁰

¹²⁴ I.C.J., Public sitting in the case concerning Jurisdictional Immunities of the State, Verbatim record of September 13, 2011, n° 2011/18, <https://www.icj-cij.org> (August 9, 2024), points 8-12.

¹²⁵ H. FOX, “Private Law Damages as a Method of State Accountability: The Tort Exception to State Immunity”, *Third World Legal Studies*, vol. 12, 1993, p. 107.

¹²⁶ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 54.

¹²⁷ H. FOX, *op. cit.* (note 125), pp. 107-108.

¹²⁸ X. YANG, *op. cit.* (note 119), p. 284.

¹²⁹ *Ibid.*

¹³⁰ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 64.

The Court emphasized the consideration that State immunity remained applicable to acts committed by foreign armed forces during armed conflict, pointing out the lack of judicial practice denying immunity in such case.¹³¹ It also recognized that while nine out of ten national statutes providing for State immunity deny it for territorial torts, only two explicitly exclude the activities of armed forces from immunity.¹³² This difference highlights a significant divergence in State practice, undermining the establishment of a consistent customary norm. The absence of consistent application of the tort exception to armed forces across different jurisdictions indicated that we were, at that time, far from recognizing this as binding international custom.

Then, the Court analyzed the State practice in the form of judgments of national courts.¹³³ The earliest examples of decisions according to State immunity to acts of foreign armed forces characterized as *acta jure imperii* are attributed to the courts of Egypt, Belgium and Germany.¹³⁴ Years later, several national courts have upheld the immunity of the State for damages caused by warships or military exercise.¹³⁵ The Court recognized only one decision that supported the Italian argument: the Greek decision. The *Distomo*¹³⁶ case of the Hellenic Supreme Court in 2000 argued at length on the tort principle without having expressed the application of it to the acts of armed forces during armed conflict.¹³⁷ But ultimately, this reasoning was repudiated by the Greek Special Supreme Court in its judgment *Margellos v. Federal Republic of Germany*¹³⁸ and even held that the tort principle was not applicable to the acts of the armed forces of a State.¹³⁹ The Court concluded that there was not sufficient State practice nor *opinio juris* to consider an exception to State immunity under customary international law.¹⁴⁰

¹³¹ X. YANG, *op. cit.* (note 119), p. 284.

¹³² A. ORAKHELASHVILI, *op. cit.* (note 95), p. 611.

¹³³ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), §§ 72-74.

¹³⁴ *Ibid.*, § 72.

¹³⁵ *Ibid.*

¹³⁶ Αρείος Πάγος (Hellenic Supreme Court), Δίστομο (Distomo case), May 4, 2000, n° 11/2000, <https://www.areiospagos.gr> (August 8, 2024).

¹³⁷ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 76.

¹³⁸ Ειδικό Δικαστήριο (Greek Special Supreme Court), Margellos v. Federal Republic of Germany, September 17, 2002, n° 6/2002, *International Law in Domestic Courts*, n° 87.

¹³⁹ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 76.

¹⁴⁰ X. YANG, *op. cit.* (note 119), p. 284.

2. The Second Argument of Italy: The Last Resort for Victims in National Courts

Italy tried to argue that an exception to State immunity could be justified in cases involving serious violations of international law, particularly when the State in question acknowledges its liability but refuses to compensate.¹⁴¹ In such situations, if bringing the claim before the national court represents the final and only way for victims to seek compensation, this could allow waiving immunity.¹⁴² The Court divided its argumentation into three parts: Firstly, Italy considered that the acts perpetrated by Germany constituted “*serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity*”.¹⁴³ In addition, Italy argued that these violations were violations of peremptory norms of international law (*jus cogens* norms).¹⁴⁴ Finally, since no other avenues for redress were available to the claimants, granting jurisdiction became necessary as a final resort.¹⁴⁵

Italy, with the first part of its argumentation, tries to convince the Court that the gravity of the violations has the effect of depriving Germany of an entitlement to immunity.¹⁴⁶ However, following the Court, there would be a logical issue in linking State immunity to the severity of the unlawful act. Immunity serves as protection from the legal process itself and requires courts to assess immunity before examining the case’s merits. If we consider immunity as conditional on the State committing a serious violation, courts will have to analyze the case’s substance to decide on jurisdiction, undermining the concept of immunity itself. Plus, if alleging that a State committed such wrongful acts were enough to waive its immunity, the immunity could easily be negated through strategic framing of the claims.¹⁴⁷ As we said earlier, the Court finds little evidence in State practice to suggest that customary international law has evolved on this matter.¹⁴⁸ Concerning customary international law, the Court reached a similar conclusion, noting that there is limited State practice supporting the denial of immunity in cases of serious violations of human rights. Even Greece, initially supporting this stance in the *Distomo*¹⁴⁹ case,

¹⁴¹ G. SERRANO, “Considerazioni in merito alla sentenza della Corte Internazionale di Giustizia nel caso relativo alle Immunità Giurisdizionali dello Stato”, *Rivista di Diritto Internazionale Privato e Processuale*, Anno XLVIII, 3-2012, p. 626.

