

## **Between Evolution and Stagnation – Immunities in a Globalized World**

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## Abstract

Immunities have long been a subject of discussion. In the context of globalization, there have, on the one hand, been calls for the limitation or even the abolition of immunities, in particular based on the argument of a lack of responsibility for grave violations of human rights. Contrarily, opposed tendencies can be observed which raise ideas such as the extension of the scope of persons to be protected by immunities, resting upon the pluralization of actors in the globalized world. This article examines these two contradictory aspects of development of immunities in public international law and how they might interrelate with each other. It analyses how the simultaneous evolution and stagnation of immunities can be explained. For that purpose the contribution evaluates at first the current state of the legal development. Further, it takes a look at a certain stagnation of legal development and clarifies the structural parameters within public international law which have led to such a stagnation. In this context, it is critically dealt with the question, whether immunities meet the demands of a globalized world. Lastly, this article addresses the development regarding a denial of immunity in cases of grave human rights violations and asks how it could be more cautiously brought forward.

## A. Introduction: Immunity's Relevance in a Globalized World

Immunities in public international law have come under pressure more than ever before. For example, during the years 2012/2013 alone over twenty court proceedings took place against beneficiaries of functional and personal immunity before national and international courts.<sup>1</sup> An apparent discrepancy can

<sup>1</sup> Regarding State immunity, see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99 [ICJ, Jurisdictional Immunities]; Italy: *Frasca v. Germany et al.*, (2013) Preliminary Order on Jurisdiction, No 4284/2013, ILDC 1998 (IT 2013) [Frasca v. Germany] ORIL; *Criminal Proceedings v. Albers and Others*, (2012) Final Appeal Judgment, Case No 32139/2012, ILDC 1921 (IT 2012); *Federal Republic of Germany v. De Guglielmi*, (2012) Appeal Judgment, Case No 941/2012, ILDC 1905 (IT 2012) [Germany v. De Guglielmi]; Canada: *Islamic Republic of Iran c. Hashemi*, (2012) Quebec Court of Appeal 1449 (CanLII) [Quebec Court of Appeal, Iran c. Hashemi]; *Steen v. Islamic Republic of Iran*, (2013) Ontario Court of Appeal 30 (Ont. C.A.) [Ontario Court of Appeal, Steen v. Iran]; Germany: Higher State Court Stuttgart, Resolution of 6 June 2013, Az 5 W 17/13; Higher State Court Berlin, Resolution of 4 June 2012, 20 Sch 10/11; European Court of Justice:

be observed between the high number of proceedings which contest the validity of immunities and the selective legal development. While progress regarding the efforts to limit international organizations' immunity in employment-related disputes seems to be somewhat more dynamic,<sup>2</sup> the reason for this might stem from a temporary asynchrony; international organizations with commercial functions are subject to a development that has already been concluded in terms of State immunity.

*Mahamdia v. People's Democratic Republic of Algeria*, (2012) C-154/11. Regarding court proceedings of Greek government bonds owners, see C. Thole, 'Klagen geschädigter Privatanleger gegen Griechenland vor deutschen Gerichten?', 66 *Wertpapier-Mitteilungen* (2012) 38, 1793; U.S.: *Sky Petroleum, Inc. v. Ministry of Economy, Trade and Energy of Albania and Others*, Order and Preliminary Injunction, Texas Western District Court, Case No A-12-CA-023-SS; European Court of Human Rights: *Wallishauser v. Austria* (No. 2), Decision, Application No. 14497/06, (2013) [ECtHR, Wallishauser v. Austria (No. 2)]; *Oleynikov v. Russia*, Decision, Application No. 36703/04, (2013); *Wallishauser v. Austria*, (2012) Decision, Application No. 156/04 [ECtHR, Wallishauser v. Austria]. Regarding diplomatic immunity, see Germany: Federal Labour Court, Decision of 22 July 2012, Az. 5 AZR 949/11 [Federal Labour Court, Az. 5 AZR 949/11]; France: *C.N. und V. v. France*, ECtHR Application No. 67724/09, Decision of 11 October 2010; UK: *Wokuri v. Kassam*, (2012) High Court EWHC 105 (Ch) [High Court, Wokuri v. Kassam]. Regarding immunity of State officials in criminal proceedings see ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422, 432, para. 20 [ICJ, Obligation to Prosecute or Extradite]; Italy: *General Prosecutor at the Court of Appeals of Milan v. Adler and Others*, (2012), Final Appeal Judgment, Court of Cassation No 46340/2012, ILDC 1960 (IT 2012) [Court of Cassation, Adler and Others]; South Africa: *Southern African Litigation Centre and Another v. National Director of Public Prosecutions and Others*, (2012) High Court (77150/09) ZAGPPHC 61 [High Court, Southern African Litigation Centre v. National Director of Public Prosecutions]; Switzerland: Federal Criminal Court Decision of 25 July 2012, BB. 2011.140 [Federal Criminal Court of Switzerland, BB. 2011.140]. Regarding State officials' immunity in civil proceedings U.S.: *Habyarimana v. Kagame*, (2012) United States Court of Appeals 10th Cir. 696 F.3d 1029; *Manoharan v. Rajapaksa*, (2012) United States District Court for the District of Columbia, F. Supp. 2d 2012 WL 642446. Regarding a war ship's immunity, see *The "ARA Libertad" Case (Argentina v. Ghana)*, Order of 15 December 2012, ITLOS Case No. 20 [ITLOS, "ARA Libertad" Case]. Regarding international organizations' immunity, see *Mothers of Srebrenica Association v. the State of the Netherlands and the United Nations*, (2012) Supreme Court of the Netherlands, 10/04437 EV/AS [Supreme Court of the Netherlands, Mothers of Srebrenica]; see also UN Haiti Cholera Dispute: Letter by UN Under Secretary-General, 21 February 2013, available at <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> (last visited 16 March 2015).

<sup>2</sup> See Sec. D.II.1.

All types of immunity are subject to similar criticism: To accord immunities in cases of serious human rights abuses contradicts the efforts of the international community to establish responsibility for such acts.<sup>3</sup> Immunity, as a relic of the Westphalian system, seems to defy ideals of global constitutionalism<sup>4</sup> due to which there are calls for its limitation<sup>5</sup> or even its abolition.<sup>6</sup> Is granting immunity in a globalized world thus no longer contemporary?

However, within globalization, there are diametrically opposed tendencies which pose questions as to whether the scope of persons to be protected by immunities should even be extended. Pluralization of actors in international relations is one of the intrinsic features of globalization. The conduct of

<sup>3</sup> T. Kleinlein, *Konstitutionalisierung im Völkerrecht* (2012), 18 & 389.

<sup>4</sup> Regarding said perspective within an international order see B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579; A. Wiener, 'Constitutionalism Unbound: A Practice Approach to Normativity', 22-23 October 2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2103049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103049) (last visited 16 March 2015). See also M. Kotzur, 'Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law', 4 *Goettingen Journal of International Law* (2012) 2, 585, 594; K.-H. Ladeur, 'Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft', 49 *Archiv des Völkerrechts* (2011) 3, 246, 259.

<sup>5</sup> For instance, see J. Besner & A. Attaran, 'Civil Liability in Canada's Courts for Torture Committed Abroad: The Unsatisfactory Interpretation of the State Immunity Act 1985 (Can)', 16 *Tort Law Review* (2008), 150; Z. Douglas, 'State Immunity for Acts of State Officials', 82 *British Yearbook of International Law* (2012), 281, 338-342; C. K. Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol', 55 *International and Comparative Law Quarterly* (2006) 2, 411, esp. 426; E. Henry, 'Les immunités juridictionnelles, en particulier d'exécution, en droit international et dans la pratique suisse', in F. Bohnet (ed.), *Quelques Actions en Exécution* (2011), 263, 280-284; L. McGregor, 'State Immunity and Jus Cogens', 55 *International and Comparative Law Quarterly* (2006) 2, 437, 441; A. Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon', 26 *Leiden Journal of International Law* (2013) 1, 9; P. Tarre Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case', 4 *Goettingen Journal of International Law* (2012) 3, 809.

<sup>6</sup> Among others, the following works contain claims to abolish the legal concept of immunity: R. Falk, *The Role of Domestic Courts in the International Legal Order* (1964), 139-145; R. Garnett, 'Should Foreign State Immunity Be Abolished?', 20 *Australian Yearbook of International Law* (1999), 175; E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), 55-57.

international relations is no longer restricted to heads of State and governments. Rather, due to an increase in transnational economic and political activities through a diversification of methods and forms of coordination there are numerous other state and non-state actors.<sup>7</sup> Do these processes require a legal development which widens the current understanding of immunity from state-relatedness to include other actors in order to allow them to effectively perform their tasks on the international level?

In order to illustrate how these contradictory strains of development can be explained and how they may be put in relation to one another, this contribution will first analyze the current state of legal development, then it will clarify which structural parameters within public international law have led to a certain stagnation of legal development. Afterwards, the questions must be discussed as to whether immunities meet the demands of a globalized world. Lastly, the paper will ask as to how the development regarding denial of immunity in cases of grave violations of human rights could be more cautiously brought forward.

Even though this contribution aims at identifying overarching characteristics of immunities, the analysis acknowledges that the various types of immunity must be clearly distinguished. Moreover, it must be differentiated among immunity *ratione personae* and immunity *ratione materiae*, as well as, immunity from criminal and civil proceedings. The concept of grave violations of human rights is used as a notion that encompasses abuses of public international law norms with *ius cogens* character, which protect the individual.

## B. Immunity exceptions in cases of grave violations of human rights

Stagnation in legal development is evident in the granting of immunity from civil proceedings. In recent years several court decisions denied exceptions to immunity, immunity of international organizations and diplomatic immunity regarding grave violations of human rights.<sup>8</sup>

<sup>7</sup> Ladeur, *supra* note 4, 252 & 253.

<sup>8</sup> For the above mentioned immunity exception in terms of a slowly evolving norm of customary international law, see A. Bellal, *Immunités et violations graves de droit humains* (2011), 135-136; M. Gavouneli, *State Immunity and the Rule of Law* (2001), 91-118, esp. 117.

## I. Adherence to the Grant of Immunity From Civil Proceedings

In its 2012 decision regarding the *Jurisdictional Immunities Case*, the ICJ rejected an exception to immunity from civil proceedings in cases of grave human rights violations.<sup>9</sup> In one of the decisions' central passages, the ICJ ascertains that there is no conflict between the rules of immunity and norms of international humanitarian law with a *ius cogens* character infringed upon by Germany. As already highlighted by several scholars,<sup>10</sup> the pertinent *ius cogens* norms constitute substantive law, while the rules regarding immunity before national courts belong to procedural law.<sup>11</sup> In the summer 2012, the Supreme Court of the Netherlands stated in the case of the *Mothers of Srebrenica*, referring to the ICJ's reasoning, that the United Nations (UN) could not be deprived of its immunity<sup>12</sup>: "The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the [...] [plaintiffs] base their claims."<sup>13</sup> In June 2013, the European Court of Human Rights upheld this judgment.<sup>14</sup>

<sup>9</sup> For a critically perspective see among others M. Bothe, 'Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the Judgment of the ICJ on the Jurisdictional Immunity of States', in A. Peters *et al.* (eds), *Immunities in the Age of Global Constitutionalism* (2015), 99, 101 [Peters *et al.* (eds), *Immunities*]; M. Krajewski & C. Singer, 'Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights', 16 *Max Planck Yearbook of United Nations Law* (2012), 1; L. McGregor, 'State Immunity and Human Rights: Is There a Future After *Germany v. Italy*?', 11 *Journal of International Criminal Justice* (2013) 1, 125, 131-133; assenting M. Kloth & M. Brunner, 'Staatenimmunität im Zivilprozess bei gravierenden Menschenrechtsverletzungen', 50 *Archiv des Völkerrechts* (2012) 2, 218, 227; M. Payandeh, 'Staatenimmunität und Menschenrechte', 67 *Juristen Zeitung* (2012) 19, 949, 956.

<sup>10</sup> H. Fox, *The Law of State Immunity*, 1st ed. (2002), 524-525; M. Rossi, 'Staatenimmunität im europäischen Zivilprozessrecht', in G. B. Portale *et al.* (eds), *Aktuelle Entwicklungen im Handels-, Arbeits- und Zivilprozessrecht* (2011), 47, 56. Critically regarding the differentiation in the ICJ decision, see M. Sarzo, 'The Dark Side of Immunity', 26 *Leiden Journal of International Law* (2013) 1, 105, 122-125.

<sup>11</sup> ICJ, *Jurisdictional Immunities*, *supra* note 1, 140-142, paras 92-97.

