

<https://doi.org/10.22364/jull.15.07>

“Not Permanent, Nor Static”: Perspectives on “Humanisation” of International Immunities in International Law

Dr. Niccolò Lanzoni

Faculty of Law, University of Bologna
Postdoctoral Research Fellow and Adjunct Professor
E-mail: niccolo.lanzoni2@unibo.it

“Humanisation” has had a variable impact on international law. Nevertheless, it has failed to significantly affect the state-centric paradigm underpinning state and state officials’ jurisdictional immunities. The present contribution is intended to provide some remarks on the challenges and perspectives on the humanisation of international immunities in international law.

Keywords: humanisation of international law, exceptions to international immunities, *jus cogens*, *controlimiti*.

Contents

<i>Introduction: Shapeshifting content and nature of international immunities</i>	81
1. <i>Cross-fertilisation of domestic judges’ decisions</i>	83
2. <i>Executives’ stance</i>	84
3. <i>Conservative approach of international courts and tribunals</i>	86
4. <i>The “controlimiti doctrine”</i>	87
<i>Summary</i>	89
<i>Sources</i>	90
<i>Bibliography</i>	90
<i>Normative acts</i>	91
<i>Case law</i>	91
<i>Other sources</i>	92

Introduction: Shapeshifting content and nature of international immunities

The term “humanisation of international law” refers to “the radiation, or the reforming effect that human rights and humanitarian law has had, and is having, on other fields of public international law”¹. This phenomenon has had a variable

¹ *Meron, Th. The Humanization of International Law. Leiden: Martinus Nijhoff, 2006, p. xv.*

impact, but failed to significantly affect the state-centric paradigm underpinning jurisdictional immunities (“international immunities”) of state and its officials².

It is true that, over the last century, state immunity has passed from “absolute” to “restricted”, and is today applicable only in relation to *jure imperii* acts³. Yet, humanisation played little role in the process. For instance, the *jure gestionis* exception stemmed primarily from the need to better safeguard the economic interests of individuals conducting business with foreign states⁴, while the territorial tort exception prioritises a strong jurisdictional connection between the domestic forum and the torts attributable to foreign states⁵. In contrast, as the rise and fall of the *jus cogens* exception shows, state immunity “has been assailed from a human rights perspective, but without much success”⁶.

On the other hand, after the Second World War, the inception of the principle of individual international responsibility as independent from state responsibility paved the way to the elaboration of exceptions to state officials’ immunities from both criminal and civil domestic jurisdiction for the commission of international crimes⁷. The actual scope of these exceptions, as well as their rationale, are still a matter of debate⁸.

One may wonder why humanisation has struggled so much to effectively “reform” international immunities. This issue has been addressed mainly with reference to the *jus cogens* exception⁹. The most prominent theory revolves around the “procedural” nature of state immunity, as opposed to the “substantial” one of human rights. According to this dichotomy, there is no genuine conflict between these areas of law, since they operate on separate levels: state immunity bars the jurisdiction of domestic judges, it does not, *per se*, prohibits the settlement of disputes involving *jus cogens* violations. This “impossible antinomy” *a fortiori* applies to any violation of human rights obligations (including that of access to justice), as well as to the commission of international crimes by state officials, at least in relation to personal immunity¹⁰.

This argument displays two possible flaws: first, it *a priori* characterises international immunities as procedural in nature. While this is not the appropriate place to elaborate on this issue, it is at least worth noting that the “true” nature of international immunities should not be taken for granted¹¹.

The second problem is that, in any case, the formalistic distinction between procedural and substantial rights only sidesteps the contradiction between international

² Among others, Pavoni, R. Human Rights and the Immunities of Foreign States and International Organizations. In: Hierarchy in International Law: The Place of Human Rights, De Wet, E., Vidmar, J. (eds). Oxford: OUP, 2012, p. 71.

³ Higgins, R. Equality of States and Immunity from Suit: A Complex Relationship. The Netherlands Yearbook of International Law, Vol. 43, 2012, p. 137.

⁴ Yang, X. State Immunity in International Law. Cambridge: CUP, 2012, p. 19.

⁵ Fox, H., Webb, Ph. Law of State Immunity. Oxford: OUP, 3rd ed., 2013, p. 466.

