

FROM BILATERALISM TO COMMUNITY INTEREST

Essays in Honour of Judge Bruno Simma

Edited by

ULRICH FASTENRATH
RUDOLF GEIGER
DANIEL-ERASMUS KHAN
ANDREAS PAULUS
SABINE VON SCHORLEMER
CHRISTOPH VEDDER



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OF RIGHTS AND REMEDIES: SOVEREIGN IMMUNITY AND FUNDAMENTAL HUMAN RIGHTS

Enzo Cannizzaro and Beatrice I Bonafé

I. Introduction

The relationship between the legal regime of sovereign immunity and international human rights law has been quite a hot topic in recent years. Not infrequently, domestic courts have been requested to lift sovereign immunity and to determine civil or criminal consequences of conduct allegedly in breach of international rules protecting fundamental values. These requests have prompted a conspicuous, yet not always fully consistent, pattern of case law and an endless scholarly debate.

The traditional view tends to maintain that sovereign immunity is expressed by procedural rules, and that therefore such rules are structurally of such a nature as to preclude conflicts with rules prohibiting egregious violations of human rights, which are substantive law by nature. At the other end of the spectrum, some authors have argued that rules granting immunity have the effect of preventing fundamental human rights law from attaining its full effect. Consequently, it is argued, rules of immunity ought to be disregarded on the basis of the superior rank of rules protecting such rights. An infinite variety of intermediate opinions have also been expressed, highlighting either the traditional inter-State character inspiring the rules on immunity, or the universal character of the emerging law of human rights.

In the current paper we intend to analyse this topic from a particular methodological angle. We maintain that the difficulty in dealing with that issue mainly lies in the asymmetry in the development of the international law of human rights, which has created individual substantive rights without creating a corresponding set of remedies. A word of clarification might be opportune in order to illustrate this point.

It is common knowledge that, starting in the second half of the twentieth century, international law has gradually matured into the idea that certain universal

values of the international community do exist, and that mainly they protect goods of individual concern. Prohibition of genocide, torture, and massive violations of human rights have thus crossed the threshold of treaty law to become the common legal 'turf' of the international community. It is commonly maintained that obligations related to these values have therefore acquired higher value corresponding to what is now called *jus cogens*. The idea that these rules not only establish rights and obligations for States but also rights and obligations for individuals is nowadays almost universally accepted.

However, the development of international law at the level of primary norms was not accompanied by a corresponding development at the level of secondary norms, ie at the level of the rules which determine the consequences of wrongdoing and establish mechanisms of enforcement. As is well known, the difficulty of conceiving a coherent frame of legal consequences for the breach of fundamental values of the international community and efficient mechanisms of enforcement constituted a crux in the codification of State responsibility. Consequently, a curious asymmetry can be observed in the legal protection of fundamental human rights. At the level of primary norms, international law has developed, and continues to develop, substantive rules granting rights and duties to individuals; however, the secondary level, concerning the consequences of the breach of such primary obligations and the mechanisms of enforcement, is still largely inspired by the classical inter-State philosophy.

This shortcoming can explain the troubled relationship between sovereign immunity and fundamental human rights. In classical international law, the grant of immunity has the effect of preserving the international mechanism of dispute settlement from intrusion by domestic courts. Yet this theoretical scheme has been altered by the emergence of fundamental human rights in the traditional landscape of international law. In this situation, the grant of immunity is acceptable in those cases in which international law has established an efficient system of remedies working at the inter-State level. It is much less acceptable when the international system of remedies has structural deficiencies and cannot secure an appropriate level of protection for the individual rights and duties established at the primary level. When the domestic order of States is the sole forum for determining the consequences of a serious breach of fundamental human rights, the grant of immunity has a disruptive effect on this determination and to some extent deprives international human rights law of its effectiveness.

In the following pages we will study the various forms of interference between sovereign immunity and fundamental human rights. The aim of our study is to distinguish two kinds of situation: on the one hand, those in which the grant of immunity has the function of safeguarding the inter-State system of remedies from undue intrusions on the part of domestic courts; and, on the other hand, those in which the grant of immunity has, rather, the effect of preventing the proper

functioning of secondary norms establishing the consequences of serious breaches of human rights.

II. State Organs' Functional Immunity versus Individual Criminal Liability for International Crimes

The first situation we intend to address is that of State organs facing criminal proceedings for international crimes committed in the performance of their official functions. In such a case, the question is whether the State organ is entitled under international law to claim immunity from jurisdiction, thereby preventing the competent criminal court or tribunal from establishing liability for the crimes allegedly committed by the accused.

The way in which case law has addressed this issue is sometimes distorted by a misconception about the nature of the rule on immunity *ratione materiae*. This particular form of immunity is not a jurisdictional bar; rather, it must be more appropriately described as an international rule on attribution.¹ Under international law, State organs' conduct is *not* conceived of as the personal activity of those individuals, attributable to them, and entailing their personal liability. Rather, it is regarded as the activity of the State itself each time State organs act in their official capacity.² In this sense, immunity *ratione materiae* is a peculiar kind of immunity because it presents a *substantive* obstacle to the exercise of jurisdiction. State organs cannot be prosecuted for conduct which is not considered to be their own. Only the State should be held responsible for State organs' conduct attributable to the State.