¹⁴² *Ibid.*

¹⁴³ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 80.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, 82.

¹⁴⁸ *Ibid.*, 83.

¹⁴⁹ Αρείος Πάγος (Hellenic Supreme Court), Δίστομο (Distomo case), May 4, 2000, n° 11/2000, <https://www.areiospagos.gr> (August 8, 2024).

ultimately rejected it in the *Margellos*¹⁵⁰ case.¹⁵¹ On the contrary, the Court highlighted that there were numerous State practices that did not support this thesis.¹⁵² With all of these considerations, the Court concluded that under current customary international law, a State is not deprived of immunity even when accused of grave violations of international law.¹⁵³

Italy argued that because *jus cogens* norms are superior to other international laws, they should override Germany's claim to State immunity.¹⁵⁴ This argumentation aligns with the theory of the hierarchy of norms. In the meantime, the Court rejected Italy's argument because it found no conflict between the procedural nature of State immunity and the substantive *jus cogens* rules. State immunity only determines whether a State can be tried, not the legality of the acts themselves. Thus, recognizing State immunity does not equate to endorsing wrongful acts or violations of *jus cogens*.¹⁵⁵

Concerning the last part of the argumentation of Italy, it asserts that Italian courts were justified in waiving Germany's State immunity because all other attempts to find compensation for the victims of Nazi war crimes had failed. According to Italy, Germany did not provide adequate reparations to all Italian victims. Even though the Court recognized that Germany had taken significant steps to provide reparations, it also noted that many Italian victims had not been compensated. However, the Court rejected Italy's argument by stating that there is no basis in customary international law to deny State immunity based on the availability or absence of means of redress: "*The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition*".¹⁵⁶ Again, the Court emphasized that immunity is a procedural matter and does not depend on the availability of adequate compensation.

¹⁵⁰ Ειδικό Δικαστήριο (Greek Special Supreme Court), *Margellos v. Federal Republic of Germany*, September 17, 2002, n° 6/2002, *International Law in Domestic Courts*, n° 87.

¹⁵¹ I.C.J., *Jurisdictional Immunity of the State* (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 83.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, § 91.

¹⁵⁴ *Ibid.*, § 93.

¹⁵⁵ *Ibid.*, §§ 92-97.

¹⁵⁶ *Ibid.*, §101 ; A. ORAKHELASHVILI, *op. cit.* (note 95), p. 612.

To conclude, the ICJ ultimately ruled that Italy's position did not justify the denial of State immunity to Germany. The Court reaffirmed that there was no exception to State immunity when serious violations of international law are alleged under customary international law. Therefore, Italy has been found to be in violation of Germany's immunity under international law.¹⁵⁷ Given the reasoning of the judges of The Hague, we cannot say that it is a surprising nor extraordinary conclusion.¹⁵⁸

However, critics can be addressed to the ICJ's ruling. The first critique focuses on how the judges of The Hague justified their reasoning by referencing "insurable risks"¹⁵⁹.¹⁶⁰ This issue is that none of the statutory provisions they discussed actually include such qualification. Their reference to "insurable risks" is therefore seen as unfounded or unnecessary argument. We can make a similar observation regarding the claim that the 2004 UN Convention does not cover military activities.¹⁶¹ This consideration is problematic because there is nothing in the actual text of the Convention that explicitly supports this exclusion. This can raise questions about the relevance and accuracy of the Court's reasoning in those analogies. The ruling gives the misleading impression that a unanimous legal consensus exists on the issue of State immunity, even though the national laws cited include exceptions that go beyond the division between *acta jure imperii* and *acta jure gestionis*.¹⁶² These exceptions suggest that there could be grounds for a human right-based exception, even though they do not say so explicitly.¹⁶³

Another critic concerns that assimilating the continued applicability of immunity to tortious acts by armed forces with the absence of State practice applying the territorial tort exception confuses the distinction between the existence of a legal rule and its enforcement.¹⁶⁴ Essentially, we may interpret wrongfully the Court's position as suggesting that a legal principle is not fully valid unless it has been explicitly upheld. The author XIAODONG YANG even considers that the absence of judicial precedents might actually indicate the opposite; it could imply that there is no obstacle preventing a court from rejecting immunity in such tort cases.¹⁶⁵

¹⁵⁷ A. ORAKHELASHVILI, *op. cit.* (note 95), p. 612.

¹⁵⁸ X. YANG, *op. cit.* (note 119), p. 285.

¹⁵⁹ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7), § 64.

¹⁶⁰ X. YANG, *op. cit.* (note 119), p. 285.

¹⁶¹ *Ibid.*

¹⁶² J. FINKE, "Sovereign Immunity: Rule, Comity or Something Else?", *European Journal of International Law*, vol. 21, 2010, p. 853.