⁶ Sheeran, S. The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries? In: Routledge Handbook of International Human Rights, Sheeran, S., Rodely, N. (eds). London: Routledge, 2013, p. 91.

⁷ Webb, Ph. Human Rights and the Immunities of State Officials. In: Hierarchy in International Law: The Place of Human Rights, De Wet, E., Vidmar, J. (eds). Oxford: OUP, 2012, p. 157.

⁸ The International Law Commission (ILC) is currently undertaking studies on the immunity of state officials from foreign criminal jurisdiction. Available: https://legal.un.org/ilc/guide/4_2.shtml [last viewed 24.03.2022].

⁹ Pavoni, R. Human Rights, p. 74.

¹⁰ Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 60.

¹¹ Orakhelashvili, A. Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening). American Journal of International Law, Vol. 106, 2012, p. 609.

immunities and humanisation instances, and overshadows the crux of the matter, i.e., the fact that international practice does not clearly support the existence of any "human rights exception" yet.

At the same time, the possibility that this trend of "humanising" could still lead to some development of international immunities is not a naïve "human-rightism"¹². Some hints in states' practice do appear to suggest the possibility of a gradual shift to a more "humanised" regime.

1. Cross-fertilisation of domestic judges' decisions

"Cross-fertilisation" encapsulates domestic judges' proneness to support the interpretation and application of international law by recalling one or more decisions of foreign domestic judges, both as manifestation of practice and *opinio juris* and as subsidiary means for the determination of the applicable rules¹³. Cross-fertilisation takes on particular importance when it comes to the regime of international immunities. In fact, this area "is at the point of intersection of international law and national procedural law"¹⁴, placing *direct* obligations on domestic judges.

This is epitomised by the shift from an "absolute" to a "restricted" state immunity triggered at the turn of the 20th century by Belgian and Italian courts¹⁵. Indeed, the distinction between *jure imperii* and *jure gestionis* acts did not remain a Belgian and Italian anomaly, but soon spilt over into Austrian, Egyptian and Swiss case law, promoting a gradually homogeneous practice worldwide¹⁶. The formation of the territorial tort exception followed a similar trajectory¹⁷.

It is important to note that cross-fertilisation spread mainly among judges belonging to the same type of legal system. In fact, these two exceptions had been elaborated upon almost exclusively by civil law judges, while common law judges tenaciously enforced state immunity as almost absolute¹⁸.

The reason behind this different approach is hard to explain. The different perception of their role by domestic judges themselves could have had some influence¹⁹. Civil law judges, when faced with a friction between international and domestic law, appear more willing to bend the former to the legal and political logic of the latter by devising original solutions. They act as state organs producing (new) practice²⁰. Common law judges, on the other hand, are more cautious and favour a position which is more consistent with the dictates of international law. The assumption holds that it is not the task of domestic judges to unilaterally hammer out a rule that, although desirable, does not conform to international practice. Domestic decisions are, first and foremost, subsidiary means for the determination of international law.

¹² That is, "the 'posture' that consists in being absolutely determined to confer a form of autonomy [...] on a 'discipline' [...]: the protection of human rights", *Pellet, A.* "Human Rightism" and International Law. *Italian Yearbook of International Law*, Vol. 10, 2000, p. 3.

¹³ *Yang, X.* State Immunity, p. 28.

¹⁴ *Hess, B.* The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property. *European Journal of International Law*, Vol. 4, 1993, p. 271.

¹⁵ *Fox, H., Webb, Ph.* Law of State Immunity, p. 150.

¹⁶ *Ibid.*, p. 153.

¹⁷ *Ibid.*, p. 464.

¹⁸ *Ibid.*, p. 137.

¹⁹ *Roberts, A.* Comparative International Law? The Role of National Courts in Creating and Enforcing International Law. *International and Comparative Law Quarterly*, Vol. 60, 2011, p. 61.

²⁰ *Sciso, E.* Italian Judges' Point of View on Foreign State's Immunity. *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011, p. 1202.

