

Immunities in the Age of Global Constitutionalism

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Immune against Constitutionalisation?

Anne Peters

1 Immunities and Global Constitutionalism

Immunities are a messy affair. They oscillate between law, politics, and comity. Throughout history, immunities have often been treated as a matter of “mere grace, comity, or usage”.¹ The view that conferring immunity is an act of international “comity” (*courtoisie*) is still popular in common law countries (UK and USA), countries which have (ironically) codified immunities in domestic statutes which often form the primary or even exclusive legal basis of those countries’ court decisions.² In its 2012 judgment, the ICJ confirmed that respect for immunity is required by international law, by stressing “that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.”³

Immunity basically means to be exempt from the jurisdiction of a national court, and from measures of enforcement and execution by the organs of states. Immunity is granted to states, state officials including diplomats, and international organisations. With regard to these different actors, the rationales of immunity differ, and concomitantly, the scope and the possible exceptions to immunity vary.

1 Lori Damrosch, “Changing International Law of Sovereign Immunity Through National Decisions,” *Vanderbilt Journal of Transnational Law* 44 (2001): 1185–1200, 1186.

2 The US American judgment US S Ct, *Schooner Exchange v. McFaddon*, judgment of 24 February 1812, 11 US (7 Cranch) 116–147 is normally considered to be the first judicial decision on immunities worldwide. It granted immunity to a French public/national military vessel as “a matter of grace and comity” (US S Ct., *Verlinden BV v. Central Bank of Nigeria*, judgment of 23 May 1983, 461 US 480, 486). The judgment *Samantar v. Yousuf* did not even mention international law, but only the US American Foreign Sovereign Immunities Act and the “policy” of the State Department (US S Ct., *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, 1 June 2010, 560 US 305; 130 S.Ct. 2278, 2284).

3 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, judgment of 3 February 2012, ICJ Reports 2012, para. 56.

Although these immunities are in principle anchored in international law,⁴ their precise legal implications are often unclear. The reason is the diversity of domestic case-law as just mentioned, the diversity of the practice of other national branches of government, the constant interaction between international and domestic law which is needed to apply the law of immunity, and the lack of a comprehensive international codification. Overall, the case law of national and international courts and the work of the International Law Commission continuously interact, and make this field of international law dynamic, complex, and partly inconsistent.

The existence and extent of immunities, notably state immunity, are a reflection of the structure of the international legal order as a whole. Therefore, any “study of State immunity directs attention to the central issues of the international legal system”, as the eminent authority on state immunity, Lady Hazel Fox, put it.⁵ This book takes up a number of new trends and challenges in this highly intriguing legal field and notably seeks to assess those within the framework of global constitutionalism and multilevel governance.

Our book title, “Immunities in the Age of Global Constitutionalism” seeks to place the study in the middle of the tension that is created by the persistence of immunities (which are, after all, an outgrowth of the Westphalian interstate system based on coordination and cooperation among equal sovereigns) confronted with a trend of (or a least quest for) a constitutionalisation⁶ of the international legal system—a process which notably implies that human rights protection (not state sovereignty) should function as the *Letztbegründung* of the international order.⁷ By “global constitutionalism”, we understand an intellectual movement which claims that constitutionalist principles, together with

4 More than 25 years ago, a study found that relative state immunity was a rule of international customary law arising from converging state practice and *opinio iuris* since the end of the 1970s. In contrast, the practice of absolute immunity did not amount to a customary rule. Isabelle Pingel-Lenuzza, *Les immunités des Etats en droit international* (Bruxelles: Bruylant 1997), 4, 11 and 377.

5 “Ultimately the extent to which international law requires, and municipal legislations and courts afford, immunity to a foreign State depends on the underlying structure of the international community”. (Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: OUP 3d ed 2013), 7, emphasis added).

6 “Constitutionalisation” is a process, a potential evolution from an international order based notably on that very organising principle of state sovereignty to an international legal order which acknowledges and has creatively appropriated and modified constitutionalist elements.

7 Anne Peters, “Humanity as the A and Ω of Sovereignty,” *European Journal of International Law* 20 (2009): 513–544.

institutions and mechanisms securing and implementing those principles, do play a role and should play a role also in the international legal order. The welcome constitutionalist elements are notably the commitment to human rights, democracy, and the rule of law.⁸

The duality of the (partly competing) rights holders—states and humans—has in the context of immunities been most relentlessly highlighted by ICJ judge Cançado Trindade in his individual opinions in the *Jurisdictional Immunities* affair, writing about “Jus gentium in the twenty-first century: Rights of States and rights of individuals”.⁹ Cançado Trindade called that case “a case which has a direct bearing on the evolution of international law in our times. There is no reason for keeping on overworking the rights of States while at the same time overlooking the rights of individuals. One and the other are meant to develop *pari passu* in our days, attentive to superior common values.”¹⁰