<sup>12</sup> Supreme Court of the Netherlands, *Mothers of Srebrenica*, *supra* note 1, paras 4.3.10-4.3.14. For a more progressive perspective see R. Freedman, 'UN Immunity or Impunity', 25 *European Journal of International Law* (2014) 1, 239, 250-254 (who does not take into account the 2012 Judgment).

<sup>13</sup> Supreme Court of the Netherlands, *Mothers of Srebrenica*, *supra* note 1, para. 4.3.14.; critically regarding the decision of the previous instance from the perspective of the ECHR because of a lack of a suitable legal protection alternative, M. Kloth, *Immunities and the Right of Access to Court under Art. 6 of the European Convention on Human Rights* (2010), 153.

<sup>14</sup> European Court of Human Rights: *Stichting Mothers of Srebrenica v. the Netherlands*, Decision, Application No. 65542/12 (2013) [ECtHR, *Mothers of Srebrenica*].

Likewise, in the Haiti Cholera dispute a U.S. District Court Judge stated in January 2015 that the UN and its subsidiary organ MINUSTAH are immune from court proceedings unless the UN explicitly waives this immunity.<sup>15</sup>

In 2011 the Regional Labour Court Berlin-Brandenburg decided that “[...] diplomatic immunity against judicial prosecution [...] regardless as to the severity of the accusations raised against the diplomat, is not open to relativization [...]”, even if grave human rights violations are at issue.<sup>16</sup> The subject of the proceedings was claims for remuneration and compensation in a case involving exploitative employment of domestic workers. The legal proceedings were to be conducted against an *attaché* of the Saudi-Arabian embassy, who was accredited in Germany until 2011.<sup>17</sup> The issue at hand reflects a general problem concerning legal breaches by diplomats in receiving countries.<sup>18</sup> Yet, it has gained special importance through activities of human rights organization, since several of the cases concerned dealt with severe forms of exploitation and abuse pursuant to Art. 7 and Art. 8 of the *International Covenant on Civil and Political Rights* [ICCPR].<sup>19</sup> Consequently, the UN Committee on Migrant Workers recommended to the member States in its Comment No. 1 in 2011 to ensure that legal remedies be

<sup>15</sup> *Delama Georges and Others. v. United Nations and Others*, U.S. District Court for the Southern District of New York, Case No. 1:13-cv-7146, available at [http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62\\_Opinion\\_and\\_Order\\_01\\_09\\_15.pdf](http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62_Opinion_and_Order_01_09_15.pdf) (last visited 16 March 2015).

<sup>16</sup> Germany: Regional Labour Court Berlin-Brandenburg, 9 November 2011, Az. 17 Sa 1468/11, para. 19 [Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11]: “Die diplomatische Immunität vor gerichtlicher Verfolgung ist hingegen unabhängig von der Schwere der gegen den Diplomaten erhobenen Vorwürfe zu gewähren; sie ist einer Relativierung nicht zugänglich.” See also *DDR-Botschafter*, (1997) Federal Constitutional Court, BVerfGE 96, 68, 85 [Federal Constitutional Court, DDR-Botschafter].

<sup>17</sup> Germany: Federal Labour Court, Az. 5 AZR 949/11, *supra* note 1, para. 1.

<sup>18</sup> For instance, see R. Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’, 79 *American Journal of International Law* (1985) 3, 641.

<sup>19</sup> UN CEDAW: *General Recommendation Nr. 26 on Woman Migrant Workers*, CEDAW/C/2009/WP.1/R, 5 December 2008, para. 21; Special Rapporteur on Contemporary Forms of Slavery, *Including its Causes and Consequences*, UN Doc A/HRC/15/20, 18 June 2010, paras 33, 57-58 & 96; ILO: The General Conference of the ILO, *Domestic Workers Recommendation No. 201* (2011); *Recommendation concerning Decent Work for Domestic Workers No. 26* (2011), para. 4.

available to domestic workers should their rights be abused by beneficiaries of diplomatic immunity.<sup>20</sup>

Legal enforcement fails first due to the fact that diplomats' private illicit behaviour is not considered to be directly attributable to the sending State;<sup>21</sup> hence, it may not be held accountable, even though employment related disputes as such are considered *acta iure gestionis*.<sup>22</sup> Therefore, most of those affected initiate proceedings against the diplomats themselves. However, the employment of domestic workers, and consequently any illicit conduct related to it, does not fall within the exceptions pursuant to Art. 31 (1) of the *Vienna Convention on Diplomatic Relations* [VCDR]. Consequently, the diplomat enjoys personal immunity regarding his private actions during his accreditation in the receiving State. The wording of Art. 31 (1) (c) VCDR, that "[an] action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions [...]" is excluded from diplomatic immunity in the receiving State, implies that also in this context the distinction between *acta iure imperii* and *acta iure gestionis* could be applicable.<sup>23</sup> However, such an equation of diplomatic and State immunity has not been accepted by national courts. In this context, the U.S. Court of Appeals explicitly rejected including employment relations under Art. 31 (1) (c) VCDR.<sup>24</sup> The Court's decision is supported by the diplomat's key status in the receiving State, who – as a particularly vulnerable organ on foreign soil – requires protection of his personal affairs in order to be able to exercise

<sup>20</sup> UN Committee on Migrant Workers, *General Comment on Migrant Domestic Workers*, UN Doc CMW/C/GC/1, 23 February 2011, para. 49.

<sup>21</sup> U.S.: *Swarna v. Al-Awadi*, (2010) 622 F3d 123 2nd Cir. Court of Appeals [Swarna v. Al-Awadi].

<sup>22</sup> *United Nations Convention on Jurisdictional Immunities of States and their Property*, 2 December 2004, Art. 11, 44 ILM 801; e.g. ECtHR: *Wallishauser v. Austria*, *supra* note 1, para. 65. Regarding Switzerland: A. Peters, *Völkerrecht*, 3rd ed. (2012), 177 [Peters, *Völkerrecht*]; for an alternative line of argument see *Benkharbouche and Janah v. Embassy of the Republic of Sudan and Others*, UK Court of Appeal (Civil Division), (2015) EWCA Civ 33.

<sup>23</sup> Cf. H. Fox & P. Webb, *The Law of State Immunity*, 3rd ed., (2013), 586 [Fox & Webb, *State Immunity* (2013)].

<sup>24</sup> U.S.: *Tabion v. Mufti*, (1996) 73 F.3d 535, 537, 4th Cir. Court of Appeals [Court of Appeals, *Tabion v. Mufti*]. See also UK: *Reyes and Suryadi v. Malki*, EWCA Civ 32, UK Court of Appeal (Civil Division), 2015; E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed. (2008), 305; Fox & Webb, *State Immunity* (2013), *supra* note 23, 708. For a critical evaluation of the U.S. jurisprudence N. Maja Bergmar, 'Demanding Accountability where Accountability is due', 47 *Vanderbilt Journal of Transnational Law* (2014) 2, 501.

his functions for the maintenance of international relations.<sup>25</sup> Furthermore, the interpretation of Art. 31 (1) (c) *VCDR* by means of the *travaux préparatoires* clearly demonstrates that the notion of commercial activity does not encompass all civil law aspects of personal lifestyle. The notion rather describes business or trade activities on a continuous basis meant to generate personal profit.<sup>26</sup> There is, however, a rather extensive consensus among courts that employment contracts with domestic workers do not fall under the protection of Art. 39 (2) *VCDR*. In other words, contracts do not constitute acts performed in the exercise of functions of a member of the mission; hence, affected workers may bring the diplomats to justice when the functions of the diplomat have come to an end.<sup>27</sup> Both the Federal Labour Court<sup>28</sup> as well as the British High Court in the case *Wokuri v. Kassam* in 2012<sup>29</sup> applied this interpretation.

## II. Indications of Legal Development – Immunity of Heads of State and Other State Officials From Criminal Proceedings

Regarding immunity of heads of State and other State officials, there are indications of legal development; however, this change in the law is not as evident as some scholars claim.<sup>30</sup> Within the current developments, one

<sup>25</sup> Germany: Federal Constitutional Court, *DDR-Botschafter*, *supra* note 16, 85-86; K. Doehring, *Völkerrecht*, 2nd ed. (2004) [Doehring, *Völkerrecht*], 293.

<sup>26</sup> Denza, *supra* note 24. Among others, Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11, *supra* note 16, para 16; Court of Appeals, *Tabion v. Mufti*, *supra* note 24, 537-539.

<sup>27</sup> UK: High Court, *Wokuri v. Kassam*, *supra* note 1, paras 22-26, referencing the U.S., Court of Appeals, *Swarna v. Al-Awadi*, *supra* note 21, 134-135, 139; see also U. Seidenberger, *Die diplomatischen und konsularischen Immunitäten und Privilegien* (1994), 118.

<sup>28</sup> Germany: Federal Labour Court, Az. 5 AZR 949/11, *supra* note 1, para 10: “His immunity ended pursuant Art. 39 para. 2 *VCDR* with his departure [...] Immunity also does not continue pursuant Art. 39 para. 2 sentence 2 *VCDR*, because the accused is not being suit due to performance of his public work.” (translation by the author). Cf. M. Bitz, ‘§ 18 GVG’, in H. Prütting & M. Gehrlein (eds), *Zivilprozessordnung*, 6th ed. (2014), para. 9.

<sup>29</sup> UK: High Court, *Wokuri v. Kassam*, *supra* note 1, para. 27.

<sup>30</sup> Bellal, *supra* note 8, 225-234; P. Gaeta, ‘Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?’, in A. Cassese (ed.), *Realizing Utopia* (2012), 227, 229; G. Hokema, *Immunität von Staatsoberhäuptern* (2002), 265-266 & 272-273; M. Lüke, *Die Immunität staatlicher Funktionsträger* (2000), 221-314, esp. 312-313. For a differentiated approach, see R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 200-415; R. van Alebeek, ‘National Courts, International Crimes and the Functional Immunity of

can distinguish between a core of legal norms whose extent and application is clear and a perimeter within which the boundaries of immunity must still be delimited. Even in cases of grave violations of human rights the serving head of State, head of government, and foreign affairs minister enjoy absolute immunity *ratione personae* from civil and criminal proceedings.<sup>31</sup> After the ICJ decision on the *Arrest Warrant Case*, national courts followed this jurisprudence<sup>32</sup> regarding the proceedings against Robert Mugabe<sup>33</sup> and Paul Kagame<sup>34</sup>. Likewise, all serving State officials enjoy immunity *ratione materiae* in relation to conduct performed in their official capacity.<sup>35</sup> There is however a *ratione loci* exception to immunity of State officials in regard to official acts which constitute severe violations of territorial sovereignty, especially for espionage, political homicide,

State Officials', 59 *Netherlands International Law Review* (2012) 1, 5, 36-41; emphasising the uncertainties: Fox & Webb, *State Immunity* (2013), *supra* note 23, 565.

<sup>31</sup> For criminal proceeding, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 22, 24, paras 54-55 & 58 [ICJ, Arrest Warrant]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177, 236-237, para. 170. Before national courts, see Belgium: Cour de Cassation, *H.S.A. and Others, V.S.A. and Others*, Decision Related to the Indictment of Ariel Sharon, Amos Yaron and Others, 42 ILM 3, 596, 600. For general information, see J. Foakes, 'Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts', 2 *International Law Briefing Papers* (2011), 2, 4; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours de l'Académie de Droit International* (1994), 13.

<sup>32</sup> See also Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, para. 5.3.

<sup>33</sup> UK: Bow Street Magistrates' Court, Application for an Extradition Warrant against Robert Mugabe, Judgment, 14 January 2004, printed in C. Warbrick (ed.), 'Current Developments: Public International Law', 53 *International and Comparative Law Quarterly* (2004) 3, 769, 770; unresolved in U.S.: *Tachiona v. United States*, (2012) 386 F.3d 205, 2nd Cir. Court of Appeals, because the Court applied Art. 29 VCDR.

<sup>34</sup> Spain: Juzgado Central de Instrucción nº 4 de la Audiencia Nacional (Tribunales españoles), Auto (6 February 2008), 32, available at [http://www.veritaswandaforum.org/dossier/resol\\_auto\\_esp\\_06022008.pdf](http://www.veritaswandaforum.org/dossier/resol_auto_esp_06022008.pdf) (last visited 16 March 2015).