In light of this rule, States are prevented from unilaterally pronouncing on the acts of foreign States. International law requires the injured and the author State to

¹ See, in general, I Brownlie, *Principles of Public International Law* (4th edn, Oxford University Press, 2008) 324 et seq; A Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 Eur J Intl L 853. This aspect is perfectly illustrated in a recent judgment of the House of Lords, *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 66. For the view challenging the existence of a customary rule providing for the immunity *ratione materiae* of all State agents, see, in particular, P De Sena, *Diritto Internazionale e Immunità Funzionale degli Organi Statali* (Giuffrè, 1996). This author nonetheless recognizes that State organs are entitled to immunity *ratione materiae* when they commit international crimes that are attributable to the entire State apparatus (ibid, 176).

² When dealing with attribution, the International Law Commission (ILC) codified a customary rule providing that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State', and that 'the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance': ILC, 'Draft Articles on State Responsibility' [2001] II(2) ILC Ybk 32, Arts 4 and 5.

look for a peaceful settlement of the dispute at the international level. Therefore, immunity *ratione materiae* is more correctly understood as a twofold rule, providing first that organs' conduct performed in their official capacity is attributable to the State and, secondly, that organs are not personally accountable for their unlawful official conduct.³ As a result, immunity *ratione materiae* removes conduct attributable to a State from the application of domestic law, as State conduct is the exclusive province of international law.

On the other hand, international law recognizes the criminal liability of any individual who engages in the commission of certain egregious violations of international obligations protecting the most important values of the entire international community, ie the commission of international crimes. Today, it is no longer disputed that the commission of crimes such as aggression, genocide, crimes against humanity, and war crimes entails, under international law, the responsibility of both States and individuals.⁴ According to a secondary international norm that provides for personal criminal liability, conduct amounting to international crimes is to be directly attributed to individuals.⁵

Therefore, from a normative standpoint, when State organs are charged with international crimes, there is a plain conflict between the rule on immunity *ratione materiae* and the principle of individual criminal liability for international crimes. This is due to the fact that the former prevents, at least in principle, international crimes from being attributed to State organs, while the latter is premised on the opposite assumption, ie that every individual, State organs included, is personally responsible for the commission of international crimes. These rules have an identical but opposite material content.

There is general agreement among international scholars that no immunity *ratione materiae* can be invoked by State organs charged with international crimes.⁶ As recently restated in the 2009 IDI Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International

³ BI Bonafé, 'Imputazione all'Individuo di Crimini Internazionali e Immunità dell'Organo' (2004) 87 *Rivista di Diritto Internazionale* 393.

⁴ See, in general, BI Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (Martinus Nijhoff, 2009).

⁵ A Cassese, *International Law* (2nd edn, Oxford University Press, 2005) 436.

⁶ See, in particular, Cassese, 'When May Senior State Officials Be Tried for International Crimes?' (n 1); P Dailler, M Forteau, and A Pellet, *Droit International Public* (8th edn, LGDJ, 2009) 794. For a different view, see M Frulli, *Immunità e Crimini Internazionali* (Giappichelli, 2007). Such a defence has been rejected ever since the Nuremberg trial. In the words of the Nuremberg International Military Tribunal (IMT): 'It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised.' *Judgment of the IMT for the Trial of German Major War Criminals: The Law of the Charter* (30 September and 1 October 1946) <<http://avalon.law.yale.edu/imt/judlawch.asp>> accessed 24 August 2010.

Crimes, '[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes'.⁷

A consistent and well-established body of case law confirms that, as far as international crimes are concerned, and as regards conduct directly attributable to individuals under international law, immunity *ratione materiae* is no longer capable of shielding State organs from criminal prosecution before either international or domestic criminal courts. The crystallization of an international customary rule on individual criminal liability for international crimes has created an exception to the traditional rule on functional immunity of State organs.

The statutes of international courts and tribunals generally embody a specific clause stating that the official position of the accused does not relieve him or her of criminal responsibility, nor does it mitigate punishment.⁸

Before domestic courts the immunity plea has not been successful in cases involving the commission of international crimes. Recent case law has consistently affirmed that, in cases of international crimes, international law has removed the functional immunity enjoyed by State organs.⁹

Immunity *ratione materiae* has been raised and discussed in a number of criminal cases before domestic courts. In many cases this immunity is not even mentioned, but State organs have actually been convicted for international crimes.¹⁰ In other cases relating to international crimes committed during the Second World War, the immunity defence has been rejected either on the ground that Control Council Law No 10 embodied a specific provision on its inapplicability,¹¹ or by simply relying on the Nuremberg precedent.¹²

⁷ Art III(1) <http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf> accessed 24 August 2010.

