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Immunity from Civil Jurisdiction: Where Do we Go from Here? Assessing the Relevance of Recent Opposing Trends in the Conceptualisation of State Immunity

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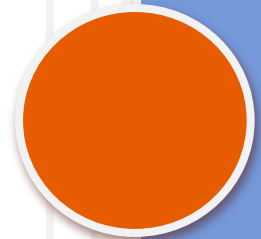
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Immunity from Civil Jurisdiction: Where Do we Go from Here? Assessing the Relevance of Recent Opposing Trends in the Conceptualisation of State Immunity

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Abstract:

Traditional rules concerning the immunity of States from jurisdiction are currently challenged by Italian domestic courts, seeking the possibility to provide exceptions to foreign immunity based upon the gravity of the foreign State's conduct and the consequences on human rights following recognition of State immunity. Such a trend is opposed to others that – for example – recognize a blanket of immunity to international organisations even where these do not establish internal procedures to adjudicate their conducts. The aim of the present work is to reconstruct the opposing emerging trends so to reflect on their value in the promotion of new rules, and to determine their consequences in terms of “crisis of the law of State immunity”.

Keywords: International Law – Immunity – Human Rights – International Organisations – Evolutionary trends Westphalian Model

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1. Introduction

As recalled by Prof. van Aaken during the opening ceremony of the 12th Annual Conference of the European Society of International Law, “crisis” is commonly defined by dictionaries as a period of insecurity where a decision – for the better or the worse – is highly needed. And, of course, the question “is international law in a state of crisis” is sensitively different from the question “how international law works in times of crisis”. None of those two questions could be easily answered in short, being the scope of such investigations with vast – possibly unlimited – boundaries.

The present study wishes to start from some generally accepted conclusions related to the first question (is international law in crisis?) to address such issue under a very specific focal lenses related to the second question (how international law works in time of crisis). In this sense, the recent developments before Italian courts in the field of State immunity from civil jurisdiction

will be reconstructed and analysed so as to detect a possible new trend in the conceptualisation – at the domestic level and under a domestic law point of view – of sovereignty and immunity. Such a trend will briefly be compared to another one that appears to secure a peculiar status to the United Nations, as long as actions to ensure international peace are at hand. This comparison will raise the question whether or not the international law of State immunity is in a state of crisis. Whilst there is little doubt that rules on immunity are currently in a higher “state of flux” than usual, it does not seem yet they have reached a state than can be unanimously be accepted by all as “crisis”.

2. Preliminary remarks on the relevance of the emerging Italian case law in the understanding of State immunity in light of the post-Westphalian crisis of the ‘Paradigm State’

As it is known, traditional theories of international law used to recognise full immunity to foreign States. Consequently, domestic courts were barred from starting proceedings, regardless of the subject matter of the dispute involving a foreign State.¹ Such a privilege under international law

¹ [T]he municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government . . . without the consent of the government of that country’ (CA *Twycross v Dreyfus* (1877) LR 5 Ch D 605). In the legal scholarship, on the evolution of State immunity, see *ex multis*, Göran Melander, ‘Waiver of Immunity’ [1976] 40 *Nordisk Tidsskrift for International Ret* 22; Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2004) 266; Riccardo Luzzatto and Ilaria Queirolo, ‘Sovranità territoriale, “Jurisdiction” e regole di immunità’ in Sergio M Carbone, Riccardo Luzzatto and Alberto Santa Maria (eds), *Istituzioni di diritto internazionale* (Giappichelli Editore, 5th Edition, 2016); Ilaria Queirolo and Stefano Dominelli, ‘Statutory certificates e immunità funzionale del registro italiano navale’ (2012) *Il Diritto marittimo* 152 ff.; Lorenzo Schiano di Pepe, ‘Brevi note (di diritto del mare) in tema di immunità delle società di classificazione a margine della pronuncia della Corte di Cassazione francese nel caso Erika’ (2012) *Il Diritto marittimo* 1281; Sergio M Carbone and Laura Carpaneto, ‘Persa un’occasione interpretativa su diritti del singolo e immunità’ (2006) *Responsabilità e risarcimento* 12; Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Domestic Courts’ [2011] 21 *European Journal of International Law* 815; Roozbeh B Baker, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ [2010] 21 *European Journal of International Law* 173; Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer, 2005); Roberto Baratta, ‘L’esercizio della giurisdizione civile sullo Stato straniero autore di un crimine di guerra’ (2004) *Giustizia civile* 1200; Francesco Berlingieri, ‘La Convenzione delle Nazioni Unite sull’immunità giurisdizionale degli Stati e delle loro proprietà’ (2006) *Il Diritto marittimo* 1351; Leo J Bouchez, ‘The Nature and Scope of State Immunity from Jurisdiction and Execution’ [1979] 10 *Netherlands Yearbook of International Law* 3; Lee M Caplan, ‘State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory’ [2003] 97 *The American Journal of International Law* 741; Andrew Dickinson, Rae Lindsay and James P Loonam, *State Immunity. Selected Materials and Commentary* (Oxford University Press, 2004); Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd edition, 2015); Micaela Frulli, *Immunità e crimini internazionali. L’esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini*

can either be inferred from the principle of sovereignty, or from the principle that States are not allowed to interfere with the legal order of other States.² Regardless of the general principle founding the rules³ on State immunity, its absolute theory is the expression of the State Paradigm that followed the Westphalian construction,⁴ which is ‘predicated on the co-equal sovereignty of States’.⁵ Such a conceptualisation of the rules on State immunity has lost consensus within the international community, but is still followed in some domestic legal orders.⁶

Today, most of the States adhere to the so called restrictive theory of State immunity: as recalled by domestic courts, ‘[u]nder this principle, the exemption of foreign States from civil jurisdiction is limited to acts performed *iure imperii* (that is, those acts with which public State functions are performed) and does not extend to acts which are *iure gestionis* or *iure privatorum* (namely acts of a private nature, which the foreign State carries out independently of its sovereign power, like a private citizen (...)).’⁷

internazionali (Giappichelli, 2007); Elisabeth Handl, ‘Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo’ [2006] 61 *Zeitschrift für öffentliches Recht* 433; Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ [1951] 28 *British Yearbook of International Law* 224; Riccardo Luzzatto, *Stati stranieri e giurisdizione nazionale* (Giuffrè, 1972); Norman Paech, ‘Staatenimmunität und Kriegsverbrechen’ [2009] 47 *Archiv des Völkerrechts* 36; Rolando Quadri, *La giurisdizione sugli Stati stranieri* (Giuffrè, 1941); Ilaria Queirolo ‘Immunità degli Stati e crisi del debito sovrano’ in Giovanna Adinolfi and Michele Vellano (eds), *La crisi del debito sovrano degli Stati dell’area euro* (Giappichelli Editore, 2013) 151; Natalino Ronzitti and Gabriella Venturini (eds), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali* (CEDAM, 2008); Stefano Dominelli, ‘Immunità statale e questioni processuali: quando l’esercizio del diritto di difesa equivale ad una tacita accettazione della giurisdizione italiana’ (2013) *Il Diritto marittimo* 147, at 149, and ID, ‘L’incidenza della giurisprudenza della Corte internazionale di giustizia nell’ordinamento interno e internazionale in materia di immunità statale per la commissione di crimina iuris gentium: posizioni attuali e prospettive future’ [2014] 2 *Nuova giurisprudenza ligure* 7, where further references in the legal scholarship.

² For a reconstruction, see Rosanne Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008), 83 ff.

³ On whether immunity under international law is a ‘principle’ or a ‘rule’, see Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’ in [2011] 21 *The European Journal of International Law* 853.

⁴ Noting that ‘internal exclusive competence coupled with external equality with and independence from other States were the hallmarks of the Westphalian State, Fox, Webb, *The Law of State Immunity*, cit., p. 26.

⁵ Cherif Bassiouni, ‘The Discipline of International Criminal Law’, in Cherif Bassiouni (ed), *International Criminal Law, Vol. I Sources, Subjects, and Contents* (Brill, 3rd Edition, 2008) 1, at 51. See also Antonio Cassese, *International Law* (Oxford University Press, 2nd Edition, 2005), 28, and Christopher Harding and Chin L Lim, ‘The Significance of Westphalia: An Archaeology of the International Legal Order’ in Christopher Harding and Chin L Lim (eds), *Renegotiating Westphalia. Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Martinus Nijhoff Publishers, 1999), 1, at 5.

⁶ Cf. for cases of application of the absolute theory of immunity, in spite of the signature of international conventions that adopt a different approach, and contrary to customary international law, and domestic rules, European Court of Human Rights, ECtHR Oleynikov v Russia, App. No 36703/04, 14 March 2013. See also Hong Kong Court of Final Appeal, 8 September 2011, Democratic Republic of the Congo and others v FG Hemisphere Associates LLC, in 150 ILR 684.

⁷ Corte di Cassazione, Sezioni Unite, 27 May 2005, n 11225, Borri v Repubblica Argentina, in *Rivista di diritto internazionale* (2005) 856. A partial English translation of the decision, quoted in the text, is

As it is known, this first evolution is the result of a first set of decisions taken by Italian and Belgian courts,⁸ according to which, ‘States acting as a private individual were regarded as having submitted themselves to all the civil consequences of the contract, included its judicial enforcement’.⁹ Such a first (re)evolution is already consistent with what today appears to be a decline of the ‘State Paradigm’.¹⁰ Due to emerging role of non-State actors, transnationalism trends, individual criminal liability, some¹¹ argue that the international community is moving towards a system¹² that no longer rests upon the Westphalian principle of co-equality and sovereignty of States but towards a system that also recognises other international actors, such as individuals. It is against this background that some current decisions in the field of State

available at http://www.geneva-academy.ch/RULAC/pdf_State/Borri-v-Argentina.pdf. In this decision, the *Corte di Cassazione* addressed the issue of State immunity of the Republic of Argentina for its *moratorium* suspending payments for bonds. Whilst acknowledging that the sell-out of sovereign debt is an *acta iure privatorum* for which no immunity can be recognised, the court made a distinguishing for the subsequent budget law that suspended payments. Not being this an act that is the expression of private law, the court recognised immunity from jurisdiction to the Republic of Argentina. This case law is however inconsistent with the position assumed by other European States, namely Germany, whose courts in Frankfurt are often prorogated with jurisdiction. Here, German courts have consistently rejected immunity (cf. LG Frankfurt/Main, 14.03.2003 - 2-21 O 294/02, in *Zeitschrift für Wirtschafts- und Bankrecht* (2003) 783, and OLG Frankfurt, 13.06.2006 - 8 U 107/03, in *Zeitschrift für Wirtschafts- und Bankrecht* (2007) 929). However, it should also be noted that, more recently, the German Supreme Court (Bundesgerichtshof, 08.03.2016 - VI ZR 516/14, in *Zeitschrift für Wirtschaftsrecht* (2016) 789) has followed a solution that resembles the one of the Italian *Corte di Cassazione* in relation to the immunity of Greece following the change of bonds that were previously emitted by that State due to an international agreement between the State on the one side, and the European Central Bank and National Central Banks of other Member States on the other.

⁸ Corte d’Appello Lucca, 1887, Hamspohn v Bey di Tunisi, [1887] *Foro it.* I, 474; Tribunal civil of Brussels, *Societe pour la fabrication de cartouches v Colonel Mutkuroff, Ministre de la guerre de la principaute de Bulgarie* (1888), in *Pandectes periodiques* (1889) 350; Tribunal of Florence, 8 June 1906, in *Rivista di diritto internazionale* (1907) 379; Court of Cassation, 13 March 1926, in *Rivista di diritto internazionale* (1926) 250; Court of Appeal of Naples, 16 July 1926, in *Rivista di diritto internazionale* (1927) 104; Court of Appeal of Milan, 23 January 1932, in *Rivista di diritto internazionale* (1932) 549; Court of Cassation, 18 January 1933, in *Rivista di diritto internazionale* (1933) 241; Court of Cassation, 11 June 1903, in *Journal de Droit International Privé* (1904) 136; Court of Appeal of Brussels, 24 June 1920, in *Pasicrisie Belge* (1922) II, 122, and Court of Appeal of Brussels, 24 May 1933, in *Journal de Droit International* (1933) 1034.

⁹ Ilaria Queirola, ‘Immunity’, in Jurgen Basedow, Franco Ferrari, Pedro de Miguel Asensio, Gisela Rühl (eds), *European Encyclopedia of Private International Law*, Edward Elgar Publishing, forthcoming.

¹⁰ Angela Del Vecchio, *Giurisdizione internazionale e globalizzazione: i tribunali internazionali tra globalizzazione e frammentazione* (Giuffrè, 2003).