<sup>35</sup> A. von Arnould, *Völkerrecht*, 2nd ed. (2014), 136 [Arnould, *Völkerrecht*]; for a different view, see Italy: Court of Cassation, *Adler and Others*, *supra* note 1.

terrorist and subversive actions,<sup>36</sup> as well as torture<sup>37</sup> and breaches of International Humanitarian Law<sup>38</sup> in the forum State.<sup>39</sup>

Indications for legal development can be found where a conflict exists between the grant of immunity to State officials and international treaty obligations requiring member States to penalize and prosecute certain crimes, which may only be committed as part of an official function. In favour of such an exception to immunity included in the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [UN Convention Against Torture] from 1984 is the fact that pursuant Art. 1, torture requires an action in an official capacity. At the same time, Art. 5 of the same Convention specifies duties to penalize. A State could not fulfil said duties, should it be obliged to grant immunity to foreign State officials due to the official quality of their acts.<sup>40</sup> This line of reasoning may be transferred to all similar conventions which deal with actions in official capacities and

<sup>36</sup> Italy: *Adler and 32 Others (Abu Omar case)*, Milan Single Judge, Verdict of 4 November 2009, Reasons filed on 1 February 2010, printed in: A. Cassese *et al.*, *International Criminal Law: Cases and Commentary* (2011), 564-570; Court of Cassation, *Adler and Others*, *supra* note 1, however, in this decision State officials' immunity is generally denied in criminal proceedings; UK: *Khurts Bat v. Investigating Judge of the German Federal Court and Others*, UK High Court, (2011) EWHC 2029 (Admin) [High Court, Khurts Bat v. Investigating Judge of the German Federal Court].

<sup>37</sup> Foakes, *supra* note 31, 13; see also Canada: *Bouzari v. Iran*, (2002) Ontario Superior Court of Justice O.J.No. 1624, Court file No. 00-CV-201372, para. 63.

<sup>38</sup> M. Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1971) 2, 246, 252. With more cautious wording as compared to the second edition of H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 697-700 [Fox, *State Immunity* (2008)], see now Fox & Webb, *State Immunity* (2013), *supra* note 23, 553.

<sup>39</sup> Arnould, *Völkerrecht*, *supra* note 35; Foakes, *supra* note 31, 13; K. Schmalenbach, 'Immunität von Staatsoberhäuptern und anderen Staatsorganen', 61 *Zeitschrift für Öffentliches Recht* (2006) 3, 397, 412; International Law Commission, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by the Special Rapporteur*, UN Doc A/CN.4/631, 56, paras 84-85, 90 [UN Doc A/CN.4/631]; to what extent cases of universal jurisdiction are included is not entirely clear; in favor of such an interpretation: R. Cryer *et al.*, *International Criminal Law and Procedure* (2007), 432-433; emphasizing insecurities: P. Webb, *International Judicial Integration and Fragmentation* (2013), 70-72 & 87-91.

<sup>40</sup> Peters, *Völkerrecht*, *supra* note 22, 186; O. Dörr, 'Staatliche Immunität auf dem Rückzug', 41 *Archiv des Völkerrechts* (2003) 2, 201, 216. See however Fox & Webb, *State Immunity* (2013), *supra* note 23, 569, who hold that exceptions to immunity in cases of grave violations of human rights seem to be restricted to ordinary State officials while the so-called troika appears to retain immunity *ratione materiae* when leaving office.

stipulate duties to sanction such as the *International Convention for the Protection of All Persons from Enforced Disappearance* of 2006.<sup>41</sup> According to its Art. 2 this convention only deals with enforced disappearances which are conducted by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. Further reaching concepts assume an exception to immunity at least from criminal proceedings whenever international treaties impose extraterritorial duties on States to prosecute international crimes, which are not exclusively restricted to State officials. These concepts extend the idea of a collision of duties beyond crimes which can only be committed in an official capacity to all conventions, which link severe human rights abuses which are usually committed by State officials to extraterritorial duties to prosecute or to the right to exercise universal jurisdiction:

“[...] where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction.”<sup>42</sup>

Exceptions to immunity and their legal development are, however, subject to significant legal uncertainties. Especially the connection of universal jurisdiction, extraterritorial duties to prosecute and curtailment of high-ranking State officials' immunity from criminal proceedings seems problematic.<sup>43</sup> Hence, even sixteen years after the *Pinochet Case* one can only observe a tendency for a legal development in regard to exceptions to the immunity of former heads of State or high-ranking State officials:<sup>44</sup> The subsequent decisions point in both directions and often depend on the concrete circumstances of each case. For example, in the 2013 decision *Lydiene X v Prosecutor* the French Court of Cassation held that the immunity of Cameroonian State officials did not preclude an investigation by the investigating judge into an alleged crime of

<sup>41</sup> GA Res. 61/177, UN Doc A/RES/61/177, 20 December 2006.

<sup>42</sup> D. Akande & S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 21 *European Journal of International Law* (2010) 4, 815, 843-849 & 851; see also Lüke, *supra* note 30, 232-273, in particular 273.

<sup>43</sup> For attempts to limit the further reaching consequences of this association, see Akande & Shah, *supra* note 42, 846-849.

<sup>44</sup> Foakes, *supra* note 31, 1; Fox & Webb, *State Immunity* (2013), *supra* note 23, 586; T. Stein & C. von Buttlar, *Völkerrecht*, 13th ed. (2012), 726.

torture.<sup>45</sup> In an extensive reading the decision might imply that the immunity of State officials no longer bars investigations in such cases. However, since the complaint was filed against an unspecified person it is also tenable to conclude that in cases of complaints directed against unknown persons at least the identity of the alleged offender has to be established before an issue of immunity arises.<sup>46</sup> Thus, while the decision represents a certain development in the law of immunities it does not clearly establish a wide exception to immunities of (high-ranking) State officials in criminal cases concerning torture committed by foreign State officials in their home States.

The assertion of uncertainties in the legal development seems indeed to directly contradict the high number of proceedings against former heads of State and other (high-ranking) State officials which transnational human rights NGOs have sought to initiate within the same time span.<sup>47</sup> Yet, the proceedings against Rumsfeld and Zemin, for instance, were expressly denied by French<sup>48</sup> and German authorities<sup>49</sup> through the defendants' immunity *ratione materiae*, even though both cases were similar to the *Pinochet Case*.<sup>50</sup> The report of the

<sup>45</sup> *Lydienne X v Prosecutor*, (2013) Appeal Judgment, Case No 12/81676, ILDC 2035 (FR 2013) ORIL.

<sup>46</sup> T. Margueritte, *ibid.*, A 4.

<sup>47</sup> See for instance the extensive lists of proceedings, which the Swiss NGO Trial (<http://www.trial-ch.org>, last visited 16 March 2015) and the American NGO The Centre for Justice and Accountability (<http://www.cja.org/section.php?id=5>, last visited 16 March 2015) have sought to initiate before courts in the U.S., Guatemala, Spain and Switzerland. See also the list of the Domestic Case Law on the International Criminal Law Database at the T.M.C. Asser Institute, available at [http://www.asser.nl/Default.aspx?site\\_id=36&level1=15246](http://www.asser.nl/Default.aspx?site_id=36&level1=15246) (last visited 16 March 2015).

<sup>48</sup> France: Cour d'Appel de Paris, *Decision of the Procureur Générale Regarding the Decision on Criminal Proceedings Against Donald Rumsfeld* (27 February 2008), an English version is available at [http://ccrjustice.org/files/Rumsfeld\\_FrenchCase\\_%20Prosecutors%20Decision\\_02\\_08.pdf](http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf) (last visited 16 March 2015); notice of decision of the Procureur de la République on 16 November 2007, available at [http://www.ecchr.de/index.php/rumsfeld-590.html?file=tl\\_files/Dokumente/Universelle%20Justiz/reponse%20procureur%2016nov07.pdf](http://www.ecchr.de/index.php/rumsfeld-590.html?file=tl_files/Dokumente/Universelle%20Justiz/reponse%20procureur%2016nov07.pdf) (last visited 16 March 2015).

<sup>49</sup> *Federal Public Prosecutor's Criminal Charge Against Jiang Zemin and Others*, Decision's Notice on 24 June 2005, available at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de> (last visited 16 March 2015).

<sup>50</sup> I. Wuerth, 'Pinochet's Legacy Reassessed', 106 *American Journal of International Law* (2012), 731, 748 [Wuerth, Pinochet's Legacy]; China ratified the *UN Convention Against Torture* in 1988, the U.S. in 1994. The approach in both cases may be regarded as a mere breach of a treaty obligation. Yet since an exception to immunity is not explicitly defined in the convention, there is some evidence to interpret the decisions as an expression of an opposing legal conviction.

ILC's first Special Rapporteur regarding immunity of State officials reinforced the above mentioned uncertainties. Beyond the immunity exceptions *ratione loci*, the Rapporteur ascertains: "[The] Pinochet Case [...] has not led to the establishment of homogenous court practice. In this respect it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law [...]"<sup>51</sup> These findings were criticized as too conservative by both members of the ILC<sup>52</sup> and several other scholars.<sup>53</sup> However, the national representatives' comments in the Sixth Committee of the General Assembly mirror this inconsistent picture<sup>54</sup> and there are recurring scholarly voices that judge immunity exceptions in cases of grave violations of human rights critically or that doubt the legal validity of these exceptions.<sup>55</sup>

<sup>51</sup> International Law Commission, UN Doc A/CN.4/631, *supra* note 39, para. 90. See also Wuerth, 'Pinochet's Legacy', *supra* note 50, 732; already in 2002 C. Tangermann, *Die völkerrechtliche Immunität von Staatsoberhäuptern* (2001), esp. 224. See also D. L. Rothe, 'Shedding the Blanket of Immunity: A Commentary on the Global Principle of Ending Impunity, Realpolitik, and Legal Precedent', 53 *Crime, Law and Social Change* (2010), 397, 409.

<sup>52</sup> International Law Commission, *Report on the Work of its Sixty-Third Session*, UN Doc A/66/10, para. 121.

<sup>53</sup> E.g. C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in M. Bergsmo & L. Yan (eds), *State Sovereignty and International Criminal Law* (2012), 223, 245.

<sup>54</sup> Sceptic about or rejecting immunity exceptions in cases of severe human rights abuses, see UN Doc A/C.6/66/SR.18 (24 October 2011), para. 52 (Mexico); UN Doc A/C.6/66/SR.19 (25 October 2011), para. 43 (Niger) & para. 56 (Hungary); UN Doc A/C.6/66/SR.24 (28 October 2011), para. 72 (Indonesia); UN Doc A/C.6/66/SR.26 (1 November 2011), para. 14 (Switzerland), paras 44 & 47 (Thailand) & para. 85 (very explicit Germany); UN Doc A/C.6/66/SR.27 (2 November 2011), para. 10 (China), para. 23 (Sri Lanka), para. 38 (Belarus), para. 54 (Cuba) & para. 66 (Russia); UN Doc A/C.6/66/SR.28 (4 November 2011), para. 1 (Australia), para. 23 (Israel), para. 30 (Singapore), para. 45 (Algeria) & para. 51 (Kenya); open or in favour, partially *de lege ferenda*: UN Doc A/C.6/66/SR.26 (1 November 2011), paras 5-8 (Norway), paras 30-36 (Greece), para. 39 (Italy), para. 58 (Peru), para. 70 (Belgium) & para. 77 (Austria); UN Doc A/C.6/66/SR.27 (2 November 2011), para. 33 (Spain), para. 45 (Iran), paras 70 & 73 (Portugal), para. 79 (India), para. 86 (New Zealand) & para. 91 (USA); UN Doc A/C.6/66/SR.28 (4 November 2011), paras 10-11 (UK), para. 26 (South Korea), para. 34 (Japan), para. 57 (the Netherlands) & para. 66 (Rumania).

<sup>55</sup> B. B. Jia, 'The Immunity of State Officials for International Crimes Revisited', 10 *Journal of International Criminal Justice* (2012), 1303, 1320-1321; Wuerth, 'Pinochet's Legacy', *supra* note 50; I. Wuerth, 'Foreign Official Immunity: Invocation, Purpose, Exceptions', 23 *Schweizerische Zeitung für internationales und europäisches Recht* (2013), 207, 219 [Wuerth, 'Foreign Official Immunity']; emphasizing regional differences: P. Webb, 'Regional Challenges to the Law of State Immunity', *European Society of International*

At least, in the summer 2012, the Federal Criminal Court of Switzerland established in a decision regarding the opening of a criminal proceeding against the former Algerian defence minister Kahled Nezzar that he could not raise a plea of immunity *ratione materiae* for the prosecution of war crimes and torture, which took place between 1992 and 1993 and which he allegedly committed within his official capacity.<sup>56</sup> In the same year, the South African High Court decided in the so called *Torture Docket Case*, a proceeding to force criminal prosecution, that the immunity *ratione personae* of the State officials of Zimbabwe did not impede the initiation of a criminal proceeding against the accused pursuant to the *South African Act on the Implementation of the Rome Statute of the International Criminal Court*.<sup>57</sup> Moreover, in 2014 the High Court of Justice held that a son of the King of Bahrain in his role as Commander of the Royal Guard did not enjoy immunity *ratione materiae* from criminal proceedings in relation to the crime of torture because the UK and Bahrain are both parties to the 1984 *UN Convention Against Torture*.<sup>58</sup> The Court applied the rationale of the *Pinochet Case* to an acting State official.

