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# Sovereign Immunity: Rule, Comity or Something Else?

Jasper Finke\*

## Abstract

*Sovereign immunity is best understood not as a specific rule of customary international law, but as a legally binding principle. If not bound by detailed treaty obligations, states are free to frame and define the scope and limits of sovereign immunity within their legal orders as long as they observe the boundaries set by other principles of international law. Viewing sovereign immunity as a principle provides for a much better explanation of the still diverse state practice than the currently prevailing concept that conceives immunity as a rule of customary international law and its denial as an exception to that rule. The distinction between principle and rule also has far-reaching practical implications. Instead of asking whether state practice allows for a certain exception, the focus must be on the limits that international law prescribes. States therefore enjoy much greater liberty to define the limits and scope of sovereign immunity, even though this liberty is restricted.*

## 1 Introduction

Foreign sovereign immunity belongs without doubt to the traditional domains of public international law and has received wide attention within academia and practice over the last 200 years. But the rise of international human rights has called the fairly settled doctrine of relative sovereign immunity – also known as the relative theory of sovereign immunity – into question. If states are bound by human rights and if the rule of law has any meaning in international law, why are states exempted from jurisdiction within the territory of another state? There are, of course, numerous reasons which support sovereign immunity – historical as well as more practical ones. But the alleged inconsistency between protecting human rights on the one hand and granting sovereign immunity on the other has found powerful support, particularly

\* PhD, Senior Researcher and Lecturer, Transnational Economic Law Research Centre, Martin Luther University, Halle-Wittenberg. Email: [jasper.finke@jura.uni-halle.de](mailto:jasper.finke@jura.uni-halle.de).

among human rights activists or idealists, as they have sometimes been called. In Europe, it was above all the *Pinochet* case<sup>1</sup> that divided academia as well as practice; in the US, this happened with the case of *Princz v. Federal Republic of Germany*.<sup>2</sup> Both sides of the great divide claim that their approach reflects the law as it stands. The idealists argue that with regard to international crimes and fundamental human rights states are obliged to deny sovereign immunity, whereas the (alleged) realists emphasize the indispensable importance of upholding sovereign immunity for maintaining good and peaceful relations among states. Immunity reflects a basic state right based on the respect for a state's sovereignty and independence.

The conflict between these incompatible conceptions has occupied not just national courts, which are naturally the first ones to decide matters of sovereign immunity. The ICJ in *The Arrest Warrant* case<sup>3</sup> and the European Court of Human Rights (ECtHR) in *Al-Adsani*<sup>4</sup> and *McElhinney*<sup>5</sup> have addressed certain aspects of the problem as well: the immunity of high-ranking state officials from criminal proceedings in another state in cases of war crimes and crimes against humanity (*The Arrest Warrant* case), or whether states are under an obligation to grant access to their courts if the foreign state is being accused of torture (as in *Al-Adsani*). In both cases the courts argued in favour of sovereign immunity. The ICJ in particular accepted that a right to sovereign immunity exists. It thus did not come as a surprise when on 23 December 2008 Germany instituted proceedings against Italy before the ICJ based on a violation of its (alleged) right to sovereign immunity in civil proceedings.<sup>6</sup>

This legal action is the direct response to several decisions of the Italian *Corte di Cassazione* (Supreme Court). In *Ferrini* the Court awarded payments in favour of Mr. Ferrini, an Italian national, who was deported from Italy and forced into slave labour in Germany in 1943.<sup>7</sup> The *Distomo* case concerns the recognition of a Greek judgment which ordered Germany to pay damages for a massacre committed against the

<sup>1</sup> *Ex Parte Pinochet*, House of Lords, 24 Mar. 1999, 38 ILM (1999) 581.

<sup>2</sup> *Princz v. Federal Republic of Germany*, 26 F. 3d 1166 (DC Cir. 1994).

<sup>3</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3. A similar case also brought to the ICJ by the Democratic Republic of Congo is still pending; see *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, application filed on 9 Dec. 2002, available at: [www.icj-cij.org](http://www.icj-cij.org).

<sup>4</sup> App No 35763/97, *Al-Adsani v. UK*, ECHR, 21 Nov. 2001, 123 ILR (2001) 24.

<sup>5</sup> App No 31253/96, *McElhinney v. Ireland*, ECHR, 21 Nov. 2001, 123 ILR (2001) 73.

<sup>6</sup> *Jurisdictional Immunities of the State (Germany v. Italy)*, 23 Dec. 2008, available at: [www.icj-cij.org](http://www.icj-cij.org).

<sup>7</sup> *Ferrini v. Federal Republic of Germany*, Corte Suprema di Cassazione (Italian Supreme Court), 5044/2004, English translation available in 128 ILR (2006) 658; see also Gattini, 'War Crimes and State Immunity in the Ferrini Decision', 3 *J Int'l Criminal Justice* (2005) 224; Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes – The Ferrini Decision', 54 *ICLQ* (2005) 951; De Sena and De Vittor, 'State Immunity and Human Rights – The Italian Supreme Court Decision on the Ferrini Case', 16 *EJIL* (2005) 89.

civilian population of the Greek village Distomo during World War II.<sup>8</sup> The *Corte di Cassazione* denied Germany a right to sovereign immunity based on the severity of the crimes committed during the war. It therefore did what the plaintiffs in *Al-Adsani* and *McElhinney* had asked the domestic courts in the UK and Ireland to do. As a consequence, the ICJ must decide whether states are allowed to deny sovereign immunity or whether the denial violates international law. The focus of the case thus differs completely from that of *Al-Adsani* and *McElhinney*. In these cases, the ECtHR had to decide whether states were under an obligation to deny sovereign immunity because they would otherwise violate the plaintiff's rights under the European Convention on

<sup>8</sup> The Distomo massacre was one of the worst crimes committed against the civilian population in Greece during World War II. On 10 June 1944, SS troops who were integrated into the German *Wehrmacht* entered the Greek village of Distomo. They came to take revenge for a partisan attack, even though they had no proof that the village was either directly or indirectly involved in that attack. Those surviving the massacre reported that the Germans randomly killed every person they could get hold of and burned the village to the ground. Members of the Red Cross who went to Distomo days after the massacre found bodies hanging from the trees lining the roads outside the village. For a brief description of the massacre see M. Mazower, *Inside Hitler's Greece* (1993), at 213–215. The Distomo litigation history is quite remarkable. Two years after the proceedings had been instituted, the Court of Leivadia held Germany liable for the Distomo massacre, awarding damages in the amount of approximately \$30 million: *Prefecture of Voiotia v. Federal Republic of Germany*, Court of 1st Instance Levadia, 137/1997; an English translation is provided by Gavouneli, 'War Reparation Claims and State Immunity', 50 *Revue Hellénique de Droit International* (1997) 595, at 599 ff; for a short summary of the judgment see Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 92 *AJIL* (1998) 765. After the Greek Supreme Court confirmed the judgment in May 2000, it became final; *Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos, 11/2000, 4 May 2000, 129 *ILR* (2007) 514. But the efforts to enforce the judgment eventually failed because the Minister of Justice denied his approval – a necessary prerequisite for executing a judgment against a foreign state under Greece law (Art. 923 of the Code of Civil Procedure). The Athens Court of Appeal upheld this decision and a complaint lodged with the European Court of Human Rights was equally unsuccessful: App. No. 59021/00, *Kalogeropoulou v. Greece and Germany*, ECtHR, 12 Dec. 2002, 129 *ILR* (2007) 537. Finally in 2003, the German Federal Supreme Court rejected the enforcement of the Greek judgment in Germany, *Distomo Massacre case*, Bundesgerichtshof, III ZR 245/98, 26 June 2003, 129 *ILR* (2007) 556; see also Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case', 5 *German LJ* (2004) 15. The German Constitutional Court in 2006 affirmed the decision of the *Bundesgerichtshof*, BVerfG, 2 BvR 1476/03, 15 Feb. 2006. In the meantime the Special Supreme Court of Greece indirectly overruled the *Areios Pagos* in parallel proceedings granting immunity to Germany; *Margellos and Others v. Federal Republic of Germany*, Anotato Eidiko Diskastirio (Greek Special Supreme Court), 6/2002, 129 *ILR* (2007) 526. This development led Dörr to conclude that the matter was settled; Dörr, 'Staatliche Immunität auf dem Rückzug?', 41 *Archiv des Völkerrechts* (2003) 201, at 209. But when the *Corte di Cassazione* issued its *Ferrini* decision, the Distomo plaintiffs instituted proceeding in Italy to execute the Greek judgment against Germany there. Their efforts have been successful so far: see *Corte di Cassazione*, 14199, 29 May 2008; German translation available at 27 *NVwZ* (2008) 1100. German commentators in particular criticized the judgment harshly: see, e.g., Stürmer, 'Staatenimmunität und Brüssel I-Verordnung – Die zivilprozessuale Behandlung von Entschädigungsklagen wegen Kriegsverbrechen im Europäischen Justizraum', 28 *IPRax* (2008) 197, at 205, holding that states are deprived of their rights (*Rechtlosstellung*), or Geimer, 'Los Desastres de la Guerra und das Brüssel I-System', 28 *IPRax* (2008) 225, at 227, complaining about the disillusioning conclusion to be drawn from the judgments.

Human Rights (ECHR).<sup>9</sup> According to the ECtHR, the convention would have been violated if there had been a duty to deny sovereign immunity under customary international law. But, as the Court denied such a duty, it held that the UK did not violate the convention. The ICJ, however, does not have to consider the existence of any duty to deny immunity in the present case. Quite the contrary, it must decide whether Italy, by denying Germany's immunity in *Ferrini* and recognizing the Greek *Distomo* judgment, has violated international law because it was under an obligation to grant immunity.<sup>10</sup>

The intuitive basis for such an obligation is a specific state right to sovereign immunity. But does such a right exist? Academia and practice by national and international courts seem to be divided on this question. There are those who conceptualize sovereign immunity as a default rule which applies as long as states have not accepted any limitations,<sup>11</sup> whereas others reject its legally binding effect under customary international law altogether.<sup>12</sup> But both conceptions neglect the current realities of international law. States accept sovereign immunity as a legally binding concept, but only on a very abstract level.<sup>13</sup> They agree on the general idea of immunity, but

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS No. 5, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, ETS No. 155.

<sup>10</sup> The ICJ's decision in *The Arrest Warrant* case is of no immediate help either. It definitely stipulates a right to immunity. But this specific right is limited to a Foreign Minister while being in office for criminal proceedings in another country. In addition, the Court emphasized '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. . . . 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': see *Arrest Warrant*, *supra* note 3, at para. 60.