¹¹ Luigi Ferrajoli, *Principia iuris. Teoria del diritto e della democrazia, vol. 2, Teoria della democrazia* (Laterza, 2007) 490 f., arguing for example that the creation of the UN has started an evolution of international law to a supra-State legal system which aims at the protection of international peace and human rights (critical on this reconstruction that applies traditional constitutional concepts to public international law, but also addressing the elements of evolution of the international community under an international law perspective, Giuseppe Palmisano, ‘Dal diritto internazionale al diritto cosmopolitico? Riflessioni a margine de La democrazia nell’età della globalizzazione’, in *Jura Gentium* (2010) 114 ff. Cf. also, on the evolutions of the traditional international law into a ‘Global Law’, Ziccardi Capaldo, *Diritto globale. Il nuovo diritto internazionale* (Giuffrè, 2010).

¹² On the elements challenging the traditional construction of the Westphalian model, cf. *ex multis* Christopher Harding and Chin L Lim (eds), *Renegotiating Westphalia. Essays and Commentary on the European and Conceptual Foundations of Modern International Law*, cit.

immunity must be analysed. For the last 100 years the traditional Westphalian construction has led to a balance between opposing interests by ensuring immunity to foreign States where they exercise sovereign functions, whilst allowing the exercise of judicial actions against foreign States where these do not act as sovereigns.¹³

On the one side, the recent Italian case law that follows the dispute between Germany and Italy does not challenge the existence of the traditional theory of the law of State immunity. On the other side, by focusing on domestic constitutional provisions, the decision of the Italian Constitutional Court might turn out to be the first step – that has not been remained unfollowed in the subsequent case law – in the elaboration of a new State practice regarding the conceptualisation of (legitimate) sovereign functions.

3. Italy and State immunity

3.1 The original controversy between Germany and Italy, and the decision of the International Court of Justice

The controversy between Germany and Italy that has led to the 2012 judgment of the International Court of Justice (ICJ) is known, and can be recalled here *quatenus opus est*, as well as the judgment itself. Starting from the *Ferrini* case, after the decision of the Italian Supreme

¹³ It must also be recalled that States do not follow the same scheme in determining the rules to distinguish an *acta iure imperii* from an *acta iure privatorum*. Whilst there is little doubt that the classification of the nature of the foreign activity is to be done in accordance to domestic laws (cf. BVerfG, 30.04.1963 - 2 BvM 1/62, in *Neue Juristische Wochenschrift* (1963) 1732, and U.S. Supreme Court, *Republic of Argentina c. Weltover Inc.*, 504 U.S. 607; but for contrary arguments cf. *Corte di Cassazione, Sezioni Unite*, 27 May 2005, n 11225, *Borri v Repubblica Argentina*, cit., par. 4.2, and U.S. District Court, District of Columbia, *Turkmani v Republic of Bolivia*, 193 F. Supp. 2d 165 (D.D.C. 2002)), some States, mainly common law countries, have adopted domestic laws that contain specific lists with exceptions to immunity. On the same line, the United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004 States as a general principle that States are entitled to immunity, but for the listed cases. On the contrary, the European Convention on State Immunity, Basle, 16.V.1972 (European Treaty Series - No. 74) reversed the axiom and starts by taking into consideration the cases in which a State does not enjoy immunity, constructing this element as the exception to the rule. Other States, mainly civil law countries, on the contrary, do not have statutory provisions that give clear guidance to the judiciary on which foreign conduct falls within the definition of *acta iure imperii*, being in these cases necessary to subsume the conduct under one or the other category on a case by case basis having particular regard to the specificities of the single case. As expectable this leads to possible contrasts of judgments in one single State: again for Italy, for example, before the *Corte di Cassazione* recognised State immunity to the Republic of Argentina, lower courts were divided between this solution (Trib. Milano 11 marzo 2003, *Gallo c. Rep. Argentina*, in *Foro it.* (2004) I, 293; Trib. Milano 11 marzo 2003, *Goldoni et. al., Rep. Argentina*, in *Rivista di diritto internazionale privato e processuale* (2005) 1102; Trib. Roma 31 marzo 2003, *Gallo c. Rep. Argentina*, in *Giurisprudenza Romana* (2003) 271), and the opposite one (Giudice di Pace Brescia 13 agosto 2004, *Bellitti e Donati c. Rep. Argentina*, decreti ingiuntivi n. 1816 e 1817, not published, and Trib. Roma 22 luglio 2002, *Mauri et. al. c. Rep. Argentina*, in *Rivista di diritto internazionale privato e processuale* (2003) 174) rejecting immunity, in line with the German case law.

Court,¹⁴ immunity for some time has consistently been denied to Germany in actions of individuals (or their heirs) who have suffered damages caused by the Third Reich during WWII. *Ferrini* came as a *revirement* of the Italian domestic case law that, prior to that day, has always recognised State immunity in favour of Germany, since acts impugned before courts were considered as the expression of the *imperium* of the defendant.¹⁵

In *Ferrini*, the *Corte di Cassazione* came to a different conclusion that subsequently led lower courts to affirm their jurisdiction on the assumption that immunity is not to be granted in certain cases, even where the foreign conduct to adjudicate falls within the traditional category of *acta iure imperii*, and this in spite of a general reluctance of Italian courts to evolve principles and rules in such a matter.¹⁶ For NATO's military actions in Italy, immunity was upheld (n. 530/2000)¹⁷ being the activity of training of military forces part of the acceptable essential defense activity of a State (also granting immunity for those actions, n. 8157/2002¹⁸).

¹⁴ Cass. Civ. Sezioni unite, 11 March 2004, n. 5044, Luigi Ferrini v Rep fed di Germania, in *Rivista di diritto internazionale* (2004) 540, on which see *ex multis*, Giuseppe Serranò, 'Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione', in *Rivista di diritto internazionale privato e processuale* (2009) 605; Francesca De Vittor, 'Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli', in *Diritti umani e diritto internazionale* (2008) 632; Federica Persano, 'Immunità statale dalla giurisdizione civile e violazione dei diritti fondamentali dell'individuo', in *Responsabilità civile e previdenza* (2008) 2259; Carlo Focarelli, 'Diniego dell'immunità giurisdizionale degli Stati stranieri per crimini, jus cogens e dinamica del diritto internazionale', in *Rivista di diritto internazionale* (2008) 738; Claudio Consolo, 'La Cassazione "vertice imminente", non "ambiguo". Fra jus cogens prevalente sulla immunità giurisdizionale degli Stati (caso greco-tedesco risalente all'eccidio di Distomo e altri crimini bellici) e libertà di vivere con dignità fino all'ultimo (caso Engl)', in *Il Corriere giuridico* (2008) 1041; Marina Castellaneta, 'Impossibile un'azione di risarcimento se l'atto deriva dal potere sovrano dello Stato', in *2 Guida al diritto - Diritto comunitario e internazionale* [2007] 45; Pasquale De Sena, Francesca De Vittor, 'Immunità degli Stati dalla giurisdizione e violazioni di diritti dell'uomo: la sentenza della Cassazione italiana nel caso Ferrini', in *Giurisprudenza italiana* (2005) 255; Id, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' in 16 *The European Journal of International Law* [2005] 89; Alessandra Gianelli, 'Crimini internazionali ed immunità degli Stati della giurisdizione nella sentenza Ferrini', in *Rivista di diritto internazionale* (2004) 643; Andrea Atteritano, 'Immunity of States and their Organs: the Contribution of Italian Jurisprudence over the Past Ten Years' in 19 *Italian Yearbook of International Law* [2010] 33; Riccardo Pavoni, 'A Decade of Italian Case Law on the Immunity of Foreign States: Lights And Shadows', in *Ibid.*, 73; Paolo Palchetti, 'Some Remarks on the Scope of Immunity of Foreign State Officials in the Light of Recent Judgments of Italian Courts', in *Ibid.* 83; Micaela Frulli, 'Some Reflections on the Functional Immunity of State Officials', in *Ibid.* 91.

¹⁵ For a reconstruction of the proceedings before domestic courts prior the decision of the Corte di Cassazione, see *ex multis* Massimo Iovane, 'The Ferrini Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights', in *Italian Yearbook of International Law* (2005) 165.

¹⁶ De Sena, De Vittor, State Immunity and Human Rights: The Italian Supreme Court Decision in the Ferrini Case, cit., 91.

¹⁷ Cass. Civ. Sezioni unite, 3 August 2000, n. 530, Pres. Cons. e altro c. Filt-Cgil Trento, in *Giustizia civile* (2001) I, 747.

¹⁸ Cass. Civ. Sezioni unite, 5 June 2002, n. 8157, Pres. Cons. c. Markovic e altro, in *Rivista di diritto internazionale privato e processuale* (2004) 311, where it can be read that '[G]li atti compiuti dallo Stato nella conduzione di ostilità belliche si sottraggono ad ogni sindacato giurisdizionale, costituendo espressioni di una funzione di indirizzo politico, rispetto alla quale non è configurabile una situazione

The *Corte di Cassazione* makes however a distinguishing between the previous cases and the issue of the immunity of the German State in the context of WWII. Such a distinguishing is based i) upon the gravity of the conduct at hand, ii) upon the violation of fundamental values of the international community, iii) upon the consequent violations of rules on international criminal law, and iv) upon the admittance by the foreign State of the gravity of the conduct. Furthermore, according to the court, the existence of universal jurisdiction does, by necessity, imply an overruling of the rules on immunity, which must necessarily extend to claims related to such crimes, and thus to civil actions against the State of the foreign agent.¹⁹ Being rules for the protection of fundamental rights at the top of the ‘hierarchy’ of rules of international law, the antinomy between the rules must be resolved in favour of the ‘higher’ value, since their evolution cannot leave other principles of international law unaffected. In this sense, immunity can only be recognised to a lawful exercise of sovereignty.

Additionally, the distinction made by the court is based on the circumstance that contemporary decisions tackling the issue of State immunity, and ruling in favour of this last element, in the context of civil actions had as their focus damages caused by a foreign State in a third State, and not in the State of the forum. This, in the court’s eye, was a sufficient element to distinguish the case, and re-interpret contemporary principles of that day, also taking into consideration foreign laws that i) do not treat immunity in the same way as where the damage occurs abroad, or within the State of the seised court, and that ii) limit State immunity for damages connected to the physical integrity (at least for States supporting terrorism).

Lastly, adopting a clear view on the relationship between functional immunity and State immunity, the court argues that evolutions that reduce the protection of the agent also have the effect of reducing the level of protection of State immunity, being these two different faces of the same medal.²⁰

The *Corte di Cassazione* in its *Ferrini* case has thus rationalised the principles and rules of public international law related to international criminal law, humanitarian law, and human rights laws so as to support its view that the law of State immunity witnessed a further evolution in respect to the *Bay of Tunisi* jurisprudence.

di interesse protetto a che gli atti in cui detta funzione si manifesta assumano o meno un determinato contenuto. In applicazione di detto principio è stato dichiarato il difetto di giurisdizione su una domanda di risarcimento proposta nei confronti della Presidenza del Consiglio e del Ministro della difesa dell’Italia per l’avvenuta distruzione, nel corso delle operazioni aeree della NATO contro la Repubblica Federale di Jugoslavia, di un obiettivo non militare, e al conseguente decesso di alcuni civili.’

¹⁹ ‘Il riconoscimento dell’immunità dalla giurisdizione in favore degli Stati che si siano resi responsabili di tali misfatti si pone in palese contrasto con i dati normativi appena ricordati, poiché detto riconoscimento, lungi dal favorire, ostacola la tutela dei valori, la cui protezione è da considerare invece, alla stregua di tali norme e principi, essenziale per l’intera Comunità internazionale, tanto da giustificare, nelle ipotesi più gravi, anche forme di reazione obbligatorie’.

²⁰ ‘Ma se il rilievo è esatto, come sembra a questa Corte, deve allora convenirsi con quanti affermano che se l’immunità funzionale non può trovare applicazione, perché l’atto compiuto si configura quale crimine internazionale, non vi è alcuna valida ragione per tener ferma l’immunità dello Stato e per negare, conseguentemente, che la sua responsabilità possa essere fatta valere davanti all’autorità giudiziaria di uno Stato straniero’.

