

2011

Changing the International Law of Sovereign Immunity Through National Decisions

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Recommended Citation

Lori F. Damrosch, Changing the International Law of Sovereign Immunity Through National Decisions, 44 *Vanderbilt Law Review* 1185 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol44/iss5/2>

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Changing the International Law of Sovereign Immunity Through National Decisions

Lori Fisler Damrosch*

ABSTRACT

The international law of sovereign immunity derives from state practice embodied in national judicial decisions and legislation. Although some U.S. Supreme Court decisions refer to this body of law using terms like “grace and comity,” the customary international law of sovereign immunity is law, which national courts should consider when arriving at immunity decisions. While it would be possible for a widely followed international treaty to work changes in customary international law, the UN Convention on Jurisdictional Immunities of States and Their Property has not done so yet. National legislation such as the U.S. Foreign Sovereign Immunities Act can precipitate changes in the international law of sovereign immunity, as can innovative lawsuits prompting national courts to reexamine theories of immunity. The International Court of Justice should refrain from interfering with the ability of national institutions to provide remedies for wrongful conduct of the type involved in Germany’s suit against Italy.

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This essay takes up several aspects of the complementary roles of national and international courts, as well as national legislatures (in the absence of an international legislature as such), with respect to the progressive development of the customary international law of sovereign immunity. The following questions are addressed:

(1) Is there an international law of sovereign immunity? Assuming an affirmative answer, what gives it its quality as *law*, rather than mere grace, comity, or usage? What are the sources of that body of international law *as law*?

(2) What is the relevance of the United Nations Convention on Jurisdictional Immunities of States and Their Property for today's international law of sovereign immunity?¹ To date, the UN Convention has attracted little support as an international treaty, and thus one must ask whether it has any significance as evidence of an evolving customary international law of sovereign immunity.

(3) Has national legislation, such as the U.S. Foreign Sovereign Immunities Act (FSIA),² made a useful contribution in staking out claims in contested domains, such as the expropriation exception or the terrorist state exception to immunity?

(4) How do we assess innovative approaches by litigants who bring suits against foreign states in national courts on novel theories? How do we assess the rulings of national courts, such as those in Italy, that have taken the first steps to decide unprecedented questions? Are these litigation strategies and judicial decisions at the national level beginning to produce a change in the existing landscape of customary international law? If the law is indeed changing, are the trajectories of change taking the law in salutary directions?

(5) Now that Germany has asked the International Court of Justice (ICJ) to put a stop to Italy's innovations,³ is an ICJ ruling on the matter likely to curb such developments in customary international law, allow them to continue, or potentially even

1. United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities] (convention not yet in force).

2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2006).

3. Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, at 4 (Dec. 23, 2008), available at <http://www.icj-cij.org/docket/files/143/14923.pdf>; Jurisdictional Immunities of the State (Ger. v. It.), Order (July 4, 2011), available at <http://www.icj-cij.org/docket/files/143/16556.pdf>.

encourage them? How might such a ruling be received within the Italian legal system?

I. THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY AS LAW

Is there an international law of sovereign immunity? If so, where did it originate? How can we identify it today? How might it change?

A bit of confusion about the “law” in sovereign immunity law comes from language used by the U.S. Supreme Court in many of its sovereign immunity cases: that the decision of one state to grant immunity to another is a matter of “grace and comity,” from which one might infer, incorrectly in my view, that international law is not necessarily relevant to the matter. This notion originated with language in the Supreme Court’s first, much-quoted sovereign immunity decision, *The Schooner Exchange v. McFaddon*.⁴ Written by Chief Justice John Marshall, this opinion emphasized that the absolute territorial sovereignty of each state “is susceptible of no limitation not imposed by itself” and treated comity as the basis for finding an implied waiver of jurisdiction when a foreign prince or public armed ship enters the territory with the consent of the territorial sovereign.⁵ In the FSIA era, the Court’s sovereign immunity cases cite *The Schooner Exchange* without elaboration, for the proposition that immunity “is a matter of grace and comity rather than a constitutional requirement,” and international law is not even mentioned as a potentially relevant source of law.⁶ Soon after the Court’s *Austria v. Altmann* decision reiterated this approach, Gerald Neuman wrote an insightful article aptly titled “The Abiding Significance of *Law* in Foreign Relations,” in which he observed that the Court in *Altmann* focused so strongly on the FSIA “that it appeared to have lost sight of the international law lying behind it.”⁷ Justice Stevens’s majority opinion quotes from the FSIA but omits its reference to international law, “and one could read the entire opinion without intuiting that the immunity of foreign states was a subject addressed by international law.”⁸ Most recently, in *Samantar v.*

4. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

5. *Id.* at 136, 145–46.

6. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 688–91 (2004) (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) 116; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983); and other cases in which immunity was granted or denied in accordance with the preferences of the political branches).

7. Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 138–39 (emphasis added).

8. *Id.*

Yousuf, the Court recapitulated the “grace and comity” point with reference to these cases.⁹ After holding (correctly in my view) that the FSIA does not apply to individuals, the Court essentially ignored international law in concluding that federal courts are to decide such cases on the basis of federal common law.¹⁰

To conclude on the contrast between “grace and comity” on the one hand and international law on the other, I believe that the Court would have been on firmer ground if its *Altmann* and *Samantar* decisions had acknowledged that international law—customary international law—is part of the relevant matrix of law that federal courts should consider, either in construing a statute enacted against the background of international law (as was the case with the FSIA)¹¹ or in addressing the nature of the sources that federal courts should consult when ruling on claims of immunity outside of the four corners of the statute.¹² To ignore the international law of immunity in national judicial decisions on immunity is to deprive those decisions of their secure foundations *in law*, and also undercuts the authority of the domestic court in contributing to the development of the body of custom that constitutes international law.¹³

9. *Samantar v. Yousuf*, 130 S.Ct. 2278, 2280–85 (2010).

10. As the discussion earlier in the symposium has brought out, the U.S. government’s position in *Samantar* is that the legal basis for determining immunity of individuals affiliated with foreign states should be “common law principles articulated by the Executive Branch and informed by customary international law.” Sarah H. Cleveland, Louis Henkin Professor in Human and Constitutional Rights, Columbia Law Sch., Remarks at the Vanderbilt Journal of Transnational Law Symposium: Foreign State Immunity at Home and Abroad (Feb. 4, 2011). Our foreign colleagues could well wonder why the Supreme Court failed to analyze the customary international law principles relevant to individual immunities. See Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT’L L. 1105 (2011) (noting that U.S. courts do not recognize customary international law as “truly binding”). Courts elsewhere have properly treated state immunity as a matter not of discretion but of international law. See, e.g., *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, [36]–[49] (Lord Hoffman) (appeal taken from EWCA (Civ)) (U.K.) (“It is necessary carefully to examine the sources of international law concerning the particular immunity claimed.”); Lorna McGregor, Dir. LLM Int’l Human Rights Law, Univ. of Essex, Remarks at the Vanderbilt Journal of Transnational Law Symposium: Foreign State Immunity at Home and Abroad (Feb. 4, 2011) (discussing *Jones*, [2006] UKHL 26 and *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 101).

11. Cf. 28 U.S.C. § 1602 (2006) (“Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned”); H.R. REP. NO. 94–1487, at 8 (1976) (“Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.”).

12. On the potential relevance of international law as part of a federal common law inquiry, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915, 960–61, 971–75 (2011).

13. By contrast, in the national judicial decisions that Germany is now challenging at the ICJ, Italian courts appear to have grounded their reasoning in the customary international law of sovereign immunity, which may give those decisions

On the assumption that the present audience does not need further persuasion that our subject is indeed one about which international law does have something to say,¹⁴ I turn now to the UN Convention on Jurisdictional Immunities of States (the Convention) as potentially relevant evidence of the customary international law of state immunity.

II. THE UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES

The Convention, a relatively new instrument finalized in 2004, is the culmination of decades of on-again, off-again efforts by the United Nations International Law Commission (ILC) to bridge formidable cleavages during a period of rapid changes in state practice concerning sovereign immunity.¹⁵ As its main features have been covered elsewhere in this symposium,¹⁶ I will confine myself here to aspects bearing on its usefulness as evidence of international custom.