<sup>11</sup> Even those who deny sovereign immunity in case of fundamental human rights violations (at least when occurring on the territory of the forum state), such as the *Areios Pagos* in *Distomo* or the *Corte di Cassazione* in *Ferrini*, assume that states in general have a right to claim immunity under customary international law, but either that this right collides with fundamental human rights or that international law accepts restrictions of this right: *Ferrini*, *supra* note 7, at 664–674; *Distomo*, *Areios Pagos*, *supra* note 8, at 516–521. The whole debate has therefore circled round the question to what extent international law either allows or requires exceptions to the default rule: see, e.g., H. Fox, *The Law of State Immunity* (2nd edn, 2008), discussing the character of sovereign immunity as a rule at 13–25 and possible exceptions to this rule at 533–598; see also C. Appelbaum, *Einschränkung der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (2007). Conceptualizing immunity and its limits as a rule–exception relationship is also supported by the existing international conventions and domestic laws on foreign sovereign immunity. The European Convention on State Immunity, see *infra* note 14, and the UN Convention on Jurisdictional Immunities of States, see *infra* note 16, follow this approach as well as the US Foreign Sovereign Immunity Act, *infra* note 17, and the UK State Immunity Act, *infra* note 18.

<sup>12</sup> Especially the US Supreme Court in its recent decisions in *Republic of Austria v. Altmann*, 541 US 667 (2004) and *Dole Food Co. v. Patrickson*, 538 US 468 (2003) has referred to comity as the only basis for sovereign immunity in international law.

<sup>13</sup> See the conclusion of Dellapenna, 'Foreign State Immunity in Europe', 5 *NY Int'l L Rev* (1992) 51, at 61; R. Jennings and A. Watts (eds), *Oppenheim's International Law* (1992), I/1, at 342–343 also point out that beyond a general understanding of sovereign immunity, national decisions differ in both detail and substance.

disagree on the extent to which they actually must grant immunity in a specific case. I therefore argue that sovereign immunity is best understood not as a specific rule or something based on the comity of the forum state, but as a legally binding principle of international law. The distinction between rule and principle is more than a mere formality. It determines how we approach the matter and which questions we ask, because a principle, in contrast to a specific rule, allows states to determine the scope of sovereign immunity within their domestic legal orders confined by the limits set by international law. The question is ‘What are these limits?’ and not ‘Have states accepted exceptions to sovereign immunity and to what extent?’

In order to substantiate my claim that sovereign immunity must be conceptualized as a principle and not as a rule, it is necessary, after a few introductory remarks (section 2), to revisit the classical discussion of possible exceptions to the alleged rule of sovereign immunity, namely the private–public distinction (section 3), the tort exception (section 4), (implied) waivers to sovereign immunity (section 5), and the ‘hierarchy of norms’ argument (section 6), as well as the ‘comity approach’ (section 7). The analysis will reveal that current state practice is too diverse to establish sovereign immunity as a specific rule obliging states to grant sovereign immunity to foreign states as a default rule. But it will also show that states actually agree on the concept of foreign sovereign immunity, at least on a very abstract level. Denying immunity any binding effect is thus incompatible with the actual conduct of states. This result will be applied to the general discussion on principles and rules, thereby trying to verify the proposition that sovereign immunity is a principle of public international law (section 8). The article will conclude by suggesting which questions the ICJ should discuss when deciding the case on *Jurisdictional Immunities of the State* between Germany and Italy.

## 2 Sovereign Immunity – Some Basics

Sovereign immunity always had two dimensions – a national and an international one. So far, the international community has witnessed several attempts to codify the law on sovereign immunity, but until now only the European Convention on State Immunity (ECSI) has entered into force.<sup>14</sup> However, even this Convention has received only eight ratifications since 1972, with Germany having been the last state to ratify it in 1990.<sup>15</sup> The United Nations have, of course, also worked on the matter – for several decades. Still, since its adoption in December 2004, the UN Convention on Jurisdictional Immunities of States (UNCJIS) has not been ratified by enough states in order to become effective.<sup>16</sup>

<sup>14</sup> European Convention on State Immunity, 16 May 1972, CETS No. 074, 11 ILM (1972) 470.

<sup>15</sup> The ratification status is available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=074&CM=0&DF=&CL=ENG>; status as of 21 Oct. 2010.

<sup>16</sup> The Convention was adopted by GA Res 59/38, 2 Dec. 2004. Even though 28 states have signed the treaty, only 6 have ratified it so far: see <http://treaties.un.org/cz/Pages/ViewDetails.aspx?src=TREATY&id=284&chapter=3&lang=en>.

Parallel to these codification efforts on the international level, some states enacted national legislation on sovereign immunity, most importantly the US Foreign Sovereign Immunity Act (FSIA).<sup>17</sup> Other states include the UK, Australia, Canada, and South Africa.<sup>18</sup> States that for whatever reason have forgone the opportunity to pass national legislation rely on international custom to determine the scope of immunity which foreign states might claim. In doing so, most states – or, to be more precise, their courts – assume that sovereign immunity serves as the basic rule until the existence of an exception has been proven.

### 3 The Private–Public Distinction

At first glance, the historical developments appear to support this idea: immunity as a shield which screens foreign states from the jurisdiction of the forum state unless it is penetrated by international custom. While states once enjoyed unqualified exemptions from the jurisdiction of other states, this absolute approach was exchanged for what is now assumed to be the current legal doctrine – the restrictive theory of sovereign immunity.<sup>19</sup> A state's conduct falls within two categories: acts *iure imperii* or acts *iure gestonis*. It is either official or private. States therefore enjoy immunity as long as they act in their official capacity, but must submit to the jurisdiction of another state if they act as a private person.<sup>20</sup>

Even though this summary accurately describes the overall development of sovereign immunity, it also (over)simplifies it significantly. The change from absolute to relative immunity did not happen in the course of a few years. Quite the contrary. Belgian courts were the first to adopt the private acts exception as early as 1857,<sup>21</sup> and Italian courts followed in the 1880s.<sup>22</sup> In 1933 E.W. Allen concluded that a 'growing number of courts are restricting the immunity to instances in which the state has acted in its official capacity as a sovereign political entity. The current idea that this distribution is peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Rumania, France, Austria and Greece.'<sup>23</sup>

<sup>17</sup> Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1602–1611.

<sup>18</sup> UK, State Immunity Act 1978, 17 ILM (1978) 1123; Canada, State Immunity Act 1982, 21 ILM (1982) 798; Australia, Foreign States Immunity Act 1985, 25 ILM (1986) 715; South Africa, Foreign States Immunity Act, reprinted in E.K. Bankas, *The State Immunity Controversy in International Law* (2005), at 455 ff.

<sup>19</sup> For the development of sovereign immunity see R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal and International Human Rights Law* (2008), at 12–64; Bankas, *supra* note 18, at 13–32; Fox, *supra* note 11, at 204–236.

<sup>20</sup> L. Fiesler Damrosch *et al.*, *International Law* (4th edn, 2004), at 1198.

<sup>21</sup> Van Alebeek, *supra* note 19, at 14 with further references.

<sup>22</sup> Fox, *supra* note 11, at 224; Appelbaum, *supra* note 11, at 47; each with further references.

<sup>23</sup> E.W. Allen, *The Position of Foreign States Before National Courts* (1933), at 301.

But it took an additional 20 years until Jack B. Tate, the then acting Legal Adviser to the Department of State, announced that the Department would no longer support absolute immunity for foreign states within the US, but adopt the private–public distinction instead.<sup>24</sup> From 1857 to 1952 the scope and limits of sovereign immunity changed gradually and slowly. If immunity had actually been a specific state right, Belgium and other states would have continuously violated international law until a new rule evolved according to which states must face the charges within the territory of another states if their conduct is qualified as private. However, the absence of formal protests by states which had not yet accepted this new trend is quite remarkable – so remarkable that it led Lauterpacht in 1951 to conclude that state practice is too diverse to assume that it has legally binding force under international law.<sup>25</sup>

The world of sovereign immunity has changed since 1951, at least with respect to the general acceptance of the restrictive theory.<sup>26</sup> As a theory, it found widespread support among states,<sup>27</sup> but the distinction between private and public acts is applied so divergently that it is hard to concede more than a very abstract conformity in state practice. Disagreement starts with the appropriate test for determining the act's character as private or public: is it the purpose or the nature?<sup>28</sup> Even though one can observe a tendency towards the nature test, Article 2(2) UNCJIS clearly reflects the still existing uncertainties. The private character of state action is usually determined by its nature, but its purpose becomes relevant if states agree so or if the forum state routinely applies the purpose rather than the nature test.

Despite this rather minor divergence, more fundamental differences exist, in particular concerning the context in which the private–public distinction applies. Historically, the restrictive theory is linked to the phenomenon of states entering the marketplace and taking part in commercial activities like private persons. It developed round the idea that 'once the sovereign has descended from his throne and entered the marketplace he has divested himself of his sovereign status and is therefore no longer immune to the domestic jurisdiction of the courts of other countries'.<sup>29</sup> Both the ECSI

<sup>24</sup> Tate Letter, 19 May 1952, 24 Department of State Bull. 984 (1952), reprinted in *Alfred Dunhill of London Inc. v. Cuba*, 425 US 682, at 711–715 (1976).

<sup>25</sup> H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYBIL* (1951) 220, at 227–228.

<sup>26</sup> Even Brownlie concedes by now that 'there is a trend in the practice of states towards the restrictive doctrine of immunity. . .': I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 325.

<sup>27</sup> See Bankas, *supra* note 18, at 31; Fox, *supra* note 11, at 235; Van Alebeek, *supra* note 19, at 47.

<sup>28</sup> The FSIA, e.g., expressly refers to the nature of the acts: 28 US §1603(d). But, as Caplan, 'State Immunity, Human Rights, and Ius Cogens: A Critique of the Normative Hierarchy Theory', 97 *AJIL* (2003) 741, at 761 has pointed out, this approach is not universally applied; see also Bankas, *supra* note 18, at 215 ff.

<sup>29</sup> *I° Congreso Del Partido*, House of Lords, 16 July 1981, 64 (1983) ILR 154, at 178, para. 527, thereby referring to the legal opinion of the plaintiff, not its own.

and the UNCJIS follow this understanding, and the FSIA does so as well.<sup>30</sup> It is not state behaviour in general which is either public or private, but only a state's participation in the marketplace. Therefore, the exception is more precisely described as the commercial exception. But this reduction of the private–public distinction has been challenged by courts. The House of Lords argued that 'it is possible to conceive of circumstances in which a sovereign may equally be regarded as having divested himself of his sovereign status, and yet not have entered the market place; the principle [the restrictive theory], if it applies at all, should apply to all circumstances, commercial or otherwise, in which a sovereign acts as any private citizen may act.'<sup>31</sup>

The differences between these two methods if, for example, applied to the problem of immunity for massive human rights violations could be fundamental. Neither torture, as in the case of *Al-Adsani*, nor the destruction of homes, property, and the mass killings of civilians in armed conflict, as in the *Distomo* case, are commercial in nature. The same holds true for slave labour, as in *Ferrini*. Even though its ultimate purpose could be described as commercial, the nature of detaining civilians and deporting them for the purpose of exploiting their work is not. The conduct of military forces within armed conflicts is therefore usually considered to be acts *iure imperii*.<sup>32</sup> However, if we apply the standard suggested by the House of Lords and the Italian *Corte di Cassazione*, it is not unreasonable to reach a different result depending on how much emphasis is put, not on the legal context in which the act has taken place, but on the act itself.