This different approach has profoundly influenced the humanisation of international immunities. Thus, the poor dialogue between the Cassazione²¹ and the House of Lords²² was one of the reasons that contributed to curbing the development of a *jus cogens* exception. Conversely, the *Pinochet (3)* decision²³, issued by the House of Lords, quickly cross-fertilised Belgian, German and US case law, eventually establishing an exception to former Heads of state personal immunity from criminal domestic jurisdiction for the commission of international crimes²⁴. Similarly, cross-fertilisation has corroborated “the contours” of a customary exception to state officials’ functional immunity from criminal domestic jurisdiction for the commission of international crimes²⁵.

It is difficult to predict whether and to what extent cross-fertilisation will channel further humanisation to the international immunity regime. International scholarship did suggest that cross-fertilisation would have boosted human rights and accountability²⁶. However, the activity of domestic judges may be determined by *ad hoc* pieces of legislation or conditioned by a certain legal or political background. Domestic judges may also lack the necessary knowledge or tools to address such a specialised field²⁷.

Still, it would seem myopic to underestimate the transformative potential of the cross-fertilisation of domestic judges’ decisions. After all, when it comes to international immunities, international practice “illustrates how a single domestic court decision which rests on a dubious interpretation of precedent and principle may gain ground rapidly”²⁸.

2. Executives’ stance

Executives’ practice has substantially contributed to the development of the international regime of immunities²⁹.

Executives’ acquiescence was pivotal to catalyse the distinction between *jure imperii* and *jure gestionis* acts in customary law by Belgian and Italian judges. The lack of reaction by the forum state might be attributed to the desire to safeguard domestic businesses from contractual breaches by foreign states, also with a view to attracting investments from abroad. As for defendant states, they refrained from invoking the violation of their immunity, probably because they tacitly agreed on the desirability of such an exception, also in terms of reciprocity, or because anyway

²¹ Judgment of the Italian Court of Cassation of 11 March 2004 in Case No. 5044.

²² Judgment of the House of Lords of 14 June 2006 in Case *Jones and Others v. The Kingdom of Saudi Arabia*.

²³ Judgment of the House of Lords of 24 March 1999 in Case *Regina v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, p. 17.

²⁴ *Webb, Ph.* Human Rights and the Immunities, p. 119.

²⁵ Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016, para. 180.

²⁶ *Wuerth, I.* International Law in Domestic Courts and the Jurisdictional Immunities of the State Case. Melbourne Journal of International Law, Vol. 13, 2012, p. 829.

²⁷ *Van Alebeek, R., Pavoni, R.* Immunities of States and their Officials. In: International Law in Domestic Courts: A Casebook, *Nollkaemper, A., et al.* (eds). Oxford: OUP, 2018, p. 158.

²⁸ *Van Alebeek, R., Pavoni, R.* Immunities of States, p. 169.

²⁹ Executives’ practice refers to “any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals”, Draft Conclusions on Identification of Customary International Law, with Commentaries. Yearbook of the International Law Commission, Vol. II, Part Two, 2018, Conclusion 6, para. 5.

equipped with immunity from execution³⁰. Be that as it may, the absence of protests avoided the formation of an international dispute and, consequently, the possible intervention of an international court or tribunal, a circumstance which could have ended up curbing the *in fieri* exception.

In common law systems, the contribution of the executive is even more evident. Here, faced with domestic judges' intransigence in interpreting and applying state immunity as (almost) absolute³¹, executives took the lead and, starting from the late 1970s, promoted the adoption of *ad hoc* pieces of legislation providing for the *jure gestionis*, the territorial tort, and other exceptions, forcibly "getting in line" domestic judges' decisions and indirectly corroborating the customary nature of the codified exceptions³².

Against this backdrop, the executives' reluctance to recognise a "human rights exception" may *prima facie* stand out. Executives have usually submitted their opinions to domestic judges, supporting the application of foreign state or state officials' immunities before "human rights exception" pleas³³. This is understandable, considering that the executive is normally in charge of managing international relations and that the affected state will almost certainly protest against the violation of its rights. True, executives may weaponize the enforcement of human rights through domestic judges as a means of advancing their foreign policy, but these are rather exceptional cases³⁴. In addition, and tellingly, no legal act or international instrument on state immunities provides for a *jus cogens* exception.