Writing about the Convention soon after it was opened for signature, David Stewart predicted “rapid adoption by a considerable number of states currently lacking domestic statutes on sovereign immunity.”¹⁷ In the ensuing six years, that prediction has not yet come true. Not only is the Convention not yet in force, but it has had relatively few adoptions to date: only twenty-eight states have signed and only eleven have ratified or acceded as of the symposium’s date.¹⁸

more authority at the ICJ and in other arenas outside Italy. On this point, see *Jurisdictional Immunities of the State (Ger. v. It.)*, Application Instituting Proceedings, *supra* note 3.

14. Compare the remarks of Russia’s culture minister, Aleksandr Avdeyev, in relation to a lawsuit brought in the U.S. District Court for the District of Columbia over archival documents held in Russia: “[T]he issue, my friends, is international law, rather than domestic American law,” Mr. Avdeyev said. “Under international law there is state jurisdiction, and if you want to sue, fine, sue us on Russian territory.” Carol Vogel & Clifford J. Levy, *Dispute Derails Art Loans From Russia*, N.Y. TIMES, Feb. 3, 2011, at C1.

15. For an overview, see David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT’L L. 194 (2005).

16. David P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 VAND. J. TRANSNAT’L L. 1047 (2011) (discussing, in detail, the history of the Convention and its implications for foreign sovereign immunity in the United States).

17. Stewart, *supra* note 15, at 211.

18. UN Convention on Jurisdictional Immunities, *supra* note 1. The eclectic list of ratifying states consists of Austria, Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Sweden, and Switzerland. Since neither Germany nor Italy is a party, it will not govern their dispute at the ICJ, discussed *infra* text accompanying notes 60–63, except to the extent that the ICJ considers it relevant

These numbers fall far short of what is typically considered reliable evidence that a treaty reflects customary international law binding on nonparties to the treaty.¹⁹

In some respects, to be sure, the fact that the ILC was able to reach agreement on certain formulations of rules of foreign state immunity could provide modest support for the proposition that states believe that the rules so formulated correspond to the requirements of customary international law (the *opinio juris* component in classic theories of international law).²⁰ However, in order to satisfy the expectations of a serious inquiry into the status of a putative rule of customary international law, one would also need to show that states follow the same rules in their patterns of practice. This may be true for some of the provisions of the Convention, but probably only for those that represented the lowest common denominator of state practice at the time the Convention was negotiated, such as acceptance that a state is not entitled to immunity for commercial transactions as regards disputes falling within the forum's jurisdiction under applicable rules of private international law.²¹ It is doubtful that the same could be said of all the Convention's provisions, many of which appear to represent negotiated compromises among divergent trends in state practice in the years leading up to the final agreement.²²

Most significantly, it is implausible that a treaty negotiated in full awareness that it was not congruent with existing immunity law and practice of leading states could be understood as establishing new rules of customary international law at odds with the FSIA and judicial decisions in the United States and other countries. Unless and until such states adopt the Convention's provisions as treaty obligations or take action within their own legal systems to embrace the new rules, they would be free not only to continue their preexisting practices but also to develop new customary international law through changing practice.

The absence of provisions in the Convention specifying exceptions to immunity that correspond to exceptions available in certain domestic legislation does not necessarily give rise to an inference that the default rule in customary international law

evidence of customary international law, which is doubtful for the reasons discussed herein.

19. On the relationship of custom and treaties, see generally INTERNATIONAL LAW: CASES AND MATERIALS 118–21 (Lori F. Damrosch et al. eds., 5th ed. 2009).

20. *Id.* at 90–112.

21. UN Convention on Jurisdictional Immunities, *supra* note 1, arts. 2(1)(c), 2(2), 10(1).

22. For example, the tort exception as formulated in Article 12 accepts that states cannot invoke immunity for certain types of acts or omissions occurring in the forum, but it appears to take a narrower approach to tort liability than that applied in the FSIA. See Stewart, *supra* note 15, at 201–03.

requires that immunity be granted. In contrast to the FSIA, which the Supreme Court has interpreted as establishing the “sole” basis for deciding claims of immunity in U.S. courts,²³ the UN Convention cannot preclude the existence and progressive development of a parallel body of customary international law on immunity, which need not be the same as the Convention’s rules. Only between treaty partners, and only to the extent that the Convention’s provisions reflect an intent to specify an exclusive list of exceptions to immunity, would it be reasonable to conclude that immunity must be allowed if an express exception has not been made.