The standard for determining the scope of immunity is whether 'the sovereign acts as any private citizen may act'<sup>33</sup> and whether the act requires governmental or sovereign authority.<sup>34</sup> It is, of course, possible and in accordance with the current practice to argue that private persons, even though they can carry and use weapons, enjoy not the same legal or sovereign authority as members of the armed forces do. But such reasoning focuses on the circumstances in which acts of mass killings of civilians and torture have been committed (armed conflict) and not so much on the act itself. There is nothing official about killing or torturing a person, and these physical acts do not require

<sup>30</sup> Art. 3 (contractual obligation) and Art. 7 ECSI (commercial activities within the forum state); Art. 10 UNCJIS (commercial transactions), § 1605(a)(2) FSIA (commercial activities either within or with direct effect on the United States). The US Supreme Court has given the commercial activity exception a rather restrictive interpretation: see, e.g., *Saudi Arabia v. Nelson*, 507 US 349, 113 S Ct 1471 (1993), granting sovereign immunity to Saudi Arabia which hired Mr Nelson in the US to work as an engineer in Saudi Arabia. Mr Nelson was tortured and detained unlawfully after he had repeatedly reported on-the-job hazards.

<sup>31</sup> *Iº Congreso*, *supra* note 29, at para. 527; see also the decision of the *Corte di Cassazione* in *Ditta Campione v. Ditta Peti Nitrogenmuvek*, Stato Ungherese, N. 3386, 14 Nov. 1972, to which the House of Lords explicitly refers.

<sup>32</sup> *Ferrini*, *supra* note 7, at 664; see also *Distomo*, Bundesgerichtshof, *supra* note 8, at 559 ff.

<sup>33</sup> *Iº Congreso*, *supra* note 29, at para. 527.

<sup>34</sup> Orakhelashvili, 'State Immunity and International Public Order', 45 *German Yrbk Int'l L* (2002) 226, at 235.

any sovereign or governmental authority.<sup>35</sup> Private entities and their personnel take part in armed conflicts as well, and they behave in the same way as official or a state's military forces. It is therefore at least theoretically possible completely to neglect the official circumstances in which the acts take place and to focus exclusively on their very nature.

The analysis so far has revealed two important points. First, the transition from the absolute to the restrictive theory of sovereign immunity occurred gradually over a long period of time. During that period, states that still granted absolute immunity to foreign states failed to protest this development.<sup>36</sup> Secondly, even now that the restrictive theory enjoys widespread support, it is understood differently by various national courts and legislation.<sup>37</sup> Not only do different standards exist on how to determine the private or public nature of an act, the context in which this distinction should be applied is also uncertain. Is it limited to commercial activities and transactions or does it affect state behaviour in general? State practice so far has been anything but uniform, and it is not surprising that 'a closer examination of the details . . . demonstrates . . . that consensus exist only at a rather high level of abstraction'.<sup>38</sup> It is of course true that most states agree on the private–public distinction. But when it comes to determining the legal effects of sovereign immunity, the relevance of uniformity on an abstract level should not be overestimated. It is the question how this concept is actually applied and defined in practice which is crucial for legal analysis.

## 4 Tort Exception

In addition to the private–public distinction, the so-called tort exception has also played an important role in the rule–exception concept, especially in order to establish the jurisdiction of the forum state in cases of massive human rights violations.<sup>39</sup> It is obviously irrelevant in cases like *Al-Adsani*, in which the tortious act has been

<sup>35</sup> Even though the UN Convention Against Torture limits the definition of torture in Art. 1(1) to instances when 'pain or suffering is inflicted by . . . a public official or other person acting in an official capacity', this limitation does not alter the conclusion that the physical acts themselves can be performed by private persons as well, regardless of whether these acts are considered to be torture from a legal point of view. In addition, the Convention against Torture itself clearly states that the definition 'is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application'.

<sup>36</sup> Lauterpacht, *supra* note 25, at 228.

<sup>37</sup> See H. Fox, *The Laws of State Immunity* (2002), at 292: '[t]he restrictive doctrine . . . ha[s] not produced uniformity in practice nor reliable guidance as to when a national court will assume or refuse jurisdiction. . . . [R]eference neither to the nature nor to the purpose of the activity can disguise the arbitrary choices made by courts.'

<sup>38</sup> Dellapenna, *supra* note 13, at 61.

<sup>39</sup> In general see C.H. Schreuer, *State Immunity: Some Recent Developments* (1998), at 93; Fox, *supra* note 11, at 569 ff; B. Hess, *Staatenimmunität bei Distanzdelikten* (1992), at 89 ff (US practice), at 138 ff (UK practice), and at 142 ff (Australian practice).

committed abroad and not within the forum state. But it could permit jurisdiction if personal injuries have been caused by an act or omission of the foreign state within the forum state, such as most atrocities committed by the German troops during World War II in the territories under their occupation. It is therefore not surprising that the Greek *Areios Pagos* argued in the *Distomo* case that this exception has evolved into a rule of customary international law and that it not only allows, but actually requires, that states reject the immunity claim of the foreign state.<sup>40</sup>

Still, the disputed status of this exception is evidenced by the ruling of the Greek *Anotato Eidiko Diskastirio* (Special Supreme Court) in the *Margellos* case. It reached the opposite conclusion, arguing that when the injury is caused during an armed conflict, customary international law does not provide for an exception to the default rule of sovereign immunity.<sup>41</sup> The *Corte di Cassazione* in *Ferrini*, on the other hand, agreed with the *Areios Pagos*. Even though the Court heavily emphasized the *ius cogens* character of the norms which Germany has violated, it also referred to the tort exception to support its ruling.<sup>42</sup> The scholarly discussion which has ensued from these rulings has therefore concentrated on the question whether or not the tort exception is actually supported by international law.<sup>43</sup>

In particular states that enacted national legislation on sovereign immunity included exemptions for torts committed in the forum state.<sup>44</sup> The ECSI (Article 11) and the UNCJIS (Article 12) contain a similar exception for tortious acts that occurred on the territory of the forum state, with one major difference: the ECSI also

<sup>40</sup> *Distomo*, *Areios Pagos*, *supra* note 8, at 519.

<sup>41</sup> *Margellos*, *Anotato Eidiko Diskastirio*, *supra* note 8, at 526. The ruling in *Margellos* must be distinguished from the judgment of the ECHR in *McElhinney*, *supra* note 5. The Court only held that Ireland, by granting immunity for torts committed by *acta jure imperii*, acted within the currently accepted international standards: *McElhinney*, at para. 38. It did not decide whether states are under an obligation to grant immunity in such cases. The judgment is therefore better understood in the following way: a state may grant or deny immunity, but it is under no obligation to do either; a similar view is held by Cremer, 'Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit', 41 *Archiv des Völkerrechts* (2003) 137, at 154. It is therefore misleading to refer to the judgment as proof that states are prohibited from denying immunity in cases in which personal injuries are caused by a foreign state on the territory of the forum state, even if it involves an act or omission by the armed forces of that state (for such an interpretation see Dörr, *supra* note 8, at 209).

<sup>42</sup> *Ferrini*, *supra* note 7, at 670 ff, and at 674 (sects 10 and 12 of the judgment respectively); see also Gattini, *supra* note 7, at 230 ff and De Sena and De Vittor, *supra* note 7, at 97 who, in light of the *ius cogens* argument, consider it of minor relevance that the *Corte di Cassazione* relied on the fact that the acts had been committed in Italy. This might actually explain why the Court did not bother to rule on the legal nature of the tort exception and its status under customary international law.

<sup>43</sup> See accompanying text at *supra* notes 7 and 11; see also Handl, 'Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo: Anmerkungen zur Entscheidung des Obersten Gerichtshofs Griechenlands (*Areopag*) vom 4. Mai 2000', 61 *Zeitschrift für öffentliches Recht* (2006) 433, demanding a more thorough argument because the tort exception limits existing rights.

<sup>44</sup> For the US see 28 USC 1605(a)(5); for the UK sect. 5 of the State Immunity Act 1978; for Canada sect. 6 State Immunity Act 1982; and for Australia sect. 13 Foreign States Immunity Act 1985.

incorporates an express counter-exception for 'anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State': Article 31. Consequently, the tort exception would not apply to situations like those in *Ferrini* and *Distomo*.<sup>45</sup> The UK drafted its State Immunity Act in a similar fashion: including a tort exception in section 5, but explicitly excluding anything relating to acts or omissions of armed forces in section 16(2), whereas the FSIA and the UNCJIS do not contain any explicit privileges for acts of the armed forces.

Still, it has been argued that the UN Convention must be understood in this way because the 1991 commentary on Article 12 clarified that only insurable risks should be covered by the tort exception.<sup>46</sup> But the authority of an ILC commentary is debatable. According to Article 31 Vienna Convention on the Law of Treaties (VCLT),<sup>47</sup> a treaty must be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. To define the purpose of Article 12 by referring to the ILC commentary would eventually neglect the fact that according to Article 32 VCLT, the preparatory work is regarded as supplementary means of interpretation. It may be invoked only if the interpretation of a provision according to Article 31 leaves its meaning obscure, ambiguous, or leads to a result which is manifestly absurd or unreasonable.<sup>48</sup> It is hardly a manifestly absurd and unreasonable result to include personal injuries caused by the armed forces of another state on the territory of the forum state if this actually reflects the current practice of at least some states. The tort exception of the FSIA, for example, has been applied to activities of foreign intelligence within the US.<sup>49</sup>

Thus, the current state practice may not support a rule of customary international law according to which states must deny sovereign immunity in case of tortious acts

<sup>45</sup> Apart from the fact that the Convention does not apply to acts, omissions, or facts which took place prior to the date on which the Convention was opened for signature on 16 May 1972: Art. 35(3).

<sup>46</sup> [1991] Yrbk Int'l L Comm II/2, at 45. In addition G. Hafner as Chairman of the Ad Hoc Committee stated that it was the general understanding of the Committee that military activities were not covered by the Convention: see summary record of the 13th meeting of the Sixth Committee, UN Doc C.6/59/SR.13, 25 Oct. 2004.