All in all, executives do not appear particularly prone to personally stand up for advocating the existence of *new* exceptions to international immunities. Yet, some elements also suggest a more nuanced view on the issue. Executives have sometimes shied away from stigmatizing the judiciary's "humanising" ventures³⁵. Moreover, while ratifying the 2004 United Nations Convention on Jurisdictional Immunities of States, some executives appended a declaration specifying that the ratification was without prejudice to any further development on the protection of human rights³⁶; others have introduced new statutory exceptions to state immunity³⁷ and to state officials' immunity from civil domestic jurisdiction³⁸, or have enacted pieces of legislation excluding state officials' immunity, *both personal and functional*, from criminal domestic jurisdiction for the commission of the international crimes listed under the Rome Statute³⁹. Finally, several states did comment favourably on the desirability of an exception to state officials' functional immunity from criminal domestic jurisdiction for the commission of international crimes in the context of the ILC works⁴⁰.

³⁰ Fox, H., *Webb, Ph.* Law of State Immunity, p. 15.

³¹ *Ibid.*, p. 137.

³² *Ibid.*, p. 139.

³³ See the case law in *Wuerth, I.* International Law, p. 829.

³⁴ *Ibid.*, p. 837.

³⁵ *Ibid.*, p. 831.

³⁶ *Van Alebeek, R., Pavoni, R.* Immunities of States, p. 162.

³⁷ Like the "sponsor of terrorism" exception, see Sections 1605A of the US Foreign Sovereign Immunities Act and 6.1 of Canada's State Immunity Act.

³⁸ Like the "torture victim protection" exception, see 28 USC 1350.

³⁹ Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016, para. 58.

⁴⁰ *Barkholdt, J., Kulaga, J.* Analytical Presentation of the Comments and Observations by States on Draft Article 7. KFG Working Paper Series, Vol. 4, 2018, p. 8.

3. Conservative approach of international courts and tribunals

International courts and tribunals have consistently resisted “humanising” temptations when ruling on international immunities.

For instance, in *Al-Adsani* the European Court of Human Rights (ECtHR) made clear that the recognition of state immunity does not entail a violation of the right of access to justice under Article 6 of the European Convention on Human Rights, even if the state allegedly violated *jus cogens* obligations⁴¹. It further ruled out the existence of a customary *jus cogens* exception to state immunity⁴², even before a *forum necessitatis* pledge⁴³. In *Jones*, the ECtHR also favoured a “pragmatic understanding” in putting on the same footing the states’ immunity and the state officials’ functional immunity from *civil domestic jurisdiction* for the commission of international crimes, including acts of torture, arguing that, “if it were otherwise, State immunity could always be circumvented by suing named officials”⁴⁴.

In *Arrest Warrant*, the International Court of Justice (ICJ) stated that incumbent heads of state, heads of government and ministers of foreign affairs enjoy personal immunity from both criminal and civil domestic jurisdiction, even for the alleged commission of war crimes and crimes against humanity⁴⁵. Moreover, in an ambiguous *obiter dictum*, the ICJ seemed to argue that former state officials lose their personal immunity before domestic courts *only* “as in respect of acts committed during th[e] period in office *in a private capacity*”⁴⁶. Again, in *Jurisdictional Immunities* the ICJ specified that the territorial tort exception does not cover unlawful acts committed by armed forces in the context of an armed conflict and that there is no *jus cogens* exception applicable to state immunity, even if obtaining compensation before the competent judge has become unfeasible⁴⁷.

Criminal international courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, have denied state officials’ immunity for the commission of international crimes⁴⁸. However, they did so mainly with respect to *their* statutory jurisdiction, paradoxically reinforcing the *a contrario* argument that, under customary law – i.e., lacking any *ad hoc* provision to the contrary –, state officials do enjoy (personal) immunity from

⁴¹ Judgment of 21 November 2001 of the ECtHR in Case *Al-Adsani v. United Kingdom* (application No. 35763/97), para. 61.

⁴² *Ibid.*

⁴³ Judgment of 15 March 2018 of the ECtHR in Case *Nait-Liman v. Switzerland* (application No. 51357/07), para. 188.

⁴⁴ Judgment of 14 January 2014 of the ECtHR in Case *Jones and Others v. United Kingdom* (applications Nos. 34356/06 and 40528/06), para. 202.

⁴⁵ Judgment of 14 February 2002 of the ICJ in Case *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), paras 51, 54 and 58.