Suggestions to restrict the different types of immunity correspond to the “constitutionalist” agenda of international law of strengthening the international rule of law and protecting the most fundamental rights of individuals more effectively. However, the “conservative” tendencies regarding the immunities of states and of international organisations also seek to safeguard fundamental, even constitutional principles of the international legal order. Bearing this in mind, global constitutionalism does not only and not in an unreflected way propagate a human rights exception to immunities. A constitutionalist outlook is also wary of the constitutional principle of equality of states, and considers it a problem when (former) state officials of weak states are selectively prosecuted, while officials of allies or powerful states are left unprosecuted for reasons of foreign policy.¹¹

Global constitutionalism places high value on the rule of law and equal protection of humans. From that perspective, it must be asked whether the closure of courts to plaintiffs solely because the respondent is a state infringes those plaintiffs’ right to equal protection of citizens in the forum state.¹²

8 Mattias Kumm and others have called this “the trinitarian mantra of the constitutionalist faith” (Mattias Kumm, Anthony Lang, James Tully, and Antje Wiener, “How large is the world of global constitutionalism?” *Global Constitutionalism* 3 (2014): 1–8, 3).

9 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), order of 4 July 2011, separate opinion of judge Cançado Trindade, heading before para. 9.

10 *Ibid.*, para. 54.

11 Cf. Stefan Talmon, “Immunität von Staatsbediensteten,” in *Berichte der Deutschen Gesellschaft für Völkerrecht* 46 (2014), 313–376, 372.

12 Sally El Sawah, *Les immunités de l’Etat et des organisations internationales: immunités et procès équitable* (Bruxelles: Larcier 2012), para. 1738.

The incoherencies in the immunity regime not only threaten to violate the right to access to a court, but more generally place the rule of law at risk.

On the other hand, a constitutionalist perspective, especially taking into account the multi-level character of global constitutionalism, facilitates the insight that any further curtailment of immunities (in order to secure victims' rights to remedy and reparation) is pre-conditioned on an effective guarantee of due process and fair trial (for impugned office-holders) before the courts of the world. Both (constitutional) elements are inevitably linked: You cannot have one without the other.

A constitutionalist outlook also pays attention to the political undercurrents of the law of immunities, because after all, constitutional law is the law facilitating and organising political processes. The granting of immunity by one state to another state or its organs is replete with considerations of opportuneness and foreign politics. But the sensitivity of the issue, especially when bringing a sovereign state before a national court, is being concealed by “a—partially false—appearance of technicality”.¹³ It is often “behind the screen of [procedural] law”, that a politisation of the law suit takes place, and that judicial proceedings will be subject to pressure by the government.¹⁴ The “increasingly legalistic discourse” on the concrete details of granting or withholding immunity in a particular case, stands in contrast to its overall context of high politics.¹⁵

Finally, the constitutionalist perspective should not overlook that immunities are not only a hybrid between law and politics, and between international and domestic law, but also between public and private law. They display features of private international law or of a choice-of-law regime,¹⁶ because they result from the multiple domestic courts' application of their proper (national) rules and principles on the scope of their jurisdiction and on the admissibility of complaints, resembling in their outcome the application of familiar private law principles such as *forum non conveniens* or *ordre public*.

13 Xiadong Yang, *State Immunity in International Law* (Cambridge: CUP 2012), 461.

14 Horatia Muir Watt, “Une perspective ‘internationaliste-privatiste’”, in Joe Verhoeven, ed., *Le droit international des immunités: consolidation ou contestation?* (Paris: LGDJ 2004), 267.

15 Yang, *State Immunity* (n. 13), 461.

16 Jean-Flavien Lalive, “L’immunité des Etats et des organisations internationales,” *Recueil des Cours* 1953-III (84): 210: The matter “est à la limite du droit international privé.” See also Sadie Blanchard, case note on a Ghanaian court decision, *American Journal of International Law* 108 (2014): 73–79, 79.

Against this foil, the underlying basic question of this book is whether the international or rather trans-national law of immunities has undergone modifications which might be interpreted as a manifestation of global constitutionalism. In the concluding Chapter 21 Stefan Oeter will return to that question.¹⁷

2 National Practice, the Comparative Approach, and the Role of Courts

To the extent that immunities do pertain to the legal realm, they are co-constituted by national law in its interplay with international law, or as an “application and interpretation of national law in the name of international law.”¹⁸ “[T]he law of state immunity is a mix of international and municipal law. This interaction complicates the law relating to State immunity and creates considerable tensions.”¹⁹ On account of this mix, the identification of a truly international legal corpus of rules on immunities requires a comparative approach,²⁰ analysing national practice (*Part One* of the book). Importantly, we need not only compare the various domestic solutions in a “horizontal” manner, but also look “vertically” at domestic law and international law.²¹

For scholarly observers, it is an open question whether such comparison should be best conducted in an “inductive” fashion, starting from the inchoate court practice and seeking to isolate the lowest common denominator,²² or whether it should—inversely—“deduce” rules from more abstract principles (such as the primacy of human rights protection acknowledged in the international legal system). Probably a combined approach, both bottom up and top down, i.e. an examination of state (court) practice guided by principles in the style of a “better law” approach is warranted in order to identify and

17 Stefan Oeter, “The Law of Immunities as a Focal Point of the Evolution of International Law,” Chapter 21 in this volume.