As it is known, such a reconstruction of public international law has been rejected in 2012 by the ICJ, which does not state that international treaty law cannot, or is not going, towards further limitations. The *decisum* of the ICJ is only limited to a study of customary international law, the only one that was applicable between the parties at the time of the proceeding.²¹

More in particular, the ICJ concluded that:

- i) immunity must be granted (this being the international wrongdoing on which the court was called to rule on²²) for *acta iure imperii*²³;

²¹ ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, para. 54. On the decision see *ex multis* Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity', in 21 *Italian Yearbook of International Law* [2011] 135; Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State', in *Ibid.*, 143; Carlos Espósito, 'Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist"', in *Ibid.*, 161; Mirko Sossai, 'Are Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?', in *Ibid.*, 175; Lee Walker, 'Case Note: Jurisdictional Immunities of the State (Germany v Italy - Greece Intervening) (Judgment) (International Court of Justice, General List No 143, 3 February 2012)', in 19 *Australian International Law Journal* [2012] 251; Stefania Negri, 'Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)', in 16 *International Community Law Review* [2014] 123; Paul C Bornkamm, 'State Immunity against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State Developments', in 13 *German Law Journal* [2012] 773; J Craig Barker, 'International Court of Justice: Jurisdictional Immunities of the State (Germany v Italy) Judgment of 3 February 2012', in 62 *International and Comparative Law Quarterly* [2013] 741; Blanke Hermann-Josef and Lara Falkenberg, 'Is There State Immunity in Cases of War Crimes Committed in the Forum State: On the Decision of the International Court of Justice (ICJ) of 3 February 2012 in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) Developments', in 14 *German Law Journal* [2013] 1817; Harvey Jarrad, '(R)evolution of State Immunity following Jurisdictional Immunities of the State (Germany v Italy) - Winds of Change or Hot Air', in 32 *University of Tasmania Law Review* [2013] 208; Rosanne van Alebeek, 'Jurisdictional Immunities for the State (Germany v. Italy): On right Outcomes and Wrong Terms', in 55 *German Yearbook of International Law* [2015] 281; Lorna McGregor, 'State Immunity and Human Rights Is There a Future after Germany v. Italy?', in *Journal of International Criminal Justice* [2012] 1; Giuseppe Nesi, 'The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy', in 11 *Journal of International Criminal Justice* [2013] 185; Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished', in 25 *Leiden Journal of International Law* [2012] 979; Alexander Orakhelashvili, 'Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)', in 106 *The American Journal of International Law* [2012] 609; Sangeeta Shah, 'Jurisdictional Immunities of the State: Germany v Italy', in 12 *Human Rights Law Review* [2012] 555, and Markus Krajewski, Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' in 16 *Max Planck Yearbook of United Nations Law* [2012] 1.

²² *Ratione temporis*, the court, As it is known, identified the relevant point in time as the denial of immunity, and not the acts for which immunity was invoked – since such acts would have fallen outside the jurisdiction of the court; see ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, cit., para. 44.

²³ ICJ, Jurisdictional Immunities of the State, cit., para. 65, and para. 77. The court has in fact avoided answering a more general question on whether the territorial tort exception find application to *acta iure imperii* in general (cf. Hazel Fox and Philippa Webb, *The Law of State Immunity*, cit., 478).

ii) serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity, are no ground to overcome State immunity (being impossible to detect a contrast between a mere procedural rule and a substantive rule);

iii) immunity is also granted where there is no other reasonable alternative judicial protection.²⁴

The decision of the ICJ has been subject to a number of critiques by scholars, other than by courts. To start, the court presented the issue as a problem of consistency between fundamental rules of the international community, namely State sovereignty, and immunity, which must ‘be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.’²⁵ As noted by scholars, this passage confirms that immunity is a right of the Defendant State, and that immunity is the rule, and absence of immunity is the exception.²⁶ In this sense, given that immunity is itself an exception to the principle of territorial sovereignty, some authors have criticised the rejection by the court of the “local tort rule” on the basis that the case law and the legislation scrutinised was not (explicitly or impliedly) applicable to military activities.²⁷

Additionally, the court has not dwelled on the legitimacy of the substantive conducts to be adjudicated by Italian courts (war crimes),²⁸ this in spite of other judges raising the issue. In his dissenting opinion, Judge Cançado Trindade suggests the ‘absence or inadmissibility of State immunities in face of *delicta imperii*, of international crimes in breach of *jus cogens*,’ admitting that international law ‘appears to be at last prepared to acknowledge the duties of States vis-à-vis individuals under their respective jurisdictions’.²⁹ However, such a reading, as noted in the legal

²⁴ ‘[...] the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue’ (ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, cit., para. 104).

²⁵ *Ibid.*, para. 57.

²⁶ Andrea Gattini, ‘Immunité et souveraineté dans l’arrêt de la Cour internationale de Justice dans l’affaire Immunités juridictionnelles de l’État’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 223, 224.

²⁷ Michael Bothe, ‘Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ’s Judgment on the Jurisdictional Immunity of States’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 99, 103 f.

²⁸ Markus Krajewski, Christopher Singer, ‘Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights’, cit., 18.

²⁹ ICJ, Jurisdictional Immunities of the State (diss. op. Cançado Trindade), para. 183 ff.

literature,³⁰ is not based on rules of law, but on a re-definition of the traditional concepts of international law and State sovereignty. By excluding sufficient State practice on the point (regardless of whether the court could have exercised judicial activism to contribute in the promotion on new principles³¹), and avoiding a deep reasoning on the legitimacy of substantive conducts, the ICJ strictly adheres to the Westphalian understanding of the international community and its founding principles, in spite of the fact that – as mentioned – such a model is in crisis. For this reason, the decision of the ICJ has been labelled as “conservative”³² in a scenario where ‘[t]he Westphalian concept of sovereignty is [...] gradually receding, as the individual takes centre stage in the international legal system.’³³ By not using at least a language giving credit of a “state of flux” of the topic³⁴ the ICJ seems to have taken advantage of current international law to avoid any departure from traditional theories and concepts.

If it seems true that the court missed an opportunity to reflect on the legitimacy of the substantive conducts taking advantage of an assumed lack of general State practice to exclude that the gravity

³⁰ Markus Krajewski, Christopher Singer, ‘Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights’, cit., 18.

³¹ This question, that is more likely a question of judicial policy and judicial activism, is answered in the affirmative by some scholars who argue that a *creative* answer would not have been a first in the court’s case law (Michael Bothe, ‘Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ’s Judgment on the Jurisdictional Immunity of States’, cit., 111 ff., however, the solution would have been led to the promotion of a different rule, given that – as also recalled by Markus Krajewski, Christopher Singer, ‘Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights’, cit., 31, the ‘Court could not have reached a different verdict on the basis of a positivist analysis of customary international law’). In more general terms, it has indeed be noted that international courts ‘are not merely Montesquieu’s *bouche de la loi*, impartial arbiters, who apply and interpret exogenous norms’ (Niels Petersen, ‘Lawmaking by the International Court of Justice—Factors of Success’, in 12 *German Law Journal* [2011] 1295). In general, on the role of international courts in the creation of international law, see Armin von Bogdandy, Ingo Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers’, in 12 *German Law Journal* [2011] 979 ff., and – on the related issue of legitimacy, Armin von Bogdandy, Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ in 23 *The European Journal of International Law* [2012] 7 ff.

³² Cf. Winston P Nagan, Joshua L Root, ‘The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory’ in 38 *North Carolina Journal of International Law and Commercial Regulation* [2013] 377, 453.

³³ Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), separate opinion of Judge Bennouna, para. 18. Cf. also Christian Tomuschat, ‘The Case of Germany v. Italy before the ICJ’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 87 f., summarising general critiques (not shared by the A.) as follows: ‘[t]hey argue that the ICJ has overlooked the new general orientation of international law by disregarding the paramountcy of the rules that were infringed by the German military and security forces during the period when Italy was placed under German occupation, rules which are today classified as *ius cogens*’.

³⁴ Markus Krajewski, Christopher Singer, ‘Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights’, cit., 31, and Anne Peters, ‘Immune Against Constitutionalisation?’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 1, 9.

of the conducts is a legitimate exception to State immunity,³⁵ the conceptualisation of the relationship between *jus cogens* and immunity was to some extent foreseeable,³⁶ and leads to the final statement that ‘sovereignty trumps *jus cogens*.’³⁷ In general terms, it appears that the approach of the court is quite formalistic in nature.³⁸ With specific regard to the matter at hand, the idea of the ICJ is that immunity and *jus cogens* are different in nature, being the first a procedural rule, and the second pertaining to substantive law. Immunity does not lead to impunity, but only determines the conditions for foreign courts to exercise their jurisdiction. In this sense, not having direct effect of the substantive liability – since its scope of application is different in nature – immunity cannot clash with principles and rules of substantive law, namely principles of *jus cogens*. Such conceptualisation is fundamental for the exclusion of an exception to State immunity based on the gravity of the foreign conduct. Being immunity a preliminary procedural matter, the gravity of the foreign conduct to adjudicate cannot be taken in consideration by courts, since this is a matter of the merits that requires prior resolution of the preliminary question on international jurisdiction. The general conceptualisation of the relationships between immunity and *jus cogens* thus leads to the conclusion that evaluating the gravity of the conduct for the purposes of assessing immunity not only does not find comfort in general State practice, but also reverses the underlying axiom, thus breaching the international law of State immunity. Given such a reading, domestic courts will probably refrain from invoking such a ground to exclude immunity, even where the gravity – as in the case at hand – is not contested by the parties.

In this sense, the ICJ could have had considered the specificities of the procedure in order to exclude a breach of international law in the reversal of such axiom. The court could have argued, for example, that for cases where the gravity of the conduct is not contested, the evaluation of the conducts for the purposes of excluding immunity would not violate the legal and logical reasoning that courts must follow.

³⁵ ICJ, Jurisdictional Immunities of the State, cit., para. 96. Cf. Michael Bothe, ‘Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ’s Judgment on the Jurisdictional Immunity of States’, cit., 101 f., confirming that previous case law on the point was with little doubt insufficient to argue in favour of an international custom, even though asking the question ‘[...] was it the right way to put the question, even on level of legal technique?’

³⁶ ICJ, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3 ff., para. 60 ‘The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.’

³⁷ Winston P Nagan, Joshua L Root, ‘The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory’, cit., 454.

³⁸ Cf. Michael Bothe, ‘Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ’s Judgment on the Jurisdictional Immunity of States’, cit., 108.

Furthermore, the decision raises the question on whether the statement of court in its previous case law, namely that immunity does not mean impunity,³⁹ is always true. The court itself in fact acknowledges that the conceptualisation of the relationship between *jus cogens* and immunity leads to cases where the enforcement of a *jus cogens* rule might be unavailable.⁴⁰ This, of course, is confirmed by the circumstance that, according to the court, immunity is also granted where there is no other reasonable alternative judicial protection.⁴¹

The decision of ICJ has led to critiques in terms of human rights,⁴² and to a number of consequences within the Italian legal system, some of which are relevant at the international law level. As will be seen, prior to the decision of the ICJ, Italian courts addressing the issues sought to offer a new interpretation of the international law of State immunity. After the intervention of the ICJ, Italian courts, to still deny immunity for some *acta iure imperii* took a step back and, based on a conservative conceptualisation of the relationships between international and national law, made recourse to the counter-limits theory so as to argue that the international custom reconstructed by the ICJ is not allowed to enter the domestic legal order. Such a recourse to a Westphalian dogma reinforces, on the one side, the traditional construction of the international community, but, on the other, leads to a clash of sovereignty where one State acts in violation of the sovereignty of another State, whose immunity is denied in breach of customary international law the latter has sought to develop overtime.

3.2 The Italian law implementing the ICJ's decision, and the change in perspective before the Italian Constitutional Court

To comply with the decision of the ICJ, the Italian lawmaker enacted law n. 5 of 14th January 2013,⁴³ [Law for the ratification of the 2004 UN Convention on Immunity] whose art. 3 provided upon courts an obligation to declare by their own motion lack of jurisdiction in all those cases in which the ICJ determines the lack of civil jurisdiction of a State. At the same time, the provision introduced a legal ground to revoke judicial decisions, even *res judicata*, in the same circumstances.

It is in this context that both the law of Execution of the Statute of the United Nations⁴⁴ and the abovementioned law on the Accession by the Italian Republic to the United Nations Convention

³⁹ ICJ, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, cit., para. 60.

⁴⁰ ICJ, Jurisdictional Immunities of the State, cit., para. 95.

⁴¹ ICJ, Jurisdictional Immunities of the State, cit., para. 104.

⁴² Pierre d'Argent, 'Immunity of State Officials and the Obligations to Prosecute', in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 244.

⁴³ GU n. 24 del 29 gennaio 2013. On which cf. Chantal Meloni, 'Jurisdictional Immunity of States: The Italian Constitutional Court v. the International Court of Justice? Brief notes on the Judgment no. 238 of 22 October 2014 of the Italian Constitutional Court', in *Zeitschrift für Internationale Strafrechtsdogmatik* (2015) 348, at 349 f.