⁴⁶ Judgment of 14 February 2002 of the ICJ in Case *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), para. 61, emphasis added. And see Judgment of the ICJ of 4 June 2008 in Case *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), paras 170 and 194.

⁴⁷ Judgment of 3 February 2012 of the ICJ in Case *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), para. 101. On this ruling see, among others, *Conforti, B.* The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity. *Italian Yearbook of International Law*, Vol. 21, 2011, p. 138, and *Pisillo Mazzeschi, R.* Il rapporto tra norme di *jus cogens* e la regola sull’immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012. *Diritti umani e diritto internazionale*, Vol. 6, 2012, p. 310.

⁴⁸ Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. *Yearbook of the International Law Commission*, Vol. II, Part Two, 2016, para. 96.

criminal jurisdiction both before international and domestic courts and tribunals for the commission of such crimes⁴⁹.

This "conservative approach" might be explained on the basis of the fact that international immunities represent one of the oldest branches of international law and corollary of the fundamental principles of reciprocity and sovereign equality of states. Therefore, it is understandable that international courts and tribunals tend to use a pinch of caution in departing from customary law or in recognising the existence of an exception that has not fully consolidated into practice in this matter.

Still, the role of international courts and tribunals in the development of international immunities can be problematic. One has just to think of the above recalled *jure gestionis* exception: if, in the early decades of the 20th century, an international court or tribunal had ruled on the validity of the so-called "Italian-Belgian theory", it would have likely declared it at variance with international law⁵⁰. It is impossible to know whether such a stance would have irreversibly stopped the shift from an absolute to a restricted immunity. In any case, as observed by Dame Rosalyn Higgins, the growing protagonism of international courts and tribunals is unfortunate, as domestic judges are the natural repository for findings on this area of international law⁵¹.

4. The "controlimiti doctrine"

The *controlimiti* doctrine works as an "emergency brake" in the case of irreconcilable conflict between the application of international (or supranational) law and compliance with the fundamental principles of the constitutional order of states. The (dualistic) solution is to uphold the latter to the detriment of the former⁵².

Domestic judges may feel inclined to resort to it to pursue their quest for a more "humanised" regime by questioning the constitutionality of the application of international immunities before (gross) violations of human rights⁵³. This is exactly what happened in the Italian Constitutional Court's (ICt) *sentenza* No. 238 of 2014. The legal background of this ruling is well known: in 2004, the Cassazione recognized the existence of a *jus cogens* exception in international law and denied the applicability of Germany's immunity for the commission of war crimes in Italy by Nazi armed forces from 1943 to 1944⁵⁴. *Ferrini* set a problematic precedent and eventually led to the *Jurisdictional Immunities* case. As a result, the Italian executive enacted an *ad hoc* piece of legislation to force Italian judges to comply with the ICJ judgment⁵⁵, but the Tribunal of Florence raised "issue of constitutionality" with respect to the compatibility between this and other pieces of legislation and Articles 2 and 24 of the Italian

⁴⁹ *Webb, Ph.* Human Rights, p. 126.

⁵⁰ *Conforti, B.* The Judgment, p. 142.

⁵¹ *Higgins, R.* Equality of States, p. 144 (referring to state immunity).

⁵² *Peters, A., Volpe, V.* Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse. In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, *Volpe, V., et al.* (eds). E-book: Springer, 2021, p. 23.

⁵³ *Conforti, B.* The Judgment, p. 133.

⁵⁴ Judgment of the Italian Court of Cassation of 11 March 2004 in the case No. 5044, para. 9.1. See, among others, *Iovane, M.* The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claim of Reparation for Victims of Serious Violations of Fundamental Rights. Italian Yearbook of International Law, Vol. 14, 2004, p. 165, *Gianelli, A.* Crimini internazionali ed immunità degli Stati alla giurisdizione nella sentenza Ferrini. Rivista di diritto internazionale, Vol. 87, 2004, p. 643 and *De Sena, P., De Vittor, F.* State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case. European Journal of International Law, Vol. 16, 2005, p. 89.

⁵⁵ Law of 14 January 2013, No. 5, Article 3.