### C. Decentralized Mechanisms of Law-Making

At first sight, the findings on the pace of the legal development are sobering in spite of a few new court decisions; this leads to a need for explanation. A prominent reason lies within the decentralized law-making mechanisms of public international law. Initiatives towards legal development concerning immunity have always emanated from national courts, not from the executive branch which is normally the driving force in public international law. Yet, court decisions have not generated a uniform State practice because its formation is hampered by States' perceived self-interests and reciprocity. Both of these reasons will remain influential as long as public international law lacks centralized mechanism of law-making as well as obligatory enforcement

*Law Conference Paper Series*, No. 6/2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193750](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193750) (last visited 16 March 2015), 6-7.

<sup>56</sup> Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, para. 5.4.3. Algeria ratified the *UN Convention Against Torture* in 1989.

<sup>57</sup> South Africa: High Court, *Southern African Litigation Centre v. National Director of Public Prosecutions*, *supra* note 1. Zimbabwe is not a member State of the *UN Convention Against Torture*.

<sup>58</sup> UK: *FF v Director of Public Prosecutions*, High Court of Justice Queen's Bench Division Divisional Court, (2014) EWHC 3419 (Admin).

mechanism.<sup>59</sup> Although legal development initiatives on immunity exceptions are a consequence of transnational policy strategies by non-governmental actors, these policies rely on traditional means of implementation; thus, the State's overall legal position remains the decisive part of the legal process.

## I. States' Self-Interests and Reciprocity

Political science theories of international relations evidence that States are prepared to legally limit their actions, if it serves their self-interests and seem beneficial if other States also subscribe to a certain norm.<sup>60</sup> Reciprocity, i.e. States' mutual interest in the law making process, is an essential element of legal development. A process of legal assertion, consent, emulation, or rejection guarantees that developed norms are based on actual States' consensus. The more States' self-interests and reciprocity expectations are involved, the more clearly a norm can surface.<sup>61</sup>

These observations explain the reasons why States indeed accepted the change from absolute to restrictive immunity;<sup>62</sup> however, do not seem to be ready to consent to immunity exceptions with regard to grave violations of human rights. The introduction of the legal concept *acta iure gestionis* corresponded to importing nations' economic interests. For instance, the first case regarding restrictive immunity in 1879 dealt with a Peruvian ship in the port of Ostend, which had Guano as cargo to be imported into Belgium.<sup>63</sup> States, such as Belgium, recognized early on the necessity to give individuals the opportunity, as a part

<sup>59</sup> Cf. B. Simma, 'Reciprocity', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 651.

<sup>60</sup> Theories which put emphasis on States' self-interest are assigned to realism and in new varieties the rational choice theory; on the one hand for instance: F. A. Boyle, 'The Irrelevance of International Law', 10 *California Western International Law Journal* (1980), 193, 198; J. Grieco, 'Anarchy and the Limits of Cooperation: A Realistic Critique of the Newest Liberal Institutionalism', 42 *International Organizations Law Review* (1988), 485, 488; on the other hand, among others: J. Goldsmith & E. Posner, *The Limits of International Law* (2005); E. Posner, 'Do States Have a Moral Obligation to Obey International Law?', 55 *Stanford Law Review* (2003), 1901, 1917.

<sup>61</sup> J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments', 16 *European Journal of International Law* (2005), 213, 235-236; Kleinlein, *supra* note 3, 500-501.

<sup>62</sup> J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), 20; X. Yang, *State Immunity in International Law* (2012), 22.

<sup>63</sup> E. Suy, 'Immunity of States before Belgian Courts and Tribunals', 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967), 660, 665-666.

of the fairness imperative, to argue before courts civil law disputes with States.<sup>64</sup> The more a State's overseas trade partners only granted restrictive immunity, the more likely that the State would apply the concept of restrictive immunity itself. Otherwise, the maintenance of the doctrine of absolute immunity would have only protected foreign States. Still, large export nations denied for a significant amount of time the introduction of restrictive immunity.<sup>65</sup> Hence, the United Kingdom only recognized the restrictive character of immunity during the seventies of the 20th century.<sup>66</sup>

In contrast, exceptions to immunity in cases of grave violations of human rights are not related to States' self-interests, but require the acceptance of community values.<sup>67</sup> Although common interests of non-reciprocal nature may become relevant in the process of law-making, it will be much more difficult to realize such values.<sup>68</sup> In addition, the concept of negative reciprocity is rather dominant, especially in cases of immunity of State officials including diplomatic immunity due to the vulnerable position of these State officials abroad. Therefore, the U.S. State Department has affirmed repeatedly regarding the claim for a *ius cogens* based immunity exception in proceedings before national courts: “[t]he recognition of such an exception could prompt reciprocal limitations by foreign jurisdictions exposing U.S. state officials to suit abroad on that basis.”<sup>69</sup> The U.S. worries that by altering their own judicial practice, it will contribute to the

<sup>64</sup> Fox & Webb, *State Immunity* (2013), *supra* note 23, 36, citing *The Charkieh* (1873), LR 4 A&E 59, 97.

<sup>65</sup> P.-H. Verdier & E. Voeten, ‘How Does Customary International Law Change? The Case of State Immunity’ (24 January 2013), available at <http://ssrn.com/abstract=2106627> (last visited 8 November 2014), 20; UK: *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 State and some States attempted to avoid this disadvantage by including in contracts an agreement not to assert State immunity.”

<sup>66</sup> Fox & Webb, *State Immunity* (2013), *supra* note 23, 139-143 & 165.

<sup>67</sup> For an interpretation of the *Pinochet Case* as a conflict between States values and Community values, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), 270-284.

<sup>68</sup> Kleinlein, *supra* note 3, 498 & 501.

<sup>69</sup> Court of Appeals, *Matar and Others v. Dichter*, Brief for the United States of America as Amicus Curiae in Support of Affirmance, (2007) 2nd Cir. Docket No. 07-2579-cv, available at <http://ccrjustice.org/files/Matar%20v%20%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf> (last visited 16 March 2015), 4. See also J. B. Bellingier, ‘The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities’, 44 *Vanderbilt Journal of Transnational Law* (2011), 819, 834.

creation of a new customary international law rule that would lead to their State officials being subject to similar proceedings all over the world. In this respect, there is a not entirely unfounded apprehension that these proceedings may be conducted in an abusive manner.<sup>70</sup>

## II. Courts' Proactive Role in a Globalized World

The creation of customary international law rules through judicial practice may be a means to overcome a State's opposition to legal development since judicial reliance on customary international law allows for the State's explicit consent to become less important. At least in democratic constitutional States court networks may, in horizontal and vertical dialogs, expedite the development of customary international law norms even against the expressed intention of the executive branch due to principle of judicial independence.<sup>71</sup>

In American law, the question, to what extent courts should give deference to the executive branch's assessment of immunity has been disputed.<sup>72</sup> In the *Samantar* decision, the U.S. Supreme Court in 2010 concluded that Common Law not the *Foreign Sovereign Immunities Act* of 1976 governs State officials' immunity due to which courts had to take into account the executive's views on immunity.<sup>73</sup> The extensive consequences of the decision were countered by the follow up decision of the Court of Appeals in *Yousuf v. Samantar* in November 2012. The Court of Appeals adopted an absolute deference to the State Department's determination only with regard to heads of States' immunity and affirmed a court's extensive right to examine State officials' immunity.<sup>74</sup> On

<sup>70</sup> Bellinger, *supra* note 69, 834; comparable reflections already played a role during the change from absolute to relative immunity, see Verdier & Voeten, *supra* note 65, 15.

<sup>71</sup> Cf. Ladeur, *supra* note 4, 269.

<sup>72</sup> J. Elsea, 'Samantar v. Yousef, The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials', *CRS Report for Congress* (2012), 11-12; in favour of a competence for the State Department: Bellinger, *supra* note 69, 827; H. Koh, 'Foreign Official Immunity after Samantar: A United States Government Perspective', 44 *Vanderbilt Journal of Transnational Law* (2011), 1141; opposed to it: P. B. Rutledge, 'Samantar and Executive Power', 44 *Vanderbilt Journal of Transnational Law* (2011), 885; I. Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department', 51 *Virginia Journal of International Law* (2011), 915.

<sup>73</sup> Supreme Court, *Samantar v. Yousuf*, (2010) 130 Ct. 2278.

<sup>74</sup> U.S.: *Yousef v. Samantar*, (2012) 699 F.3d 763 4th Cir. Court of Appeals, 772-773 [Court of Appeals, *Yousef v. Samantar*]; for a follow-up: E. Smith, 'Immunity Games: How the State Department Has Provided Courts With a Post-Samantar Framework for Determining Foreign Official Immunity', 67 *Vanderbilt Law Review* (2014), 569, 569-608.

this basis, it denied Samantar immunity due to violations of norms with *ius cogens* character.<sup>75</sup> Moreover, in the case of the former Algerian defence minister, Kahled Nezzar, the Swiss Federal Criminal Court expressly deviated from the opinion of the Swiss Foreign Affairs Department, which had confirmed the former defence minister's immunity from court proceedings.<sup>76</sup>

The Executive may, however, try to stop the above mentioned court dialogues by prompting an international court's decision. Likewise, the executive branch – at least in a parliamentary democracy – may also hold back legal development through instigating legislation. The ICJ can probably not assert the formation of a customary international law rule, if there is a lack of corresponding State practice in the legislative field.<sup>77</sup>

Through its decision in the *Jurisdictional Immunities Case*, the ICJ has probably interrupted or at least delayed, until further notice, a development in State immunity.<sup>78</sup> Numerous courts have already relied on its findings. Thus, the European Court of Human Rights held in its 2014 judgment *Jones v. the United Kingdom* that the ICJ judgment is “[...] authoritative as regards the content of customary international law [...]” and that therefore the UK had not violated the Convention by granting immunity to Saudi Arabia in civil claims for torture.<sup>79</sup> In the same year, the Canadian Supreme Court rejected the proposition that an exception to State immunity in civil proceedings for acts of

<sup>75</sup> Court of Appeals, *Yousef v. Samantar*, *supra* note 74, 777. However, the State Department, itself, denied the immunity of the accused, because the U.S. had not recognized the Somalia Government at that time and Samantar had become a U.S.-citizen. The accused once again filed a petition for writ of *certiorari* before the Supreme Court on 4 March 2013, available at <http://cja.org/downloads/Samantar%20Certiorari%20Petition%20.pdf> (last visited 5 August 2015) and on 5 March 2014, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/Samantar-v-Yousuf-Cert-Petition-FINAL.pdf> (last visited 5 August 2015). The Supreme Court denied both petitions.

<sup>76</sup> Federal Criminal Court of Switzerland, BB. 2011.140, *supra* note 1, E.

<sup>77</sup> R. Higgins, ‘Equality of States and Immunity from Suit: A Complex Relationship’, 43 *Netherlands Yearbook of International Law* (2013), 129, 145 [Higgins, Equality of States].

<sup>78</sup> Krajewski & Singer, *supra* note 9, 29; Payandeh, *supra* note 9, 954. See however European Court of Human Rights: *Jones v. the United Kingdom*, Judgment, Application Nos 34356/06 40528/06 (2014), para. 215 [European Court of Human Rights, *Jones v the United Kingdom*]: “However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.”

<sup>79</sup> ECtHR, *Jones v. the United Kingdom*, *supra* note 78, para. 198.

torture existed as a rule of customary international law based, *inter alia*, on an analysis of the ICJ decision.<sup>80</sup>

However, the political will to push for a more progressive development of the law remains. While the Italian legislation aimed to comply with the ICJ decision,<sup>81</sup> the Italian Constitutional Court declared this legislation unconstitutional, in particular insofar as it obliged Italian courts to follow the ICJ's decision.<sup>82</sup> According to the Constitutional Court, such a duty would violate one of the supreme principles of the Italian Constitution, namely the judicial protection of fundamental rights. Where immunity protects acts of foreign States which constitute most serious human rights violations a complete bar from judicial protection cannot be justified under the Italian Constitution.<sup>83</sup> The Court applied its jurisprudence on “[...] ‘counter-limits’ [*controlimiti*] to the entry of European Union law [...]” into the Italian legal order to general international law and stressed that “[...] the fundamental principles of the constitutional order and inalienable human rights constitute a [...] limit to the introduction (...) of generally recognized norms of international law [...]”.<sup>84</sup>

In its self-perception the judgment pressures for a progressive evolution of international law<sup>85</sup> and aligns itself with the *Kadi* decision of the European Court of Justice<sup>86</sup> in that it aims to protect “constitutional principles” against conflicting international obligations.<sup>87</sup> However, while the *Kadi* decision is directed against a political organ whose nearly unfettered discretion is hardly controlled by international courts the decision of the Italian Constitutional Court

<sup>80</sup> Canada: Supreme Court of Canada, *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 S.C.R. 176, paras 61, 103-108; on appeal from Quebec Court of Appeal, *Iran c. Hashemi*, *supra* note 1. See also Ontario Court of Appeal, *Steen v Iran*, *supra* note 1.