⁴⁴ Law No. 848 of 17 August 1957.

on Jurisdictional Immunities of States and their Property were scrutinised under the Italian Constitution⁴⁵.

More in particular, two are the relevant questions addressed by the Constitutional Court:

- a) the compatibility with the right to defense enshrined in the Italian Constitution of the “norm created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution”, of the international custom, as found by the International Court of Justice [...] insofar as it denies the jurisdiction [of civil courts] in the actions for damages for war crimes committed *jure imperii* by the Third Reich, at least in part in the State of the court seized;⁴⁶
- b) the compatibility with the right to defence enshrined in the Italian Constitution with the law on the Execution of the United Nations Charter, insofar as, through the incorporation of art. 94 U.N. Charter, it obliges the State to comply with the Judgment of the ICJ;
- c) the compatibility with the right to defence enshrined in the Italian Constitution of the law 5/2013 that obliges domestic courts to comply with the Judgment of the ICJ.

It is fundamental to note here that both the remitting court and the Constitutional Court acknowledge that rules of customary international law are those as determined by the ICJ in its

⁴⁵ Corte Costituzionale, Judgment 238/2014, in *Rivista di diritto internazionale* (2015) 237, on which see Enzo Cannizzaro, ‘Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014’, in *Ibid.*, 126; Francesco Francioni, ‘From Deference to Disobedience: The Uncertain Fate of Constitutional Court Decision No. 238/2014’, in 24 *Italian Yearbook of International Law* [2014] 1; Riccardo Pisillo Mazzeschi, ‘Access to Justice in Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court’, in *Ibid.*, 9; Michael Bothe, ‘The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany’, in *Ibid.*, 25; Giuseppe Cataldi, ‘A Historic Decision of the Italian Constitutional Court on the Balance Between the Italian Legal Order’s Fundamental Values and Customary International Law’, in *Ibid.*, 37; Paolo Palchetti, ‘Can State Action on Behalf of Victims Be An Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?’, in *Ibid.*, 53; Fulvio Maria Palombino, ‘Italy’s Compliance with ICJ Decisions Vs. Constitutional Guarantees: Does the “Counter-Limits” Doctrine Matter?’, in 22 *Italian Yearbook of International Law* [2012] 187; Roberto Bin, ‘L’adattamento dell’ordinamento italiano al diritto internazionale non scritto dopo la sent. 238/2014’, in Paolo Palchetti (ed), *L’incidenza del diritto non scritto sul diritto internazionale ed europeo* Editoriale scientifica, 2016) 191; Valentina Spiga, ‘Foreword’, in 14 *Journal of International Criminal Justice* [2016] 569; Riccardo Pavoni, ‘How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?’, in *Ibid.*, 573; Micaela Frulli, ‘Time Will Tell Who Just Fell and Who’s Been Left Behind’: On the Clash between the International Court of Justice and the Italian Constitutional Court’, in *Ibid.*, 587; Gianluigi Palombella, ‘German War Crimes and the Rule of International Law’, in *Ibid.*, 607; Martin Scheinin, ‘The Italian Constitutional Court’s Judgment 238 of 2014 Is Not Another Kadi Case’, in *Ibid.*, 615; Raffaella Kunz, ‘The Italian Constitutional Court and ‘Constructive Contestation’: A Miscarried Attempt?’, in *Ibid.*, 621, and Francesco Francioni, ‘Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court’, in *Ibid.*, 629.

⁴⁶ An unofficial translated version of the judgment is available at <https://italyspractice.info/judgment-238-2014/>.

2012 judgment.⁴⁷ As opposed as to decisions of the *Corte di Cassazione*, Italian courts here do not try to argue that international law has developed so as to allow the exercise of domestic jurisdiction over foreign States acting also in the territory of the seised court in violation of international criminal law. Italian courts shift their perspective from the reconstruction of international law to the compatibility of such international rules with domestic founding principles.⁴⁸

In the first place, it must be admitted that the conclusions of the Constitutional Court have come with a certain degree of surprise to the legal scholarship, since – in the past – some decisions of the court gave reason to believe that a Constitutional scrutiny was excluded for international customs developed within the international community before the adoption, in 1948, of the Constitution.⁴⁹ Nonetheless, the court admitted its competence to address the question of constitutionality since, in more general terms, it admitted that such a scrutiny, with regard to ordinary domestic laws, has not been considered barred by the circumstance that the law was adopted (such as for example, the Italian civil code) before the entry into force of the Italian Constitution.⁵⁰

⁴⁷ Enzo Cannizzaro, *Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014*, cit., 127.

⁴⁸ Stefano Dominelli, *L'incidenza della giurisprudenza della Corte internazionale di giustizia nell'ordinamento interno e internazionale in materia di immunità statale per la commissione di crimina iuris gentium: posizioni attuali e prospettive future*, cit., 10. Judgment 238/2014: 'First, it should be noted that the referring judge excluded from the subject-matter brought before this Court any assessment of the interpretation given by the ICJ on the norm of customary international law of immunity of States from the civil jurisdiction of other States. The Court, indeed, cannot exercise such a control. International custom is external to the Italian legal order, and its application by the government and/or the judge, as a result of the referral of Article 10, para. 1 of the Constitution, must respect the principle of conformity, i.e. must follow the interpretation given in its original legal order, that is the international legal order. In this case, the relevant norm has been interpreted by the ICJ, precisely with a view to defining the dispute between Germany and Italy on the jurisdiction of the Italian judge over acts attributable to the Federal Republic of Germany (FRG)'.

⁴⁹ Claudio Consolo and Valentina Morgante, 'La immunità degli Stati, dopo l'Aja, presidiata dalla revocazione, deferita al giudice costituzionale italiano', in *Il Corriere giuridico* (2014) 449, at 455, and Enzo Cannizzaro, *Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014*, cit., 132. This has been inferred from a passage of a previous decision that dealt with customary provisions that entered into force after the adoption of the Italian Constitution. According the relevant passage of the decision no. 48/1979, '[a]t any rate, it should be noted, more generally, with regard to the generally recognized norms of international law that came into existence after the entry into force of the Constitution, that the mechanism of automatic incorporation envisaged by Article 10 of the Constitution cannot allow the violation of the fundamental principles of our constitutional order, as it operates in a constitutional system founded on popular sovereignty and on the rigidity of the Constitution' (emphasis added). Cf. Paola Ivaldi, *L'adattamento del diritto interno al diritto internazionale*, in Sergio M Carbone, Riccardo Luzzatto and Alberto Santa Maria (eds), *Istituzioni di diritto internazionale* (Giappichelli, 3rd Edition, 2011) 131, at 158.

⁵⁰ Judgment 238/2014: 'Hence, it must be recognized today that the principle set out in Judgment No. 1/1956, according to which the control of constitutionality concerns both norms subsequent to the republican Constitution and those prior to it, also applies to generally recognized norms of international law automatically incorporated by Article, para. 1 of the Constitution, irrespective of whether they formed before or after the Constitution'.

The Constitutional Court thus proceeds with its analysis of a possible ‘conflict between the norm of international law (a norm that is hierarchically equivalent to the Constitution through the referral of Article 10, para. 1 of the Constitution) incorporated and applied in the domestic legal order, as interpreted in the international legal order, and norms and principles of the Constitution, to the extent that their conflict cannot be resolved by means of interpretation.’

As it is known, the result of such an analysis has led the court to adopt a position that opens up to a conflict with the result of the decision of the ICJ. The Constitutional Court, by recalling i) the fundamental value of judicial protection and human rights protection in the Italian legal system;⁵¹ and ii) the necessity to ensure effective judicial protection,⁵² has concluded that a) the customary norm cannot “enter”⁵³ in the Italian legal order because the compression of the right to defense exceeds the acceptability that usually – in the field of State immunity – is admitted, leading in the case at hand to impunity,⁵⁴ and that b) ‘[t]he immunity [...] protects the [sovereign] function [of

⁵¹ Judgment 238/2014: ‘As early as in Judgment No. 98/1965 concerning European Community law, this Court held that the right to effective judicial protection “is one of the inviolable human rights protected by Article 2 Constitution. This is also clear from the consideration given to this principle in Article 6 of the ECHR” (Para. 2 of ‘The Law’). More recently, this Court unequivocally defined the right to judicial protection as “one of the supreme principles of our constitutional order, intrinsically connected to the principle of democracy itself and to the duty to ensure a judge and a judgment to anyone, anytime and in any dispute” (Judgment No. 18/1982, as well as No. 82/1996)’.

⁵² Judgment 238/2014: ‘With an eye to the effectiveness of judicial protection of fundamental rights, this Court also noted that “the recognition of rights goes hand in hand with the recognition of the power to invoke them before a judge in judicial proceedings. Therefore, “the recourse to a legal remedy in defense of one’s right is a right in itself, protected by Articles 24 and 113 of the Constitution. [This right is] inviolable in character and distinctive of a democratic State based on the rule of law. (Judgment No. 26/1999, as well as No. 120/2014, No. 386/2004, No. 29/2003). Further, there is little doubt that the right to a judge and to an effective judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times’.

⁵³ This is of particular importance in the Italian context. See Lorenzo Gradoni, *Corte costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull’immunità dello Stato straniero dalla giurisdizione civile*, in *SIDIBlog* (2014) 183, 188, recalling that the Constitutional Court can only scrutinize the constitutional legality of laws, and acts having force of law. However, international customs, if they “enter” the Italian legal order acquire the same value of their adaptor, i.e. art. 10 of the Constitution, by consequence acquire constitutional force, in whose respect, ex art. 134 Cost., the court has not power of scrutiny, hence the necessity to create a pre-condition for the international custom to enter the system (the respect of its fundamental values).

⁵⁴ Judgment 238/2014: ‘Nonetheless, precisely with regard to cases of immunity from jurisdiction of States envisaged by international law, this Court has recognized that, in cases involving foreign States, the fundamental right to judicial protection can be further limited, beyond the limitations provided by Article 10 of the Constitution. However, this limit has to be justified by reasons of public interest potentially prevailing over the principle of Article 24 Constitution, one of the “supreme principles” of the constitutional order (Judgment No. 18/1982). Moreover, the provision that establishes the limit has to guarantee a rigorous assessment of the [public] interest in light of the concrete case (Judgment No. 329/1992). In the present case, the customary international norm of immunity of foreign States, defined in its scope by the ICJ, entails the absolute sacrifice of the right to judicial protection, insofar as it denies the jurisdiction of [domestic] courts to adjudicate the action for damages put forward by victims of crimes against humanity and gross violations of fundamental human rights. This has been acknowledged by the ICJ itself, which referred the solution to this issue, on the international plane, to the opening of new negotiations, diplomatic means being considered the only appropriate method (para. 102, Judgment of 3 February 2012). Moreover, in the constitutional order, a prevailing public interest that may justify the sacrifice of the right to judicial protection of

State]. It does not protect behaviours that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are in breach of inviolable rights, as was recognized, in the present case, by the ICJ itself, and – before that Court – by the [Federal Republic of Germany...].’

On the one side, such a position is one of the purest expressions of the Westphalian construction: the dualism between international and national law has been employed by the court to ensure overruling nature to domestic rules. On the other side, however, it seems that such a national conceptualisation of State sovereignty has been also developed to change traditional theories of international law through domestic practice. In this sense, the Constitutional Court recalls that – in the past – ‘national judges [have already] limited the scope of the customary international norm, as immunity from civil jurisdiction of other States was granted only for acts considered *jure imperii*. The purpose was mainly to exclude the benefit of immunity at least when the State acted as a private individual, as that situation appeared to be an unfair restriction of the rights of private contracting parties’. Nonetheless, whereas the previous case law did not wish to expressly oppose international customary law, but rather wanted to re-interpret immunity in light of the new conceptualisation of the State and State sovereignty,⁵⁵ the Constitutional Court clearly states that the 2014 decision is inconsistent with international law, for the protection of irrenunciabile constitutional principles.⁵⁶ In this sense, the decision of the Constitutional Court does not “wish” to convince lower courts of the reconstruction of international principles and rules, but rather – from a domestic law perspective – challenges the current state of the arts, thus being a first possible element of a Pandora box⁵⁷ where principles to overcome traditional rules can be found and possibly referenced to by other courts.⁵⁸

fundamental rights (Articles 2 and 24 Constitution), impaired as they were by serious crimes, cannot be identified’.