Constitution⁵⁶. In an unexpected turn of events, the ICCT upheld the issue of constitutionality, noting that:

[T]he fundamental principles of the constitutional order and inalienable human rights constitute a limit to the introduction [within the Italian legal system] of generally recognized norms of international law [...]. [I]nsofar as the law of immunity from jurisdiction of States conflicts with the[se] fundamental principles, it has not entered the Italian legal order and, therefore, does not have any effect therein⁵⁷.

The change of strategy is evident: unlike the Cassazione in *Ferrini*, the ICCT acknowledged the lack of a *jus cogens* exception in international law; it is for this reason that it triggered the *controlimiti* to reassert the right of access to justice “especially when the right at issue is invoked to protect fundamental human rights”⁵⁸. Strictly speaking, this judgment is not an element of humanisation, although, in a broader sense, it is a highly qualified element of practice expressing an *opinio juris* and, therefore, it “may also contribute to a desirable – and desired by many – [sic] evolution of international law itself”⁵⁹.

Sentenza No. 238 has sparked “extensive and heated scholarly commentary”⁶⁰. As of today, however, its actual impact has been minimal, if not irrelevant. At the domestic level, Italian judges re-embraced the *Ferrini* jurisprudence and, in splendid isolation, keep condemning Germany to pay reparation to Italian victims of Nazi massacres and deportation⁶¹.

On the contrary, outside Italy, *sentenza* No. 238 has hardly inspired imitation attempts. There is no clear reason as to why it is so. One may argue that the lack of cross-fertilisation is due to both the unique set of circumstances characterising the whole legal ordeal and the peculiarity of the Italian institutional framework that ultimately allowed Constitutional Court to rule against the enforcement of an international judgment upon request of a domestic judge, indirectly validating the Supreme Court’s previous case law. However, the *controlimiti* doctrine virtually applies in any legal system equipped with a constitutional review mechanism. This is also true when international immunities have been codified in a domestic act, although the question will likely narrow down to the constitutionality of the that act, without involving the applicability of international law.

In addition, the more frequent establishment of *ad hoc* judicial bodies tasked with adjudicating disputes arising from the violations of human rights by states in conflict scenarios may have contributed to reducing the filing of claims for compensation

⁵⁶ Orders of the Tribunal of Florence of 21 January 2014 in Cases Nos 84, 85 and 113.

⁵⁷ Judgment of the Italian Constitutional Court of 22 October 2014 in the case No. 234, paras 3.2. and 3.5. The translation is in *Volpe, V., others* 2021, p. 415.

⁵⁸ Judgment of the Italian Constitutional Court of 22 October 2014 in Case No. 234, para. 3.4.

⁵⁹ *Ibid.*, para. 3.3.

⁶⁰ See, among others, *Tanzi, A. M.* Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale. *La Comunità internazionale*, Vol. 70, 2015, p. 13, *Cataldi, G.* A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order’s Fundamental Values and Customary International Law. *Italian Yearbook of International Law*, Vol. 24, 2015, p. 37 and *Cannizzaro, E.* Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014. *Rivista di diritto internazionale*, Vol. 98, 2015, p. 126.

⁶¹ Recently, Italy has established a public fund for the liquidation of these damages. Once the payment is made, all the rights related to the claim shall cease to exist, see Decree-Law of 30 April 2022, No. 36, Article 43.

before domestic courts⁶². Again, this explanation is not particularly satisfying, since it applies to a limited number of potential cases.

Of course, it may well be that domestic judges regard the application of international immunities consistent with their respective constitutional order, thereby withholding *ab initio* the formation of a "constitutional exception". After all, whether to invoke the *controlimiti* is, first and foremost, a question of domestic law, not of international law. Still, it seems just a matter of time (and chance) before other domestic judges find themselves in a situation akin to that of the ICCt and justify the lifting of state or state officials' immunities by recourse to the *controlimiti* doctrine.

Recently, the Seoul Central District Court did apply the *controlimiti* doctrine to condemn Japan to compensate twelve South Korean women who had been victims of sexual slavery perpetrated by members of the Imperial Japanese Army during Japan's 1910 to 1945 colonial rule of Korea. The South Korean judges remarked that "the doctrine of State immunity is not permanent nor static" and, referring to *Ferrini* and *sentenza* No. 238, ruled that the application of state immunity would deprive "victims of their right of access to courts guaranteed by the Constitution"⁶³.