<sup>47</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155 331, 8 ILM (1969) 679.

<sup>48</sup> If the commentary can be qualified as an instrument within the meaning of Art. 31(2) VCLT, it would in fact have significant authority for the interpretation of the Convention as it is part of the context in which the treaty was concluded. But the commentary has not been made by one or more parties as it is the commentary of the ILC. In addition, UN GA Res 59/38 of 2 Dec. 2004 which adopted the Convention only recalls the work of the ILC, its draft articles and commentaries in its preamble without embracing its content. The exact scope of Art. 12 UNCJIS is therefore unclear. It is not unreasonable to interpret it in such a way as to include torts committed by the armed forces of another state within the forum state, which would also include situations of armed conflict: see Fox, *supra* note 11, at 582.

<sup>49</sup> *Letelier v. Republic of Chile*, 488 F. Supp 665 (DDC 1980); *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir. 1989). It could be argued that foreign intelligence is different from actions by the armed forces. But such understanding would enable the foreign state to circumvent restrictions to immunity by separating intelligence from the armed forces. It would thus be the foreign state and not the forum state which determined the scope of immunity.

committed by another country in the forum state.<sup>50</sup> Even though such an obligation is included in the ECSI and the UNCJIS, a considerable number of states do not apply this exception. But this does not answer the question whether states are prohibited from doing so. Section 1605 of the FSIA, for example, denies immunity in cases ‘in which money damages are sought . . . for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state’.<sup>51</sup> If sovereign immunity is the default rule and all exceptions must reflect customary international law, and if the tort exception has not yet evolved into custom, then states such as the US, UK, Canada, and Australia that have included the tort exception in their national immunity laws automatically violate international law – a conclusion which no commentator so far has suggested. But if states that enact this exception as law do not violate international law, why then should a state do so if its courts apply this exception not on the basis of national law, but on the basis of how they construe and interpret the doctrine of sovereign immunity under international law?

## 5 (Implied) Waivers

The very foundation of sovereign immunity – the sovereignty of the foreign state – obviously allows a state to waive its immunity and reveals at the same time that immunity must be understood as a rule–exception relationship: states are entitled to claim immunity as long as none of the exceptions apply or as long as the state has not consented to the jurisdiction of another country.<sup>52</sup> It has therefore been suggested that consenting to the jurisdiction of another state and consenting to the jurisdiction of an international court are just two sides of the same coin.<sup>53</sup> The consent can either be issued by an express statement or derived from the behaviour of the state, especially from arguing on the merits of the case. It has therefore been advocated that the concept of implied waiver should be applied to fundamental human rights violations

<sup>50</sup> Cremer, *supra* note 41, at 150; Fox, *supra* note 11, at 587 arguing that Art. 12 UNCJIS ‘is a considerable advance on existing law’, thereby implying that it has not evolved into a rule of customary international law; Dörr, *supra* note 11, at 208 ff.

<sup>51</sup> § 1605(5) FSIA; however, the exception, even though including acts of ‘any official or employee of that foreign state while acting within the scope of his office or employment’, does not apply to a ‘claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’.

<sup>52</sup> § 1605(a)(1) FSIA, Arts 2 and 3 ECSI, Arts 7 and 8 UNCJIS.

<sup>53</sup> Brownlie, ‘Contemporary Problems Concerning the Immunity of Foreign States’, 62 *Annuaire Institut de Droit International* (1987) 6, at 55; Jennings, ‘The Place of Jurisdictional Immunity of States in International and Municipal Law’, Lecture at the European Institute at the University of the Saarland (1988). Even though the parallel between immunity and the international dispute settlement rule is convincing at first glance, it must be restricted to cases in which one state sues another state in yet another state: see Hess, *supra* note 39, at 324 ff with further reference; see also Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’, 54 *British Yrbk Int’l L* (1983) 74, at 80.

as well.<sup>54</sup> But expanding it could be seen as a blunt attempt to reach the correct result and has therefore found only little support in theory and in practice.<sup>55</sup>

Supporters of that argument could, however, point to the commercial exception, its development, and the change that the rise of human rights brought about in the international system. A sovereign doing business like a private person has disposed of her sovereign rights: 'once the sovereign has descended from his throne and entered the marketplace he has divested himself of his sovereign status and is therefore no longer immune'.<sup>56</sup> The commercial exception is obviously based on a capitalist conception of the liberal state, its inherent distinction between private and public, and on the idea that economic transactions are private and not public. If someone is participating in economic activities in a capitalist society she is doing so in her private capacity, an assumption which applies to the sovereign too. Thus, by stepping down from the throne and entering the territory of another state, the sovereign implicitly waives her sovereignty.<sup>57</sup> With the aggrandizement of human rights, our understanding of the state and its powers *vis-à-vis* its citizens changed again. The once sacrosanct sovereign authority was first restricted by capitalism and now by human rights. Thus, the implied waiver for fundamental human rights only transfers the idea on which the commercial exception is based to the new realities of international law and the changed conception of the state and its powers.

Even though such reasoning would put the implied waiver idea for fundamental human rights violations on a theoretically firmer footing, it misreads the rationale for the commercial exception. It does not rest on the limits of sovereignty in relation to private persons. The sovereign was still allowed to take part in commercial transactions, but had to accept that she must subscribe to the rules of the marketplace as an equal. The sovereign did not waive her immunity; she simply had none – like any other private person. Accordingly, other states would view a state that participates in the

<sup>54</sup> See Belsky, Merva, and Roht-Arriaza, 'Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', 77 *California L Rev* (1989) 365.

<sup>55</sup> Among them is the Court of Leivadia, the Greek Court of First Instance, which issued the first judgment in the course of the still ongoing *Distomo* litigation in 1997: see *Distomo*, Court of Leivadia, *supra* note 7, at 599.

<sup>56</sup> *I° Congreso*, *supra* note 29, at 178, para. 527.

<sup>57</sup> Such reasoning is actually based on two different aspects. The first has a specific international context: a state enters the territory of another state and by doing so it consents to the jurisdiction of that state: see *Storelli v. Governo della Repubblica Francese*, Court of Rome, 26 *AJIL* (1932) Supp 604, at 605 stating that the territorial jurisdiction of the forum state does not automatically yield to the claim of sovereign immunity of the foreign state, especially when much more emphasis is put on the jurisdiction of the forum state, as is the case in common law countries: see Fox, *supra* note 11, at 58. This may also explain the tendency of common law lawyers to define jurisdiction of the forum state as the default rule and immunity as an exception to it: see Caplan, *supra* note 28, at 744. The second aspect of the implied waiver argument is of a more general nature: it is the participation in the marketplace which is interpreted as an implied waiver of immunity. This reasoning is limited to commercial activities, whereas the implied waiver based on entering another state's territory would apply to official acts as well, at least theoretically.

marketplace not as a state, but as a private person. Exercising jurisdiction could therefore not affect the other state's sovereignty. Those who argue for an implied waiver equate sovereignty (and its limits *vis-à-vis* the individual) with sovereign immunity – a conclusion that does not reflect the basis of immunity in international law. It is the relationship between two sovereigns and not the relationship between a sovereign and the individual within her power on which sovereign immunity rests.<sup>58</sup> The implied waiver theory therefore assumes a paradigm shift in international law which has not yet taken place, at least with regard to the enforcement of human rights.<sup>59</sup> States, and not the individual, are still the foundation of the international system. But the inconsistency between the protection of fundamental human rights, such as the prohibition of torture, war crimes, and crimes against humanity on the one hand, and granting immunity to those who are responsible or at least liable for these acts on the other hand lies at the centre of what is best described as the supremacy argument.<sup>60</sup>

## 6 *Ius Cogens*, Human Rights Violations, and Sovereign Immunity

In practice, the idea that sovereign immunity must yield to fundamental human rights violations was first applied by the US District Court in the *Princz* case.<sup>61</sup> However, the heyday of the supremacy argument was short: the US Court of Appeals for the DC Circuit overruled the judgment.<sup>62</sup> And even though the judgment of the House

<sup>58</sup> The basis of sovereign immunity in international law is hotly debated. Generally courts and scholars refer to the sovereign equality and independence and the principle of *par in parem non habet imperium*, meaning that an equal does not have power over an equal: see, e.g., Bankas, *supra* note 18, at 37 ff; van Alebeek, *supra* note 19, at 47 ff; Fox, *supra* note 11, at 40 ff; J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), at 11 ff. But the equality aspect, and therefore the principle of *par in parem non habet*, is seriously questioned because equality has been given a mere formal meaning, not a substantial one: see Hess, *supra* note 39, at 307, with further references. The League of Nations also referred solely to the state's independence and did not mention the sovereign equality of states as a basis for immunity: Publications of the League of Nations, V: Legal, 1927, V.9 No. 11, Competence of the Courts in regard to Foreign States, reprinted in 22 *AJIL* (1928), Sp. Supp. 117, at 118. In addition one must keep in mind that the principle of *par in parem non habet* was developed at a time when sovereignty was usually based not on equality, but on the personal dignity of the sovereign, and later the abstract dignity of the state. The equality argument is therefore closely connected to the dignity of states – a basis we should reject in modern international law.

<sup>59</sup> For a more detailed discussion on the obligations of states with regard to 'private enforcement' of human rights see *infra*, the text accompanying notes 76–82.

<sup>60</sup> Bröhmer *supra* note 58, at 189 ff; Bianchi, 'Denying State Immunity to Violations of Human Rights', 46 *Austrian J Public & Int'l L* (1994) 195, at 220 ff, stressing not the formal hierarchy of norms, but what he calls a 'jurisprudential approach' based on coherence in interpreting international law; this view is also supported by De Sena and De Vittor, *supra* note 7, at 102 ff, who argue that the Corte di Cassazione in *Ferrini* has in fact taken this position.

<sup>61</sup> *Princz v. Federal Republic of Germany*, 813 F. Supp 22 (DDC 1992).