<sup>81</sup> Art. 3, Legge 14.01.2013 n° 5, G.U. 29.01.2013: “Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonche’ norme di adeguamento all’ordinamento interno”, available at <http://www.altalex.com/index.php?idnot=61325> (last visited 15 March 2015). See also Italy: *Frasca v Germany*, *supra* note 1; *Criminal Proceedings v. Albers*, *supra* note 1; *Germany v. De Guglielmi*, *supra* note 1.

<sup>82</sup> Italy: Constitutional Court, *Sentenza* No. 238 (2014) [Constitutional Court, *Sentenza* No. 238].

<sup>83</sup> *Ibid.*, para. 5.

<sup>84</sup> *Ibid.*, para. 3.2.

<sup>85</sup> *Ibid.*, para. 3.3: “At the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law itself.” (translation by the author).

<sup>86</sup> *Ibid.*, para. 3.4.

<sup>87</sup> European Court of Justice: *Kadi and Al Barakaat*, Joint Cases C-402/05 P & C-415/05 P, [2008] ECR I-6351, para. 285.

second-guesses a judgment of the globally most authoritative legal institution and violates Art. 94 para. 1 *UN Charta*. This tug o'war around the exceptions to State immunity is representative for the dangers which might arise when national courts are the main driving force behind a progressive development of international law: challenging the decisions of international (judicial) organs can be detrimental to the normativity of the international legal order, in particular where it questions the authority of the UN's principal judicial organ. Likewise, it endangers universality and multilateralism as important foundations of the international legal order in favour of unilateralism: "It gives priority to one (state's) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court."<sup>88</sup> In the long run recurring precedences of national disobedience might be as dangerous for the normative force of international human rights law as they are at present detrimental for general international law.

#### D. Rationale Behind Immunities in a Globalized World

If legal development on exceptions to immunity to end impunity may only be attained in a slow and selective manner, then the question as to whether immunity under the conditions of a post-modern globalized world may at all be justifiable becomes more manifest. On what rationale is immunity based?

Generally, the protection of State sovereignty and the principle of equal sovereignty of States are known as the sources of State immunity,<sup>89</sup> while immunity of State officials and diplomatic immunity are justified by safeguarding functionality of these organs.<sup>90</sup> In addition, pursuant paragraphs 3 and 4 of the *VCDR*'s preamble, the protection of international relations is also cited as the basis for diplomatic immunity. The immunity of international organizations does not only serve to secure the performance of their functions, but also to

<sup>88</sup> A. Peters, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL: Talk!* (22 December 2014), available at <http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/> (last visited 16 June 2015).

<sup>89</sup> ICJ, *Jurisdictional Immunities of the State*, *supra* note 1, para. 57; Arnould, *Völkerrecht*, *supra* note 35, 133 *et seq.*; Rossi, *supra* note 10, 50. Cf. Peters, *Völkerrecht*, *supra* note 22, 173; differentiating B. Hess, *Staatenimmunität bei Distanzdelikten* (1992), 306-308.

<sup>90</sup> Seidenberger, *supra* note 27, 22-23; R. van Alebeek, 'Immunity, Diplomatic', in Wolfrum (ed.), *supra* note 59, Vol. V (2012), 98, 99; Peters, *Völkerrecht*, *supra* note 22, 173.

guarantee their autonomy.<sup>91</sup> However, should one mainly anchor the rationale of State immunity in the protection of sovereignty, then the main aims served by immunity under conditions of globalization would be concealed. Rather, a functional, comprehensive and overarching approach is required since the principal congruence between these different forms of immunity is that both, immunity of State officials as well as diplomatic immunity, are ultimately manifestations of State immunity.<sup>92</sup> Comparability of State immunity and immunity of international organizations is given due to that in both cases the exercise of public authority<sup>93</sup> is guaranteed through immunity.<sup>94</sup>

Thus, the rationale of immunity lays in its functional necessity. Accordingly, immunity allows for effective performance of public activities in international relations. Additionally, immunity serves as a rule on the exercise of jurisdiction in a decentralized multi-level system where competences are divided between different levels and different actors. Consequently, immunity also guarantees legal security, peaceful international relations and – at least for the time being – the legitimate interests of democratic constitutional States.

## I. Effective Performance of Public Functions Within International Relations

The meaning of immunity as a means to perform public functions in international relations is becoming especially perspicuous under the conditions

<sup>91</sup> A. Reinisch, *International Organizations Before National Courts* (2000), 233 [Reinisch, International Organizations].

<sup>92</sup> Fox & Webb, *State Immunity* (2013), *supra* note 23, 131-133 & 135; M. Lüke, *supra* note 30, 216 & 218; for a clear distinction between State and diplomatic immunity, M. Kohen, 'The Distinction between State Immunity and Diplomatic Immunity', in G. Hafner, M. Kohen & S. Breau (eds), *State Practice regarding State Immunities* (2006), 48; for a clear distinction between State immunity and immunity of State officials, G. Boggero, 'Without State Immunity, No (Individual) Responsibility', 5 *Goettingen Journal of International Law* (2013) 2, 375, 388.

<sup>93</sup> For a classification of international organizations activities as an exercise of international public authority: A. v. Bogdandy, P. Dann & M. Goldmann, 'Völkerrecht als öffentliches Recht: Konturen eines rechtlichen Rahmens für Global Governance', 49 *Der Staat* (2010), 23.

<sup>94</sup> For the comparability T. Neumann & A. Peters, 'Switzerland', in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013), 241, 247-248 [Reinisch, International Organizations in Domestic Courts]; A. Peters, 'Die funktionale Immunität internationaler Organisationen und die Rechtsweggarantie', 21 *Revue suisse de droit international et européen* (2011) 3, 397, 415-416 [Peters, Funktionale Immunität]; Reinisch, *International Organizations*, *supra* note 91, 232.

of globalization. Through pluralization of actors and an increase of their transnational public activities, a tendency has been generated due to which the circle of the beneficiaries of immunity has been expanded. This is shown by two new legal developments, namely the ascertainment of rights of special missions under customary international law and the granting of immunity to global public-private partnerships.

### 1. Special Missions as Functional Equivalents

During special missions, public representatives are sent for a limited period of time to another State with the consent of the latter in order to attend to specific questions or perform specific functions.<sup>95</sup> Scholars contest to what extent customary international law rules apply in addition to the *Convention on Special Missions* from 1969.<sup>96</sup> Yet, in light of a uniform State practice there are by now a few customary international law rules that may be identified.<sup>97</sup>

As far as special missions owe their renewed importance to the increasing plurality of foreign-policy actors who fulfil public functions in a transnational context, a wider circle of immunity beneficiaries may be discerned in customary

<sup>95</sup> *Convention on Special Missions*, 16 December 1969, Art. 1, 1400 UNTS 231; Doehring, *Völkerrecht*, *supra* note 25, 225-226.

<sup>96</sup> Opposing view K. Ipsen, *Völkerrecht*, 5th ed. (2004), 596; N. Kalb, 'Immunities, Special Missions', in Wolfrum (ed.), *supra* note 59, 95; U.S.: *Sissoko v. USA*, United States District Court, Southern District of Florida, Order, 121 ILR 600.

<sup>97</sup> Akande & Shah, *supra* note 42, 822; Bellinger, *supra* note 69, 832; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 414; Foakes, *supra* note 31, 11-12; Fox & Webb, *State Immunity* (2013), *supra* note 23, 562; C. Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 380, 390-392; M. Wood, 'The Immunity of Official Visitors', 16 *Max Planck Yearbook of United Nations Law* (2012), 35, 65; from State practice: UK: *Re Bo Xilai*, Bow Street Magistrates' Court, (2005) 128 ILR 713; *Re Ehud Barak*, District Court, (29 September 2009); *Re Gorbachev*, City of Westminster Magistrates' Court, Judge Wickham, Deputy Senior District Judge, (30 March 2011), unreported, printed in 82 *British Yearbook of International Law* (2012), 570 [City of Westminster Magistrates' Court, *Re Gorbachev*]; High Court, *Khurts Bat v. Investigating Judge of the German Federal Court*, *supra* note 36. See also Written Ministerial Statement by Mr Henry Bellingham (Under-Secretary of State for Foreign Affairs), HC Deb., 13 December 2010, Vol. 520, Column 72 WS; U.S.: *Weixum v. Xilai*, District Court, (2008) 568 F.Supp.2d 35 [District Court, *Weixum v. Xilai*].

international law.<sup>98</sup> A requirement is that the visitor represents the State.<sup>99</sup> Indeed a high ranking visitor must be involved, yet, they do not have to be government officials. For instance, a head of State's consultant may qualify for special mission immunity status. The Dutch Advisory Committee on Issues of Public International Law explicitly confirmed this status in an expert report in 2011.<sup>100</sup> The individuals do not even have to have a similar rank as a member of the government.<sup>101</sup> In fact, a chief of police may also be a beneficiary as part of a special mission.<sup>102</sup> The Dutch report presented another case of application for special missions: when within the frame of a non-international armed conflict, armed groups and government representatives meet for peace negotiations in third States.<sup>103</sup> An example proving the need for such an application stems from autumn 2012 when representatives of the Colombian rebel organization FARC requested immunity from criminal proceedings in Norway in order to conduct peace negotiations with representatives of the Colombian Government there.<sup>104</sup>

At the same time, special missions have become a functional equivalent to immunities of State officials in order to diminish legal uncertainties and allow for the smooth functioning of international relations.<sup>105</sup> Accordingly, a customary international law rule has crystallized that members of special

<sup>98</sup> Wood, *supra* note 97, 51. Regarding previous cases see U.S.: *Chong Boon Kim v. Kim Yong Shik and David Kim*, 1st Cir. Circuit Court (State of Hawaii), Judgment of 9 September 1963, reproduced in 58 *American Journal of International Law* (1964), 186-187 (regarding a Korean Foreign Secretary); *Kilroy v. Windsor (Prince Charles, the Prince of Wales) and Others*, Northern District of Ohio, Eastern Division, Civil Action No C-78-291, 7 December 1978, *International Law Report* 1990, 605-607; Germany: *Tabatabai*, BGHSt 32, 275.

<sup>99</sup> Cf. UK: The Secretary of State for Foreign and Commonwealth Affairs (Mr William Hague), 'Special Mission Immunity', Daily Hansard - Written Ministerial Statement, 4 March 2013, Column 55WS [UK, Written Ministerial Statement].

<sup>100</sup> Advisory Committee on Issues of Public International Law, 'Advisory Report on the Immunity of Foreign State Officials', Advisory Report No. 20 (2011) 34 [Advisory Committee on Issues of Public International Law].

<sup>101</sup> The Netherlands: The Hague District Court (Rechtbank), Case LJN: 380820 / KG ZA 10-1453 (24 November 2010), available at <http://jure.nl/ECLI:NL:RBSGR:2010:BO6114> (last visited 16 March 2015); Wood, *supra* note 97, 68.

<sup>102</sup> P. Smolar, 'La justice française annule la procédure sur les disparus du Beach de Brazzaville', *Le Monde* (24 November 2004).

<sup>103</sup> Advisory Committee on Issues of Public International Law, *supra* note 100, 34-35.

<sup>104</sup> 'FARC Demands Immunity From Arrest in Norway', *The Local* (Norway) (3 October 2012).

<sup>105</sup> See already in Doehring, *Völkerrecht*, *supra* note 25, 292.

missions, with approval of the receiving State<sup>106</sup>, shall enjoy complete immunity from criminal proceedings for the duration of a specific official visit,<sup>107</sup> even if the accused is suspected to have committed grave violations of human rights.<sup>108</sup> The Israeli opposition leader Tzipi Livni was repeatedly treated accordingly in visits to London as member of a special mission. As a consequence, courts have refused applications for an arrest warrant on the grounds of commitment of war crimes.<sup>109</sup> Other cases concerned the Israeli military chief of staff as well as a retired major general.<sup>110</sup> On a similar basis, court proceedings were suspended in France against the detained Congolese chief of police N'Dengue on account of crimes against humanity.<sup>111</sup> In a civil law case of Falun Gong supporters against the acting Chinese Trade Secretary Bo Xilai, a U.S. court rejected a claim due to immunity of special missions in accordance with a corresponding submission by the State Department.<sup>112</sup>

## 2. Granting of Immunity to Global Public-Private Partnerships

The granting of immunity to global public-private partnerships shows that immunity is an essential means to enable globalization. Since the midst of the last decade, the UN started to fulfil certain functions through establishing

<sup>106</sup> UK, Written Ministerial Statement, *supra* note 99, Column 56WS; High Court, *Khurts Bat v. Investigating Judge of the German Federal Court*, *supra* note 36, paras 37-40; A. Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State', *62 International & Comparative Law Quarterly* (2013) 1, 193, 197.