18 Yang, *State Immunity* (n. 13), 464.

19 Fox and Webb, *State Immunity* (n. 5), 1.

20 Lalive, “L’immunité” (n. 16), 210: “Autrement dit, la technique du droit comparé se révèle ici indispensable.”

21 Cf. Aleksandar Momirov and Andria Naudé Fourié, “Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law,” *Erasmus Law Review* 2 (2009): 291–309.

22 See in that sense Yang, *State Immunity* (n. 13), 4. “[T]he received wisdom appears largely a result of repetition only, rather than of any mysterious principles.” (ibid., 5).

develop the law of immunities.²³ This approach is particularly incumbent on legal scholars who are in any case not law-makers but at best act as midwives for the development of new and potentially better rules.

A striking feature of the law of immunities is that it is driven by courts, not by the governments (the executive branch) of states. NGOs are often crucial actors in motivating victims to sue, and supporting them as counsels, but these complaints still address courts. In the end, any legal evolution will therefore still be determined by state institutions, not by the non-state actors themselves.²⁴

The relevant decisions have traditionally been rendered by national courts, not by international ones.²⁵ Only in the recent years, a case-law of the ECtHR developed, and the 2012 ICJ judgment on state immunity has effectively stunned the prior attempts to limit state immunity in proceedings concerning international crimes. The dialogue among those various international and domestic courts manifests the both “horizontal” and “vertical” interaction in this field of the law. For example, the ICJ in the mentioned judgment heavily relied on numerous states’ judicial pronouncements,²⁶ and also on two judgments of the ECtHR.²⁷ The ECtHR in turn recently cited “as authoritative” the ICJ.²⁸ Inversely, the case law of the ECtH, especially on the immunity of international organisations in employment disputes,²⁹ has been overwhelmingly received by national courts all over Europe, even beyond the member states of

23 Cf. Lalive, “L’immunité” (n. 16), 387, asking for “une synthèse des solutions jurisprudentielles les plus progressistes en la matière”.

24 Heike Krieger, “Immunität: Entwicklung und Aktualität als Rechtsinstitut,” in *Berichte der Deutschen Gesellschaft für Völkerrecht* 46 (2014), 233–259, 233.

25 60 years ago, an eminent scholar noted that there existed no pronouncement of an international court or tribunal on the matter of immunities. Lalive, “L’immunité” (n. 16), 205–389 (209). (Lalive mentioned as the sole exception the sentence of a tribunal mixte gréco-allemand, *Greek Government v. Vulkan Werke*, interlocutory decision of 12 Aug 1925, in *League of Nations Official Journal* Oct. 1927, 1342–1347, but this tribunal did not directly rely on immunity to declare itself incompetent).

26 ICJ, *Jurisdictional Immunities* (n. 3), para. 85.

27 ECtHR, *Al-Adsani v. United Kingdom* (Grand Chamber), application No. 35763/97, judgment of 21 November 2001, ECHR Reports 2001-XI, p. 101, and *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, decision of 12 December 2002, ECHR Reports 2002-X, p. 417 (quoted in ICJ, *Jurisdictional Immunities* (n.3), para. 90).

28 ECtHR, *Case of Jones and others v. UK*, appl. nos. 34356/06 and 40528/06, judgment of 14 Jan. 2014, para. 197: The judgment of the ICJ in *Germany v. Italy* “must be considered by this Court as authoritative as regards the content of customary international law”.

29 ECtHR, *Waite and Kennedy*, Appl. No. 26083/94, judgment of 18 February 1999.

the ECHR.³⁰ In the field of state immunity, national courts constantly refer to foreign cases; indeed “such references constitute a persistent feature in cases of State immunity”.³¹ In contrast, the conversation entertained among national courts on questions of the immunity of international organisations is more laconic: A recent serious comparative study of that domestic case-law found that the expected judicial dialogue among domestic courts on this question “hardly takes place”.³²

The peculiar role and function of national courts in identifying or possibly developing international law seems unique in the field of immunities. The reason is of course that immunities by definition come into play when an issue is brought before a domestic court. From the perspective of the meta-law on international legal sources, national court decisions may be relevant for the formation of international law in three different ways.³³ First, such court decisions might be constitutive of international customary law, as instances of state practice and/or as pronouncements of an *opinio iuris*. Second, national court decisions might constitute “subsequent practice” for the interpretation of treaty law (in the sense of Art. 31(3)(b) VCLT), and arguably concomitantly for the “interpretation” of international customary rules. Third, “judicial decisions” by national courts are a “subsidiary means for the determination of rules of law” in the sense of Art. 38(1)(d) ICJ-Statute. In reality, national court decisions play not only a supplementary, but even a primordial role in the area of immunities,³⁴ as all contributions to this volume show. The unusual and to some extent controversial role that domestic judicial pronouncements play in international law thrusts into the limelight the shortcomings of international law’s fixation on “the state” as a black box. In reality, the attribution of one uniform legal “opinion” to the state is a legal fiction. And this fiction is becoming increasingly problematic in a global order that promotes the rule of law at

30 August Reinisch and Ralph RA Janik, “The Personality, Privileges, and Immunities of International Organizations before National Courts,” in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press 2013), 329–337 (332–335 with further references).