<sup>62</sup> *Princz v. Federal Republic of Germany*, 26 F. 3d 1166 (DC Cir. 1994); for a review see Reisman, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*', 16 *Michigan J Int'l L* (1994–95) 403, and Zimmermann, 'Sovereign Immunity and Violation of *Ius Cogens* – Some Critical Remarks', 16 *Michigan J Int'l L* (1994–95) 433.

of Lords in the *Pinochet* case seems to rest on it,<sup>63</sup> and although it reappeared prominently in the powerful dissenting judgment in the *Al-Adsani* case,<sup>64</sup> it was not until the *Corte di Cassazione* delivered its judgment in *Ferrini* that a state's highest court had ever embraced it explicitly:

Such [fundamental human] rights are protected by norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all conventional and customary norms, including those, which relate to State immunity. . . . The recognition of immunity from jurisdiction . . . for such misdeeds stand in stark contrast to [this] . . . analysis, in that such recognition does not assist, but rather impedes, the protection of those norms and principles. . . There is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence of the norm with the highest status.<sup>65</sup>

But no matter how plausible this reasoning may appear, it rather simplifies the concept of *ius cogens* and its consequences on 'ordinary' international law. Most scholars would probably agree by now that *ius cogens* is a valid category of norms in international law, yet everything else is disputed – such as how to determine which norms have acquired the status of *ius cogens* and which practical consequences this generates.<sup>66</sup>

One of the many particularities of the whole discussion is a basic assumption which has not been seriously questioned: fundamental human rights, like the prohibition of torture, crimes against humanity, and war crimes, are part of *ius cogens* whereas sovereign immunity, even though a legally binding rule, belongs to the bulk of norms that form the body of 'ordinary' international law.<sup>67</sup> This view reveals a substantive understanding of *ius cogens* which focuses on the basic values of the international community.<sup>68</sup> In contrast to a more formal perception, it emphasizes the protection of the most fundamental human rights, thereby strengthening the position of the individual *vis-à-vis* the state.<sup>69</sup> Such a normative understanding of *ius cogens* is, of course,

<sup>63</sup> *Pinochet*, *supra* note 1, at 581. Accepting that the prohibition of torture formed part of *ius cogens* plays an important role in the judgment. But interestingly it is primarily invoked to establish universal jurisdiction for international crimes. However, establishing and exercising jurisdiction in such cases necessarily implies that the accused cannot rely on sovereign immunity: see Lord Phillips at 661. At the same time Lord Hutton at 640 and Lord Millet at 651 explicitly expressed their conviction that denying immunity for criminal liability of the individual does not imply that the state itself is deprived of its immunity before courts in another state.

<sup>64</sup> *Al-Adsani*, *supra* note 4, Joint Dissenting Opinion of Judges Rozakis and Callisch, Joined by Judges Wildhaber, Costa, Cabral Baretto, and Vajić, at para. 4; Dissenting Opinion of Judge Ferrari Bravo and Dissenting Opinion of Judge Loucaides who agrees with Judges Rozakis and Callisch in general, but prefers a balancing approach for each case in order to determine whether granting immunity would violate the individual's right of access to court under Art. 6(1) ECHR.

<sup>65</sup> *Ferrini*, *supra* note 7, at 668–669.

<sup>66</sup> See in general L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988); A. Orakhelashvili, *Peremptory Norms in International Law* (2006).

<sup>67</sup> See *Al-Adsani*, *supra* note 4, Dissenting Opinion of Judges Rozakis and Callisch, at para. 2.

<sup>68</sup> C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 141; see also Orakhelashvili, *supra* note 34, at 255 defining *ius cogens* as peremptory norms of general international law which 'serve as a public order embodying material constitutional provisions of international law'.

<sup>69</sup> Tams, *supra* note 68, at 142 with further references, especially to the commentary on Art. 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] Yrbk Int'l Law Commission II, Pt Two.

not uncontested. The more formal or systematic perception includes rules that are inherent to the functioning of the international legal system, like *pacta sunt servanda*, good faith, and the sovereign equality and independence of states.<sup>70</sup> If we accept, first, this more state-centred concept of *ius cogens* and, secondly, that sovereign immunity is directly based on sovereignty and the independence of states, it is much more difficult to argue that sovereign immunity – at least in its core element – is not part of *ius cogens*. Thus, construing a conflict between a *ius cogens* norm and an ‘ordinary’ norm of international law in the case of fundamental human rights violations and state immunity already points to a conception of international law that is highly relevant for solving this (alleged) conflict: the supremacy of human rights. But given the current state of international law, it is far from settled that such an absolute hierarchy exists. Assuming a conflict is therefore not the only way in which the relationship between violations of fundamental human rights and the granting of sovereign immunity can be illustrated.

This conclusion is closely linked to another problem that those who promote the supremacy argument have not been able to solve convincingly: does a conflict of norms exist which must be resolved in favour of human rights?<sup>71</sup> Surely, Articles 53 and 64 of the VCLT prescribe that a treaty is either void at the time of its conclusion if it is inconsistent with an existing peremptory norm of general international law or becomes void if such a norm evolves after the treaty’s entering into force.<sup>72</sup> But it is far from being settled that this specific consequence applies outside conflicting treaty obligations involving *ius cogens*. Assuming a conflict between fundamental human rights and state sovereignty in customary international law, it is not a matter of logic that the latter must yield to the former, but rather a matter of discussion.<sup>73</sup>

In addition, the clash between fundamental human rights and sovereign immunity is a clash of concepts and ideologies, not of norms. A conflict of norms would actually

<sup>70</sup> Abi-Saab, ‘The Use of Article 19’, 10 *EJIL* (1999) 339, at 349 referring to systemic norms of a legal system imposed by logical or legal necessity. On systemic norms see also A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd edn, 1984), at 59–60.

<sup>71</sup> See, e.g., Orakhelashvili, *supra* note 34, at 255, arguing that peremptory norms, since they embody the community interest, must operate unimpeded in case of a conflict, thereby presupposing the existence of a conflict without describing it. The *Corte di Cassazione* in *Ferrini* assumed the existence of a conflict as well. But it seems to understand it not as a conflict of norms or rules, but as a conflict of values because it stresses the importance of *ius cogens* for the reinterpretation of sovereign immunity: *Ferrini*, *supra* note 7, at 670. The effect is, of course, quite similar, but the reasoning much more convincing. Still, the analysis of the *Corte di Cassazione* requires that ‘sovereign immunity as a norm of customary international law’ is actually flexible enough to be reinterpreted. This, in return, suggests that the court, despite its unclear terminology, conceives immunity as a principle and not as a rule.

<sup>72</sup> For the relevance of *ius cogens* on the law of treaties see in general C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976); Czaplinski, ‘Ius Cogens and the Law of Treaties in The Fundamental Rules of the International Legal Order’, in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2006), at 83–98.

<sup>73</sup> Tams, ‘Schwierigkeiten mit dem Ius Cogens, Anmerkungen zum Urteil des Europäischen Gerichtshofs für Menschenrechte im Fall Al-Adsani gegen Vereinigtes Königreich vom 21. November 2001’, 40 *Archiv des Völkerrechts* (2002) 331, at 345.

require that the legal consequences of two norms are incompatible with each other – a requirement not met in the case of fundamental human rights and sovereign immunity. It is one of the truisms of international law that the existence of a rule and its enforcement are two different sets of problems.<sup>74</sup> The absence of a centralized enforcement system is one of the characteristics and may be the weakness of the international legal system. It is therefore not only legitimate but also perfectly consistent with international law to argue that the existence of a norm is completely unrelated to its enforcement.<sup>75</sup> This is true not only for ‘ordinary’ international law, whether treaty or custom, but also for peremptory norms. To conclude from the *ius cogens* character of a norm that all other norms which may limit its enforcement are invalid would require the existence of the following rule: any *ius cogens* norm, because of its superior value, invalidates rules which limit its enforcement. Such a rule does not and will not exist.

It is, of course, not impossible to construe a conflict of norms, and not just a clash of concepts. Such a conflict of norms would occur if states were not only allowed, but actually required, to grant unrestricted access to their courts and establish universal jurisdiction in civil matters for all cases of fundamental human rights violations. But for the time being, international law is far from reaching this state.

Article 14 of the Anti-Torture Convention could be interpreted as a first step in this direction, because it requires member states to ensure an enforceable right to fair and adequate compensation for torture victims. But the meaning of Article 14 and thereby the scope of the obligation is unclear. The Committee against Torture seems to believe that Article 14 actually obliges states to establish universal jurisdiction and to deny sovereign immunity to foreign states because it criticized Canada for the ‘absence of effective measures to provide civil compensation to victims of torture *in all cases*’ and suggested that Canada ‘should . . . ensure the provision of compensation through its civil jurisdiction *to all victims* of torture’.<sup>76</sup> The committee was probably responding to the ruling of the Ontario Court of Appeal in *Bouzari v. Iran*.<sup>77</sup> In this case, the court held that the federal State Immunity Act barred Mr Bouzari from bringing a civil action in Ontario for torture inflicted upon him by, and in, Iran at a time when he was still an Iranian citizen.<sup>78</sup> The United States, on the other hand, when ratifying the Convention has taken the view that Article 14 was intended to have territorial limitations.

<sup>74</sup> Zimmermann, *supra* note 62, at 438.

<sup>75</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, 1933 PCIJ (ser A/B) No. 61, 1933: ‘It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.’

<sup>76</sup> Conclusions and recommendations of the Committee against Torture: Canada, 7 July 2005, CAT/C/CR/34/CAN (emphasis added).

<sup>77</sup> *Bouzari v. Republic of Iran* (2004), 71 OR (3d) 675, (2004) 243 DLR (4th) 406 (CA); see also Forcese, ‘De-immunizing Torture: Reconciling Human Rights and State Immunity’, 52 *McGill LJ* (2007) 127, at 129 and 160–161 and Novogrodsky, ‘Immunity for Torture: Lessons from *Bouzari v. Iran*’, 18 *EJIL* (2008) 939.

<sup>78</sup> Mr Bouzari, after being tortured in Iran, was granted refugee status in Canada. He applied for Canadian citizenship, but his application was not granted until hearings during appeal: *supra* note 77, at para. 15.

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to “the victim of an act of torture committed in any territory under its jurisdiction.” The italicized wording appears to have been deleted by mistake.<sup>79</sup>

It is not unreasonable to assume that a state is only required to ensure civil remedies for acts which have been committed within its territories and/or by its officials, and that that state is not obliged to establish civil universal jurisdiction and deny foreign sovereign immunity in cases of torture.<sup>80</sup> But even if states are under a treaty obligation to provide a civil remedy in all cases of torture, this obligation must also qualify as a *ius cogens* obligation in order to prevail over immunity under customary international law.<sup>81</sup> To prove only the *ius cogens* character of the fundamental human right does not suffice. Thus even those who argue in favour of a human rights exception to sovereign immunity must concede that there is ‘not yet any consistent state practice or case law to the effect that the rule of State immunity must yield norms of *jus cogens*, in particular in the case of torture’.<sup>82</sup>

## 7 Sovereign Immunity and Comity

The diametrically opposite position to immunity as a specific state right is held by those who deny sovereign immunity any legal effect under customary international law.<sup>83</sup> They refer either to inconsistent state practice, as highlighted by Lauterpacht,<sup>84</sup> or to the territorial sovereignty of the forum state which prevails over any sovereignty claim that foreign states may have when they face legal action in the forum state, as the US Supreme Court does in its current jurisprudence.<sup>85</sup> The latter view in particular

<sup>79</sup> Reagan Administration Summary and Analysis of the Convention, reproduced in US Senate Committee on Foreign Relations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 30 (1990), at 23–24.