<sup>107</sup> *Convention on Special Missions*, *supra* note 95, Art. 31; Foakes, *supra* note 31, 11; Wood, *supra* note 97, 67.

<sup>108</sup> Advisory Committee on Issues of Public International Law, *supra* note 100, 31; Akande & Shah, *supra* note 42, 823. See also ICJ, *Arrest Warrant*, Counter-Memorial of the Kingdom of Belgium on 28 September 2001, paras 1.11–1.12 & 3.2.32, available at [www.icj-cij.org/docket/files/121/8304.pdf](http://www.icj-cij.org/docket/files/121/8304.pdf) (last visited 16 March 2015); City of Westminster Magistrates' Court, *Re Gorbachev*, *supra* note 97, 570.

<sup>109</sup> O. Bowcott, 'Tzipi Livni spared war crime arrest threat', *The Guardian* (6 October 2011); H. Sherwood, 'Israeli Minister Tzipi Livni Given Diplomatic Immunity for UK Visit', *The Guardian* (13 May 2014).

<sup>110</sup> *Ibid.*

<sup>111</sup> Smolar, *supra* note 102; Wood, *supra* note 97, 77-78.

<sup>112</sup> District Court, *Weixum v. Xilai*, *supra* note 97. See also District Court (*Weixum v. Xilai*), Suggestion of Immunity and Statement of Interest of the United States (24 July 2006), available at <http://www.state.gov/documents/organization/98832.pdf> (last visited 16 March 2015).

global public-private partnerships.<sup>113</sup> A pertinent example is the Global Fund to Fight Aids [Global Fund] – a charitable foundation pursuant to Art. 80 *et seq.* of the *Swiss Civil Code*.<sup>114</sup> The Foundation funds the battle against the illnesses AIDS, malaria and tuberculosis.<sup>115</sup> This kind of international privatization aims at providing more flexible instruments as compared to traditional interstate organizations which are considered to be slow and heavy-handed. Hence, in the founding process in 2001, the status as a foundation was deliberately chosen because it seemed faster and more effective than the founding of an international organization.<sup>116</sup> After the Global Fund was initially joined to the WHO, a claim to its own immunity already seemed indispensable in 2003 after organizational detachment. Immunity was seen as a necessary prerequisite for effectively performing the Fund's functions.<sup>117</sup> According to the Global Fund's evaluation reports immunity from jurisdiction and execution should especially serve to protect the organization's financial activities<sup>118</sup> as well as the employees' personal security and performance of functions during trips outside Switzerland. Immunity should also guarantee the Global Fund's autonomy against potentially abusive behaviour in implementer countries.<sup>119</sup> Finally, a competitive disadvantage was seen in relation to other organizations regarding employee

<sup>113</sup> B. Hamm (ed.), *Public-Private Partnership und der Global Compact der Vereinten Nationen* (2002). See also from a legal perspective L. Clarke, *Public-Private Partnerships and Responsibility under International Law* (2014); L. Clarke, 'The Exercise of Public Power over Global Health Through Public-Private Partnerships and the Question of Responsibility under International Law', 105 *American Society of International Law: Proceedings of the Annual Meeting* (2011), 96; L. Clarke, 'Global Health Public-Private Partnership: Better Protecting Against Disease but Creatin a Gap in Responsibility Under International Law', 20 *Finish Yearbook of International Law* (2009), 349-372.

<sup>114</sup> The entry in the electronic foundation directory is available at [http://www.edi.admin.ch/esv/05263/index.html?webgrab\\_path=aHR0cDovL2VzdjIwMDAuZW RpLmFkbWluLmNoL2QvZW50cnkuYXNwP0lkPTI1MDg%3D&lang=de](http://www.edi.admin.ch/esv/05263/index.html?webgrab_path=aHR0cDovL2VzdjIwMDAuZW RpLmFkbWluLmNoL2QvZW50cnkuYXNwP0lkPTI1MDg%3D&lang=de) (last visited 16 March 2015).

<sup>115</sup> The Global Fund's By Laws, Art. 2, as amended 21 November 2011, available at <http://www.theglobalfund.org/en/board/> (last visited 17 March 2015).

<sup>116</sup> The Global Fund, Fourth Board Meeting (29 to 31 January 2003), *Report on Legal Status Options for the Global Fund*, Doc GF/B4/12, 2, available at <http://www.theglobalfund.org/en/board/meetings/fourth/> (last visited 17 March 2015) [The Global Fund, Legal Status].

<sup>117</sup> *Ibid.*, 3.

<sup>118</sup> The Global Fund, Thirty-Second Board Meeting (20 to 21 November 2014), *Privileges and Immunities of the Global Fund*, Doc GF/B32/19, paras 14 *et seq.* [The Global Fund, Immunities].

<sup>119</sup> *Ibid.*, paras 16, 19-22; The Global Fund, *Legal Status*, *supra* note 116, 6.

recruitment, if immunity could not be ensured.<sup>120</sup> Switzerland concluded a headquarters agreement with the Global Fund in 2004; Art. 5 of the headquarters agreement grants jurisdictional immunity before Swiss courts.<sup>121</sup> The lack of immunity in other States was still considered as a significant disadvantage for the Global Fund's work;<sup>122</sup> therefore, the Global Fund has concluded in the meantime similar agreements<sup>123</sup> for its missions with Ethiopia, Georgia, Ghana, Moldavia, Montenegro, Rwanda, Swaziland and Uganda.<sup>124</sup>

The conclusion of the agreement between the Global Fund and Switzerland has been reflected in a new host State law.<sup>125</sup> According to Art. 2 (1) (b), the Federal Government may also grant immunity to “quasi public organizations”, which must be differentiated from interstate organizations and which should encompass public-private partnerships.<sup>126</sup> Pursuant Art. 8 it is required that the organization's members mainly be States, public institutions or be entities which fulfil public functions, that it be structured similarly to interstate organizations, as well as that it be active in two or more States. Similarly, the U.S. has accorded immunities to the Global Fund in 2006<sup>127</sup> as well as

<sup>120</sup> *Ibid.*, 4-5. See also D. Aziz, ‘Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria’, *Institute of International Law and Justice Emerging Scholars Papers* 2009/14, 26.

<sup>121</sup> *Abkommen zwischen dem Schweizerischen Bundesrat und dem Globalen Fonds zur Bekämpfung von Aids, Tuberkulose und Malaria zur Regelung des rechtlichen Statuts des Globalen Fonds in der Schweiz* [Agreement Between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in View of Determining the Legal Status of the Global Fund in Switzerland], 13 December 2004, SR 0.192.122.818.11; English version available at [http://www.theglobalfund.org/documents/board/08/BM08\\_07Annex4AAgreement\\_Annex\\_en](http://www.theglobalfund.org/documents/board/08/BM08_07Annex4AAgreement_Annex_en) (last visited 17 March 2015).

<sup>122</sup> Aziz, *supra* note 120, 26.

<sup>123</sup> The Global Fund, Twentieth Board Meeting (9 to 11 November 2009), *Annex A: Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria*, GF/B20/4 Attachment 1, available at <http://www.theglobalfund.org/en/board/meetings/twentieth/> (last visited 17 March 2015).

<sup>124</sup> The Global Fund, *Immunities*, *supra* note 118, para. 10; G. A. Newton, ‘The Global Fund to Fight AIDS, Tuberculosis and Malaria: An Innovation in the Form of International Organization’, *Istituto di Ricerche sulla Pubblica Amministrazione, Global Administrative Law Working Paper* 2012/3, 6.

<sup>125</sup> *Bundesgesetz über die von der Schweiz als Gaststaat gewährten Vorrechte, Immunitäten und Erleichterungen sowie finanziellen Beiträge* [Federal Law Regarding Privileges, Immunities and Relief as well as Financial Contributions Awarded by Switzerland as Host State], GSG, SR192.12, 22 June 2007, .

<sup>126</sup> Peters, *Völkerrecht*, *supra* note 22, 184 (translation by the author).

<sup>127</sup> *22 U.S. Code Chapter 7*, Subchapter XVIII – Privileges and Immunities of International Organizations, paras 288 & 288f-6.

to the International Union for Conservation of Nature – an NGO composed of governments and civil society members alike.<sup>128</sup> Basically we can observe a kind of international reprivatization. The practical experience of the pertinent institutions has demonstrated that granting immunity is pivotal for effective performance of functions.

## II. A Plea Against the Exercise of Jurisdiction Where Competences Are Divided

Immunity serves as a plea against the exercise of jurisdiction in a decentralized legal system where competences are divided. The ICJ rightly clarified that jurisdictional rules are generally to be distinguished from procedural impediments due to immunity.<sup>129</sup> The determination of general jurisdiction precedes granting of immunity.<sup>130</sup> However, should a court affirm in the next step the plea for immunity, then jurisdiction may no longer be exercised. Thus, immunity fulfils also a function as a rule on the exercise of jurisdiction in a decentralized system where competences are divided. As Fox and Webb formulated: “A plea of State immunity is therefore a signal to the forum court that jurisdiction belongs to another court or method of adjudication.”<sup>131</sup>

This proposition seems acceptable, since granting immunity does not generally lead to the loss of a claim.<sup>132</sup> Likewise, an offender remains criminally responsible.<sup>133</sup> As a rule, there are alternative legal paths or international mechanism available that correspond to each kind of immunity. Claims may be, depending on each case’s details, pleaded before States’ and State officials’ national courts.<sup>134</sup> Criminal and also disciplinary responsibility may also be achieved in a home State. In the case of international crimes, international

<sup>128</sup> *Ibid.*, para. 288f-4.

<sup>129</sup> ICJ, *Arrest Warrant*, *supra* note 31, para. 59: “It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.”

<sup>130</sup> C. Appelbaum, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (2007), 30.

<sup>131</sup> Fox & Webb, *State Immunity* (2013), *supra* note 23, 27.

<sup>132</sup> See also in this regard Regional Labour Court Berlin-Brandenburg, Az. 17 Sa 1468/11, *supra* note 16, para. 29.

<sup>133</sup> Fox & Webb, *State Immunity* (2013), *supra* note 23, 94.

<sup>134</sup> For instance, *Vienna Convention on Diplomatic Relations*, 24 April 1964, Art. 31 (4), 500 UNTS 95.

criminal courts provide an alternative forum.<sup>135</sup> Similarly, depending on the circumstances, courts or committees of international and regional human rights conventions are also available.<sup>136</sup> Furthermore, there are, contingent on the field of law concerned, different public international law instruments available from claims commissions and the exercise of diplomatic protection<sup>137</sup> to special enforcement mechanisms pursuant to the *VCDR*.

## 1. Changes in the Law of Immunity of International Organizations?

The immunity of international organizations also serves as a means to channel the exercise of jurisdiction where competences are divided. This is especially shown by the way employment-related disputes with their staff are handled.<sup>138</sup> Both granting of immunity and the creation of internal administrative tribunals is supposed to ensure legal uniformity and predictability, which would

<sup>135</sup> See for instance the proceedings against Chad's former President, Hissène Habré: 'Human Rights Watch, Senegal: Hissène Habré Court Opens' (8 February 2013), available at <http://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens> (last visited 17 March 2015) [HRW, Habré Court Opens].

<sup>136</sup> For instance, *Edgar Fernando García* (Admissibility), IACHR Petition 12-343, Report No. 91/06; *Case of the Rio Negro Massacres v. Guatemala*, ICtHR, Judgment of 4 September 2012, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_250\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf) (last visited 17 March 2015).

<sup>137</sup> R. O'Keefe, 'Immunity and Human Rights: Heads and Walls, Hearts and Minds', 44 *Vanderbilt Journal of Transnational Law* (2011) 4, 999, 1041.