⁵⁵ Corte d’Appello Lucca, 1887, *Hampohn v Bey di Tunisi*, [1887] *Foro it.* I, 474; ‘[a]tteso che la Corte ritenga inutile di esaminare si fatta questione non accettando il principio invocato come massima generale ed assoluta. Essa invero distingue, come ha fatto altra volta, lo Stato quale potere politico, dallo Stato quale persona civile, e considera, insieme alla Corte di cassazione di Firenze, la quale confermò un suo precedente giudicato, che mentre non è permesso che gli atti di un Governo concernenti l’alta sua missione politica, vadano soggetti al sindacato di altra Potenza o straniera autorità e che l’esercizio della sovranità cada sotto la giurisprudenza, anzi giurisdizione di un potere straniero, quando però queste eminenti prerogative sono in salvo, ed il Governo, come ente civile, scende nel campo dei contratti ed opera nel senso di acquistare diritti e di assumere obbligazioni, come farebbe una persona privata, allora nulla ha che vedere l’indipendenza dello Stato, perché allora si tratta soltanto di azioni ed obbligazioni private e debbonsi seguire le regole del *ius commune*’. Cf. in this sense, Lorenzo Gradoni, ‘Consuetudine internazionale e caso inconsueto’, in *Rivista di diritto internazionale* (2012) 704, at 712 f. See also on the courts promoting the new re-interpretation of State sovereignty and immunity, *Discorso del Senatore Giuseppe Manfredi Procuratore generale del Re presso la Corte di cassazione di Firenze nella assemblea generale dell’8 gennaio 1887*, Firenze, 1887, p. 23 ff.

⁵⁶ Lorenzo Gradoni, ‘Corte costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull’immunità dello Stato straniero dalla giurisdizione civile’, *cit.*, 192.

⁵⁷ Also of this view, Jerzy Kranz, *L’affaire Allemagne contre Italie ou les dilemmes du droit et de la justice*, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 116, 125.

⁵⁸ In general, on the role of domestic courts in the evolution see Anne Peters, ‘Immune Against Constitutionalisation?’ *cit.*, 6 (also noting at p. 7 that references to foreign decision by domestic courts

Furthermore, after having excluded that the “permanent adaptor” to international customs can work if said custom is contrary to founding principles of the Italian Constitution, thus avoiding at all any conflict between constitutional provisions – since international customs do not even enter the system – the Constitutional Court focuses on the conflict between the Law of Adaptation to the United Nations Charter and Articles 2 and 24 of the Constitution, however only exclusively and specifically with regard to the Germany v. Italy ICJ Judgment. Based on the same reasoning above, the court concludes that ‘[t]he impediment to the incorporation of the conventional norm [Article 94 of the United Nations Charter] to our legal order – albeit exclusively for the purposes of the present case – has no effects on the lawfulness of the external norm itself, and therefore results in the declaration of unconstitutionality of the special law of adaptation, insofar as it contrasts with the abovementioned fundamental principles of the Constitution.’⁵⁹ The same reasoning applies to the law 5/2013 that obliges domestic courts to comply with the Judgment of the ICJ.

3.3 A comment on the decision of the Italian Constitutional Court: Further implications and its role in the creation on a new rule of customary international law

There is little doubt that the decision is a landmark case in Italy. On the one side, the Constitutional Court opposes the vision that still favors State immunity, and, on the other, the decision at hand is an indicator of the tensions⁶⁰ between the judiciary and the legislative and governmental powers (that did not defend the positions of Italian courts before the ICJ with sufficient strength⁶¹), putting Italy in a position to commit a wrongful act by denying immunity to Germany.⁶²

There are, however, some questions that appear to be of relevance:

in immunity matters are a persistent feature); Editorial, ‘Jurisdiction of Municipal Courts over Foreign States in Actions Arising out of Their Commercial Activities’, in *The Yale Law Journal* (1931) 786; Eyal Benvenisti and George W Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’, in 20 *The European Journal of International Law* [2009] 59; Osnat G Schwartz, ‘Changing the Rules of the (International) Game: How International Law is Turning National Courts into International Political Actors’, in 24 *Washington International Law Journal* [2015] 99, and Lori F Damrosch, ‘Changing the International Law of Sovereign Immunity through National Decisions Symposium’, in 44 *Vanderbilt Journal of Transnational Law* [2011] 1185.

⁵⁹ This has led to the consequential declaration of unconstitutionality of the domestic law that, by acceding to the 2004 UN Convention, and in application of the duty of the State to comply with the decisions of the ICJ, introduced the statutory obligations for courts to declare their lack of jurisdiction in all those cases in which the ICJ determines the lack of civil jurisdiction of a State.

⁶⁰ Cf. Pasquale De Sena, ‘Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale’, in *SIDIBlog* (2014), 197.

⁶¹ Michael Bothe, ‘Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ’s Judgment on the Jurisdictional Immunity of States’, cit., 100 f.

⁶² Lorenzo Gradoni, Corte costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull’immunità dello Stato straniero dalla giurisdizione civile, cit., p. 184.

A. *The original nature of the Constitutional court's reasoning*

It does not seem possible to argue that the theoretical approach of the Italian Constitutional Court is completely new in the international scenario: as noted in the scholarship, the 2012 judgment of the ICJ could equal the Stork European Court of Justice CJEU case, and the Italian Constitutional Court could equal the German *Solange Beschluss*, by which domestic courts opposed the *dicta* of the CJEU, that has argued in the past that what is now EU law should have found application regardless of rights enshrined in domestic constitutions.⁶³ In more general terms, it also seems that the solution of the Constitutional Court is framed in terms that rest on general theories of international law, namely a rigid division between the internal and the international legal systems, and the possibility to privilege domestic principles over international ones. In this sense, in light of the change of perspective that has been adopted for the conceptualisation of State immunity, it can be noted that Italian courts have moved from a “civilist approach” in the *Ferrini* case (where human rights exceptions to immunity are deducted from the system following the reconstruction of higher values and rules⁶⁴) to a more “constitutional approach” (where the exception to immunity follows a balancing of principles), thus clearly opposing the position of the ICJ, based on a “State-centred approach” in the reconstruction of the rules on State immunity.⁶⁵

B. *Are there elements that could substantiate the Constitutional court's arguments?*

The open question is whether the ICJ will follow the path of the ECJ and change its previous case law. There is case law, also of the European Court of Human Rights (ECtHR), that, in the context of immunity of Heads of States and of international organisations,⁶⁶ mainly in the field of labour cases, prescribes that immunity is compatible with the right to access a court of law only in so far as there is an alternative remedy,⁶⁷ which was not the case in the controversy between Germany and Italy. This does however not mean that – in broad terms – immunity in general requires the possibility for the individual to seise a court of law, being also acceptable that other forms of redress are made available, such as, for example, arbitration,⁶⁸ nor that full restoration has to be granted to damaged parties, as long as their interests find a sufficient protection.

⁶³ *Ibid.*, p. 190.

⁶⁴ On these classifications, see Robert Uerpmann-Witzack, ‘Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 236 ff.

⁶⁵ *Ibid.*, 239.

⁶⁶ On the importance of immunity as a tool to protect the functions of international organisations, cf. *World Bank Group v. Wallace*, 2016 SCC 15. For a reconstruction of the Italian case law, see Pietro Pustorino, ‘The Immunity of International Organizations from Civil Jurisdiction in the Recent Italian Case Law’, in 19 *Italian Yearbook of International Law* [2009] 57, and August Reinisch, ‘Comments on a Decade of Italian Case Law on the Jurisdictional Immunity of International Organizations’, in *Ibid.* 101.

⁶⁷ ECtHR, 18 February 1999, *Waite and Kennedy v. Federal Republic of Germany*, in *Rivista di diritto internazionale* (2000) 168, parr. 59, 63, and ECtHR, 21 November 2001, *Fogarty v. United Kingdom*; ECtHR, 21 November 2001, *McElhinney v. Ireland*; ECtHR 21 November 2001, *Al-Adsani v. United Kingdom*.

⁶⁸ ECtHR, 6 January 2015, *Klausecker v. Germany*, App. no. 415/07.

Whilst it cannot be denied that the idea of an alternative means of protection has been mainly developed in respect of international organisations or State labour cases (where the case law has proven to be more hesitant⁶⁹), and whilst it does not seem to be an absolute dogma, it appears that the critique of the Italian Constitutional Court to the ICJ has some grounds and could thus induce at least an in-depth reasoning by international courts on the right to access a court of law and its relationships with State immunity, at least in those cases in which the foreign State admits that no alternative means of protection will be granted.

Additionally, it also seems that such a latter evaluation should take into consideration all the relevant elements such as, for example for the case of actions for damages related to war, effects of refunds from one State to the other, whose duty is to provide final restoration to the victims.

C. Was another solution possible?

A further question is whether the Italian Constitutional Court could have exercised a self-restraint to support a diplomatic settlement of the matter. There is little doubt that the court could have had rejected the constitutional questions to support diplomatic means. Nonetheless, it has been noted that, at the practical level, such a result would have been uncertain at least, thus inducing the court to rule on the matter.⁷⁰ Such a road would have had the merit of ensuring respect of international law, and possibly obtain some compensation for the damaged parties. In this last sense, it should also be recalled that the Constitutional Court did not particularly dwelled on the possibility of suggesting the Italian Government pursuing the diplomatic path, most probably due to the possible difficulties in reaching an international agreement on the matter after the decision of the ICJ, and in light of the fact that – in spite of a similar suggestion by the ICJ – negotiations did not started between the two States.

D. What is the impact of the Constitutional Court's ruling for the creation of a new customary international law rule?

If the finding of the ICJ on the point whether an alternative means to protection is available, and thus whether or not in some cases immunity might turn out as a way to impunity⁷¹ is debatable, the task to offer an “authentic reconstruction” of international customary law rests with the ICJ, which, should in the future address again the issue, will have to take into consideration the impact of the ruling of the Italian Constitutional Court on the existing law.⁷² As it is known, the

⁶⁹ Riccardo Pavoni, ‘L’immunità degli Stati nelle controversie di lavoro’, in Natalino Ronzitti and Gabriella Venturini (eds), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali* (CEDAM, 2008) 43.

⁷⁰ Cf. Pasquale De Sena, ‘Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale’, cit., 198.

⁷¹ Also on the relationship between immunity and impunity, see Dissenting Opinion Yusuf. In the legal scholarship, Pierre d’Argent, ‘Immunity of State Officials and the Obligation to Prosecute’, cit., 244 ff.

⁷² See Lorenzo Gradoni, ‘Corte costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull’immunità dello Stato straniero dalla giurisdizione civile’, cit., 191, noting how the ICJ cannot, on its own, change its case law, unless an evolution of international customary law is given. In this sense. The A. notes that the “victim” of the Italian ruling is not the ICJ, but the international community itself.

relevance of domestic decisions for the reconstruction of international customary law must be analysed in light of whether they express a clear internal practice that is shared by other States.⁷³ This element could induce to believe that, in the short run, the effects of the Constitutional Court's ruling on conceptualisations of international law might turn out to be not particularly influential.

In fact, with regard to the "internal" effects of the ruling, the Italian practice might not be particularly clear. Whereas courts are implementing the ruling in similar cases involving claims against Germany,⁷⁴ or have apparently extended the Constitutional Court's golden rule⁷⁵ in a criminal and civil action⁷⁶ against Serbian military forces for the wrecking of an EC helicopter in Podrute (here the *Corte di Cassazione*, dealing with the civil claims against Serbia as the successor-State, argued that in no way did the Italian Constitutional Court requires a complete

⁷³ Editorial, 'Jurisdiction of Municipal Courts over Foreign States in Actions Arising out of Their Commercial Activities', cit., 788, 'In the absence of treaty stipulations or precedents established by international tribunals the only criterion of the obligations of a State with respect to the assumption by its courts of jurisdiction over a foreign State is to be found in the degree of uniformity in the judicial practice of the municipal courts of the world and the outcome of diplomatic protests consequent upon a denial of immunity'.

⁷⁴ See Cass. Civ. Sezioni Unite, 29 July 2016, n. 15812, in *Dejure*, also raising an international diplomatic law point, as it excludes notes of the German embassy sent directly to the court and not via the lawyer granted with power of attorney.