31 Yang, *State Immunity* (n. 13), 4.

32 Reinisch and Janik, “International Organizations” (n. 30), 329–337, 330.

33 See also Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law,” *International and Comparative Law Quarterly* 60 (2011): 57–92, 62–63.

34 Scholarly treatment of the law of immunities has been dubbed as amounting to not much more than commentaries on the case-law (Yang, *State Immunity* (n. 13), 6).

the national and international levels,³⁵ because the rule of law requires that states should be internally organised according to the principle of a separation of powers, and should be staffed with courts that are independent from the executive branch. From a constitutionalist perspective, the tendency of some courts to defer to the assessment of the executive branch when deciding whether to grant immunity or not is troublesome. The problem is that the executive's assessment will be mostly influenced by concerns of foreign policy opportuneness and less guided by principled rule-of-law considerations. In this context, judicial self-restraint risks to end up in an abdication of the judiciary.

The dispersed mode of formation has contributed to the complexity, incoherence and legal uncertainty of the issue. One reason is that the different national courts are subject to diverging national procedural laws which influence their approach to immunities. Moreover, the courts of different states are not bound by the decisions of another state. Although courts, as just pointed out, do refer to other regime's or legal orders' affairs, the creation of a coherent corpus of international law has been hampered by the national idiosyncrasies of each case. In result, the law of immunity can only be fully understood through the analysis of state practice.

It is particularly this need for a comparative approach which warrants the examination of the topic under the auspices of two national learned societies of international law. In that sense, we have engaged in "comparative international law", to use the felicitous phrase coined by Anthea Roberts.³⁶ Last but not least, an examination of immunities is particularly appropriate for a colloquium held in Switzerland, a traditional host country of international organisations whose privileges and immunities are of eminent practical value for this country.³⁷

3 State Immunity before the ICJ

The 2012 judgment of the International Court of Justice has made an important contribution to the law of state immunity, but has been received with regret by

35 UN GA, The rule of law at the national and international levels, A/RES/66/102, 13 January 2012.

36 Roberts, "Comparative International Law?" (n. 33), 57–92.

37 It may be added that Switzerland played an active role in the elaboration of the UNCISL and belongs to the first states with a longstanding rule-of-law tradition which ratified the Convention (16 April 2010).

scholars.³⁸ A number of commentators deplores the “stato-centrisme” of the Court.³⁹ The ICJ was a “rear runner”; it “closed a door that stood open for a few years.”⁴⁰ “[T]he highly politicized framework in which the ICJ has to operate and its relatively slow and low output of judgment compared with that of the ICTY or domestic courts has left the ICJ lagging behind in these fast developments [on a human rights exception to immunity]. Consequently this has put the ICJ in the position of slowing down rather than shaping as a front runner the developments in international law.”⁴¹

Virtually all commentators observe that the ICJ could have legitimately and *lege artis* presented a different, more prospective, more open reading of the law as it stands, or could have at least employed language indicating that the law is uncertain or in flux,⁴² and thereby leave more room for a possible future evolution of the law of immunities. In this book, analyses of specific aspects of that judgment reveal a wide gamut of viewpoints on the merits and flaws of the judgment (*Part Two*).

It has been rightly pointed out that “the interests of the real victims were not present during the ICJ proceedings”.⁴³ The Italian government was not keen on defending the decisions of its own courts against Germany, because it might have feared similar proceedings against Italy for crimes committed by its own military forces abroad. More generally speaking, it may be doubted

38 See only Rosanne van Alebeek, “Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms,” *German Yearbook of International Law* 55 (2012): 281–317; Carlos Esposito Massimo, “Of Plumbers and Social Architects: Elements and Problems of the Judgment of the International Court of Justice in Jurisdictional Immunities of the State,” *Journal of International Dispute Settlement* 4 (2013): 439–456; Hermann-Josef Blanke and Lara Falkenberg, “Besteht Staatenimmunität bei Kriegsverbrechen im Lande des Forumstaates?” *Zeitschrift für öffentliches Recht* 69 (2014): 5–38. On the rhetorical persuasiveness of the court Andrea Bianchi, “Gazing at the Crystall Ball (again): State Immunity and Jus Cogens Beyond Germany v. Italy,” *Journal of International Dispute Settlement* 4 (2013): 457–475.

39 Pierre-François Laval, “L’arrête de la Cour internationale de justice sur les immunités juridictionnelles de l’Etat,” *Annuaire français de Droit International* (2012): 147–180, 178.

40 Markus Krajewski and Christopher Singer, “Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights,” *Max Planck Yearbook of United Nations Law* 16 (2012): 1–34, 30.

41 Nikos Lavranos, “National Courts, Domestic Democracy, and the Evolution of International Law,” *European Journal of International Law* 20 (2009): 1005–1011, 1011 (referring to the law of immunities in tension with the desire to prosecute serious human rights violations).

42 Krajewski and Singer, “Should Judges be Front-Runners?” (n. 40), 31.

43 *Ibid.*, 32.

that a true legal evolution on questions of immunity can be expected as long as the law-making process rests firmly in the hands of the states that are guided by considerations of reciprocity. Krajewski and Singer suggest to admit *amicus curiae* briefs by victims before the ICJ in such a constellation.⁴⁴ Such a modest procedural innovation which fits into the existing rules of the ICJ would alleviate the “stato-centrist” approach to questions of immunity while respecting the basic inter-state structure of the system. This proposal thus appears adequate for a (slowly) constitutionalising international system.