⁸ See Art 7 IMT Statute; Art 6 of the Statute for the International Military Tribunal for the Far East; Art II of Control Council Law No 10; Art 7 of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY); Art 6 of the Statute for the International Criminal Tribunal for Rwanda (ICTR); Art 27 of the Statute for the International Criminal Court (ICC); Art 6 of the Statute for the Special Court for Sierra Leone (SCSL). More specifically, in *Blaskic* the Appeals Chamber of the ICTY held that 'those responsible for [international] crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity': *Prosecutor v Blaskic* (Judgment on the Request for Review) ICTY-95-14 (29 October 1997) para 41.

⁹ See *Jones* (n 1) para 81.

¹⁰ See, eg, *Re Ahlbrecht* (1948–49) 16 ILR 396 (Special Criminal Court and Special Court of Cassation, Holland); *Re Kappler* (1948) 15 ILR 471 (Rome Military Tribunal); the *Kesselring* case (1947) VIII Law Reports of Trials of War Criminals 9 (British Military Court at Venice); *Re Rauter* (1948–49) 16 ILR 526 (Special Criminal Court, The Hague and Special Court of Cassation, Holland).

¹¹ Art II of Control Council Law No 10 provided that: 'The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.' A similar provision was embodied in the IMT Charter (Art 7).

¹² See, eg, *Re Yamashita* (1946) 16 ILR 269 (US Supreme Court); *Re Bubler* (1949) 15 ILR 680 (Supreme National Court of Krakow, Poland); *Re Von Lewinski* (1949) 16 ILR 509 (British Military

In the *Eichmann* case,¹³ for example, the Israeli Supreme Court still substantially relied on the IMT Statute and on the Nuremberg judgment in rejecting the appellant's 'act of State' plea.¹⁴ The Court nonetheless grounded such a position directly on the development of international customary law.¹⁵

Among more recent cases, the *Pinochet* case gave rise to different judgments in different countries and to different positions with respect to the immunity issue. The problem of Pinochet's immunity from foreign jurisdiction was dealt with by both the Audiencia Nacional and by the House of Lords.

The Spanish court, in its decision asking the Spanish government to solicit Pinochet's extradition,¹⁶ dealt thoroughly with the problem of Pinochet's immunity *ratione materiae*. When it came to the particular issue of the relationship between the act of State doctrine and individual liability for international crimes, the court held that State organs are no longer entitled to immunity *ratione materiae* when they are charged with international crimes before foreign domestic courts.

In the United Kingdom, the *Pinochet* case gave rise to two judgments of the House of Lords.¹⁷ The second judgment in particular shows a broad set of arguments on which the Lords relied to deny Pinochet's functional immunity. Even though extradition was only granted in connection with the treaty-based crime of torture, the denial of functional immunity was justified on the basis of general international law.

More recent cases decided by domestic courts confirm the consistent approach emerging from international practice according to which immunity *ratione*

Court at Hamburg, Germany); *Re Demjanjuk* (1985) 79 ILR 534 (US Court of Appeals, Sixth Circuit); *Fédération Nationale des Déportés et Internés Résistants et Patriotes v Barbie* (1983/84/85) 78 ILR 124, 100 ILR 331 (Court of Cassation, France); *Re Bouterse* (2000) 120 ILR 680 (Court of Appeals, Amsterdam).

¹³ *AG of Israel v Eichmann* (1962) 36 ILR 277 (Israel Supreme Court).

¹⁴ *Ibid*, 311 ('the principle laid down in Article 7 of the Charter of the International Military Tribunal at Nuremberg, to which the Tribunal adhered, is that the doctrine cannot afford a defence in respect of international crimes, particularly those defined in the Charter... The principle expressed in these words, which totally negates the "Act of State" plea, is today one of the "Nuremberg Principles" which have become part of the law of nations... The result is that this plea, so far as concerns the crimes in question, finds no support in international law and can in no way avail the appellant.')

¹⁵ *Ibid*, 310.

¹⁶ Equipo Nizkor, 'Audiencia Nacional' (3 November 1998) <<http://www.derechos.org/nizkor/chile/juicio/informe.html>> accessed 24 August 2010.

¹⁷ While a first provisional warrant was quashed by a Divisional Court, the quashing of the second provisional warrant was stayed pending an appeal to the House of Lords. Its first judgment was given on 25 November 1998, *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet* (1998) 19 HRLJ 419 (HL) (*Pinochet I*). However, that judgment was set aside on the ground that the Committee was not properly constituted: *ibid*, 443. Thus, the appeal appeared again before the House of Lords. Its second judgment was given on 24 March 1999, *R v Bartle and the Commissioner of Police for the Metropolis ex p Pinochet* (1999) 20 HRLJ 61 (HL) (*Pinochet II*). Both judgments allowed the appeal, and the arrest warrant was upheld. See, in general, D Woodhouse (ed), *The Pinochet Case. A Legal and Constitutional Analysis* (Hart Publishing, 2000).