¹⁶³ *Ibid.*

¹⁶⁴ X. YANG, *op. cit.* (note 119), p. 285.

¹⁶⁵ *Ibid.*

Finally, while it may appear that the Court did not adequately take the victims' rights into consideration, it's crucial to recognize that the ICJ was constrained by the current State of customary international law. The Court is bound to interpret and apply the law as it stands rather than to create new legal norms or expand existing ones. Despite the moral imperative we sense to address the injustices suffered by the victims, the ICJ could not justify the departure from the established principles of State immunity. While we might wish the Court had taken a more progressive approach to evolve the norms, the reality of the situation is that such a step would have required a consensus in State practice and *opinio juris* that simply did not exist at the time.

Chapter 3. Judicial Pparallels: Complementary Case Studies

Section 1. South Korea: Comfort Women Cases

1. Seoul Central District Court of South Korea (2021)

We will discuss two cases that bear strong similarities to the *Germany v. Italy* case, particularly in their facts and legal considerations. The first case was decided on January 8, 2021, by the Seoul Central District Court, which ruled against Japan's claim of State immunity.¹⁶⁶ This case began in August 2013, when 12 Korean victims of the Japanese military's 'comfort women' system submitted a request for mediation, seeking a compensation of 100 million won per person from the Japanese Government. However, the mediation did not proceed because Japan refused to participate, leading the matter to be escalated to the Seoul Central District Court.¹⁶⁷ On January 8, 2021, the judgment became final, as Japan did not appeal it.¹⁶⁸

The 'comfort women' system concerned the systematic sexual slavery imposed by Imperial Japan on women from various occupied territories, including Korea, during the Second World War.¹⁶⁹ Women were abducted and forced, often through deceit or coercion, to serve in 'comfort stations', which were military brothels established by the Japanese military.¹⁷⁰ These women were subjected to repeated sexual assaults, violence and inhumane conditions without any freedom or any kind of compensation.¹⁷¹ This system is seen as a gross violation of human rights and has been recognized as a crime against humanity. This situation led to severe physical and psychological trauma for the victims that persisted for a long time after the war's end.¹⁷² Just like in the *Germany v. Italy*¹⁷³ case, despite various international agreements and legal actions, justice and reparations for the victims remained unsolved.¹⁷⁴

¹⁶⁶ K. CHANG-ROK, "Korea's Court Denies Japan's State Immunity Again", *The Asia-Pacific Journal*, vol. 22, n° 1, 2024, p. 1.

¹⁶⁷ *Ibid.*

¹⁶⁸ 서울중앙지방법원 (Seoul Central District Court), 손해배상 사건 2016가합505092 (Compensation for Damage (Others)), n° 505092, January 8, 2021, in English <https://womenandwar.net> (August 8, 2024).

¹⁶⁹ *Ibid.*, p. 3.

¹⁷⁰ *Ibid.*, p. 4.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, pp. 20-21.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, pp. 13-19.

The Seoul Central District Court acknowledged that acts committed by a State, even in the context of war, were generally considered sovereign acts (*acta jure imperii*) immune from foreign jurisdiction.¹⁷⁵ It provided a similar analysis of customary international law, referencing the *Ferrini* case, the *Germany v. Italy* case, and the Italian Constitutional Court decision of October 22, 2014, which will be examined in this chapter.¹⁷⁶ Considering the circumstances outlined by the Court and acknowledging that customary international law itself allows exceptions to State immunity, the Court concluded that State immunity is far from being absolute.¹⁷⁷ The Court argued that the acts in question in this case, namely the crimes against humanity committed by the Imperial Japan, constituted systematic and widespread violations of peremptory norms of international law (*jus cogens*).¹⁷⁸ The Court came to the conclusion that although these acts might typically be considered sovereign, State immunity cannot be invoked in reason of the severity and nature of the violations.¹⁷⁹ Plus, it recalled the principle of Article 27(1) of the South Korean Constitution that “*All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act*”¹⁸⁰, considering that if the effectiveness of such a remedy is not guaranteed, the right of access to courts becomes void.¹⁸¹

The Korean judges, although acknowledging the procedural status of State immunity, considered that procedural law must be interpreted as a means to realize substantive legal order.¹⁸² In other words, procedural rights cannot prevent the effective application of substantive rights or distort the substantive legal order.¹⁸³

Given the theory of State immunity, which exempts “*acts conducted during armed conflict (war)*” from jurisdiction due to the unpredictable damages, the Court emphasized that the acts *in casu* were committed outside direct battlefronts, making it challenging to categorize them as acts carried out during armed conflict.¹⁸⁴

¹⁷⁵ *Ibid.*, p. 21.

¹⁷⁶ *Ibid.*, pp. 21-25.

¹⁷⁷ *Ibid.*, pp. 25-26.

¹⁷⁸ *Ibid.*, p. 26

¹⁷⁹ *Ibid.*

¹⁸⁰ 대한민국 헌법 제27조 (Constitution of the Republic of Korea, Article 27). Translated from Korean on a website.