Summary

Humanisation constantly strives for pushing the state-centric boundaries of international immunities forward. This area of law has proved remarkably steady, but it is dubious whether some elements of the international immunity regime will stand the test of time.

For instance, it may seem "inherently anomalous [...] that the exercise of territorial jurisdiction prevails over immunity where torts are concerned, but not where criminal acts of foreign military are concerned"⁶⁴. In the same vein, the "impossible antinomy" theory translates into an over-formalistic avoidance technique and appears ill-suited to convincingly settle the "value conflict" between the fundamental right of access to justice and state immunity before a *forum necessitatis* pledge for gross violations of human rights. In addition, this theory falls short of explaining why, when it comes to gross violations of human rights, state officials' functional immunity does not appear to benefit from its "procedural" nature as state officials' personal immunity and state immunity do⁶⁵.

The recent ILC works also support a more "humanised" law of state officials' immunities and could be instrumental in reigniting the debate on the admissibility of a *jus cogens* exception to state immunity. In particular, a customary exception to state officials' functional immunity from criminal domestic jurisdiction for

⁶² Fontanelli, F. Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work? In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, Volpe, V., et al. (eds). E-book: Springer, 2021, p. 168.

⁶³ Judgment of the Seoul Central District Court of 8 January 2021 in Case No. 2016 Ga-Hap 505092, paras. C(3)(3) and C(3)(6)(i). Recently, however, another South Korean court has upheld Japan's immunity in an almost identical case, see Amnesty International. South Korea: Disappointing Japan Ruling Fails to Deliver Justice to "Comfort Women". Available: <https://www.amnesty.org/en/latest/news/2021/04/south-korea-disappointing-japan-ruling-fails-to-deliver-justice-to-comfort-women/> [last viewed 24.03.2022].

⁶⁴ Higgins, R. Equality of States, p. 138.

⁶⁵ Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2018, para. 130. The major counter-argument obviously being that any theoretical contradiction is only of secondary importance in the face of how international practice has developed.

the commission of international crimes could represent a dialectical argument for challenging the theoretical consistency of the applicability of state immunity from civil domestic jurisdiction for the commission of corresponding acts.

Finally, a more frequent recourse to the *controlimiti* doctrine may contribute to the establishment of new exceptions.

On the other hand, it is crucial to stress that international immunities play an essential role in ensuring an orderly allocation and exercise of jurisdiction and in respecting the sovereign equality of states. Therefore, any exception should (and, most likely, will) progressively emerge in international practice as the result of a careful composition between these and equally valuable, but diverging interests. For instance, a strong territorial connection with the forum state justifies the lifting of state immunity even with respect to *jure imperii* acts. Similarly, the lack of exceptions to incumbent state officials' personal immunity finds a reasonable counterweight in its temporary nature.

In conclusion, guessing whether and to what extent international immunities will actually develop entails the risk of conflating the "ought" and the "is" of international law⁶⁶. In the light of international practice, it looks likely that the conundrum of the conflict between international immunities and human rights will be solved halfway, hopefully leaning towards a more comprehensive protection of the latter, at least before the most heinous violations of international law.

Sources

Bibliography

1. *Barkholdt, J., Kulaga, J.* Analytical Presentation of the Comments and Observations by States on Draft Article 7. KFG Working Paper Series, Vol. 4, 2018.
2. *Cannizzaro, E.* Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014. *Rivista di diritto internazionale*, Vol. 98, 2015.
3. *Cataldi, G.* A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law. *Italian Yearbook of International Law*, Vol. 24, 2015.
4. *Conforti, B.* The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity. *Italian Yearbook of International of International Law*, Vol. 21, 2011.
5. *De Sena, P., De Vittor, F.* State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case. *European Journal of International Law*, Vol. 16, 2005.
6. *Fontanelli, F.* Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work? In: *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court Sentenza 238/2014*, *Volpe, V., et al.* (eds). E-book: Springer, 2021.
7. *Fox, H., Webb, Ph.* *Law of State Immunity*. Oxford: OUP, 3rd ed., 2013.
8. *Gianelli, A.* Crimini internazionali ed immunità degli Stati alla giurisdizione nella sentenza *Ferrini*. *Rivista di diritto internazionale*, Vol. 87, 2004.
9. *Hess, B.* The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property. *European Journal of International Law*, Vol. 4, 1993.
10. *Higgins, R.* Equality of States and Immunity from Suit: A Complex Relationship. *The Netherlands Yearbook of International Law*, Vol. 43, 2012.
11. *Iovane, M.* The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claim of Reparation for Victims of Serious Violations of Fundamental Rights. *Italian Yearbook of International Law*, Vol. 14, 2004.
12. *Meron, Th.* *The Humanization of International Law*. Leiden: Martinus Nijhoff, 2006.