⁷⁵ On the "spill-over" effect of the decision, see Enzo Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014', cit., 132 f., writing '[a]lthough the effect of a decision of unconstitutionality is strictly limited to the norms under review, the spill-over effect of this particular ruling may be more pervasive by far. Even if the ruling is limited to a specific issue, namely to immunity of foreign States for civil claims arising from conduct that amounts to a serious violation of human rights, it may have a larger scope of application. In an apparently incidental passage, the Constitutional Court, recalling its previous case-law, Stated that limitations to the principle of judicial protection are admissible only if they are aimed to attain a superior public interest. In this passage the Constitutional Court seems to invert the logic of the reasoning followed hitherto. Instead of excluding the grant of immunities with regard to particular heinous conducts, the Constitutional Court seems to point out that immunities can be granted, and that the principle of judicial protection can be disregarded, only in the presence of a superior public interest. Thus the question arises of what superior public interest is required by the Constitutional Court in order to grant immunities. The most logical inference is that the generic interest of the Italian State to comply with its international obligations should not be sufficient and that a qualified public interest is needed instead. Should one assume that this additional requirement is to be found in the motives that led a foreign State to claim immunity, the consequence would ensue that a foreign State would be entitled to immunity only with regard to lawful conduct. Yet, if this assumption were correct, the dictum of the Constitutional Court, far from being confined to the specific case at hand, would have a very broad scope. It would apply to all the categories of immunities granted by international law and would deeply affect its effectiveness'.

⁷⁶ Cassazione, Prima sezione penale, 14 September 2015, n. 43696, in *Rivista di diritto internazionale* (2016) 629 ff., on which see for a first reading, Matteo Sarzo, 'La Cassazione penale e il crimine di guerra di Podrute: un divorzio dal diritto internazionale?', in *Ibid.*, 523 ff. The case concerned a criminal action for unlawful killings of some members to the European monitor mission in Yugoslavia. Members of the Yugoslav army fired at an helicopter in Podrute in 1991, causing the death of said members to the European mission. By addressing criminal aspect, the Italian court allowed the civil action of the parents of the victims seeking compensation against the successor State. Such action against the successor State of Serbia have been admitted after rejecting the applicability of rules on State immunity for *acta iure imperii*.

lack of alternative means of protection to deny the applicability of the rules on State immunity⁷⁷), the political consequences of this case law should be borne in mind. As mentioned, Italian courts still seek to promote a new (domestic) conceptualisation of sovereignty and State immunity, which is acceptable only in so far as basic human rights are respected, this position being founded on the premises of the Westphalian model itself, i.e. sovereignty and the dualistic approach that permeates the relationships between national and international law. Nonetheless, the Italian State practice also comprises laws: immediately after the ruling of the Constitutional Court, the Italian Parliament passed a law⁷⁸ recognising immunity from execution of sums on diplomatic bank accounts for which the foreign State (and not Italian courts) have declared that they are devoted to public functions (a declaration that was solicited for by the Italian Government right after the entry into force of the law⁷⁹). Additionally,⁸⁰ the Italian internal judicial practice might not be upheld by the Italian Government should Italy be sued before courts of other States. In circumstances where immunity of the Italian State might become relevant in cases of human rights violation committed by officials in the exercise of public functions,⁸¹ should private parties to a procedure invoke the Italian Constitutional Court's doctrine against Italy itself before a court of a foreign State, in order to preserve its prerogatives, the Italian Government might still invoke immunity – possibly arguing that the doctrine at hand is based on internal laws rather than on international principles. Should this happen, the practice of Italy, as a State, would become too much inconsistent to argue that it could concur in the possible formation of a new customary rule.

With regard to the “external” value of the Italian ruling, it has to be recalled that domestic decisions contribute in the creation of international customs in as much they ‘start a process in which other nations intervene by either following suit, by rejecting the proposed innovation, or by reserving their response until consequential implications become clearer’.⁸² In light of this consideration, the relevant State practice is still uncertain, even though diplomatic responses from Germany lean towards the refusal of the principle created by the Italian Constitutional court: the German government declares that, even though between the two States cooperation is always

⁷⁷ Cassazione, Prima sezione penale, 43696/2015, cit., 651 f.

⁷⁸ Art. 19-bis, l. 10 novembre 2014 n. 16, on which see Benedetto Conforti, ‘Il legislatore torna indietro di circa novant’anni: la nuova norma sull’esecuzione sui conti correnti di Stati stranieri’, in *Rivista di diritto internazionale* (2015) 558.

⁷⁹ Benedetto Conforti, ‘Il legislatore torna indietro di circa novant’anni: la nuova norma sull’esecuzione sui conti correnti di Stati stranieri’, cit., 560.

⁸⁰ I would like to thank the reviewers for stimulating further reasoning on this point.

⁸¹ Other than cases connected to WWII where Italy might be sued, one could perhaps also think to more current scenarios where Italian military forces are involved in the use of force, such as – for example – the fight against piracy. Should the Italian Navy catch pirates, and commit on board gross human rights violation, to transfer afterwards pirates to a third processing State, courts of said State, if seised, might need to address the issue of State immunity and the possible effectiveness of a right to access an Italian court whilst being incarcerated abroad. In general, on the issue of piracy, human rights violation, third country processing States, and immunity, see Anna Petrig, ‘Arrest, Detention and Transfer of Piracy Suspects: A Critical Appraisal of the German Courier Case Decision’ in Gemma Andreone, Giorgia Bevilacqua, Giuseppe Cataldi, Claudia Cinelli (eds), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore, 2013) 153, 169.

⁸² Christian Tomuschat, ‘The Case of Germany v. Italy before the ICJ’, cit., 88.

taking place,⁸³ Italy is still bound by the ruling of the ICJ,⁸⁴ and no compensation will be made to individuals by the German Government.⁸⁵

In light of the above, it seems premature to argue that other courts or other legal systems have accepted a solution that differs from the one proposed by the ICJ, Germany *in primis*. It also seems difficult to give a proper value to the position of Italy, whose opposed visions (judicial and governmental) might ‘weaken the weight to be given to the practice concerned’.⁸⁶ Indeed, it cannot simply be disregarded that the reaction of the Italian Parliament to the ruling of the Constitutional Court was to enact a legislation for the protection of – at least – diplomatic bank accounts, a protection so strong that the determination of the public utility of the account has been left (and quickly demanded) to the foreign State itself (thus doing more than what is required under international law, and with aspects that also might raise questions under a domestic constitutional point of view). This, regardless of whether seizure of diplomatic bank accounts used for commercial purposes but differently classified by the foreign State might be the only asset over which one party could seek material enforcement in Italy. However, in more general terms, it appears that such a scenario in which inconsistencies at the domestic level can be found are destined to become more important in time: as noted in the legal literature, the law of immunities is driven by courts, and not by governments,⁸⁷ and the ‘attribution of one uniform legal “opinion” to the State is a fiction. And this fiction is becoming increasingly problematic in a global order that promotes the rule of law at the national and international level’.⁸⁸

In this sense, it does not seem that the ruling of the Italian Constitutional Court could, *per se*, foster international customary law in the short run; what remains today is that the judgment of the ICJ is an iconic bastion of State sovereignty vestiges’, and the ruling of the Italian Constitutional Court one of the latest *pièce de résistance* in the scenario for the protection of fundamental human rights where different legal systems, divided but inter-connected, live alongside.

⁸³ Deutscher Bundestag Drucksache 18/3492, 18. Wahlperiode 09.12.2014, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Jan Korte, Sevim Dağdelen, weiterer Abgeordneter und der Fraktion DIE LINKE – Drucksache 18/3333 – Entschädigung für NS-Opfer in Italien, question 8.

⁸⁴ *Ibid.*, question 10.

⁸⁵ *Ibid.*, question 4.

⁸⁶ International Law Commission, Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, Second report on identification of customary international law, Draft Conclusion 7, para. 50. In the scholarship, for cases of different approaches followed within one domestic system by executive branches and courts, with specific reference to the context of State immunity and the Italian-German dispute, see Wuerth Ingrid, ‘International Law in Domestic Courts and the Jurisdictional Immunities of the State Case Commentary’ in [2012] 13 Melbourne Journal of International Law 819.

⁸⁷ Anne Peters, ‘Immune Against Constitutionalisation?’, *cit.*, 6.

⁸⁸ *Ibid.*, 8.

4. *Immunity and alternative means of protection: a privileged status for the UN acting for the protection of international peace?*

As it is known, the ECtHR has had a number of occasions to rule on the compatibility of the right to access a court of law, and the privilege to immunity from jurisdiction. The court stated in this respect that ‘It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons’.⁸⁹

In dealing with particular cases, mainly labour cases, or cases involving international organisations,⁹⁰ the Court has always admitted a compression of the right to seize a Court, provided that the core right is not prejudiced, and the limitation does pursue a legitimate State interest. Such an approach has strongly influenced the case law⁹¹ of the States Parties to the

⁸⁹ ECtHR, 11 June 2013, *Stichting Mothers of Srebrenica and Others v the Netherlands*, Application no. 65542/12, para 139, on which see Beatrice I Bonafè, ‘L’esistenza di rimedi alternativi ai fini del riconoscimento dell’immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso delle Madri di Srebrenica’, in *Rivista di diritto internazionale* (2012) 826; Maria I Papa, ‘Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell’”Associazione Madri di Srebrenica”’, in *Diritti umani e diritto internazionale* (2014) 27; Valentina Spiga, ‘Effective Limitations and Illusory Rights: A Comment on the Mothers of Srebrenica Decision of the European Court of Human Rights’, in 23 *The Italian Yearbook of International Law* [2014] 269; Otto Spijkers, ‘Responsibility of the Netherlands for the Genocide in Srebrenica. The Nuhanović and Mothers of Srebrenica Cases Compared’, in 18 *Journal of International Peacekeeping* [2014] 281; Nico Schrijver, ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’ in Niels Blokker, Nico Schrijver (eds), *Immunity of International Organizations* (Brill, 2015) 329, and Kirsten Schmalenbach, ‘Preserving the Gordian Knot: UN Legal Accountability in the Aftermath of Srebrenica’, in 62 *Netherlands International Law Review* [2015] 313.

⁹⁰ As noted in the legal scholarship, such a case law that has been delivered in cases of acts that cannot be considered *acta iure imperii* is also likely to have relevance on the case law where acts of the foreign State or of the international organisation can be qualified as such: Raffaella Nigro, ‘Immunità degli Stati esteri e diritto di accesso ai giudici: un nuovo approccio nel diritto internazionale?’, in *Rivista di diritto internazionale* (2013), 812, 843. In general, on the relationship between immunity of international organisations and the right to access a court of law, or forms of compensations, see Marcello Di Filippo, ‘Immunità dalla giurisdizione versus diritto di accesso alla giustizia: il caso delle organizzazioni internazionali (Giappichelli, 2012); Beatrice I Bonafè, ‘L’esistenza di rimedi alternativi ai fini del riconoscimento dell’immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso delle Madri di Srebrenica’, cit.; August Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’, in 7 *Chinese Journal of International Law* [2008] 285 suggesting, following a human rights based approach, that immunity from jurisdiction of international organisations might be conditional upon the respect of allowing a form of redress. With specific regard to UN peacekeeping operations, see Rosa Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’, in 25 *The European Journal of International Law* [2014] 239, arguing that in the breakthrough of cholera in Haiti, the UN’s approach – that invokes immunity – ‘to disputes arising from peacekeeping operations can and does lead to violations of individuals’ rights to access a court and to a remedy’ (254).

⁹¹ Bearing in mind that ‘Very few supreme courts in the world have tackled the question of immunity of international organizations, and even fewer have addressed the tension between the immunity of the organization and the individual’s right of access to a court’ (Jan Wouters, Cedric Ryngaert, Pierre

ECHR up to the point that a number of domestic courts have granted immunity to international organisations only after⁹² a check of the adequacy of the international organisation's system of protection of rights.⁹³ Nonetheless – as a matter of general principle – it must be recalled that Italian domestic courts have proven to follow a more cautious approach when it comes to foreign States:⁹⁴ the Italian *Corte di Cassazione* has indeed noted that foreign States must respect the core rights to defence by instituting an impartial judicial system, not being necessary to verify on a case by case approach that the right to defence as enshrined in the Italian Constitution and in Italian procedural safeguards have an identical protection in the foreign State.⁹⁵

Whereas, at a general level, immunity for international organisations is seen as a corollary to the establishment of an alternative system of protection,⁹⁶ with specific reference to the United

Schmitt, 'Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya; General Secretariat of the ACP Group v. B.D.: Belgian Supreme Court Decisions on the Immunities of International Institutions in Labor and Employment Matters', in 105 *The American Journal of International Law* [2011] 560, 562).

⁹² The importance of such a check has been highlighted by scholars; it has indeed been argued 'The option to sue foreign States before their own domestic courts in case they enjoy jurisdictional immunity abroad suggests that the right of access to court may also be pursued before different alternative fora. The right of access to court may be flexible enough not to require States to provide always and exclusively their own judicial system. Rather, it may permit them to provide access to either their own courts or to an adequate alternative system of dispute settlement. In the case of international organizations, which do not possess their own domestic courts, the availability of such an alternative dispute-settlement mechanism will be crucial. If claims are brought against international organizations before national courts and if they are dismissed as a result of the defendant organization's immunity, the forum State will violate the claimant's right of access to court unless it ensures that there is an alternative adequate dispute-settlement mechanism available' (August Reinisch, Ulf A Weber, 'The Jurisdictional Immunity of International Organizations, The Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', in *International Organizations Law Review* (2004) 59, 68).