¹⁸¹ 서울중앙지방법원 (Seoul Central District Court), 2016가합505092 손해배상 사건 (Compensation for Damage (Others)), n° 505092, January 8, 2021, in English <https://womenandwar.net> (August 8, 2024), p. 26.

¹⁸² *Ibid.*, pp. 26-27.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

The Court finally argued that, while State immunity is a principle of customary international law, it should not be applied when it leads to unjust situations.¹⁸⁵ It is even more true in cases involving grave violations of human rights, such as crimes against humanity.¹⁸⁶ The Court emphasized that interpretations of the law must align with constitutional principles, which prioritize justice and access to remedies.¹⁸⁷ Exceptions should be made to ensure that States cannot use immunity to evade responsibility for their actions.¹⁸⁸

In conclusion, the Seoul Central District Court ruled in favor of the plaintiffs, affirming their right to seek compensation. The Court's judgment considered that State immunity cannot shield a State from liability when we are in front of severe violations of international law, and particularly crimes against humanity. From all the various international agreements reviewed by the Court, it was determined that none of them extinguished the plaintiff's individual rights to seek reparations.¹⁸⁹ We can see that the Court wanted to underscore the imperative of justice and the necessity of ensuring that States cannot escape from such acts.

2. Seoul High Court of South Korea (2023)

This case¹⁹⁰ shared a similar core issue, focusing on the Japanese military's 'comfort women system. However, this time, it involved 11 Korean victims and the family of five deceased victims, who were demanding 200 million won per person from the Japanese government.¹⁹¹ This ruling became final on December 9, 2023, as Japan chose not to appeal.¹⁹² The Seoul High Court, even though it shared the same premises and verdict, had different reasonings.¹⁹³ The Court's decision established that customary international law no longer grants State immunity for torts inflicted on a forum State's nationals within its own territory.¹⁹⁴ After analyzing the United Nations Convention on State Immunities, the European Convention on State

¹⁸⁵ *Ibid.*, p. 28.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, p. 29.

¹⁸⁹ Agreement between Japan and Republic of Korea on the settlement of problems concerning property and claims and on economic co-operation (with Protocols, exchanges of notes and agreed minutes), signed at Tokyo, June 22, 1965, <https://treaties.un.org> (August 9, 2024) ; Agreement on the Comfort Women Issue between Japan and South Korea, signed at Seoul, December 28, 2015. Unfortunately, this last Agreement cannot be found on internet.

¹⁹⁰ 서울고등법원 (Seoul High Court), 2021나2017165 손해배상 사건 (Damage Claim case), n° 2017165, November 23, 2023, <http://justice.skr.jp> (August 9, 2024).

¹⁹¹ K. CHANG-ROK, *op. cit.* (note 166), p. 2.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, p. 3.

¹⁹⁴ D. MANDELL, "Another Blow to the Sovereign Shield: South Korean Court Rejects Japan's Sovereign Immunity Defense in 'Comfort Women' Case", *American Society of International Law*, vol. 28, 2024, p. 3.

Immunities, the State practice and the laws of the United States, Canada, Australia, Singapore, United Kingdom, Greece, Ukraine and Brazil, the Court came to the conclusion that State immunity has exceptions.¹⁹⁵ Considering these practices, the Court concluded that State immunity does not apply to tortious acts committed against nationals within the territory of the jurisdiction.¹⁹⁶

But how does the High Court of Seoul justify this stance when the ICJ ruled the opposite in *Germany v. Italy*? Firstly, like the Central District Court did years before, it recalled that Japan's actions did not occur "during an armed conflict" as the war was raging in China and Southeast Asia, not on the Korean Peninsula, where the victims were abducted and abused.¹⁹⁷ Secondly, the Court argued that the ICJ's decision specifically applied to acts committed by foreign armed forces on the forum State's territory during an active conflict, which was not the case here.¹⁹⁸ It interpreted the ICJ's ruling narrowly, considering that offenses against the victims cannot be considered to have taken place 'in the context of an armed conflict'.¹⁹⁹

Section 2. Federal Supreme Court of Brazil (2021)

The same situation occurred in Brazil, where the *Supremo Tribunal Federal* (STF) in 2021, ruled that Germany could not claim its State immunity due to serious violations of human rights.²⁰⁰ The case involved the sinking of the Changri-La fishing boat by a German submarine near Cabo Frio.²⁰¹ This situation caused the deaths of ten fishermen, and the victims' relatives sought compensation before the Brazilian courts.²⁰² The *Supremo Tribunal Federal* overruled the judgments of its lower courts, who recognized the foreign State's immunity.²⁰³

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Supremo Tribunal Federal (Brazilian Federal Supreme Court), Min. Edson Fachin v. República Federal da Alemanha (Changri-La case), August 23, 2021, n° 954.858, <https://www.jusbrasil.com.br> (August 9, 2024).