⁶⁶ *Tzevelekos, V. P.* Revisiting the Humanisation of International Law: Limits and Potentials. Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation. *Erasmus Law Review*, Vol. 6, 2013, p. 75.

13. *Orakhelashvili, A.* Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening). *American Journal of International Law*, Vol. 106, 2012.
14. *Pavoni, R.* Human Rights and the Immunities of Foreign States and International Organizations. In: *Hierarchy in International Law: The Place of Human Rights*, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012.
15. *Pellet, A.* "Human Rightism" and International Law. *Italian Yearbook of International Law*, Vol. 10, 2000.
16. *Peters, A., Volpe, V.* Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse. In: *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court Sentenza 238/2014*, *Volpe, V., et al.* (eds). E-book: Springer, 2021.
17. *Pisillo Mazzeschi, R.* Il rapporto tra norme di *ius cogens* e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012. *Diritti umani e diritto internazionale*, Vol. 6, 2012.
18. *Roberts, A.* Comparative International Law? The Role of National Courts in Creating and Enforcing International Law. *International and Comparative Law Quarterly*, Vol. 60, 2011;
19. *Sciso, E.* Italian Judges' Point of View on Foreign State's Immunity. *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011.
20. *Sheeran, S.* The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries? In: *Routledge Handbook of International Human Rights*, *Sheeran, S., Rodeley, N.* (eds). London: Routledge, 2013.
21. *Tanzi, A. M.* Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale. *La Comunità internazionale*, Vol. 70, 2015.
22. *Tzevelekos, V. P.* Revisiting the Humanisation of International Law: Limits and Potentials. *Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation*. *Erasmus Law Review*, Vol. 6, 2013.
23. *Van Alebeek, R., Pavoni, R.* Immunities of States and their Officials. In: *International Law in Domestic Courts: A Casebook*, *Nollkaemper, A., et al.* (eds). Oxford: OUP, 2018.
24. *Webb, Ph.* Human Rights and the Immunities of State Officials. In: *Hierarchy in International Law: The Place of Human Rights*, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012.
25. *Wuerth, I.* International Law in Domestic Courts and the Jurisdictional Immunities of the State Case. *Melbourne Journal of International Law*, Vol. 13, 2012.
26. *Yang, X.* State Immunity in International Law. Cambridge: CUP, 2012.

Normative acts

1. Law of 14 January 2013, No. 5.
2. Decree-Law of 30 April 2022, No. 36.

Case law

1. Judgment of the House of Lords of 24 March 1999 in Case Regina v. Bow Street Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (No. 3).
2. Judgment of 21 November 2001 of the ECtHR in Case Al-Adsani v. United Kingdom (application No. 35763/97).
3. Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).
4. Judgment of the Italian Court of Cassation of 11 March 2004 in Case No. 5044.
5. Judgment of the House of Lords of 14 June 2006 in Case Jones and Others v. The Kingdom of Saudi Arabia.
6. Judgment of the ICJ of 4 June 2008 in Case Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).
7. Judgment of 3 February 2012 of the ICJ in Case Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening).
8. Judgment of 14 January 2014 of the ECtHR in Case Jones and Others v. United Kingdom (applications No. 34356/06 and 40528/06).
9. Judgment of the Italian Constitutional Court of 22 October 2014 in Case No. 234.
10. Judgment of the Seoul Central District Court of 8 January 2021 in Case No. 2016 Ga-Hap 505092.

Other sources

1. Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016.
2. Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2018.
3. Draft Conclusions on Identification of Customary International Law, with Commentaries. Yearbook of the International Law Commission, Vol. II, Part Two, 2018.

© University of Latvia, 2022

This is an open access article licensed under the Creative Commons Attribution 4.0 International License (CC BY-NC 4.0) (<https://creativecommons.org/licenses/by-nc/4.0/>).