4 Commercial Activities and State Immunity

The entire field of immunity is in a flux, last but not least due to economic and technical developments and due to changing value judgments. The adoption of the UN Convention on State Immunity in 2004 (UNSCI)⁴⁵ is a milestone. But this convention does not simply codify pre-existing customary law. Quite to the contrary, it contains many negotiated compromises that have resulted in controversial provisions which raise difficult questions of interpretation. A remaining core problem is notably the criterion for distinguishing between immune and non-immune acts which is not satisfactorily solved in the definition of “commercial transaction” set out in Art. 2(2) UNSCI.⁴⁶ The much increasing transnational economic activity of states, waves of privatisation, and hybrid public-private undertakings have made the line to draw between *acta iure gestionis* and *acta iure imperii* even more uncertain. Nevertheless, courts (including the ECtHR⁴⁷) have begun with the “provisional application” of UNSCI which might generate legitimate expectations.⁴⁸ These issues are tackled in *Part Three* of the book.

44 Ibid.

45 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI), 2 December 2004 UN-Doc. A/59/508. The UNSCI is not yet in force; it has 16 ratifications as of July 2014 while 30 are needed for its entry into force.

46 Fox and Webb, State Immunity (n. 5), 4.

47 ECtHR, *Oleykinov v. Russia*, app. no. 36703/04, 14 March 2013, esp. paras 66–72. The Court held UNSCI “as customary law” against Russia which signed but has so far not ratified UNSCI.

48 Fox and Webb, State Immunity (n. 5), 613.

5 Immunity and Impunity

Immunities seem to stand in tension to another, newer, constitutional value of international law: the effective protection of human rights and the prosecution of international crimes. The potential human rights exception to (some types of) immunity is most discussed with regard to the core area of international crimes, but possibly also concerns other massive human rights violations such as torture, arbitrary detention, forced labour, extraordinary renditions, and extrajudicial executions.⁴⁹ At stake are rights to physical integrity and dignity, and also the right to access to an independent tribunal in the sense of Art. 6 ECHR. *Part Four* of the book deals with this theme.

For example, in a criminal proceeding in Switzerland against a former Algerian minister of defence, instituted for torture, the Swiss Federal Criminal Tribunal granted no immunity *ratione personae* for acts which the minister had allegedly committed when still in office. The court's argument was that otherwise Switzerland, which committed itself to punish the gravest crimes by ratifying the Rome Statute, would behave in a self-contradictory way.⁵⁰

Importantly, the issue of human rights violations is not limited to proceedings against states or state officials, but also concern diplomats and international organisations. Diplomats frequently employ migrant domestic workers; and there are instances of abuse bordering on inhumane treatment and forced labour (Art. 3 and 4 ECHR).⁵¹ International organisations and their bodies have the potential to violate human rights, too. Cases concern on the one hand the procedural right of access to an impartial tribunal in employment disputes, and on the other hand substantive rights to life, health, and bodily integrity

49 See in scholarship in favour of a human rights exception to immunity (in various variations, concerning states, state officials, in civil or criminal proceedings, and relating to different types of crimes in quality and quantity) Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Martinus Nijhoff 1997), esp. 197–211; Annysa Bellal, *Immunités et violations graves des droits humains* (Bruxelles: Bruylant 2011), 135–40 and 225–227 with question marks. Sceptically Maria Gavouneli, *State Immunity and the Rule of Law* (Athen: Ant. N. Sakkoulas Publishers 2001), 118. Denial of a human rights exception by Christian Appelbaum, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (Berlin: Duncker & Humblot 2007).

50 Swiss Federal Criminal Tribunal, decision of 25 July 2012, BBl. 2011, 140.

51 Cf. UN Committee on Migrant Workers, General Comment No. 1 on migrant domestic workers, CMW/C/GC/1, 23 February 2011, para. 49: "(...) States parties should also ensure that migrant domestic workers can obtain legal redress and remedies for violations of their rights by employers who enjoy diplomatic immunity under the Vienna Convention on Diplomatic Relations."

which are threatened by the complicity of an organisation to crimes (e.g. the UN peacekeeping force in Srebrenica), or by the organisation's own negligence (as in the case of the outbreak of the Cholera in Haiti, possibly imported to the island by UN peace keeping troops from Nepal employed in the UN Stabilisation Mission in Haiti, MINUSTAH).⁵²

The 1999 English House of Lords judgments in the Pinochet case,⁵³ denying immunity to a former head of state has been a “watershed moment” in the struggle for accountability for human rights violations, but it has not, as recently demonstrated by Ingrid Wuerth, fundamentally changed the trajectory of immunity law.⁵⁴ There still is no customary human rights exception in the law of immunities which would allow or even mandate domestic courts to entertain criminal proceedings against state officials, former state officials, or civil proceedings for damages against states, on account of serious international crimes which constitute massive violations of human rights.⁵⁵