<sup>80</sup> M. Nowak and E. McArthur, *The United Nations Convention Against Torture – A Commentary* (2008), Art. 14, at para. 123: ‘[s]tates are not yet legally required by Article 14 (1) to ensure universal civil jurisdiction before their domestic courts’.

<sup>81</sup> See Gattini, *supra* note 7, at 236: ‘[t]he incoherence could arise only to the extent that it is . . . assumed that the right of access to justice constitutes itself a *jus cogens* norm, which it is evidently not’.

<sup>82</sup> A. Cassese, *International Law* (2nd edn, 2005), at 106–107.

<sup>83</sup> For a summary see Fox, *supra* note 11, at 13 ff.

<sup>84</sup> Lauterpacht, *supra* note, at 227–228. In addition to inconsistent state practice and the absence of protest by those states which were still relying on the absolute concept of sovereign immunity, Lauterpacht referred to the phenomenon of reciprocity in granting sovereign immunity – a peculiar precondition if a duty to grant sovereign immunity exists as a matter of international custom.

<sup>85</sup> *Dole Food Co. v. Patrickson*, 538 US 468, 479 (2003); *Republic of Austria v. Altmann* 541 US 677, 696 (2004). See also Caplan, *supra* note 28, at 764, who seems to embrace the US position that comity is the correct basis of immunity in international law but at the same time stresses its binding legal effect as a rule of customary international law.

is based on a controversial reinterpretation of one of the oldest judgments on sovereign immunity: that of 1812 in *Schooner Exchange v. Fadden* by the US Supreme Court.<sup>86</sup> Scholarly writing and jurisprudence are obviously divided in their understanding of the case. It has been referred to as a source for the absolute theory of sovereign immunity<sup>87</sup> as well as for the assumption that immunity is granted as a matter of courtesy and not as a matter of law.<sup>88</sup>

The factual observation made by Lauterpacht is undeniable: state practice with regard to sovereign immunity was inconsistent in 1951, and it still is in 2009. But what conclusion can be drawn from this? The answer depends very much on what can be established as the lowest common denominator among states. It is quite striking that all states accept foreign sovereign immunity as a category or concept of international law. Even the United States, when enacting the FSIA, believed that immunity reflected a doctrine of international law.<sup>89</sup> Foreign sovereign immunity as international custom is therefore characterized by agreement among states concerning the concept as such, and at the same time by substantial disagreement on detail and substance. It is, thus, binding on states, but only on a very high level of abstraction. Characterizing sovereign immunity not as a rule but as a (legally binding) principle of international law is the only way to reconcile these alleged inconsistencies.

## 8 Sovereign Immunity – A Principle

The current literature and jurisprudence often refer to sovereign immunity as a principle of international law. But, with a few exceptions, the term is obviously used as a synonym for a rule and not as a distinct category that requires a different analysis from the rule–exception concept.<sup>90</sup> The idea of principles as an independent category of norms is not new. But so far it has not been linked to foreign sovereign immunity as an explanation for the current diverse state practice on the one hand and the wide-reaching consensus on the general concept on the other hand.

<sup>86</sup> *The Schooner Exchange v. McFadden*, 11 US (7 Cranch) 116 (1812).

<sup>87</sup> Bankas, *supra* note 18, at 21; Damrosch, *supra* note 20, at 1197.

<sup>88</sup> Caplan, *supra* note 28, at 745 ff; whereas Appelbaum, *supra* note 11, at 37 concedes that it could be interpreted either way.

<sup>89</sup> 'Sovereign Immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state': HR Rep 94-1487, 1976 USCCAN 6604, at 6606, 15 ILM (1976) 1398, at 1402; see also Fox, *supra* note 11, at 14.

<sup>90</sup> The *Corte di Cassazione* in *Ferrini* counts as one of the few exceptions. Although it considered sovereign immunity to be a norm under customary international law, it held at the same time that 'no matter how often [the proposition that only an express normative provision would be able to justify derogation from the principle of sovereign immunity] is repeated, this proposition is one with which this Court cannot agree': *Ferrini*, *supra* note 7, at 671. The Court can derive at this conclusion only on the assumption that immunity is a principle, not a rule. De Sena and De Vittor, *supra* note 7, at 89 seem to interpret the *Ferrini* decision in this way as well.

## A Rules and Principles – What’s the Difference?

The difference between rule and principle has been widely discussed in legal theory. In particular Ronald Dworkin emphasized not only their existence, but also their importance for our understanding of law:<sup>91</sup>

[P]rinciples . . . conflict and interact with one another, so that each principle that is relevant to a particular legal problem provides a reason arguing in favor of, but does not stipulate, a particular solution. The man who must decide the problem is therefore required to assess all the competing and conflicting principles that bear upon it, and to make a resolution of these principles rather than identifying one among others as ‘valid’.<sup>92</sup>

Naturally, it is impossible to establish a clear-cut distinction between principles and rules. But problems in categorization can hardly affect the existence of the category itself. A classical criterion for separating principles from rules is the former’s lack of precision. Rules are more specific than principles, and the degree of abstraction indicates the legal nature of the norm: it is either a rule or a principle.<sup>93</sup>

More important, however, than the level of generality are the different legal consequences of a collision of rules and principles. A rule has a specific legal consequence, meaning that it either requires or allows for a certain behaviour. Any deviance from this rule is thus prohibited, at least as long as the rule is valid – something that Dworkin has called the all-or-nothing fashion of rules.<sup>94</sup> If two rules collide because the first rule requires what the second rule prohibits, only one of the rules can be valid. The conflict can be solved by adding an exception to the first rule for all cases of the second rule or, if no exception exists, by recourse to more general maxims like *lex specialis* or *lex posterior*.<sup>95</sup> A principle, however, allows for a broader spectrum of possible behaviour. It does not require a particular decision. Quite the contrary; a principle of a given legal system is something which ‘officials must take into account, if it is relevant, as a consideration inclining in one direction or another’.<sup>96</sup> Principles can therefore be fulfilled gradually depending on what is legally and factually possible.<sup>97</sup> As with rules, more than one principle may apply to a specific situation, each leaning towards different outcomes. But even though one principle may be given more weight in a certain situation, this does not necessarily mean that it is no longer part of the legal system – as is the case with an invalid rule. Instead, it can prevail in other

<sup>91</sup> R. Dworkin, *Taking Rights Seriously* (1977), at 22 ff and at 71 ff.

<sup>92</sup> *Ibid.*, at 72

<sup>93</sup> Raz, ‘Legal Principles and the Limits of Law’, 81 *Yale LJ* (1972) 823, at 838; Christie, ‘The Model of Principles’, 17 *Duke LJ* (1968) 449, at 669.

<sup>94</sup> Dworkin, *supra* note 91 at 24: ‘[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision’.

<sup>95</sup> On the conflict of rules see R. Alexy, *Theorie der Grundrechte* (1986), at 77 ff.

<sup>96</sup> Dworkin, *supra* note 91, at 25.

<sup>97</sup> Alexy, *supra* note 95, at 75.

circumstances over other colliding principles. As a consequence, principles which collide must be balanced against each other with a view to the case at hand and the facts involved. The balancing process, in turn, will produce a specific rule that requires a certain behaviour in a certain situation.<sup>98</sup> In other words, the rule reflects the outcome of the balancing process of two different principles.

As long as one or more people are authorized to undertake this balancing process for a group of persons and as long as the result is binding on everyone within this group, we will not encounter any difficulties with regard to different outcomes. But if such an authority does not exist, the process of balancing conflicting principles and thereby specifying the rules which apply to a particular case or situation will inevitably result in different and sometimes even inconsistent results. But both outcomes may reflect a reasonable construction of one single principle or of a balancing of conflicting principles.

## B Principles in International Law

The idea of principles as an independent category is not unknown in international law. The 'general principles of law recognized by civilized nations' are, for example, listed among the sources of international law in Article 38(1)(c) of the ICJ Statute.<sup>99</sup> The provision was included to enable the Court to fill gaps which its drafters thought to be very common in international law.<sup>100</sup> The wording suggests quite unambiguously that the provision applies only to principles which are derived from a comparative study of municipal legal systems.<sup>101</sup> But an alternative interpretation understands Article 38(1)(c) to include general principles of international law as well, such as *pacta sunt servanda* and good faith.<sup>102</sup> Yet, no matter how the general principle's provision is understood, it serves only as a back-up in the event that treaty or custom does not provide the required solution and leaves the Court and parties to the dispute with a *non-liquet*.<sup>103</sup> Thus, Article 38(1)(c) does not cover the entire

<sup>98</sup> *Ibid.*, at 81 ff.

<sup>99</sup> Statute of the International Court of Justice, 24 Oct. 1945, 59 Stat. 1055 (1945), TS No. 993.

<sup>100</sup> Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oehlert-Frahm (eds), *The Statute of the International Court of Justice – A Commentary* (2006), at para. 245 with further references.

<sup>101</sup> *Ibid.*, at para. 249, stating that there is little doubt that general principles within the meaning of Art. 38(1)(c) are 'unwritten legal norms of wide-ranging character; and recognized in the municipal laws of States; moreover they must be transposable at the international level'.

<sup>102</sup> For a summary see Thirlway, 'The Source of International Law', in M.D. Evans (ed.), *International Law* (2006), at 115, 128. According to M.N. Shaw, *International Law* (5th edn, 2003), at 95: 'it is not clear . . . whether what is involved is a general principle of law appearing in municipal systems or a general principle of international law'. At the same time he considers *pacta sunt servanda* to be a 'crucial general principle of international law': *ibid.*, at 97. The PCIJ also referred to a principle of international law rather than general principles recognized by civilized nations: *Chorzów Factory Case*, PCIJ Series A, No 17, 1928, at 29.