²⁰¹ A. TUFFI SALIBA and L. CARLOS LIMA, *The Immunity Saga Reaches Latin America. The Changri-La Case*, December 2, 2021, <https://www.ejiltalk.org> (August 9, 2024) ; Supremo Tribunal Federal (Brazilian Federal Supreme Court), Min. Edson Fachin v. República Federal da Alemanha (Changri-La case), August 23, 2021, n° 954.858, <https://www.jusbrasil.com.br> (August 9, 2024) p. 88.

²⁰² A. TUFFI SALIBA and L. CARLOS LIMA, *op. cit.* (note 201).

²⁰³ *Ibid.*

The STF rooted their argument differently than what we previously analyzed in this thesis. It anchored its reasoning in the Brazilian Constitution, which establishes the prevalence of human rights as a fundamental rule guiding the international relations of the Brazilian State.²⁰⁴ This type of argumentation is based on the supremacy of the State's and gives priority to the constitutional rule of the “prevalence of human rights”.²⁰⁵ It is important to underline that this decision marks the first time the STF has addressed wrongful *jure imperii* acts committed by a foreign State on its territory.²⁰⁶

The Tribunal categorized Germany's actions as war crimes, referencing the Nuremburg Tribunal's definition and asserting that even *acta jure imperii* do not provide immunity when they involve a serious violation of human rights.²⁰⁷ This approach aligns with the dissenting opinion given by the Judge Cançado Trindade in the *Germany v. Italy* case: “*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. (...) There is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity*”.²⁰⁸ The Court also relied on the status of State immunity under international law and on precedents in other legal systems, such as the *Ferrini* case²⁰⁹, the *Distomo* case²¹⁰, *Comfort women* case²¹¹.²¹²

²⁰⁴ A. TUFFI SALIBA and L. CARLOS LIMA, *op. cit.* (note 201).

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ I.C.J., Jurisdictional Immunity of the State (*Germany v. Italy; Greece Intervening*), Dissenting Opinion of Judge CANÇADO TRINDADE, Judgment February 3, 2012, <https://www.icj-cij.org> (August 13, 2024), §§178-179 ; A. TUFFI SALIBA and L. CARLOS LIMA, “The Law of State Immunity before the Brazilian Supreme Court: What is at stake with the “Changri-La” case?”, *Revista de Direito Internacional*, vol. 18, 2021, p. 55.

²⁰⁹ Corte Suprema di Cassazione (Italian Supreme Court of Cassation), *Ferrini c. Repubblica Federale di Germania* (*Ferrini v. Federal Republic of Germany*), March 11, 2004, n° 05044, *Rivista di diritto internazionale*, 2004, p. 658.

²¹⁰ Αρείος Πάγος (Hellenic Supreme Court), Δίστομο (*Distomo case*), May 4, 2000, n° 11/2000, <https://www.areiospagos.gr> (August 8, 2024).

²¹¹ 서울중앙지방법원 (Seoul Central District Court), 손해배상 사건 2016가합505092 (*Compensation for Damage (Others)*), n° 505092, January 8, 2021, in English <https://womenandwar.net> (August 8, 2024).

²¹² A. GADKARI, *The Curious Case of Changri-La and Jurisdictional Immunities*, 2020, <https://pure.jgu.edu.in> (August 9, 2024), p. 6.

By prioritizing the Brazilian Constitution's human rights provision over customary international law, the STF has set a precedent that could influence future cases involving State immunity and human rights violations.

However, just like every other precedent on this matter, this decision also raised questions about the balance between national legal principles and international obligations. Even concerning the impact it could have on Brazil's diplomatic relations, particularly with Germany.²¹³ Despite these concerns, it remains a bold and decisive ruling that shows the commitment of evolving human rights, not afraid to challenge established norms when justice is at stake.

Section 3. The Supreme Court of Ukraine (2022)

On April 12, 2022, the *Верховний Суд України* (Ukrainian Supreme Court) ruled against granting State immunity to the Russian Federation in a tort claim brought by Ukrainian civilians due to Russian military actions during the invasion of Crimea in 2014.²¹⁴ The plaintiffs sought compensation for the death and personal loss of relatives during the military operations led by Russian forces.²¹⁵ Just like the Brazilian '*Changri-La*' case²¹⁶, the Ukrainian Supreme Court overturned the judgment of the *Закарпатський апеляційний суд* (Zakarpattia Appeal Court)²¹⁷, which had granted immunity to the Russian Federation.²¹⁸ The Court began to analyze its national legislation, and particularly Article 79(1) of the Law of Ukraine on Private International Law, which upholds the principle of State immunity but allows exceptions provided by treaties or Ukrainian laws.²¹⁹ This is the basis for the Court to explore the possibility of an exception.

²¹³ *Ibid.*

²¹⁴ Верховний Суд України (Ukrainian Supreme Court), n° 308/9708/19, April 14, 2022, <https://supreme.court.gov.ua> (August 9, 2024) ; C.-E. RENAULT, *The limits of the state liability exemption in wartime*, International Bar Association, 2023, <https://www.ibanet.org> (August 9, 2024).