<sup>138</sup> U.S.: *Mendaro v. The World Bank*, Court of Appeals (D.C. Cir. 1983), 717 F.2d 610: "[The] purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." *Broadbent v. Organization of American States*, Court of Appeals (1980), 628 F.2d 27: "An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations." UN-Memorandum, in Belgium: *Mandelier v. Organisation des Nations Unies*, Brussels Civil Tribunal (11 May 1966), ILR 1972, 446: "[In] civil cases, the uniform practice is to maintain immunity, while offering, in accord with section 29 of the General Convention, alternative means of dispute settlement. In disputes with third parties, the alternative means of dispute settlement offered is usually negotiation, conciliation, mediation and/or arbitration [...]. This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national court systems, but at the same time it eliminates the prospect of impunity, as the United Nations provides the appropriate mechanisms to resolve all complaints of a private law nature."

be at risk, should member States' courts base their decisions on their national law. Otherwise, the organizations' internal employment regulations could run the risk of being fragmented. Hence, different legal protection standards could emerge, depending on the location, for employees of organizations with worldwide operations.<sup>139</sup> Nevertheless, a development may be observed particularly in Europe: in some cases courts deny international organizations' immunity regarding employment-related disputes although this development does not (yet) cover the UN itself.<sup>140</sup>

The changes in the law are based on the case *Waite and Kennedy*<sup>141</sup> before the European Court of Human Rights. Some courts rigorously follow the path set by the decision. Courts in Belgium, France, Italy and apparently Russia<sup>142</sup> refused granting immunity in employment-related disputes, if by not doing so, Art. 6 (1) of the *ECHR* would be violated. Here, the case *Banque africaine de développement v. M.A. Degboe* stands out.<sup>143</sup> The French Court of Cassation denied immunity to an international organization in a dispute regarding the right to terminate an employment contract due to a lack of an alternative legal remedy as required in the *Waite and Kennedy* decision.<sup>144</sup> Also courts in Belgium, Italy and Switzerland scrutinize whether organizations provided an adequate alternative to judicial protection. Thereby, they increase the intensity of judicial review. As a result Belgian and Italian decision have also denied immunity to international organization due to a lack of alternatives to judicial

<sup>139</sup> A. Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', 7 *Chinese Journal of International Law* (2008) 2, 285, 285-286.

<sup>140</sup> J. Wouters & P. Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials', in A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (2010), 77. See however Freedman, *supra* note 12, 242. See on immunity and accountability for UN acts in the light of the dispute over the cholera outbreak in Haiti, P. Lewis, 'Who Pays for the United Nations' Torts? Immunity, Attribution, and "Appropriate Modes of Settlements"', 39 *North Carolina Journal of International Law and Commercial Regulation* (2014) 2, 259.

<sup>141</sup> *Waite and Kennedy v. Germany*, ECtHR Application No. 26083/94, Judgment of 18 February 1999, 15, para. 67.

<sup>142</sup> S. Y. Marochkin, 'The Russian Federation', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 221, 236 *et seq.*

<sup>143</sup> France: *Banque africaine de développement c. M.A. Degboe*, Cour de Cassation (Chambre Social), Case No. 04-41012, 25 January 2005, JDI 2005, 1142; for a high standard of scrutiny see *Illemassene c OCDE*, Cour de Cassation (Chambre Social), Case No. 1804 FS-D, 29 September 2010.

<sup>144</sup> Even further in France: *UNESCO v. Boulois*, Cour d'appel de Paris (14e Ch. A), Rev. arb. 1999, 343, 344-345.

protection.<sup>145</sup> Some Belgian cases are even further reaching, particularly the decision on *Siedler v. Western European Union*. A Brussels court determined that although the WEU indeed had an internal procedure, said procedure did not provide an *adequate* alternative to judicial protection. Thus, Art. 6 (1) *ECHR* and Art. 14 (1) *ICCPR* were infringed and the court denied immunity.<sup>146</sup> Such a broadening of the intensity of judicial review has not yet been observed beyond Belgium.<sup>147</sup>

Some courts outside the Council of Europe member States take increasingly notice of the *Waite and Kennedy* jurisprudence.<sup>148</sup> Thus, in an employment-related dispute against the Northwest Atlantic Fisheries Organization [NAFO] before the Supreme Court of Nova Scotia the plaintiff referred to the ECtHR judgment and the Court refused to accept the organization's immunity defence, *inter alia*, on the basis of Art. 14 *ICCPR*.<sup>149</sup> However, in 2013 the Canadian Supreme Court upheld NAFO's immunity rejecting quite explicitly the requirement of alternative legal remedies:

“The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts [...] it is an ‘inevitable result’ of a grant of immunity that certain parties will be left without legal recourse [...]”<sup>150</sup>

<sup>145</sup> A. Reinisch, ‘Comments on a Decade of Italian Case Law on the Jurisdictional Immunity of International Organizations’, 19 *Italian Yearbook of International Law* (2009), 101, 105-108 [Reinisch, Comments on Italian Case Law]; C. Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’, 7 *International Organization Law Review* (2010) 1, 121, 133.

<sup>146</sup> Belgium: *Siedler c. UEO*, Cour du Travail (Bruxelles), *Journal des Tribunaux* (2004), 25, 617.

<sup>147</sup> Reinisch, ‘Comments on Italian Case Law’, *supra* note 145, 108.

<sup>148</sup> Already in 1983 the Argentine Supreme Court had applied a comparable jurisprudence based on the right to judicial protection under the Mexican Constitution; *Cabrera v. Comisión Técnica Mixta de Salto Grande*, (5 december 1983) 305 Fallos de la Corte Suprema 2150; R. E. Vinuesa, ‘Argentina’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 17, 22.

<sup>149</sup> *Amaratunga v Northwest Atlantic Fisheries Organization*, 2010 CanLII 346 (NSSC); P. Saunders, ‘Canada’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 73, 95.

<sup>150</sup> *Amaratunga v Northwest Atlantic Fisheries Organization*, [2013] 3 S.C.R. 866.

While U.S. courts have not yet applied Art. 14 *ICCPR* to immunity cases,<sup>151</sup> the UN Human Rights Committee has only vaguely stated that:

“The failure of a State party to establish a competent tribunal [...] would amount to a violation of article 14 if such limitations are not based [...] on exceptions from jurisdiction deriving from international law such, for example, as immunities.”<sup>152</sup>

Thus, it cannot (yet) be safely inferred from jurisprudence that Art. 14 (1) *ICCPR* entails the same obligation as Art. 6 (1) *ECHR*.<sup>153</sup>

Consistently applied, the *Waite and Kennedy* jurisprudence leads to a conflict of norms. On the one hand, should Art. 6 (1) *ECHR* be infringed because courts through granting immunity do not ensure legal protection in spite of a lack of alternative mechanisms, then the contracting Member State is responsible under the *ECHR*. On the other hand, should the State not grant immunity to an international organization, even though it is obliged to do so under the founding treaty or a headquarters agreement, then the State would also be responsible under public international law.

The courts that have recognized this conflict solve it differently. The Swiss Federal Court circumvents the conflict on the *ECHR* level. In a case concerning immunity of the Bank for International Settlements the court interprets the jurisprudence of the European Court of Human Rights to the effect that pursuant Art. 6 (1) *ECHR* the necessary “[...] proportionality assessment [may] not lead to an international organization having to subject itself to national jurisdiction [...]”.<sup>154</sup> The Belgian Court of Cassation justifies the precedence of the *ECHR* in a decision concerning the African, Caribbean and Pacific Group of States [ACP] through stating that an agreement that contravenes Art. 6 (1) *ECHR*

<sup>151</sup> C. H. Brower II, ‘United States’, in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 303, 310.

<sup>152</sup> UN Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32 (2007), para. 18.

<sup>153</sup> See, however, Sec. 29 of the 1946 *Convention on the Privileges and Immunities of the United Nations*; A. Reinisch, ‘To What Extent Can and Should National Courts ‘Fill the Accountability Gap?’’, 10 *International Organization Law Review* (2013) 2, 572, 576 [Reinisch, Accountability Gap].

<sup>154</sup> Switzerland: *NML Capital Ltd. und EM Limited gegen Bank für Internationalen Zahlungsausgleich (BIZ) und Betriebsamt Basel-Stadt*, BGE 136 III 379, 4.5.3 (translation by the author); differently evaluated by Peters, *Funktionale Immunität*, *supra* note 94, 422.

may not be applied by a Belgian judge.<sup>155</sup> Lastly, a British court affirmed UNESCO's immunity in the case *Entico v. UNESCO* by Art. 30 (4) (b) of the *Vienna Convention on the Law of Treaties*, because the *ECHR* only became effective after the conclusion of the *Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations* from 1947 and the *ECHR* is only binding for a minority of the member States.<sup>156</sup> The judge invokes the European Court's case-law in the *Golder* decision and interpretes the *ECHR* in light of a presumption of concordance among public international law norms.

In the case of *Mothers of Srebrenica v. the Netherlands* the European Court of Human Rights explicitly addresses this norm conflict:

“[where] a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law [...]”<sup>157</sup>

In relation to the UN the decisive norm is Art. 103 *UN Charter*. The Court argues that the presumption established in its *Al-Jedda* case that Art. 103 *UN Charter* would not necessarily override regional human rights obligations<sup>158</sup> can be rebutted. For this purpose, the Court distinguishes legal remedies against peacekeeping missions from employment-related disputes. In line with its reasoning in the *Behrami and Saramati* case it holds that domestic jurisdiction over acts and omissions of the Security Council can only be created with the UN's consent because otherwise member States could interfere with

<sup>155</sup> Belgium: *Secrétariat Général du Groupe des Etats d'Afrique, des Caraïbes, et du Pacifique c. Lutchmaya*, Cour de Cassation, C 03 0328 F, ILDC 1573 (BE 2009), available at [http://jure.juridat.just.fgov.be/pdfapp/download\\_blob?idpdf=F-20091221-5](http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20091221-5) (last visited 17 March 2015). See also in this regard C. Ryngaert, 'Belgium', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 55, 58.

<sup>156</sup> UK: *Entico Corp Ltd v United Nations Educational, Scientific and Cultural Organization and Another*, (2008) High Court of Justice, 1 CLC 524, 536, para. 19. See also in this regard S. Sarooshi & A. Tzanakopoulos, 'United Kingdom', in Reinisch (ed.), *International Organizations in Domestic Courts*, *supra* note 94, 275, 294.

<sup>157</sup> ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 139.

<sup>158</sup> ECtHR, *Al-Jedda v. the United Kingdom* [GC], Judgment, Application No. 27021/08 (2011), para. 102.

the effective fulfilment of the UN's main purpose.<sup>159</sup> Consequently, the Court explicitly rejects the tendency to assume that “[...] in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court”.<sup>160</sup> With this decision, the European Court of Human Rights has aimed to contain the effects of its *Waite and Kennedy* jurisprudence, although it is not yet clear whether it will also have a restricting effect on employment-related disputes.<sup>161</sup>

However, all attempts to solve the conflict of norms developed through judicial practice do not reach a reconciliation of interests. The Belgian Court of Cassation, which does not apply Art. 14 *ICCPR*, does not consider that the *ECHR* is not binding for the ACP and its member States. The solution proposed by the British court does indeed present an interpretation of public international law norms that conforms to rules of precedence *lege artis*; yet, the notion that the protection of human rights should be effective and practicable is not done any justice at least in the cases in which international organizations do not provide any kind of alternative legal protection. The same holds true for UN cases in matters concerning the maintenance of peace and security. Therefore, in order to meet the function of immunity as a rule on the exercise of jurisdiction a pragmatic solution to the conflict is required. The norm conflict which so far apparently only arises for member States of the *ECHR* is best solved if Art. 6 (1) *ECHR* is interpreted as a call upon its member States to, if necessary, negotiate in order to ensure that alternative dispute settlement mechanisms exist. Within these negotiations, there would be room for the interests of international organizations which have member States that have not or mainly have not joined the *ECHR*.<sup>162</sup> The European Court of Human Rights might have contested this proposition in its *Mothers of Srebrenica* decision where it holds that the lack of alternative mechanism “[...] is not imputable to the Netherlands.”<sup>163</sup> Yet, the court lags behind the Swiss Federal Supreme Court in its case *NADA v. Seco* concerning the targeted sanctions regime. While the Swiss Court considers the regime to be in violation of Art. 6 para. 1 *ECHR* it acknowledges that redress can only be attained at the UN level and approves of the Swiss government's efforts to work towards introducing an effective Security Council control mechanism. It

<sup>159</sup> ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 154.

<sup>160</sup> *Ibid.*, para. 164.

<sup>161</sup> Reinisch, ‘Accountability Gap’, *supra* note 153, 576.

<sup>162</sup> However, it should be borne in mind that not only the *ECHR* calls for alternative dispute settlement mechanisms.

<sup>163</sup> ECtHR, *Mothers of Srebrenica*, *supra* note 14, para. 165.

also holds that the State is obliged to support the plaintiff during the de-listing procedure.<sup>164</sup> Such a duty to work towards (*Hinwirkungspflicht*) alternative dispute settlement mechanisms constitutes an adequate compromise between the interests of international organizations, member States and plaintiffs.