<sup>103</sup> Shaw, *supra* note 102, at 93; Thirlway, *supra* note 102, at 127.

dimension of principles in international law because they also exist within treaties and custom.<sup>104</sup>

### C Sovereign Immunity – a Principle, not a Rule

All states, with a very few exceptions, accept sovereign immunity as something which is legally binding under international law. But that's basically it.<sup>105</sup> The extent to which foreign states are awarded immunity differs from state to state. Even the restrictive theory of sovereign immunity and its distinction between public and private acts is applied so divergently that it is more aptly described as an idea, doctrine, or concept which needs to be specified before it can be applied to a case than as a specific rule.<sup>106</sup>

But what is eventually more important for the categorization of immunity as a principle and not as a rule is the current diverse state practice concerning exceptions to sovereign immunity, in particular the tort exception and its scope of application. If sovereign immunity is a rule and the tort exception, at least with regard to acts *iure imperii*, has not yet acquired the status of customary international law, all states which apply it commit an international wrong.<sup>107</sup> The same is true for states that expand the public–private distinction beyond its original commercial context.<sup>108</sup> But state practice does not support this conclusion. There are states that apply the tort exception and states that do not.<sup>109</sup> And even those that do, do so differently.<sup>110</sup> In addition, the

<sup>104</sup> It has been argued that principles belong to a category of norms beyond the classical sources of public international law as they are contained in Art. 38(1)(c) of the ICJ Statute. Particularly the element of *opinio iuris*, which is necessary to establish international custom requires a degree of specification which principles lack: see C.-S. Zöllner, *Das Transparenzprinzip im Internationalen Wirtschaftsrecht* (2009), at 95 ff. This reasoning is not necessarily convincing. If we accept that principles are in theory part of the law, then there is no reason why states cannot accept a principle as law and behave accordingly, thereby establishing a certain state practice. This practice will probably be inconsistent with regard to details seeing that states differ in how they specify or balance competing principles. But there is a general understanding on what the law is.

<sup>105</sup> See Dellapenna, *supra* note 13, at 61, concluding 'that consensus exists only at a rather high level of abstraction', which necessarily implies a certain amount of agreement. Jennings and Watts, *supra* note 13, at 342–343, even though emphasizing substantial difference in national court decisions, concede a general understanding of sovereign immunity.

<sup>106</sup> For a brief description of the most fundamental differences see *supra* at sect. 3.

<sup>107</sup> A minor exception must be added for those states which have ratified the ECSI. In relation to each other they are obliged to give full effect to this exception, whereas they would be legally prohibited from doing so in relation to states which have not ratified the ECSI – at least if sovereign immunity is the default rule and exceptions to this default rule must be supported by customary international law.

<sup>108</sup> It is quite interesting that the private–public distinction and the commercial exception are usually used synonymously, even though the former has a more far-reaching scope of application than the latter; for a more detailed discussion see *supra* at sect. 3.

<sup>109</sup> In particular civil law countries like the US and the UK which have enacted national sovereign immunity laws apply the tort exception on basis of these laws: § 1605(a)(5) FSIA and sect. 5 of the State Immunity Act 1978. The ECSI and the UNCJSI also provide for a tort exception, for details see *supra* at sect. 4.

tort exception is not the only exception to sovereign immunity which is applied by some, but not by all states. The FSIA, for example, has been amended over the years and now contains exceptions *inter alia* for cases in which property is expropriated in violation of international law,<sup>111</sup> and cases in which money damages are sought for personal injury or death which is caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking.<sup>112</sup> Even though additional requirements must be met in order to establish jurisdiction in US courts, and even though these requirements limit the application of the exceptions considerably, the FSIA still provides for jurisdiction of US courts over foreign states in cases of official conduct.<sup>113</sup>

It is not only the current state practice that supports the view of sovereign immunity as a principle, but also its theoretical underpinnings. The correct basis of sovereign immunity in international law is hotly debated. Scholars and courts usually refer to *par in parem non habet imperium*, the principle of sovereign equality and independence, even though much more emphasis should be placed on the aspect of independence than on equality.<sup>114</sup> However, the claim of unimpaired sovereignty by the foreign state clashes with the claim of territorial sovereignty of the forum state. And no matter how we look at it – from the angle of either the forum state or the foreign state – neither of the two claims can assert to be higher ranking in principle.<sup>115</sup> '[T]he rule's content cannot be construed so as to protect the autonomy of only one of the disputing States – this would look like a totalitarian way of violating sovereign equality. The problem appears rather to lie in delimitating or balancing the conflicting sovereignties.'<sup>116</sup> States are therefore faced with the task of balancing these two principles – whereby sovereign independence and equality are equated with immunity of the foreign

<sup>110</sup> The ECSI and the State Immunity Act explicitly exempt acts of the armed forces from the tort exception, whereas the FSIA and the UNCJIS do not include such a counter-exception; at least explicitly; see *supra* at sect. 4.

<sup>111</sup> § 1605(a)(3) FSIA as long as the expropriated property is present in the US and linked to commercial activities carried by the foreign state within in the US.

<sup>112</sup> The so-called terrorism exception also applies if material support or resources for acts of torture, extrajudicial killing, aircraft sabotage, and hostage taking is provided. But the act itself or the provision of material support or resources must be 'engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency', and it applies only to states that are designated as state sponsors of terrorism; for more details see § 1605A FSIA.

<sup>113</sup> The judgments which have been issued against states acting in their official capacity are listed by the Corte di Cassazione in *Ferrini*, *supra* note 7, at 673.

<sup>114</sup> See the accompanying text to *supra* note 58.

<sup>115</sup> It is quite surprising that most scholars usually acknowledge the competing/ 'sovereignty claims' of the forum state and the foreign state, but at the same time assume that either one of them is generally less relevant: see, e.g., Lauterpacht, *supra* note 25, at 290 (over)emphasizing the principle of territorial sovereignty, while supporters of state right to sovereign immunity largely neglect any legitimate claim of the forum state.

<sup>116</sup> M. Koskeniemi, *From Apology to Utopia* (1989), at 433.

state – in order to determine specific rules concerning the conditions under which foreign states are accorded sovereign immunity within their jurisdiction.<sup>117</sup>

But who is authorized to conduct the balancing of principles in order to reach specific rules? The answer to this question is of fundamental importance for all cases in which national decisions and practice are scrutinized by an international court or tribunal, as in the current ICJ case, *Jurisdictional Immunities of the State* between Germany and Italy. Practice seems to support the claim that the states themselves have the power to do so. The common law countries in particular have enacted national legislation on sovereign immunity which can be understood as an exercise of their balancing power. Still, this fact does not provide sufficient proof that a court like the ICJ is barred from reviewing the results of the balancing process. But if international law does not oblige states to behave in a specific way because they have not agreed on precise rules, but only on an abstract principle, and if states are thus free to determine the rules within the limits set by international law, then it is not for the courts to second-guess the balancing process in detail. Otherwise it would be the courts and not the states that actually make these rules. There may be situations when international courts are asked and even obliged to specify the meaning of a principle for a certain case, especially when such a principle is relevant for determining the meaning of an existing rule. But as long as such a rule does not yet exist, since it has to be derived from the specification of a principle or the balancing of conflicting principles, states are generally free to make their decisions according to their policies.

A critique of this approach could refer to the fact that the international community – at least since the advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case<sup>118</sup> – has rejected the traditional ruling of the PCIJ in the *Lotus* case according to which states are free to act as long as they are not restricted by a rule of customary international law and treaty law.<sup>119</sup> The international system has changed from the coordination of independent, self-contained states to a regime of interdependence and cooperation.<sup>120</sup> But even if we assume that this observation is an accurate description of contemporary international law, is it really true that the right to balance conflicting principles in the absence of specific rules is nothing other than ‘*Lotus* in disguise’? The underlying problem for the ICJ in *Legality of the Threat or Use of Nuclear Weapons*

<sup>117</sup> It seems as if the *Corte di Cassazione* in *Ferrini* actually applied such a balancing approach even though its terminology with regard to the legal nature of sovereign immunity is inconsistent: see the text accompanying *supra* notes 71 and 90. De Sena and De Vittor, *supra* note 7, at 89 interpret *Ferrini* in a similar fashion, even though the principles involved are the territorial sovereignty of the forum state, on the one hand, and the sovereign independence of the foreign state on the other, and not the sovereign equality of states and the protection of inviolable right. The latter may influence the outcome of the balancing process, but it cannot override the limits set by the sovereign independence of a state, at least in cases in which these rights are not enforced by the international community of states, but by a single state alone.

<sup>118</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226.

<sup>119</sup> *The Case of the S.S. ‘Lotus’ (France v. Turkey)*, 7 Sept. 1927, PCIJ, Ser. A., No. 10, 1927.

<sup>120</sup> On the notion of cooperation and how it changed the conception of public international law see C. Friedman, *The Changing Structure of International Law* (1964), at 10, 63.

<sup>121</sup> *Legality*, *supra* note 118, Dissenting Opinion of Judge Shahabuddeen, at 393 ff.

was that if the Court applied the *Lotus* doctrine, it had to stipulate 'a right in law to act in ways which could deprive the sovereignty of all other States of meaning'.<sup>121</sup> I do not think that such a consequence would result from holding that states are free to determine the scope of sovereign immunity within their borders in the absence of specific rules. In addition, I will show that international law actually prescribes limits on states' freedom to act, limits which are based on competing principles.<sup>122</sup> Unlike France in the *Lotus* case, states are thus not required to prove the existence of a specific rule which restricts the other state's freedom to act. If we accept that norms, particularly those of international custom, are sometimes better described as principles than rules, then we must decide who is authorized to develop specific rules from these principles: the individual state or international courts? The problem is therefore not one of the fundamental nature of the legal system; it rather refers to who is making which decisions. The *Lotus* case stipulated a presumption that everything not prohibited by custom or treaty is allowed. But the balancing of conflicting principles neither rests on nor reinforces this presumption and should therefore be treated differently.

#### D *The Limits to the Freedom of States*

Because sovereign immunity is a principle and not a rule, international courts and tribunals may only scrutinize whether a state has violated the boundaries set by international law that a state must observe when balancing its territorial sovereignty and the sovereign independence of foreign states. These limits of international law restrict not only the freedom of states to grant, but also their freedom to deny, sovereign immunity to foreign states within their jurisdiction.

As shown above, granting immunity either in cases of fundamental human rights violations or in cases in which a foreign state (including its armed forces) has caused personal injuries on the territory of the forum state (including armed conflict) does not violate international law. The only possible constraint is the restrictive theory of sovereign immunity: a state may not grant immunity to private acts of a state, even though it has considerable freedom to determine the criteria by which it defines what constitutes a public and what a private act.

The limits that prevent the forum state from denying sovereign immunity to a foreign state are much more difficult to determine. In our effort to define these limits, we should recognize the link between jurisdiction and immunity. True, the ICJ treats jurisdiction and sovereign immunity as two distinct categories.<sup>123</sup> But it is undeniable that both concepts are based on the same competing principles: the territorial sovereignty of the forum state and the sovereign independence of the foreign state.<sup>124</sup>

<sup>122</sup> See *infra*, at sect. 8 D.

<sup>123</sup> *Arrest Warrant*, *supra* note 3, at para. 59.