materiae cannot be invoked by State organs charged with international crimes. The Belgian Court of Cassation in the *Sharon* case held that, under customary international law, immunity *ratione materiae* can be disregarded when the foreign State organ is charged with international crimes before domestic courts.¹⁸ Similarly, a quick reference to the inapplicability of immunity to international crimes is made by the Spanish Audiencia Nacional in the *Scilingo* case.¹⁹ In *Jones*, the House of Lords examined in some detail the issue of immunity enjoyed by the State and its organs under international law.²⁰ While the Lords mainly focused on State immunity, they indirectly explained that, in *Pinochet*, immunity *ratione materiae* could have been disregarded because customary international law provides for the criminal liability of those State organs which have committed an international crime (specifically, in that case, torture).²¹

The same conclusion may be drawn if one looks at the relationship between functional immunity and individual criminal responsibility from the particular methodological angle we have chosen for the current analysis. It is commonly recognized that criminal responsibility is one of the consequences arising from international law for conduct amounting to international crimes. However, general international law has not developed procedural rules for determining this consequence at the international level. Thus, unless a treaty body is set up and entrusted with the task of determining the criminal responsibility of individuals charged with international crimes, it is for domestic courts to establish this form of international responsibility. The invocation of immunity from a domestic jurisdiction, therefore, is tantamount to denying the possibility of establishing the international consequence of particularly heinous conduct that amounts to a crime under international law.

The existence of a rule which attributes the criminal conduct not only to the State on behalf of which the conduct was performed but also to the individuals who materially committed it thus also appears particularly meaningful in a systematic perspective. Indeed, it seems to pave the way to a conception of the system of remedies under domestic law as part of the process of determining and enforcing the international consequences of wrongdoing.

¹⁸ *Sharon* case (2003) (Belgian Court of Cassation) <<http://www.indictsharon.net/12feb2003dectrans.pdf>> accessed 24 August 2010. See A Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case' (2003) 1 J Intl Crim Justice 437.

¹⁹ *Auto de conclusión del sumario y de apertura de juicio oral en el Caso Scilingo* (2003) (Audiencia Nacional, Sala de lo Penal, Spain) para 4 <<http://www.derechos.org>> accessed 24 August 2010.

²⁰ See *Jones* (n 1).

²¹ See also the *Lozano* case recently decided by the Italian Court of Cassation, First Criminal Section, judgment of 24 July 2008, no 31171, reprinted in (2008) 91 Rivista di Diritto Internazionale 1223.

III. State Organs' Personal Immunity versus Individual Criminal Liability for International Crimes

The second situation to be addressed concerns charges of international crimes brought against State organs who are entitled to personal immunity. Under international law, personal immunity, or rather immunity *ratione personae*, is a jurisdictional bar, a special protection afforded to some State organs who represent the State in order to secure the peaceful development of international relations among States. Accordingly, immunity *ratione personae* is granted for a very particular purpose to specific and limited categories of State organs, such as heads of State, prime ministers, ministers for foreign affairs, diplomatic agents, and, to a limited extent, consular agents. In addition, this kind of immunity concerns all acts of State organs, regardless of whether they are carried out in a public or private capacity. In other words, it is not limited to those acts which can be attributed to the State, and it constitutes a complete bar to the exercise of criminal jurisdiction. On the other hand, this broad immunity is limited in time to the duration of the mandate of the State organ. After cessation of the official functions, personal immunity ceases to apply: acts carried out in a private capacity will be attributed to the person who has performed them, whereas acts carried out in an official capacity will be attributed to the State, with the consequences discussed above. Thus, personal immunity essentially aims at temporarily preventing domestic courts from interfering with the performance of international relations.

It follows that, in the case of State organs charged with international crimes, this kind of immunity entails a completely different situation from the one described above. As the International Court of Justice (ICJ) has recently had the occasion to clarify:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.²²

This explains why personal immunity represents a bar to criminal prosecution before domestic courts, but not before competent international tribunals.²³

²² *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 60.

²³ *Ibid.*, para 61; see *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL-03-01-1-59 (31 May 2004); *Prosecutor v Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009) para 43. Therefore, a successful plea of personal immunity could only be justified under very exceptional circumstances. As recently confirmed by the Appeals Chamber of the ICTY in *Karadzic*, only an explicit Security Council resolution would have been able to grant immunity to the accused: *Prosecutor v Karadzic* (Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement) ICTY-95-5/18-I (12 October 2009) para 42 et seq. For a different situation

On the other hand, under international law immunity *ratione personae* undoubtedly constitutes a bar to criminal proceedings before domestic courts, even when State organs are charged with international crimes. The relevant case law has constantly upheld the validity of such a claim. In *Pinochet*, the House of Lords incidentally dealt with the issue, and personal immunity of incumbent heads of State was grounded on customary international law.²⁴ In *Kadhafi*, the French Court of Cassation reached a similar conclusion.²⁵ In *Tachiona v Mugabe*, the US District Court found that, under international law, incumbent heads of State are entitled to immunity *ratione personae*, that is, they are immune from lawsuits and service of process, as far as this immunity allows them to perform their official duties.²⁶ In the *Arrest Warrant* case, the ICJ recognized that incumbent ministers of foreign affairs are entitled to immunity from foreign domestic jurisdiction under customary international law. More generally, the Court was:

... unable to deduce from [current] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.²⁷

The decision of the Court was later confirmed by the Belgian Court of Cassation in *Sharon*.²⁸

This appears fully understandable if one assumes that personal immunity affords only a temporary shield, and does not perpetually prevent the exercise of criminal

in which 'diplomatic immunity' would be granted to State organs facing trial before an international court, see Art 98 ICC Statute.