The much strengthened international legal status of the individual presses, as Hazel Fox had put it in 2008, “for the lifting of immunity for all claims arising from the conduct of the State.”⁵⁶ But this sentence is no longer found in the 2013 edition of the book—it has been deleted presumably to accommodate the ICJ judgment of 2012 which had found that “under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.”⁵⁷ The ICJ in this judgment put forward a procedural notion of state immunity, conceptualising it as a purely procedural plea⁵⁸ and thus detaching immunity from any substantive

52 See three proceedings brought before New York Tribunals, among them the United States District Court Southern District of New York, *Georges et al v. United Nations et al*, civil action (class action complaint), filed 9 oct 2013; United States District Court Eastern District of New York, *Laventure et al v. United Nations et al*, Class action complaint, files 11 March 2014. See Rosa Freedman, “UN Immunity or Immunity? A Human Rights Based Challenge,” *European Journal of International Law* 25 (2014): 239–254.

53 UK, House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others—Ex Parte Pinochet*, judgments of 25 November 1998 and of 24 March 1999.

54 Ingrid Wuerth, “Pinochet’s legacy reassessed,” *American Journal of International Law* 106 (2012): 731–768, especially 765.

55 See the sceptical state pronouncements in the UN GA 6th committee meeting of 2011 (referenced in Krieger, “Immunität” (n. 24), 241 note 51).

56 Hazel Fox, *The Law of State Immunity* (Oxford: OUP, 2nd ed. 2008), 5.

57 ICJ, *Jurisdictional Immunities* (n. 3), para. 91.

58 *Ibid.*, para. 93: regarding “*jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State

unlawfulness of state action which might form the material basis of the judicial proceedings against the state. This judgment had a “chilling effect”⁵⁹ on the future evolution of international law on state immunity and perhaps other immunities as well.

However, the tension between the legitimate demand to hold states accountable and to punish their officials for crimes committed against individuals on the one hand, and the importance of safeguarding peaceful intercourse and cooperation among sovereign states could not simply be defined away through judicial technique (or rather: judicial politics). The persistence of this tension is manifest in the discrepancy between the rising tide of law suits challenging immunities before domestic courts, and the small number of successful ones.⁶⁰ The increase of such proceedings is in part due to the extension of the extraterritorial jurisdiction of domestic courts. However, most courts have so far not yielded to the claim that immunity must be lifted, but have confirmed immunity and thus denied the admissibility of the complaints. Ingrid Wuerth has pointed out that in many if not all instances where immunity was denied, the relevant state had not invoked it. And if immunity is not invoked, then court decisions do not count towards state practice. The failure to confer immunity when it is not pleaded means that there is no breach of the persisting customary law obligation to grant immunity.⁶¹

The conflict between granting immunity (to a state, its officials, or to an international organisation) and safeguarding human rights can be conceptualised in different ways, and these options again manifest the hybridity between the public law and private law-like features of the law on immunities. This conflict can notably be tackled with the private-law technique of subsumption, or with the public-law technique of balancing competing principles. The subsumption technique is to delimitate and narrow the scope of immunity and to carve out constellations in which it simply does not apply.

In contrast, the balancing technique starts from the idea that the antagonist legal institutions represent legal goods which should be reconciled to the

immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. (...)."

59 Esposito, "Of Plumbers and Social Architects" (n. 38), 455.

60 According to Heike Krieger, between 2012 and 2013, more than 20 proceedings relating to immunity have been instituted before national and international courts. Krieger, "Immunität" (n. 24), 233.

61 Wuerth, "Pinochet's legacy" (n. 54), 733.

largest extent possible in a concrete case. That approach is thus more case-sensitive and flexible than the subsumption approach. The resulting trade-off depends on the relative value ascribed to the antagonist legal goods. It seems fair to say that—as a general matter—participants and observers of the international legal process have placed a higher value on accountability which would make the balance tilt more to that side.

I have the impression that the balancing-approach is gaining ground in the international and domestic case-law on the matter, and in scholarship.⁶² It could be said that this makes the issue of immunities a paradigmatic constitutional issue, because accomodating public interest or state powers with private interests is the very substance of constitutional law.⁶³ Importantly, the ECtHR in its seminal and widely received 1999 decision on the immunity of an international organisation in an employment dispute (*Waite and Kennedy*) balanced the granting of jurisdictional immunity against the availability of reasonable alternative dispute settlement mechanisms.⁶⁴

Along a similar vein, the ECtHR, in a case regarding state immunity, favoured a “harmonising” approach in which it insisted that both different issue areas of international law, the law of immunities, and human rights law, must be reconciled, acknowledging “the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity”.⁶⁵ This led the Court “to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court”.⁶⁶

62 See only Raffaella Nigro, “Immunità degli stati esteri e diritto di accesso al giudice: un nuovo approccio nel diritto internazionale?” *Rivista di diritto internazionale* 96 (2013): 812–846 who favours a proportionality analysis in the concrete case. According to Horatia Muir Watt, we must “faire surgir de cette tension un nouvel équilibre.” We need to “concilier le besoin de protection de l’Etat et les nouvelles exigences de transparence et de réparation auxquelles adhère la communauté internationale” (Muir Watt, “Une perspective ‘internationaliste-privatiste’” (n. 14), 265–274, 267 and 274).