²¹⁵ Верховний Суд України (Ukrainian Supreme Court), n° 308/9708/19, April 14, 2022, <https://supreme.court.gov.ua> (August 9, 2024), p. 1.

²¹⁶ Supremo Tribunal Federal (Brazilian Federal Supreme Court), Min. Edson Fachin v. República Federal da Alemanha (*Changri-La* case), August 23, 2021, n° 954.858, <https://www.jusbrasil.com.br> (August 9, 2024).

²¹⁷ Закарпатський апеляційний суд (Ukrainian Zakarpatskyi Appellate Court), n° 308/9708/19, September 1, 2021, <https://opendatobot.ua> (August, 9, 2024).

²¹⁸ B. KARNAUKH, "Territorial tort exception? The Ukrainian Supreme Court held that the Russian Federation could not plead immunity with regard to tort claims brought by the victims of the Russia-Ukraine war", *Access to Justice in Eastern Europe*, 2022, p. 168.

²¹⁹ *Ibid.*, p. 167.

The Supreme Court outlined six criteria for the territorial tort exception to apply: (1) The harmful act must occur within the court's territory; (2) The State agent responsible must be present in that territory at the time; (3) The act must be attributable to the State; (4) The court's law must recognize liability for such acts; (5) The harm must involve death, injury, or property damage; and (6) there must be a direct causal link between the act and the harm. With all criteria met, the Court considered that the case could proceed even without Russia's consent.²²⁰

The same question can be asked here, how does the Ukrainian Supreme Court justify its position against the ICJ's ruling in *Germany v. Italy*²²¹? The Court argued that the acts in question were not adequately addressed in the *Germany v. Italy* case due to the difference of context and emphasized the principle of access to justice and the protection of fundamental human rights, arguing that granting immunity to Russia would have the effect of denying justice to victims of this aggression.²²² Plus, the ICJ's ruling and the precedent cases we analyzed highlighted the same context of atrocities committed during World War II that were addressed through reparations and intergovernmental agreements. Here, the situation is slightly different. We are in the unique context of the ongoing war between Ukraine and Russia, where no reparations or agreements have been made yet.

We can sense in the Ukrainian Supreme Court's argumentation the willingness of changing the current customary law. There is a necessity of departure from traditional State immunity doctrines in light of the crimes committed by Russia.

This decision marks a significant turning point in the evolving landscape of international law, where the specificity of this case underscores the broader and emerging trend towards prioritizing the protection of human rights over traditional procedural rules. In particular, this case is part of a larger recognition within the international legal community of an exception to State immunity in cases of grave breaches of international law and crimes against humanity to ensure justice for victims of such acts.

²²⁰ Закарпатський апеляційний суд (Ukrainian Zakarpatskyi Appellate Court), n° 308/9708/19, September 1, 2021, <https://opendatabot.ua> (August, 9, 2024), p. 6 ; B. KARNAUKH, *op. cit.* (note 218), p. 169.

²²¹ I.C.J., Jurisdictional Immunity of the State (*Germany v. Italy; Greece Intervening*), *op. cit.* (note 7).

²²² B. KARNAUKH, *op. cit.* (note 218), p. 170.

Section 3. Court of Cassation of Italy (2014 and 2023)

Following the ICJ's ruling in *Germany v. Italy*²²³, which found Italy in breach of international customary law, Italy enacted the Legge n° 5/2013²²⁴. This law was designed to align Italy's domestic legal framework with the ICJ's judgment by codifying the principle of State immunity. This prevents Italian courts from exercising jurisdiction over foreign States, including Germany. The law aimed to ensure compliance with international obligations. It reinforced the notion of State immunity for sovereign acts, particularly in cases of historical wartime conduct.²²⁵

In 2014, two years after the ICJ ruling, the *Corte Costituzionale* issued a ruling²²⁶ that challenged the vision of State immunity given by the ICJ. It declared notably that the application of Article 3 of the Legge n° 5/2013, and thus by extension the judgment by the ICJ, was incompatible with Articles 2 (right of access to justice) and 24 (protection of inviolable human rights). The *Corte* held that these two articles are strongly linked and that depriving individuals of their right to access justice for crimes against humanity committed under the cloak of immunity of a foreign State would be contrary to the fundamental principles of the Constitution.²²⁷

The interesting part of this judgment is the line of argumentation on the issue concerning the non-reception of the international law norm on the immunity of State within the Italian legal order.²²⁸ The *Corte* concluded that such a principle, despite its recognition in international law, could not enter the Italian legal system because it conflicted with fundamental constitutional principles, namely the right of access to justice and the protection of inviolable human rights.²²⁹

²²³ I.C.J., Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening), *op. cit.* (note 7).