## 2. Guaranteeing Legal Stability and Certainty as well as Peaceful International Relations in a Multipolar World

Understood as a rule on the exercise of jurisdiction, immunity also ultimately guarantees legal stability and certainty as well as peaceful international relations. There is no consensus on what a proper understanding of legal stability requires. Is it sufficient to convey a state of stability through law<sup>165</sup> in order to achieve legal security for all parties?<sup>166</sup> Accordingly, a state of legal stability may be achieved even if material claims are not settled and injustice has not been eliminated. As a contrast there is a concept of legal stability according to which this state may only be reached if injustice is actually countered.<sup>167</sup> However, certain legal concepts, such as the limitation period,<sup>168</sup> rather point to a formal understanding.<sup>169</sup> To accord immunities contributes to such an understanding of legal stability and certainty as well as peaceful international relations. The argument has, for instance, been raised in relation to the *Jurisdictional Immunities Case*. Tomuschat stressed that denying State immunity in order to grant reparation claims to every individual victim of violations of the laws of war in the aftermath of an armed conflict would endanger any definitive

<sup>164</sup> *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, Case No 1A 45/2007; ILDC 461 (CH 2007); BGE 133 II 450, paras 8.3. & 9.

<sup>165</sup> A. von Arnould, *Rechtssicherheit: Perspektivische Annäherung an eine idée directrice des Rechts* (2006), 111.

<sup>166</sup> In this spirit by K. Doehring, 'Staatenimmunität dient dem Rechtsfrieden: Kriegschäden oder -unrecht sind keine Angelegenheit nationaler Gerichte', *Frankfurter Allgemeine Zeitung* (1 September 2001), 10; R. Müller, Rechtsfrieden, *Frankfurter Allgemeine Zeitung* (3 February 2012), available at <http://www.faz.net/aktuell/politik/staat-und-recht/entscheidung-in-den-haag-rechtsfrieden-11636702.html> (last visited 17 March 2015).

<sup>167</sup> In this spirit for instance by K. Thorn, 'Diskussionbeitrag', in A. Zimmermann *et al.*, *Moderne Konfliktformen: humanitäres Völkerrecht und privatrechtliche Folgen*, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 44 (2010), 414.

<sup>168</sup> A. Guckelberger, *Die Verjährung im Öffentlichen Recht* (2004), 421.

<sup>169</sup> Critically with respect to the concept of legal stability due to lack of objectivity, H. Rottleuthner, 'Zum Rechtsfrieden', in J. Brand, D. Stempel & E. Blankenburg (eds), *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag* (1998), 683, 692.

peace settlement and thus the (re-)establishment of peaceful co-existence and cooperation among States.<sup>170</sup>

The decision of the International Tribunal for the Law of the Sea in the “*ARA Libertad*” Case is based on a comparable concern for the maintenance of peaceful international relations.<sup>171</sup> Argentine presented the argument that “[...] [f]urther attempts to forcibly board and move the Frigate without the consent of Argentina would lead to the escalation of the conflict and to serious incidents in which human lives would be at risk”.<sup>172</sup> The court agreed with the argument, requested “[...] full compliance with the applicable rules of international law [...]”<sup>173</sup> and stressed that “[...] any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States [...]”.<sup>174</sup>

The function of immunity to ensure legal stability and certainty as well as peaceful international relations, should gain even more importance the more the international order should develop into a multi-polar world order.<sup>175</sup> This is shown by the dispute between the African Union (AU) and the European Union (EU) regarding the exercise of universal jurisdiction. The dispute started through several criminal law proceedings, which were initiated in France and Spain against members of the Rwandan government and other State officials.<sup>176</sup> The dispute did not only revolve around universal jurisdiction, but also – if one looks at the AU decisions – specifically around discarding immunity in cases of grave violations of human rights.<sup>177</sup>

<sup>170</sup> C. Tomuschat, ‘The International Law of State Immunity and its Development by National Institutions’, 44 *Vanderbilt Journal of International Law* (2011) 4, 1105, 1107 & 1135. See also J. Schaarschmidt, ‘Die Reichweite des völkerrechtlichen Immunitätsschutzes – Deutschland v. Italien vor dem IGH’, 5 *Beiträge zum Europa- und Völkerrecht* (2010), 19.

<sup>171</sup> F. Bothway, ‘The Immunity Conundrum’, 22 *African Journal of International and Comparative Law* (2014) 2, 258, 270.

<sup>172</sup> ITLOS, “*ARA Libertad*” Case, *supra* note 1, para. 82.

<sup>173</sup> *Ibid.*, para. 100.

<sup>174</sup> *Ibid.*, para. 97.

<sup>175</sup> Regarding the general consequences of this phenomenon on public international law for instance, M. Happold (ed.), *International Law in a Multipolar World* (2011); Y. Onuma, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (2010). On African States from a perspective of political science see U. Engel & M. J. Ramos, *African Dynamics in a Multipolar World* (2013).

<sup>176</sup> Wuerth, ‘Pinochet’s Legacy’, *supra* note 50, 753.

<sup>177</sup> See also African Union, *Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc Assembly/AU/11(XIII), para. 6: “CALLS UPON all concerned States to respect

It would be short-sighted to merely understand the dispute as an expression of African despots' concern to be held responsible before a court, since also democratic African States supported the AU's position.<sup>178</sup> The question as to which courts – African or European – attain jurisdiction to establish responsibility for grave violations of human rights is the actual subject matter of the dispute.<sup>179</sup> Though the European side does rightly point-out that there is often a lack of readiness by African States to criminally prosecute,<sup>180</sup> the African States' claim to be able to independently provide for accountability of severe human rights abuses is not without any reasonable chance. For instance, in February 2013 a proceeding was opened against Chad's former President, Hissène Habré, before the so-called Extraordinary African Chambers.<sup>181</sup> Surely this development was also a product of political pressure, which Europe exerted, among others, through the ICJ proceeding between Belgium and Senegal regarding *aut dedere aut iudicare* duties.<sup>182</sup> Nonetheless, political pressure may be exerted in several different ways. It does not necessarily need to materialize through discarding immunity. It should be borne in mind that African States perceive proceedings in which immunity has been denied as politically selective. In the AU and EU Commission's joint report – a commission which was appointed during the dispute on the exercise of universal jurisdiction – it was clear that African States assume the use of double standards.<sup>183</sup>

Is this accusation farfetched? If proceedings are carried out against foreign States and their State officials in cases of grave violations of human rights before

International Law and particularly the immunity of State officials when applying the Principle of Universal Jurisdiction.”

<sup>178</sup> K. Mills, “Bashir is Dividing us”: Africa and the International Criminal Court’, 34 *Human Rights Quarterly* (2012) 2, 404, 440.

<sup>179</sup> Cf. *ibid.*, 407, 412 & 444. This dispute must be distinguished from the dispute around the ICC and the lack of immunity for acting Heads of State before this court. To stress its position in this respect the AU Assembly adopted a *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Doc STC/Legal/Min/7(I) Rev. 1, 15 May 2014) in which Article 46A *bis* stipulates that: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”

<sup>180</sup> *Report of the AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 REV 1, para. 44 [AU-EU Report].

<sup>181</sup> HRW, ‘Habré Court Opens’, *supra* note 135. The Zimbabwean *Torture Docket Case* is also worth mentioning: South Africa: High Court, *Southern African Litigation Centre v. National Director of Public Prosecutions*, *supra* note 1.

<sup>182</sup> ICJ, *Obligation to Prosecute or Extradite*, *supra* note 1.

<sup>183</sup> *AU-EU Report*, *supra* note 180, para 34.

national courts in the U.S., Switzerland, Canada, Italy and the UK through adoption of universal jurisdiction and extraterritorial duties to penalize, these States will also have to accept such proceedings against themselves and their State officials before national courts in Algeria, China, Iran, Congo, Rwanda or Zimbabwe. That democratic constitutional States are not yet ready for this has not only been shown in the development of the law on special missions, but also through the practice of agreeing to functional immunity for members of the armed forces in receiving States through Status of Force agreements.<sup>184</sup> Accordingly, in the deployments to Bosnia and Herzegovina, Iran and Afghanistan so-called exclusive jurisdictional agreements were increasingly used, which accorded immunity from host nation jurisdiction and have even resulted in criminal prosecution gaps.<sup>185</sup>

In the end, the denial of immunity requires an international community of constitutional States. As long as this requirement is not met democratic constitutional States will perceive the perspective of transnational models of enforcement at least as ambivalent from a fundamental rights standpoint. As long as there is no such international community of constitutional States, immunity serves democratic constitutional States to protect their State officials from being exposed to court proceedings which do not meet the standard of the rule of law. Hence, the United States District Court clearly stated in the case *Tabion v. Mufti* that the aim of granting immunity was “[to] protect United States [officials] from [...] prosecution in foreign lands [...] [because] not all countries provide the level of due process to which United States citizens have become accustomed [...]”<sup>186</sup> In light of such conflicts between normative claims and legal reality, immunity seems to be, in the words of Hazel Fox, “[...] a neutral way of denying jurisdiction to States over the internal administration of another State and diverting claims to settlement in the courts of that State, or by diplomatic or other international means to which that State has consented.”<sup>187</sup>

<sup>184</sup> Arnould, *Völkerrecht*, *supra* note 35, 136; P. J. Conderman, ‘Status of Armed Forces on Foreign Territory Agreements (SOFA)’, in Wolfrum (ed.), *supra* note 59, Vol. IX, 586, 593.

<sup>185</sup> Regarding the gap, as well as all legal attempts to close it, see Conderman, *ibid.*, 596-597.

<sup>186</sup> U.S.: *Tabion v. Mufti*, District Court, (E.D. Va. 1995) 877 F. Supp. 285, 293.

<sup>187</sup> H. Fox, ‘In Defence of State Immunity, Why the UN Convention on State Immunity is Important’, 55 *International and Comparative Law Quarterly* (2006), 399, 405.

## E. Prospects

Since immunity still fulfils important functions in a globalized world, the question must ultimately be asked as to how international law development regarding denial of immunity in cases of grave violations of human rights could be more cautiously brought forward. In the end, an alternative legal remedy is not always actually available. Victims remain unheard, while perpetrators evade being punished.

A careful step forward may have been mapped out by the ICJ in the case *Djibouti v. France*. The ICJ stated that the State, which claims immunity *ratione materiae* for its state officials, needs to notify the forum State of the existence of said immunity. Only that way courts may ensure that immunity is not unjustly denied; hence, relieving the forum State of incurring responsibility under public international law.<sup>188</sup> The requirement of notification is legally justified due to that immunity *ratione materiae* of a state official is ultimately a product of State immunity. Whether the ICJ's statement may claim customary international law validity, may be doubted if one considers that not only in Germany<sup>189</sup>, but also in Great Britain<sup>190</sup>, for instance, jurisdictional immunity must be reviewed by courts proprio motu, i.e. on their own initiative. In addition, Art. 6 (1) of the *UN Convention on Jurisdictional Immunities of States and their Property* also requires that forum States ensure that courts review jurisdictional immunity of their own initiative.

Nevertheless, it is submitted that procedural law, limited to cases regarding severe human rights abuses, should be changed to the effect that the

<sup>188</sup> ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177, 244, para. 196: "The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs"; see also International Law Commission, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction by the Special Rapporteur*, UN Doc A/CN.4/646, paras 16-17; however, there was no diplomatic dialogue regarding the presence of the accused in the forum State; Higgins, 'Equality of States' *supra* note 77, 135.

<sup>189</sup> *Philippinisches Botschaftskonto*, (1977) Federal Constitutional Court, BVerfGE 46, 342, 359; Baumbach-Lauterbach-Hartmann (ed.), *Zivilprozessordnung*, 72nd ed. (2014), Einf. vor §§ 18-20 GVG, para. 2.

<sup>190</sup> Sec. 1 (2) *State Immunity Act 1978*.

State, whose officials are to undergo trial, must invoke their immunity.<sup>191</sup> This would open twofold possibilities: the concerned State, whose officials are to undergo trial, could decide whether transgressing immunity would run contrary to the rationale behind immunity. In other words, whether a State's interests in performing public functions would be at risk or whether there are other reasons against the jurisdiction of the forum State. Hence, State's interest would be taken into account. At the same time, a link would be created for civil society transnational enforcement strategies, which could put political pressure on the concerned States in order to bring them not to claim immunity. A procedural problem would be solved at a procedural level.

<sup>191</sup> See also A. Peters, 'Immune against Constitutionalisation?', in Peters *et al.* (eds), *Immunitates*, *supra* note 9, 1, 18; Wuerth, 'Foreign Official Immunity', *supra* note 55, 223 *et seq.*