²⁴ See the opinions of Lord Browne-Wilkinson, *Pinochet II* (n 17) 67, Lord Goff of Chieveley, *ibid*, 71, Lord Hope of Craighead, *ibid*, 85 ('It seems to me to be clear that what section 20(1) did was to give statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts'), Lord Hutton, *ibid*, 90, Lord Saville of Newdigate, *ibid*, 96 ('In general, under customary international law serving heads of state enjoy immunity from criminal proceedings in other countries by virtue of holding that office. This form of immunity is known as immunity *ratione personae*'), Lord Millett, *ibid*, 98, and Lord Phillips of Worth Matravers, *ibid*, 103.

²⁵ *Kadhafi* (2001) 105 *Revue Générale de Droit International Public* 474 (Cour de Cassation): 'la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger.'

²⁶ *Tachiona v Mugabe* (2001) 169 F Supp 2d 259 (US District Court). See D Mundis, 'Tachiona v Mugabe: A US Court Bows to Personal Immunity of a Foreign Head of State' (2003) 1 *J Intl Crim Justice* 462.

²⁷ *Ibid*, para 58. International law scholars generally agree with the Court on this specific point. See Cassese, 'When May Senior State Officials Be Tried for International Crimes?' (n 1) 853; J-P Quéneudec, 'Un Arrêt de Principe: l'Arrêt de la C.I.J. du 14 Février 2002', *Actualité et droit international*, May 2002 <<http://www.ridi.org/adi>> accessed 24 August 2010; M Sassoli, 'L'arrêt Yerodia: Quelques Remarques sur une Affaire au Point de Collusion entre les Deux Couches du Droit International' (2002) 106 *Revue Générale de Droit International* 791; J Verhoeven, 'Mandat d'Arrêt International et Statut de Ministre', *Actualité et droit international*, May 2002 <<http://www.ridi.org/adi>> accessed 24 August 2010.

²⁸ *Sharon* (n 18).

jurisdiction. Thus, the question might arise of particular cases in which personal immunity could in fact result in complete impunity for the State organs charged with international crimes. Let us take, for example, the case of an incumbent head of State staying in office for life who is charged with international crimes. If there is no competent international tribunal to try him, and if prosecution before the domestic courts of that State is highly unlikely, then personal immunity from foreign jurisdiction might actually entail a complete shield from prosecution. To be sure, these are extreme situations but it cannot be excluded that personal immunity would in some cases effectively guarantee the impunity of alleged perpetrators of the most serious international crimes. In these extreme cases, therefore, one can reasonably assume that a conflict between the two legal regimes arises because the strict application ultimately prevents the other from attaining its goals and therefore nullifies its normative essence.

From a methodological viewpoint, these situations would require the domestic court to strike a balance between two fundamental international law rules. As pointed out in a joint opinion attached to the *Arrest Warrant* case:

On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the interstate level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual interstate relations, which is of paramount importance for a well-ordered and harmonious international system.²⁹

IV. State Organs' Immunity versus Individual Civil Liability for International Crimes

Under certain circumstances, State organs that commit international crimes may also be sued before domestic courts, and damages may be recovered by the victims of such crimes for the injuries suffered. The US case law under the Alien Tort Claims Act (ATCA) deserves a brief discussion here because it involves a particular relationship between, on the one hand, the immunity to which State organs might

²⁹ *Arrest Warrant* (n 22) (Joint Separate Opinion of Judges Higgins, Kooijmans, Buergenthal) para 75.

be entitled, and, on the other hand, a secondary rule on individual civil liability for international crimes established under domestic law.

The ATCA is a statute under US federal law providing that: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'³⁰ Accordingly, the ATCA attributes civil liability to those who commit violations of international law and US federal courts can exercise a universal civil jurisdiction over such violations.

Historically, the application of the ATCA has given rise to two main issues. First, it was unclear whether *any* violation—or only qualified violations of the law of nations—would entitle the victim to bring a claim under the statute. Secondly, US courts had to identify with precision which categories of perpetrators could be held accountable under the ATCA.

As to the first issue, the US Supreme Court held in *Sosa* that the scope of application of the ATCA is limited to breaches of norms of customary international law 'so well defined as to support the creation of a federal remedy'.³¹ Accordingly, international crimes prohibited under customary international law would be included among the cause of actions subject to jurisdiction under the ATCA.

With respect to which perpetrators may be held liable in such actions, the ATCA case law initially addressed violations of the law of nations essentially committed by State organs. Only later were the courts called on to hear claims against private individuals. From this standpoint, the leading case is undoubtedly *Kadic v Karadzic*. There the federal court held that breaches of the law of nations could be committed by State organs as well as private individuals, by either isolated individuals or organized groups.³²

With respect to State organs, the question arose whether personal immunity and functional immunity could preclude federal courts' jurisdiction under the ATCA. In *Mugabe* it was held that personal immunity is a valid bar to jurisdiction under that Statute.³³ A different view prevailed in other cases in which federal courts have rejected pleas of functional immunity and upheld US jurisdiction under the

³⁰ 28 USC §1350.