²²⁴ Legge di 14 gennaio 2013 sull' Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno (Law of July, 14, 2013, on the Accession of the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in New York on December 2, 2004, as well as adaptation provisions to domestic law), 2013/5, entered into force on January 30, 2013, *Gazzetta Ufficiale*, anno 154°, n° 24, p. 1-36.

²²⁵ "When the Court of Justice, (...) has excluded the subjection of specific conduct of another State to civil jurisdiction, the court before which a dispute concerning the same conduct is pending shall note, ex officio and even when it has already issued a non-final judgment that has become final and has recognized the existence of jurisdiction, the lack of jurisdiction at any stage and level of the proceedings" translated by the author.

²²⁶ Corte Costituzionale (Italian Constitutional Court), n°238/2014, October 22, 2014, *Gazzetta Ufficiale*, October 29, 2014, Anno 155°, n° 45, p. 1-14.

²²⁷ C. MELONI, "Jurisdictional Immunity of States: The Italian Constitutional Court v. the International Court of Justice? », *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 6, 2015, p. 350.

²²⁸ *Ibid.*, p. 351.

²²⁹ *Ibid.*

In fact, because it was inconsistent with the core principles of the Italian Constitution, the usual process outlined in Article 10 – which provides the integration of customary international law into the Italian legal system – was deemed inapplicable.²³⁰ The ability of the Italian courts' to contribute to the evolution of international law may be a blessing in disguise.²³¹

Until July 21, 2023, when the *Corte Costituzionale* issued a new decision²³² that could bring the dispute between Germany and Italy to an end. It has validated an Italian legislation²³³ setting up a compensation fund for victims of war crimes and crimes against humanity committed by the armed forces of the Third Reich on Italian territory or against Italian citizens between September 1, 1939, and May 8, 1945.²³⁴ This law transfers the financial responsibility from Germany to Italy for compensating victims. It protects German property in Italy from any forced exception linked to these crimes.²³⁵ Does this new decision by the *Corte Costituzionale* signify that Italy is retreating from its previous stance and aligning itself with the ICJ ruling? Not entirely. Even though Germany no longer has to fear further executions on its property – which may lead it to withdraw its complaint to the ICJ – it does not mean Italy changed its stance on State immunity.²³⁶ This decision reaffirms Italy's controversial position that State immunity does not apply in the case of serious crimes violating international law, such as crimes against humanity.²³⁷ Although this law restrains judges from issuing forced execution orders on foreign State property, it still allows them to hear cases against foreign States for serious crimes and to override State immunity in such instances.²³⁸

We can sense that this delicate balancing act came from a desire to avoid diplomatic tensions with foreign States while still upholding Italy's commitment to justice. By setting up a fund to

²³⁰ M. LONGOBARDO, "The Italian Constitutional Court's Ruling Against State Immunity when International Crimes Occur: Thoughts on Decision n° 238 of 2014", *Melbourne Journal of International Law*, vol. 16, 2015, p. 14.

²³¹ P. ROSSI, "Italian courts and the evolution of the law of State immunity: A reassessment of Judgment no 238/2014", *Questions of International Law Journal*, 2022, p. 57.

²³² Corte Costituzionale (Italian Constitutional Court), n° 159/2023, July 21, 2023, *Gazzetta Ufficiale*, 26 luglio 2023, Anno 155°, n° 30, p. 34-47.

²³³ Legge di 29 giugno 2022 sulla conversione in legge, con modificazioni, del decreto-legge 30 aprile 2022, n. 36, recante nuove misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (Law of June 29, 2022 on the conversion into law, with amendments, of the legislative decree of 30 April 2022, n. 36, containing new urgent measures for the implementation of the National Recovery and Resilience Plan), n° 79, *Gazzetta Ufficiale*, June 29, 2022, Anno 163°, n° 150, p. 1-57.

²³⁴ A. M. PELLICONI, *The Italian Constitutional Court's new decision on state immunity and the ICJ Germany vs Italy*, n° 2, July 28, 2023, <https://www.ejiltalk.org> (August 9, 2024).

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

compensate victims, instead of seeking to enforce judgments against German property, victims can now receive compensation directly from the Italian fund. This offers a solution for victims while avoiding tensions with foreign States. However, this law primarily benefits Italian citizens. The Greek victims and other non-Italian claimants do not have access to this fund, which has led to criticism.²³⁹ This situation is comprehensible because Italy is motivated by the desire to take full responsibility for compensating its own nationals, rather than placing the burden on other States or causing diplomatic frictions.²⁴⁰

²³⁹ D. GRECO, *Jurisdictional Immunities and Reparation for WWII Crimes: The Impact of the Italian Constitutional Court's Judgement No. 159/2023 on Greek Victims' Claims*, August 15, 2023, <https://www.ejiltalk.org> (August 9, 2024).