<sup>124</sup> C. Ryngaert *Jurisdiction in International Law* (2008), at 6; Muse, 'A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)', 30 *George Washington J Int'l L & Econ* (1996/97) 207, at 241–242 and Oxman, 'Jurisdiction of States', in R. Wolfrum (ed.), *Encyclopedia of Public International Law* (online), at para. 1 are of a similar view.

As a consequence, recent years have shown a growing tendency to link the outer limits of denying immunity to the lawful exercise of jurisdiction: as long as jurisdiction can be established, states can and, in the view of some authors at least, should deny immunity, especially in cases of fundamental human rights violations.<sup>125</sup> But this concept, apart from eliminating immunity as a distinct category, runs the risk of neglecting important differences in the concept of jurisdiction in general and sovereign immunity in particular. Jurisdiction and its limits have developed differently depending on the subject matter. The jurisdiction to adjudicate in civil matters has, for example, developed mainly in the context of private international law, even though it is not unrelated to public international law.<sup>126</sup> Immunity, on the other hand, is linked to official acts of a state (if we accept the principal distinction between private and public acts) and is therefore more sensitive to the sovereignty of the foreign state. Linking immunity to the limits of jurisdiction to adjudicate in civil matters would therefore mean disregarding the official character of the foreign state's conduct.

Another conception of sovereign immunity, which would allow for taking these aspects into account, is to think of immunity not as a distinct category, but as a special form of jurisdiction that the forum state can exercise if a state in its official capacity is involved. The most difficult problem is, of course, drawing the limits of this concept of jurisdiction. As already noted, it is sovereignty understood as independence rather than the concept of sovereign equality which should guide us.<sup>127</sup> Independence is based on the idea that states enjoy some sort of external sovereignty, especially vis-à-vis other states. These 'other states' (but not necessarily the international community of states) must respect actions taken by a foreign state within its own territory which affect its own citizens.<sup>128</sup> Yes, these actions may violate public international law and they can, for example, trigger the response of the international community in the form of binding Security Council resolutions. But it is not for the individual states to judge these actions, which took place within the territory of another state, by their own standards.

Quite different, however, are situations in which a foreign state acts on the territory of another state, especially when affecting the forum state's citizens. Such acts are often in themselves a violation of the forum state's sovereignty. In addition, a strong and legitimate link exists between the case and the forum state. A state may therefore legitimately decide to exercise its jurisdiction and to deny sovereign immunity to the

<sup>125</sup> Caplan, *supra* note 28, at 778; see also Novogrodsky, *supra* note 77, at 948 ff, suggesting that Canada should add an additional exception to its State Immunity Act for cases of fundamental human rights violations as long as the plaintiff is a Canadian citizen at the time when he takes legal action against the foreign state in Canada. In justifying this amendment he argues that the citizenship requirement establishes the necessary nexus or link between the territory of the forum state and the case. Novogrodsky thereby exclusively relies on the concept of jurisdiction and, at least implicitly, rejects the one of sovereign immunity as a distinct category.

<sup>126</sup> Oxman, *supra* note 124, at para. 7.

<sup>127</sup> See the text accompanying *supra* note 58.

<sup>128</sup> Hess, *supra* note 39, at 311.

foreign state even when acting in its official capacity. This would also include acts committed by the armed forces of the foreign state during armed conflict because the fact that armed forces and armed conflict are involved does not make the claim of the foreign state stronger or the claim of the forum state weaker. There are, of course, doubts whether municipal courts are suitable for dealing with these kinds of cases at all. But such doubts are based on practical obstacles and do not change the fact that by denying jurisdiction, the forum state legitimately exercises its territorial sovereignty.

But cases in which a foreign state acts on the territory of the forum state must be distinguished from cases in which the national of the forum state is subject to actions of the foreign state within its territory. Within a criminal law context the jurisdiction of the forum state would be based on the disputed passive personality principle: states assert the right to try a foreigner for injuring a national of the state outside the territory of that state.<sup>129</sup> But in the case of jurisdiction in civil matters, the term 'passive personality' principle is misleading. It is the national of the forum state who has been affected and who is trying to assert her rights against the foreign state. In determining the significance of the forum state's external sovereignty in such a case, it is important to consider that the foreign state acted *vis-à-vis* citizens of another state and not its own. A state may rely on sovereignty understood as independence only if it does not internationalize the issue itself, which it does in cases that involve the nationals of another state. However, the state has a right that its conduct is judged not by the standards of the forum state, but by either its own or international standards based on treaty or custom. To complicate matters, it is of course possible, as in *Bozouri v. Iran*, that the applicant, while being the national of the foreign state during the acts in question, acquires the nationality of the forum state before or even during the trial.<sup>130</sup> Still, at the time of conduct such a case is identical to those in which the claim for independence of the foreign state is strongest: when acting *vis-à-vis* its own nationals on its own territory. If the principle of sovereign immunity is to have any discrete meaning and exist as an independent concept, these cases must be treated alike. States are therefore prohibited from denying sovereign immunity if the claimant acquires the forum state's nationality after the conduct in question occurred.

International law obviously limits the legal ability of states to determine the scope of sovereign immunity within their legal orders: states may not award immunity for acts *iure gestionis*, but must do so when the foreign state acts in its official capacity on its own territory *vis-à-vis* its own citizens at that time. Everything else is up to the forum state: it may, but does not have to, grant sovereign immunity depending on its political preferences.<sup>131</sup>

<sup>129</sup> Oxman, *supra* note 124, at para. 34 ff; Shaw, *supra* note 100, at 589 ff.

<sup>130</sup> *Bouzari v. Iran*, *supra* note 77, at para. 15.

<sup>131</sup> The freedom of the forum state to determine the scope of sovereign immunity within its legal order has been particularly emphasized by US scholars as well: see, e.g., Caplan, *supra* note 28. But they base their claim on the assumption that the jurisdiction of the forum state serves as the default rule and sovereign immunity as an exception to it. States are therefore free to determine the limits of sovereignty and are

## 9 Concluding Remarks: *Germany v. Italy*

Sovereign immunity is a principle, not a rule. But what implications does this have for the pending case between Germany and Italy before the ICJ? Though it does not alter the overall legal question – did Italy, by denying immunity for the acts committed by the German *Wehrmacht* during WWII, violate international law? – it influences the way in which the ICJ must answer it. This answer does not depend on the existence of a rule under customary international law that allows for denying immunity in cases of torts committed by a foreign state on the territory of the forum state during an armed conflict. It is the very nature of a principle that it can be specified in different ways. The essential problem therefore is whether in doing so Italy has violated the limits set by international law.

The analysis has shown that if the conduct of the *Wehrmacht* had taken place today, Germany would lose the case.<sup>132</sup> But what consequences arise from the fact that 65 years have passed since the end of World War II? States at that time usually granted absolute sovereign immunity even though they were not legally required to do so. Sovereign immunity was a principle back then just as it is today. The fact that most, but not all, states awarded immunity without exception does not mean that they could not have done otherwise. Even 65 years ago, international law would have allowed Italy to deny immunity for acts committed by Germany in Italy *vis-à-vis* Italian citizens during World War II. The crucial point, however, is that Italy actually did award immunity, at least for acts *iure imperii*. The relevant focus for deciding the case therefore shifts significantly. The outcome now depends on whether Germany may rely on the fact that states until recently regularly awarded immunity in comparable cases, instead of an alleged right to sovereign immunity. To make such a claim, Germany must actually show that not only courts in general, but the *Corte di Cassazione* in

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only required to award immunity in case of state conduct that ‘collectively benefits the community of nations’: *ibid.* at 744. However, the scope of immunity is something which is determined by the behaviour of states and not by logic. Thus, framing the issue just the other way round does not necessarily explain why states enjoy considerable freedom to make their own policy decisions. States could have accepted so many exceptions as a matter of international custom that the freedom to act would have been reduced considerably. In addition, the requirement of state conduct which collectively benefits the international community is hardly helpful. It focuses exclusively on the protection of human rights and not the maintenance of international peace and security. These two aspects are of course intertwined, but policy-makers and scholars have argued that sovereign immunity is actually necessary for preserving and retaining good relations among states: see, e.g., Al-Adsani, *supra* note, at para. 54. What constitutes behaviour which collectively benefits the international community thus depends on what international law is all about: states and their relations to each other or the protection of fundamental human rights. But this question has not been answered in one or the other way.

<sup>132</sup> Special problems might arise on the enforcement level which have not been discussed in this article.

particular has decided a comparable case and has therefore created a precedent that Germany could rely on.<sup>133</sup>

If that is the case, the ICJ must decide whether Germany's reliance claim is a matter of international law. The US Supreme Court, for example, decided that the FSIA applies even if the facts of the case took place before its enactment.<sup>134</sup> But how to apply the FSIA is surely a domestic legal question, and Italy, in order to determine the scope of sovereign immunity, applies customary international law which, according to Article 25 of the Italian Constitution, is part of the Italian legal system. Still, even though sovereign immunity constitutes a principle of international custom, it must be specified in order to apply within the Italian legal order. If enacting domestic legislation transforms sovereign immunity into a domestic matter, what about a judgment of a national court which specifies an international law principle: is it national or international law? Italy could at least argue that specifying sovereign immunity makes it a domestic legal question.

Still, should the ICJ decide that it actually faces a matter of international law, it has to determine whether Germany can rely at all on how an international law principle is specified by a domestic court and, if so, for how long. This problem is obviously of a more general nature than the limits of sovereign immunity under customary international law.<sup>135</sup> Answering this and the abovementioned questions is not part of the present analysis. However, one should bear in mind that the ICJ itself considers sovereign immunity as a procedural right and not a substantive one,<sup>136</sup> and that, as a matter of principle, reliance on a procedural right does not qualify for as much protection as reliance on a substantive right.

<sup>133</sup> The term 'precedent' does not suggest that the *Corte di Cassazione* is legally bound by its previous judgments (*stare decisis*), which is a matter of national and not international law anyway. Instead it is merely used to illustrate the basis for a possible reliance claim. Even though claiming reliance is closely connected to the problem of retroactivity, it must be distinguished from questions of inter-temporal application of the law.

<sup>134</sup> *Austria v. Altmann*, *supra* note 12.

<sup>135</sup> That the US Supreme Court applied the FSIA retroactively has no bearing on deciding this question. The Supreme Court based its decision on the text of the FSIA which provides in § 1602 that 'claims of foreign states to immunity should *henceforth* be decided . . . in conformity with the principles set forth in this chapter' (emphasis added). It is therefore misleading to suggest, like Gattini, *supra* note 7, in note 68, that the decision of the Supreme Court in *Altmann* anticipates the outcome under customary international law, especially considering that sovereign immunity does not constitute a specific rule and state right, but only a principle.

<sup>136</sup> *Arrest Warrant*, *supra* note 3, at para. 60.