³¹ *Sosa v Alvarez-Machain* 542 US 692 (2004) (US Sup Ct).

³² 'We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals': *Kadic v Karadzic* 70 F 3d 232, 238 (1995) (US Court of Appeals, 2nd Cir).

³³ 'The purpose of diplomatic and head-of-state immunity is not to cover up heinous deeds from coming to the light of day, or to protect a nation's leaders from accountability for their acts and, by shielding them from reprisals, tacitly condone their wrongs. If there is a larger end here to be served, for which accusations of grave misconduct as between particular individuals may be momentarily set aside, it is in the interest of comity among nations—to safeguard friendly relations among sovereign states': *Tachiona v Mugabe* 169 F Supp 2d 259, 168–9 (2001) (US District Court for the Southern District of New York).

ATCA in cases of international crimes committed by State organs in the performance of their official duties. This conclusion was mainly based on the premise that international crimes exceed, by nature, the scope of governmental authority. In *Filartiga*, the Appeals Court briefly noted: 'we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state'.³⁴ More explicitly, in *Gramajo* it was stated that: 'the acts that form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority. Accordingly, I conclude that the defendant is not entitled to immunity under the FSIA'.³⁵

What is worth noting here is the structure of the relationship between the international rule on functional immunity and the domestic rule on individual civil liability. On the one hand, there is the rule on functional immunity according to which the official activities of State organs are to be attributed to the State. On the other, there is a secondary rule, a right of action provided under a domestic statute establishing the civil liability of those individuals who have committed international crimes. The relation between these two rules can be appraised according to two different views. First, one can maintain that there is no clash between such rules, and that under international law functional immunity is only lifted for the purpose of attributing individual criminal responsibility for international crimes. Accordingly, it would be inconsistent with international law to disregard functional immunity when claims are brought before US courts under the ATCA.³⁶ Alternatively, it is more common to find views which construe—albeit indirectly—the rule on attribution of international crimes to individuals as a general rule under international law which leaves open the possibility for States to establish domestic civil remedies in cases involving international crimes.³⁷

Therefore, what can reasonably be gathered from the ATCA case law is that international law does not seem to prevent States from expanding their tort jurisdiction and from establishing the civil liability of those who have committed international crimes. This practice is not sufficient, by itself, to conclude that international practice attributes to individuals civil liability for international crimes committed by State organs. However, the case law of US courts on ATCA seems to add a further step to the line of reasoning suggested above: that rules on immunity cannot prevent domestic courts from assessing the possible consequences of illicit conduct where the international system of remedies fails to provide adequate safeguards to the individuals affected by serious breaches of human rights. This leads us to the

³⁴ *Filartiga* 630 F 2d 876, 889 (1980) (US Court of Appeals, 2nd Cir).

³⁵ *Xuncax v Gramajo* 886 F Supp 162, 175 (1995) (US DC for the District of Massachusetts).

³⁶ See the opinion of Loid Hoffmann, who considers the ATCA case law to be 'contrary to customary international law'; *Jones* (n 1) para 99.

³⁷ See, eg, *Kadic* (n 32).

last situation which must be addressed, which concerns the relationship between State immunity and the responsibility of States for international crimes.

V. State Immunity versus State Responsibility for International Crimes (Individuals' Right to a Remedy before Domestic Courts)

Among the various situations addressed in the present contribution, this one seems to be the most controversial. In the last decade, domestic courts have frequently been asked to disregard State immunity and to adjudge damages flowing from a breach of fundamental rules of the international legal order. The idea has repeatedly been put forward that the higher normative rank of these rules implies the duty for domestic judges to set aside rules of immunity, which allegedly are inferior in the hierarchy of international law.

This idea is premised on the existence of a conflict between the two sets of rules, to be settled using the hierarchical method. However, this premise is not logically convincing. Quite to the contrary: the very idea of a conflict between procedural rules, such as those granting State immunity, and substantive rules, such as those protecting fundamental human rights, seems misplaced.³⁸ The application of the rules on immunity by domestic courts does not entail a justification of the State's conduct³⁹ or the recognition of its lawfulness.⁴⁰ Indeed, it does not entail any judgment on the merits of the case. It simply prevents domestic courts from assessing whether conduct allegedly amounting to an international crime did occur, and prevents them from adjudicating a private claim based on that allegedly unlawful conduct.

The non-existence of a conflict also emerges from a functional analysis, which takes into account the role and the aim of the two legal regimes. The grant of immunity does not, in principle, preclude the invocation at the international level of the consequences of wrongdoing. Immunity only precludes recourse to domestic means of redress, and leaves unaltered the possibility to have recourse to the remedies available under international law. One could safely assume that the international legal order is still, at the present stage of development, the proper forum for ascertaining a breach of fundamental international rules and for determining the

³⁸ A Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens*—Some Critical Remarks' (1995) 16 Michigan J Intl L 438; P d'Argent, *Les Réparations de Guerre en Droit International: La Responsabilité Internationale des Etats à l'Épreuve de la Guerre* (Bruylant, 2002) 801 et seq; LM Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97 American J Intl L 741; H Fox, *The Law of State Immunity* (Oxford University Press, 2002) 25.