63 I thank Evelyne Langrage for reminding me of this.

64 ECtHR, *Waite and Kennedy* (n. 29), para. 68: “For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”

65 ECtHR, *Jones* (n. 28), para. 189.

66 *Ibid.*

It must not be forgotten that the driver of legal evolution in the area of immunities has so far been the economic rationale. For example, the restriction of state immunity (the elimination of immunity for commercial activity) was motivated by economic considerations. States, in their commercial relationships (with private actors of other states), were pushed to renounce on immunity in order to offer solid and fair commercial conditions⁶⁷ to their trading partners.⁶⁸

The same is true for international organisations acting in the commercial sphere, e.g. the World Bank.⁶⁹ In order to be creditworthy, the organisations must ensure that financial claims against it are potentially judicially enforceable. Only through submission to national judiciaries these actors will be able to satisfy the societal expectations resting on them.⁷⁰

There is no comparable incentive for a forum state to limit another state's or state official's immunity with regard to human rights violations allegedly committed by the latter. Quite to the contrary, forum states fear reciprocal law suits exposing their own officials to judicial proceedings abroad on the basis of claims of human rights violations. Importantly, such looming proceedings might be instigated in an abusive fashion, and/or in procedures which do not satisfy international standards of due process. Therefore, the negative reciprocity mechanism which incites forum states to continue to generously

67 In Swiss German, this consideration of equal terms (or level playing field) is called "gleich lange Spiesse".

68 UK Supreme Court, *NML Capital Limited (Appellant) v Republic of Argentina (Respondent)*, [2011] UKSC 31, para. 11: "The absolute doctrine of state immunity could pose a disincentive to contracting with a state and some states attempted to avoid this disadvantage by including in contracts an agreement not to assert state immunity." See in scholarship Krieger, "Immunität" (n. 24), 244.

69 See Art. VII (3) World Bank Statutes: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank." (Articles of Agreement of the International Bank for Reconstruction and Development, 27 Dec. 1945, UNTS vol. 2 (1947) pp. 134–199). See similarly, Art. 27 of the Protocol to the Statutes of European Investment Bank, 30 March 2010, EU OJ 2010 C 83/251.

70 Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften* (Cologne: Carl Heymanns Verlag, 7th ed. 2000), para. 1909.

award immunity to other states and their officials is not inevitably “tainted” by parochial self-interest or sheer opportunism, but may be motivated by legitimate concerns for due process—a constitutionalist value.

The recent ICJ’s deliberate choice to desist from taking up a discernible (but not uniform or linear) trend of not invoking state immunity in criminal proceedings concerning massive human rights violations has passed the bucket to other, potentially more legitimate actors in charge of developing international law. A main forum is the International Law Commission⁷¹ whose ongoing work on the immunity of state officials from foreign criminal jurisdiction is discussed and potentially endorsed by the state representatives in the General Assembly and its legal committee, and which might end up, like the UNSCI, in a new international convention.

6 Immunities of International Organisations

International organisations which enjoy immunity from domestic jurisdiction have expanded and intensified their activities and relative powers. This relative gain in importance and powers on the one hand calls for an effective protection of the organisations’ activities and of their independence notably from the host states, a protection which can be realised through the conferral of immunities. On the other hand, the intensified activity increases the dangers of an abuse of powers which in turn calls for better accountability mechanisms. Immunities stand in the way of holding organisations accountable. It is therefore no wonder that the so-called “absolute” immunity of international organisations is being challenged. This topic is dealt with in *Part Five* of the book.

Heike Krieger has here identified a “catch 22” for the organisations’ member states: If the host state denies access to courts (by granting immunity to the organisation), the host state violates Art. 6 ECHR. If it does grant access to

71 See, inter alia, the work of two special rapporteurs on the *Immunity of State Officials from Foreign Criminal Jurisdiction*: Roman Anatolevich Kolodkin, Special Rapporteur: Preliminary Report 29 May 2008 A/CN.4/601; Second Report of the Special Rapporteur, Mr. Roman Anatolevich Kolodkin A/CN.4/631, revised 22 February 2010; Third Report of the Special Rapporteur, Mr. Roman Anatolevich Kolodkin A/CN.4/646, 63rd Session of the ILC (2011); Preliminary Report prepared by special rapporteur Ms Concepción Escobar Hernandez of 31 May 2012, A/CN.4/654. A very useful overview over the existing law and case law is provided by the Memorandum by the ILC Secretary, 31 March 2008, A/CN.4/596.

court, it potentially violates the host agreement. For this constellation, Krieger suggests to construe Art 6 ECHR as an *obligatio de negotiando*, as a duty to re-negotiate the host agreement.⁷²

Beyond international organisations, further actors might merit immunities. The Swiss Host State Act,⁷³ in force since 1st January 2008, allows for the conferral of immunity to “quasi-governmental international organisations” (Art. 8);⁷⁴ and “international non-governmental organisations (INGOS)” may be privileged, e.g. through tax exemptions (Art. 24 and 25). It might be asked whether private military contractors that take over functions of armed forces should under some circumstances also be granted immunities.⁷⁵ Another phenomenon in state practice are the extensions of immunity regarding special missions which is sometimes bordering on abuse of the legal institution.⁷⁶

7 Conclusions

Are immunities, as “bastards” emerging out of an engagement of law with politics, of international law with domestic law, of public law with private law, illegitimate per se? We do not think so, because they protect legitimate values of both domestic and international societies. From the perspective of international law, it matters that the immunities of states, state officials, and of international organisation protect law and order (“*Rechtsfrieden*”), the stability of international relations, inter-state cooperation, and that they secure the discharge of public functions of the relevant actors. However, the immunities granted need not and should not extend beyond the true rationale of the

⁷² Krieger, “Immunität” (n. 24), 252–253.