²⁴⁰ *Ibid.*

Conclusion

This thesis is far from being exhaustive and does not have such pretensions. The evolution of customary international law into the creation of a human rights exception takes time and cannot be confined to these considerations alone. However, by first exploring the ICJ's *Germany v. Italy* case²⁴¹, we have overviewed a glimpse of a possible evolution. The ICJ even left room for changes itself: “ (...) *under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict*”²⁴².

This transition left by the ICJ in customary international law has been seen in various countries. We have seen different ways of justifying an exception to State immunity with some countries seeking to have human rights prevailing through their Constitution, while others try to justify it with wording abilities and restrictively considering the ruling of the ICJ. But at the end, all of these justifications are pointing in the same direction; the need for justice for victims and the prevalence of human rights over procedural rules, particularly State immunity.

Even common law States who are, by tradition, more reluctant to accept this kind of exception, are considering an exception to State immunity in cases of serious human rights violations. For example, in Article 7 of the *Foreign Sovereign Immunity Act (1976)*, the United States made an amendment in 1996 to address such cases: “(...) *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 (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.*”²⁴³ This amendment can be seen as a significant improvement in the recognition of waiving immunity in cases of serious human rights violations. This amendment clearly marks a before and after in American case law.²⁴⁴

²⁴¹ I.C.J., *Jurisdictional Immunity of the State (Germany v. Italy; Greece Intervening)*, *op. cit.* (note 7).

²⁴² *Ibid.*, § 91.

²⁴³ A. BELLAL, *op. cit.* (note 1), p. 57.

²⁴⁴ *Ibid.* ; However, it is important to specify that only Americans can avail themselves of this Article and that this exception is limited to States considered by the administration as financing terrorism, namely Cuba, Iran, Democratic People's Republic of Korea (North Korea), Syria. This situation has raised fears of reciprocity, and this fear was justified, as Iran adopted a law allowing victims of American interference to file a complaint against

State immunity is often perceived by scholars as a gesture of courtesy for political reasons rather than a binding legal duty. According to Article 38 of the ICJ Statute, customary international law rules require a general practice accepted as law (*opinio juris*). These scholars argue that States do not grant immunity out of a sense of legal obligation but rather due to political considerations²⁴⁵. Could this argument be used against the idea of an exception to State immunity due to violations of human rights? We believe it cannot, quite the opposite. Limiting State immunity to a certain level of violation of human rights cannot be seen as a mere gesture of courtesy but rather as a reflection of an evolving sense of legal obligation under international norms. The growing body of case law, scholarly opinions, and national legislation recognizing exceptions to State immunity in cases of serious human rights violations illustrates a shift towards the recognition of these exceptions as a legal necessity. This shift represents a new understanding of State immunity, prioritizing human rights over traditional notions of State immunity. It aligns with the principles of *opinio juris* under Article 38 of the ICJ Statute, marking a significant evolution in international law.

International law may take years, possibly decades, to see changes in customary rules regarding State immunity. However, if courts persist in rejecting sovereign immunity, it could signal a continued evolution to this once-absolute principle. Such evolution would represent a substantial departure from the traditional doctrine that held *rex non potest peccare* (the king can do no wrong).²⁴⁶ While State practice is increasingly evolving, the ICJ remains conservative in its interpretation of customary international law. Even though we believe that it is arguably not the role of the ICJ to drive such changes but rather that of States, as demonstrated by the actions of countries like Korea, Brazil, Italy and Ukraine.

This thesis has illustrated that national courts possess the capacity to render highly innovative legal decisions, provided these decisions are rooted in reasonableness and adhere to established normative standards.²⁴⁷ While courts may sometimes have difficulties with articulating the rationale for exceptions to State immunity, their willingness to do so shows a broader imperative to refine the concept of State immunity.

the United States in Iranian courts ; K. SEALING, “‘State Sponsors of Terrorism’ Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Make Less Sense now Than It Did Before 9/11”, *Texas Journal of International Law*, 2003, p. 121.

²⁴⁵ A. BELLAL, *op. cit.* (note 1), p. 55.

²⁴⁶ D. MANDELL, *op. cit.* (note 194), p. 3.

²⁴⁷ P. ROSSI, *op. cit.* (note 231), p. 41-57.

It is important to acknowledge that the limited case law on exceptions to State immunity can be attributed to the fact that such cases involve serious violations of international law, which are fortunately rare. The rarity of these severe breaches naturally limits the number of judicial decisions in this area. In fact, considering the gravity of these violations, the existing jurisprudence should be considered as relatively significant. This should be sufficient to suggest a gradual shift towards recognizing exceptions to State immunity.

While we understand the importance of State immunity in maintaining international relations and the principle of sovereignty, we believe that this protection should not extend so far as to undermine the most fundamental values of the international community. In cases involving these severe violations, State immunity should be limited. However, without a clear and consistent legal framework, there is a risk of abuse. Courts, while expected to remain impartial, may struggle to separate legal reasoning from emotional responses in such grave cases. This could lead to arbitrary dismissals of immunity based on political considerations, resulting in legal uncertainty and potential diplomatic tensions.

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