⁹³ August Reinisch, 'Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations – An Introduction', in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013) 1, 11.

⁹⁴ Riccardo Pavoni, 'L'immunità degli Stati nelle controversie di lavoro', in Natalino Ronzitti, Gabriella Venturini (eds), *Le immunità giurisdizionali degli stati e degli altri enti internazionali* (Cedam, 2008) 29, 43. This does not however mean that no hesitation has followed in the application of the principle stated by the ECtHR. For a comparative study on such hesitations, see Hazel Fox and Philippa Webb, *The Law of State Immunity*, cit., 461 ff.

⁹⁵ Corte Cost., 2 February 1982, n. 18, Di Filippo e altro c. Gospodinoff e altro, in *Rivista di diritto internazionale* (1982) 667; Corte Cost., 27 December 1965, n. 98, Società Acciaierie San Michele c. Comunità europea del carbone e dell'acciaio, in *consultaonline*; Cass. Civ. Sezioni unite, 8 June 1994, n. 5565, Nacci c. Istituto di Bari del Centre International De Hautes Agronomiques Mediterraeennes, in *Rivista di diritto internazionale privato e processuale* (1995) 402. Recently, in the scholarship, see Beatrice I Bonafè, 'Italian Courts and the Immunity of International Organizations', in Niels Blokker, Nico Schrijver (eds), *Immunity of International Organizations* (Brill, 2015) 246.

⁹⁶ Cf. Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur on Status, privileges and immunities of international organizations, their officials, experts, para. 58 f., where it can be read that 'According to most existing texts (conventions on privileges and immunities, headquarters agreements and so forth), international organizations cannot be judged by any court of ordinary law unless they expressly waive that privilege. Even if they do so, their waiver cannot be extended to measures of execution. Although this exceptional situation may seem excessive, it is expressly limited by the obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in

Nations, the creation of such a system has also been seen as a necessary condition to ensure consistency of the organisation with its goal to promote justice for people.⁹⁷ Nonetheless, international practice has shown that not in all cases a system for the internal management of claims has been created by the United Nations. This raises the question if States should or should not recognise immunity to the UN to comply with the prescriptions of the ECHR.

In dealing with the question whether or not Netherlands violated the ECHR by recognising immunity to the UN for the events in Srebrenica, the ECtHR tackles for the first time (in its case law) the issue of individual actions against the UN for damages suffered during peacekeeping operations. In this regard, the court notes that ‘operations established by United Nations Security Council resolutions [...] are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations.’⁹⁸ The relevance of the function and of the role of the UN appears so important to recognise a specific protection to the organisation;⁹⁹ in the court’s eye ‘To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations.’ This peculiar circumstance, according to the court, is sufficient to make a distinguishing between the case at hand, and previous cases:¹⁰⁰ this distinguishing leads to the known consequence that ‘[i]t does not follow [...] that the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court,’¹⁰¹ in particular if the action of ensuring international peace and security is at stake.¹⁰² This solution clearly finds a “political” point of balance between the interests of individuals to seek redress, and the necessity not to interfere with peacekeeping operations. As noted by some scholars, ‘allowing suits against an international organization in relation to wrongful acts committed in the context of peace operations may weaken the willingness of its Member States to contribute troops to peace operations, and ultimately weaken the world’s peace and security structures.’¹⁰³ This “political” (or pragmatic) solution seems however to be consistent with the principle that limitations to fundamental human rights are

which they may become involved. This obligation is enshrined in all the existing headquarters agreements.’

⁹⁷ ICJ Effect of awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion of July 13th, 1954, in I.C. J. Reports 1954, 47, 57.

⁹⁸ ECtHR, 11 June 2013, *Stichting Mothers of Srebrenica and Others v the Netherlands*, cit., para. 154.

⁹⁹ Cf. Jacob Katz Cogan, ‘*Stichting Mothers of Srebrenica v. Netherlands*’, in 107 *The American Journal of International Law* [2013] 884, at 886.

¹⁰⁰ ECtHR, 11 June 2013, *Stichting Mothers of Srebrenica*, cit., para. 150 ff. Cf. also in the Dutch case law *Mothers of Srebrenica v. Netherlands*, No. 10/04437, P 4.3.3 (Sup. Ct. Neth. Apr. 13, 2012).

¹⁰¹ ECtHR, 11 June 2013, *Stichting Mothers of Srebrenica and Others v the Netherlands*, cit., para. 164.

¹⁰² Recently, on the immunity of the UN, see Kristen E Boon, ‘The United Nations as Good Samaritan: Immunity and Responsibility’, in 16 *Chicago Journal of International Law* [2016] 341 ff., also arguing, at 377, that immunity should be recognised only in so far as immunity involves a core mission or a “constitutional question” (‘When cases arise that challenge U.N. actions in the course of a peacekeeping operation there will be a tendency to uphold the U.N.’s immunity on the basis of functionalism and operational necessity. The decision in the *Mothers of Srebrenica* case, however, serves as a cautionary tale about overbroad readings of the U.N.’s purpose’).

¹⁰³ Cedric Ryngaert, ‘The Immunity of International Organizations before Domestic Courts: Recent Trends’, in 7 *International Organizations Law Review* [2009] 121, 147.

admissible only in so far as they are foreseen by law and serve legitimate interests, which is the case of immunities. Additionally, limitations must be proportionate and not prejudice the core of the human right at stake.¹⁰⁴ It seems in particular that the respect of those two additional elements might raise questions: whereas the protection of the core right to access justice does not seem to be protected, the peculiar treatment of the UN acting to maintain international peace is nonetheless apparently justifiable in the court's eye in light of the principle of proportionality, since individual interests to access justice must be balanced with the collective and public interests in international peace and security.¹⁰⁵

The decision of the ECtHR seems in line with the decision of the ICJ:¹⁰⁶ also according to the former, immunity cannot be overrun by the gravity of the conducts to adjudicate¹⁰⁷ (omission to prevent genocide¹⁰⁸), and alternative means of protection are not seen as strictly necessary to apply the rules on immunity.¹⁰⁹

Domestic courts usually follow the approach of the ECtHR: the US District Court, Southern District of New York, clearly wrote ‘nothing in the text of the [Convention on the Privileges and Immunities of the United Nations] suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29’.¹¹⁰ Such decision has been confirmed by the court of appeals,¹¹¹ even though the UN seems currently admitting the necessity for some restoration in connection to the cholera epidemic in Haiti (and other conducts held by peacekeeping forces).¹¹²

¹⁰⁴ Cfr. *ex multis* ECtHR, 21 November 2001, Case of McElhinney v. Ireland, cit.

¹⁰⁵ I would like to thank the reviewers for stimulating further reasoning on this point.

¹⁰⁶ Jacob Katz Cogan, ‘Stichting Mothers of Srebrenica v. Netherlands’, cit., 887.

¹⁰⁷ ECtHR, 11 June 2013, Stichting Mothers of Srebrenica and Others v the Netherlands, cit., para. 158.

¹⁰⁸ On the difference between commission and prevention of genocide, and *jus cogens*, see ICJ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, in I.C.J. Reports 2007, 43.

¹⁰⁹ Hazel Fox and Philippa Webb, *The Law of State Immunity*, cit., 583, and there fn. 38. Wondering on whether the combined case law of the two courts might in the future lead domestic court to take a more cautious approach, August Reinisch, ‘To What Extent Can and Should National Courts’ Fill the Accountability Gap?’, in Niels Blokker, Nico Schrijver (eds), *Immunity of International Organizations* (Brill, 2015) 313, 317.

¹¹⁰ US District Court, Southern District of New York, Delama Georges, et al., v United Nations, et al., 13-CV-7146 (JPO), 9 January 2015. For a first reading of the material facts of the case, see prior to the decision, Rosa Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’, cit., and Nico Schrijver, ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’, cit.; Stephan Hollenberg, ‘Immunity of the UN in the Case of Haitian Cholera Victims’, in 19 *Journal of International Peacekeeping* [2015] 118; Thomas G Bode, ‘Cholera in Haiti: United Nations Immunity and Accountability’, in 47 *Georgetown Journal Of International Law* [2016] 759, and Kristen E Boon, ‘The United Nations as Good Samaritan: Immunity and Responsibility’, cit.

¹¹¹ United States Court of Appeals for the Second Circuit, Delama Georges, et al., v United Nations, et al., Case 15-455, Decided August 18, 2016.

¹¹² As reported by the *New York Times*, «[t]he deputy spokesman for the secretary general, Farhan Haq, said in an email this week that “over the past year, the U.N. has become convinced that it needs to do much more regarding its own involvement in the initial outbreak and the suffering of those affected by cholera.” He added that a “new response will be presented publicly within the next two months, once it has been fully elaborated, agreed with the Haitian authorities and discussed with member States”» (Jonathan M Katz, ‘U.N. Admits Role in Cholera Epidemic in Haiti’, Aug. 17, 2016, available at

In general, international practice seems consistent in recognising an absolute ‘blanket of immunity’¹¹³ to the UN. In this sense, it appears quite clear that the UN (to the extent it acts to maintain international peace and security) does enjoy a privileged status; a status that might be inconsistent with the new Italian judicial approach. Should Italian courts be called to rule on the matter, they would have to evaluate their case law bearing in mind that a blanket of immunity could induce States in ‘shifting the attribution of the alleged wrongful acts from themselves to the (immune) organization’ and, at the same time, that ‘[v]ictims who seek to assign blame directly to international organizations will need to lobby for the establishment of non-judicial panels (such as commissions of inquiry) to investigate and issue findings concerning their alleged wrongful acts.’¹¹⁴

5. Opposing Trends in the conceptualisation of State immunity: Where do we go from here?

As noted in legal writings, immunity ‘should be viewed within the historical context of the rise and fall of immunities granted by sovereign nations as a courtesy to their neighbours. Immunity is not a static institution, but adapts as the world changes around it’.¹¹⁵ Under a Westphalian perspective, immunity is a consequence that follows either the equal sovereignty of the original associates of the international community, or their obligation not to interfere with foreign domestic affairs. In this sense, the XX century already acknowledges the evolution of the traditional Westphalian model, since it has witnessed a reduction of the material scope of application of State immunity, and a massive creation of international organisations, to which a (different) degree of State sovereignty has been transferred to. These elements, taken alone, are sufficient to debate the contemporary structure of the international community. To this long on-going debate the immunity cases recalled above add two significant, yet opposing, trends, in whose light a reflection on the fundamental shapes and principles of the contemporary international community appears everything but to be near to a final and definitive conclusion.

http://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html?_r=1; last access Sept. 21, 2016). On the latest position of the U.N. in respect to the Haiti epidemic, see Kristen E Boon, ‘Haiti Cholera Update’, in *Opinio juris* (Sept. 20, 2016 – last access Sept. 21, 2016). More recently, the UN Secretary General apologised for the U.N. role in the outbreak of Cholera in Haiti see Kristen E Boon, ‘UN Apologizes for Role in Cholera Outbreak’, in *Opinio juris* (Dec. 7, 2016 – last access Dec. 29, 2016).

¹¹³ Kimberly Faith, ‘Stichting Mothers of Srebrenica v. Netherlands: Does U.N. Immunity Trump the Right of Access to a Court?’, in 22 *Tulane Journal of International and Comparative Law* [2014] 359, at 372. Cf. also Rosa Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’ cit., 243, also noting that, even where some courts have followed a different approach, a certain distinguishing in favour of the U.N. has most often been made.

¹¹⁴ Jacob Katz Cogan, ‘Stichting Mothers of Srebrenica v. Netherlands’, cit., 889.

¹¹⁵ Kimberly Faith, *Stichting Mothers of Srebrenica v. Netherlands: Does U.N. Immunity Trump the Right of Access to a Court?*, cit., 373. See also Pierre-Hugues Verdier and Erik Voeten, ‘How Does Customary International Law Change? The Case of State Immunity’, in 59 *International Studies Quarterly* [2015] 209, and cf., Christian Tomuschat, ‘International Law of State Immunity and Its Development by National Institutions, The Symposium: Foreign State Immunity at Home and Abroad’, in 44 *Vanderbilt Journal of Transnational Law* [2011] 1105, 1106.