⁷³ Loi fédérale du 22 juin 2007 sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu’Etat hôte (*Loi sur l’Etat hôte*, LEH). Recueil Systematique (RS) 192.12 (an unofficial English translation is available at <http://www.admin.ch/ch/e/rs/1/192.12.en.pdf>).

⁷⁴ For example the Global Fund to Fight AIDS, Tuberculosis and Malaria; see, e.g., the Agreement between the Swiss Federal Council and that public-private partnership in view of determining the legal status of the Global Fund in Switzerland, of 13 Decembre 2004 which, inter alia, grant privileges and immunities to the Global Fund http://www.theglobalfund.org/documents/board/08/BMo8_07Annex4AAgreement_Annex_en.pdf (I thank Heike Krieger for this example).

⁷⁵ Talmon, “Immunität” (n. 11), 321.

⁷⁶ *Ibid.*, 344–347.

regime, “au-delà de sa véritable justification”,⁷⁷ so as not to degenerate into privileges which are inadequate to the contemporary global order.

We should not overlook that sustainable order and peace will be achieved only when transitional justice has been done. Any stability covering up blatant injustices will not be sustainable. It is therefore unsurprising that the current state of the law on immunities—which is considered to be “unsatisfactory”⁷⁸ by many observers—remains under tension and attack. I therefore conclude with a reference to the Strasbourg Court’s recent judgment *Jones v. UK* in a case on state immunity against allegations of torture. Here the Court observed that “in light of the developments currently under way in this area of public international law, this is a matter which needs to be kept under review”⁷⁹—not only by the contracting states as the ECtHR wanted it, but also by the college of international lawyers.

In the spirit of global constitutionalism, a number of interesting reform proposals should be reconsidered. For example, it has been suggested to award victims of serious human rights violations reparations for the suffered negation of access to justice, to be granted by the state conferring immunity.⁸⁰ One problem here is how to determine the sum of those damages which would be formally detached from the material basis of the claim which gave rise to the controversy over immunity.

A potentially effective proposal is to insist stronger on procedural requirements.⁸¹ This approach seems all the more promising as it would, firstly, not affect the current basic features of the law of immunities, and secondly, dovetail with the ICJ’s recent emphasis on the “procedural” character⁸² of that legal institution. The idea is that states should be required to *invoke* immunity. If not invoked, then forum state courts may not award immunity. This approach would not even require an actual modification of the law because it can easily be argued into the existing legal structure: “The legal effect of failing to raise

77 El Sawah, *Les immunités de l’Etat* (n. 12), para. 22. Cf. Joe Verhoeven, “Avant-propos” *ibid.*, ed, *Le droit international des immunités: consolidation ou contestation?* (Paris: LGDJ 2004) 5–8, 5: “Si c’ est la souveraineté qui justifie l’ immunité (. . .) il suffit que lui soit reconnue une portée conforme à sa raison d’être. »

78 Yang, *State Immunity* (n. 13), 440.

79 ECtHR, *Jones* (n. 28), para. 215.

80 El Sawah, *Les immunités de l’Etat* (n. 12), para. 1735; Talmon, “Immunität” (n. 11), 357.

81 See, e.g., Krieger, “Immunität” (n. 24), 256. Wuerth, “Pinochet’s legacy” (n. 54), 766 points out that in a surprising number of cases, immunity is not raised in cases against defendants whose state is not willing to defend them. These cases should be welcomed and encouraged.

82 See above text with note 58.

immunity is that the forum state has no obligation to confer it, at least in the context of individual functional immunity. The failure to raise immunity might therefore count as state practice or *opinio iuris* in the form of acquiescence” to the other state’s exercise of its jurisdiction.⁸³ That approach would allow the state which is sued (or whose officials are sued) not only to consider its political interests, but also—more important from a constitutionalist perspective—the prospects of a fair trial or due process in proceedings of the forum state, for deciding to assert immunity in one state but not elsewhere. This leeway would offer protection against abuses and against unfair proceedings which do not satisfy international procedural standards. Finally, a stricter linkage of conferring immunity to actual prior pleading, i.e. the abandonment of its examination *ex curia*, would empower civil society actors to put pressure on states not to invoke immunity in proceedings based on claims of serious human rights violations by state organs. That procedural approach, too, appears adequate to a constitutionalising world order in which individuals and civil society actors have gained importance but in which states remain the gate-keepers.

83 Wuerth, “Pinochet’s legacy” (n. 54), 750.