³⁹ Jones (n 1), paras 24 and 44.

⁴⁰ B Stern, 'Vers une Limitation de l' "Irresponsabilité Souveraine" des Etats et Chefs d'Etat en Cas de Crime de Droit International?' in MG Cohen (ed), *La Promotion de la Justice, des Droits de l'Homme et du Règlement des Conflits par le Droit International: Liber Amicorum Lucius Caflisch* (Martinus Nijhoff, 2006) 544 et seq.

State responsibility flowing from the breach. The granting of procedural immunity before domestic courts simply means that domestic courts are not the proper forum for ascertaining State responsibility, and that the matter must be dealt with at the international level through the mechanisms provided under international law for the settlement of disputes.

Indeed, the case law of international and domestic courts has consistently upheld State immunity even in cases involving the commission of international crimes. International practice provides a number of consistent decisions according to which the various arguments advanced to lift State immunity have been rejected.⁴¹

However, this solution may not prove entirely satisfactory in cases where States commit egregious breaches of human rights and the victims are left with no remedy at all, even at the international level. The question is whether this concern can be addressed from a legal standpoint, and whether there are particular circumstances in which an exception to State immunity is both possible and legally sound. In other words, the absence of a normative conflict between the two sets of rules does not exclude the existence of particular situations in which the application of one fully deprives the other of its effectiveness. The exceptional limitation of one might, in other words, prove to be necessary to avoid the nullification of the very *raison d'être* of the other.

This assumption might be reasonably sustained on the basis of a functional argument, which takes into account the dynamic of interests underlying the existence of positive law. The existence of a plurality of rules giving legal protection to heterogeneous interests, absent any instrument of coordination, is based on the presumption that the diverse interests can be simultaneously pursued. The absence of a normative conflict between the content of two rules indicates precisely that the underlying interests are normally entitled to unconditional legal protection. However, the infinite variety of situations of the real world might unveil situations in which apparently autonomous interests, which underlie different and independent legal rules, interfere. Whereas a limited interference must be accepted as an incidental yet acceptable effect of the interrelation among rules, a more dramatic interference might prove intolerable. In situations of the kind, in order to avoid a legal breakdown, a partial sacrifice of one interest is necessary in order to allow the functioning of the legal system.

⁴¹ See, eg, *Prinz v Federal Republic of Germany* 813 F Supp 22 (1992) (US DC) and 26 F 3d 1166 (1994) (US Court of Appeals); *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3rd) 675 (CA Ontario); *Jones* (n 1). Even under treaty law, where a right to a remedy is expressly accorded to individuals, the European Court of Human Rights has affirmed the principle of State immunity with respect to international crimes. See *Al-Adsani v United Kingdom* (App no 35763/97) ECHR 2001-XI. One notable exception is provided by the *Ferrini* line of case law. See *Ferrini v Germany* (2004) 87 *Rivista di Diritto Internazionale* 539 (Italian Court of Cassation), and more recently Court of Cassation, first criminal section, case no 1072 (21 October 2008) not yet reported.

In order to pursue this perspective, we must take into account, first, the arguments pleading for a full application of State immunity. It is common knowledge that the rule has the function of preventing domestic courts from interfering with the exercise of sovereign activities of a foreign State. Disputes on the lawfulness of these activities must be determined at the international level through the process of international dispute settlement. Domestic adjudication of the consequence of unlawful conduct would thus run counter to fundamental principles of the international legal order, such as the principle of sovereign equality of States and the principles excluding judicial resolution of disputes without the consent of the States parties concerned. The fact that a private claim is based on the alleged violation of fundamental rules of the international legal order does not change this assumption, since what the rule seeks to avoid is precisely the unilateral assessment of the lawfulness of State conduct by the domestic courts of another State.

However, the balancing approach does not entirely rule out the question of whether there are hard cases in which exceptional circumstances might be invoked to deny State immunity. These might refer to situations in which granting State immunity leads to the practical effect of rendering meaningless the prohibition of international crimes and allowing States to escape accountability. In this respect, it is not sufficient to prove that the individuals allegedly damaged have not obtained redress under the international system of remedies. This conclusion would disregard the function of the rule on immunity, which is precisely that of excluding domestic adjudication in matters of State sovereignty. Rather, it seems necessary to demonstrate that the international system of remedies proves structurally incapable of determining and enforcing the consequences of an egregious breach of fundamental rules established in favour of individuals, and that recourse to the domestic system might be considered the only means for balancing the deficiencies of the international system and securing an effective application of the consequences of the breach of fundamental international obligations. In this context, it is worth mentioning that Article 48(2)(b) of the Articles on State Responsibility expressly provides for reparation in the interest of the beneficiaries among the consequences of a serious breach of a *jus cogens* rule, and that Article 54 envisages the right of every State of the international community to take 'lawful measures' to enforce this consequence.