On the one side, Italian courts oppose international customary law and promote their domestic vision of sovereignty, according to which States are no longer seen as “untouchable”, unless they legitimately exercise their powers (i.e. they do not breach fundamental principles and rules of international law) and ensure, at the same time, an effective form of redress. On the other side, other courts appear more reluctant to follow a similar approach, thus confirming that both sovereignty and the role of international actors appear to be one of the (few) legal certain elements of the international community.

In general terms, it does not seem surprising that the voices that call for a (explicit or implied) re-evaluation of the Westphalian vestiges of the international community are coming from domestic courts, called to apply domestic law, rather than from international courts or States themselves, given that these might be – in a number of occasions – less likely to abandon traditional legal conceptualisations of international law, at least where these rest on the principle of State sovereignty. The question is whether the Italian approach is likely to be followed in the future by courts of other States. A question that finds no easy answer, even though a number of courts are now used to reason in terms of alternative means of protection to justify/deny recognition of foreign immunity to *acta iure imperii* (with a margin of discretion upon States and courts to determine the effectiveness of the possible alternative means of protection, as in the case of the Italian Constitutional Court that saw no valid judicial remedy and no international negotiation between the concerned States¹¹⁶).

As of today, it cannot be excluded that domestic courts of other States could still follow the Italian example, and thus contribute to change – in time – customary international law, even though, as seen, up until today it does not seem that this decision alone can change current principles. In this process of evolution, the possible entry into force of the 2004 UN Convention will play a significant role in the understanding of the relationship between immunity and right to access a court (at least in non-military operations). Nonetheless, it must also be pointed out that gradually human rights acquire a significant importance, as testified by the *Kadi* case law of the CJEU that – As it is known – has also been known for adopting a (unusual for the court) dualist approach.¹¹⁷ In spite of this importance, and of the circumstance that immunity can indeed lead to impunity (of States for the ICJ, of the UN for the ECtHR), it still appears that notwithstanding the many voices and decisions that advocate for human rights to restrict State sovereignty, as of today

¹¹⁶ On the contrary, as noted by Pasquale De Sena, *Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale*, cit., 198, the Italian Constitutional Court saw the Italian legislator promptly enacting domestic rules to comply with the decision of the ICJ, thus possibly reasoning on the opportunity to rule on the matter rather than declaring its lack of jurisdiction and “invite” the Italian Government in starting international negotiations.

¹¹⁷ Case C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, on which see ex multis Juliane Kokott and Christoph Sobotta, ‘The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?’, in 23 *The European Journal of International Law* [2012] 1015. Also, for a comparison between the Italian decision and the *Kadi* judgment of the CJEU, see Chimène I Keitner, ‘Authority and Dialogue: State and Official Immunity in Domestic and International Courts’, in Chiara Giorgetti, Guglielmo Verdirame (eds), *Concepts of International Law in Europe and the United States* (Cambridge University Press, forthcoming), and ID, ‘Constitutional Courts and International Law: Revisiting The Transatlantic Divide’, in 129 *Harvard Law Review* [2016] 1362. But cf. Martin Scheinin, ‘The Italian Constitutional Court’s Judgment 238 of 2014 Is Not Another *Kadi* Case’, cit.

this peculiar aspect of the Westphalian construction still holds, and will do in the future up until that (indefinite) point in time where a sufficient number of domestic courts will oppose international law and thus shape customary international law in general. Should this take place, it will be probably a long path: domestic courts might exercise self-restraint in this respect. However, this long path is now open: domestic courts willing to change their case law now have a first decision to which they could make reference to, and contextualise it in a broader legal framework of international human rights protection and constitutional provisions.¹¹⁸ Nonetheless, prognostically speaking, courts are likely to face resistances of States (Italy included, possibly, if judicial practice should not be followed by the Government if the State were to be sued before foreign courts) wishing to preserve their status under international law.

Yet, the co-existence of different trends seems to raise concerns on the very foundation of State immunity and of the international community. Concerns that can be differently declined depending on how much consensus the “Italian trend” will find. Should human rights *not* become a widely accepted limit to immunity, but nonetheless find at least *some consensus* amongst other States, what will be left of State immunity? Can the growth of different rules applied within domestic systems de-construct the customary principle itself? As of today there are in fact a number of different conceptualisations: those who grant absolute immunity; those who grant a restricted immunity, without exception for *acta iure imperii*; those who grant a limited immunity, but for cases of States sponsoring terrorism,¹¹⁹ and those who grant a limited immunity, unless the

¹¹⁸ The specification seems important: having adopted a rigid dualist approach, the decision alone – whose aim is not to provide a new rationalisation of the rules of international law, as was the case in previous cases – could not be a sufficient convincing element for foreign courts, since the focus of the Constitutional Court analysis is domestic law alone, and how rules of international law are admitted within the Italian system. Also critical on the possibility for the Constitutional Court to promote a shift in international law after having changed its scope of investigation, Enzo Cannizzaro, ‘Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014’, cit., 128.

¹¹⁹ See Iranian application before the ICJ, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity. Other than the well-known examples of the United States of America (Justice Against Sponsors of Terrorism Act (JASTA), entered into force on Sept. 28, 2016), and of Canada, Italian courts have also recently affirmed that States supporting terrorism act in violation of international law and actions for damages following violations of fundamental human rights do not enjoy immunity. The case has been dealt with by the *Corte di Cassazione* in a case for recognition and enforcement of a foreign decision where the immunity of the convicted State was invoked as a ground to refuse recognition and enforcement under the Italian Private International Law Act (Cass. Civ., 28 October 2015, n. 21964, in *Rivista di diritto internazionale* (2016) 292 ff., where it can be read that ‘[c]on la sentenza della Corte costituzionale n. 238 del 2014 è stato sbarrato l’ingresso, nel nostro ordinamento, della norma consuetudinaria sull’immunità degli Stati esteri dalla giurisdizione civile per gli atti compiuti nell’esercizio dei poteri sovrani, limitatamente alla parte in cui estende l’immunità alle azioni di danni provocati da atti o comportamenti qualificabili come crimini di guerra e contro l’umanità, lesivi di diritti inviolabili della persona, in quanto tali estranei all’esercizio legittimo della potestà di governo. Pertanto, non è applicabile il principio dell’immunità giurisdizionale dello Stato straniero là dove il risarcimento del danno sia stato chiesto ed accordato a seguito di un fatto terroristico annoverabile tra i crimini internazionali commessi in violazione dei diritti inviolabili dell’uomo. L’immunità dello Stato estero, infatti, non è un diritto, ma una prerogativa che non può essere assicurata di fronte a *delicta imperii*, a crimini, cioè, compiuti in violazione di norme internazionali di *jus cogens*, in quanto tali lesivi di valori universali che trascendono gli interessi delle singole comunità statali.’

foreign conduct to adjudicate is in breach of fundamental values of domestic systems,¹²⁰ (and taking into consideration that treaty law might complicate the reconstruction of a general norm). Could in such a scenario be still possible to speak of an international custom or could this fragmentation – if exasperated – be the very negation of a principle on State immunity so to argue that this derives its legitimacy from a rule that is not State sovereignty, but rather from a more general obligation of States not to interfere in foreign domestic affairs without due reason?¹²¹

On the contrary, *should* human rights become a widely accepted limit to immunity,¹²² what will remain of State sovereignty itself if each State will unilaterally determine preconditions for foreign States to enjoy immunity, or will there be a centralised organ to uniformly determine when a State act is in compliance with international law (thus entitle to immunity)? In the long-run, it appears that this question will press for answers, and domestic courts eventually ruling following the indications of the Italian Constitutional Court should not be blind to the issue of sovereignty¹²³ and to what the international community will look like¹²⁴ if States will no longer be sovereigns, especially if the de-construction¹²⁵ of the Westphalian model follows a case by case

¹²⁰ For a recent study in comparative perspective of cases where domestic constitutional provisions have been invoked in general to avoid domestic implementation of international law, and thus that pose the domestic constitution as a limit to international law, see Chimène I Keitner, ‘Authority and Dialogue: State and Official Immunity in Domestic and International Courts’, cit.

¹²¹ Riccardo Luzzatto, La giurisdizione sugli Stati stranieri tra Convenzione di New York, norme internazionali, generali e diritto interno, in XXIII Comunicazioni e studi [2007] 7 ff. Always taking into consideration – for the different purpose – the mentioned fragmentation, so to argue that immunity does not longer express a “rule” of public international law, but rather a “principle”, see Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’, cit., 853.

¹²² In general on human rights as a possible exception to immunity, see Andrea Bianchi, ‘Denying State Immunity to Violators of Human Rights’, in 46 Austrian Journal of Public and International Law [1994] 195.

¹²³ Also suggesting caution in the elaboration of extraordinary measures of reparation for cases of grave breaches of international law, Christian Tomuschat, ‘The Case of Germany v. Italy before the ICJ’, cit., 91 f., additionally noting ‘[s]hould every State be entitled to pursue its own sanctioning strategy or is some kind of international coordination necessary?’

¹²⁴ It is indeed acknowledge that State immunity ‘provides a valuable case study of the present nature of the international community and in particular the interaction of international law and national law, and on the formation of customary international law from national sources. Ultimately the extent to which international law requires, and national legislations and courts afford, immunity to a foreign State as a defendant before another State’s courts depends on the underlying structure of the international community and the degree to which one State may adjudicate the disputes of another State. In order to understand the structure of international law, theory must be tested against reality, and the significance of trends and patterns must be discerned. A study of State immunity directs attention to the central issues of the international legal system’ (Hazel Fox and Philippa Webb, *The Law of State Immunity*, cit., 7). Cf. also in the same terms, Anne Peters, ‘Immune Against Constitutionalisation?’, cit., 2, and Stefan Oeter, ‘The Law of Immunities as a Focal Point of the Evolution of International Law’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 355, 358.

¹²⁵ It seems fit here to speak of “de-construction” of the Westphalian model, since the very concept of “sovereignty” does not allow for a reasoning of an international community that transcends form State-based normative actors. As recalled in the scholarship, ‘[t]wo main answers to this question compete within contemporary international relations theory. According to the first view, the sovereign State is unlikely to remain the main locus of political authority and community in the future. It is challenged by new constellations of authority and community which transcend the divide between the domestic and the international spheres, and will soon be replaced by new forms of political life that

approach¹²⁶ adopted by domestic courts under the focal lenses of domestic constitutional provisions. In this last sense, whilst the ideological outcome of the Italian Constitutional Court's ruling can be praised under some points, this *modus operandi* that seeks to promote new concepts relevant under international law but from a domestic perspective might lead to excessive fragmentation of law, which would advise a more systemic and systematic assessment of all the issues related to immunity. A collective effort of States that could create enough consensus on the general principles – an effort that nonetheless is hardly in sight, and whose lack has determined both the reaction of domestic courts and their change in perspective.

To conclude, in light of the above it does not seem that – today – it is possible to undisputedly speak of a clear and definite crisis of the international law on State immunity. There are indeed different conceptualisations, a number of rules that co-exist but that do not lead to a significant fragmentation of rules able to deny the very existence of the principle underlying immunity itself. In this sense, the opposing trends in the law of immunities do not seem to reach the state of “crisis” intended as a “time of great disagreement, confusion, or suffering” as defined by the Oxford Dictionary. Today, there is little doubt that customary law is crystallised in the ICJ decision, and that Italy is in violation of international law. Of course, this might change if, due to attitude of States, further domestic courts will determine that it becomes necessary to challenge and oppose international law as it stands – up until that point in time where international law actually evolves (thus with a regression from a possible transitional state of crisis of the law of immunities). Nonetheless, current tensions – whilst not expressing a crisis in their own specific field – could play an additional role in the on-going assessment of the possible crisis of the Westphalian model which still predicates the privilege of States not to be judged by others, at least when they exercise sovereign acts, and that still sees in States – rather than in others – the most important and preponderant international actors. It is a static vision that, even more every day, seems unable to adapt to a changing world where individuals seem to move to the centre stage¹²⁷ of international law.

know nothing of this distinction. Yet the tricks that the concept of sovereignty continues to play on our political imagination make it difficult to make coherent sense of these new constellations as they do not conform to the indivisibility and discreteness that characterize sovereignty. This concept should therefore either be abandoned, or be redefined in order to make sense of these new constellations’ (Jens Bartelson, ‘The Concept of Sovereignty Revisited’, in 17 *The European Journal of International Law* [2006] 463, 464).

¹²⁶ Arguing that ‘due regard to the requirements of international co-operation within a world without central authority’, Robert Uerpmann-Witzack, ‘Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges’, in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill, 2015) 236, 243.

¹²⁷ ICJ, *Jurisdictional Immunities of the State*, cit., para. 18.