In order to discharge this task, therefore, a domestic court must consider a potentially open list of elements and carefully weight each against the others. It might be useful to point to some of these elements, and to discuss their relative weight in the balancing process.

1. Existence or inexistence of an international determination of a previous breach

Lifting State immunity appears more justified in the presence of an international determination that an egregious breach of fundamental rules protecting

individual rights has occurred, and that it is attributable to the State which invokes immunity. The existence of a previous international determination appears more in accordance with the international process of enforcement. Indeed, it avoids the unilateral adjudication on the lawfulness of sovereign activities of a State by the domestic courts of another State. It also provides evidence that immunity is being invoked in an effort to avoid the legal consequences flowing from a breach which was unequivocally determined at the international law level. In such a context, adjudication of private claims by domestic courts might well be considered a means to enforce international responsibility. The lifting of State immunity by a domestic court might amount to one of the lawful measures to ensure reparation in the interest of the beneficiaries of the obligation breached.

2. Existence or inexistence of a specially affected State; existence or inexistence of an international mechanism of disputes settlement

Another element which must be considered with great care is the existence of a State entitled to claim the consequence of the breach on behalf of the beneficiaries of the obligation breached. Without engaging in a discussion of the vexed question of the holder of *erga omnes* obligations, it is reasonable to suppose that lifting immunity and exercising domestic jurisdiction is less justified if the dispute can be conveniently settled at the international level. This is more likely to occur when there is a State affected (or particularly affected) by the breach, and that State has a direct interest in bringing an international claim *vis-à-vis* the responsible State. Lifting immunity is even less justified in the presence of a process of international dispute settlement, which can be seriously undermined by unilateral action by the courts of a third State.

Conversely, the exercise of domestic jurisdiction appears *more* justified if there is no State that is affected in a particular way, and if other States are not willing to pursue the matter. In these situations, domestic courts constitute the only available forum for claiming the consequences of the breach by the beneficiaries of the obligation breached.⁴²

3. Exhaustion of domestic remedies? Existence or inexistence of effective remedies in the domestic order of the responsible State

Thirdly, before lifting immunity, domestic courts should also take into account the existence of, and the effective possibility of access to, a system of remedies

⁴² For a particular case in which the lifting of an international organization's immunity was justified by exceptional circumstances, ie the denial of justice that the claimant would have been confronted with if the domestic court had granted immunity from jurisdiction to the international organization since no other means of redress was available, see French Court of Cassation, *Banque africaine de développement v MA Degboe*, decision of 25 January 2005, reprinted in [2005] *Journal du Droit International* 1142.

at the disposal of the claimant in the domestic order of the allegedly responsible State. To adjudicate the claim in that legal order does not imply disregarding rules on State immunity. This means of redress thus appears less disruptive of the system of competence and prerogatives of the international legal order and, consequently, may represent a material element in the balancing of interests. Indeed, a comprehensive consideration of the various competing interests at stake might reveal that a partial, but not meaningless, satisfaction in the domestic law of the responsible State is to be preferred to a full attainment of the individual claims at the expense of a profound subversion of the foundations of the interstate relationship.

VI. Concluding Remarks

If a general remark can be drawn from the foregoing analysis, it concerns the difficulty for the international legal order to establish rights without simultaneously establishing a working and efficient system of remedies. This appears to be a result of the disorderly and somewhat chaotic way in which the development of international law has proceeded, that is to say, it follows from the establishment of a coherent system of consequences of serious breach of fundamental human rights without also creating an equally efficient system of enforcement.

Of course, it cannot be taken for granted that such a system ought to recognise *locus standi* to individuals. The use of the term 'beneficiaries' in Articles 48(2)(c) and 54 of the Articles of State Responsibility seems rather to indicate that, in the system of State responsibility, only *States* are the holders of rights and obligations. Individuals, in principle, merely benefit from State actions. The fact remains, however, that a purely inter-State system of remedies might present shortcomings when collective or universal interests, such as fundamental human rights, are at stake. The tendency of individuals whose substantive human rights have been violated to have recourse to the system of remedies provided for by domestic legal orders seems inescapable.

It is basically against this general framework that the issue of the relationship between sovereign immunity and human rights must be assessed. In normal situations, the two sets of rules apply simultaneously. A plain normative conflict seems limited to the prosecution of State organs for international crimes. As noted above, this particular situation is resolved in favour of the lifting of functional immunity in order to allow prosecution before both international and domestic courts of State agents that have committed international crimes.

A material and occasional collision between immunity and fundamental human rights is furthermore discernible in exceptional situations, ie in those circumstances where domestic adjudication is necessary to secure the consequences of the

breach and can therefore be considered an essential part of the process of enforcement of international responsibility. In this situation, the application of the rules of sovereign immunity would interfere with that process and would run counter to the logic of the system. The more the international legal order develops into a system of rights and duties bestowed directly upon individuals, the more the need to limit the scope of the rules on sovereign immunity will be averted.