Because of significant discrepancies between the Convention and the FSIA, which are surveyed elsewhere,²⁴ there is not likely to be much interest in the United States in displacing the U.S. statute and the growing corpus of judicial decisions under it with the different formulations found in the Convention. The case would have to be made that the United States stands to benefit by adjusting its own approach in the direction of compromises hammered out in a multilateral arena. In the absence of a groundswell of support for the Convention’s rules among other developed states, U.S. policymakers are not likely to see any advantages to changing the current U.S. rules.

The meager number of ratifications to date, and particularly the lack of interest from states with well-established rule-of-law traditions, leaves the usefulness of the Convention very much open to doubt. It would be interesting to learn from European colleagues at this symposium whether there is serious discussion in their countries about becoming party to the Convention, and if so, for what reason. European scholars are beginning to write about the Convention with attention to its compatibility with existing bodies of law and potential interactions between the Convention and decisions about state immunity in national and international tribunals.²⁵

23. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (finding that the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in U.S. courts).

24. See Stewart, *supra* note 15, at 199 n.31 (divergence between approaches to commercial activity under the Convention and the FSIA); *id.* at 201–03 (differences concerning tortious conduct); *id.* at 205–06 (absence from Convention of provisions corresponding to FSIA exceptions for expropriation and terrorism); *id.* at 207 n.74 (“inexact parallels” as regards certain measures of constraint); *id.* at 211 n.93 (predicting difficulty in ratifying the Convention in countries with already developed statutory frameworks for sovereign immunity).

25. See e.g., Andrea Atteritano, *Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years*, 19 ITALIAN Y.B. INT’L L. 33, 36–38 (2009) (discussing the UN Convention and a possible *jus cogens* exception to immunity); Riccardo Pavoni, *A Decade of Italian Case Law on the Immunity of Foreign*

III. THE FSIA AND OTHER NATIONAL LAWS: CATALYSTS FOR CHANGE IN INTERNATIONAL LAW

The enactment of the FSIA in 1976 was one among several developments in national legislation to produce significant changes in the landscape of state practice concerning immunity in the 1970s and the ensuing time period.²⁶ The FSIA was subsequently amended several times, notably to add a “terrorist state” exception in 1996, which was maintained and recodified in the 2008 amendments.²⁷

A driving motivation for the U.S. Congress’s action to create an exception to immunity for state sponsors of terrorism was the fact that the relatives of victims in the explosion of Pan Am Flight 103 over Lockerbie, Scotland were lobbying intensively for such a change, in connection with lawsuits brought against Libya in U.S. courts to obtain redress for the attack.²⁸ Those lawsuits advanced creative theories for interpreting the FSIA in the absence of a clearly applicable exception to immunity,²⁹ such as an implied waiver of immunity on a *jus cogens* theory.³⁰ Prior to the enactment of the terrorist state exception, the U.S. Court of Appeals for the Second

States: Lights and Shadows, 19 ITALIAN Y.B. INT’L L. 73, 78–79 (2009); see also Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The Civitella Case*, 7 J. INT’L CRIM. JUST. 597, 607–08 (2009) (discussing implications arising out of Italy’s lack of treaty obligations or national legislation on foreign sovereign immunity).

26. One recent catalogue of immunity statutes identifies the United States, United Kingdom, Pakistan, South Africa, and Canada as having legislation on the subject. See Atteritano, *supra* note 25, at 34 n.1. Interestingly, these countries are all common law systems; codification of immunity law has apparently not been thought necessary in civil-law countries, though statutes regulating particular aspects of immunity practice have occasionally been adopted in such countries. A recent example is the enactment in Italy of a law specifically suspending enforcement proceedings against a foreign state during the pendency of an ICJ case challenging such measures of execution. See *id.* at 46–47 (discussing Decree-Law No. 63, Decreto Legge 28 aprile 2010, n. 63 (It.) (codified into law by Legge 23 giugno 2010, n. 98)).

27. The 1996 amendment (part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 1241 (1996)) added a new exception for state sponsors of terrorism in what was then § 1605(a)(7) of the FSIA. 28 U.S.C. § 1605(a)(7) (1996), *repealed by* Pub. L. No 110-181, § 1803(b), 122 Stat. 341 (Jan. 29, 2008). With the 2008 amendments, the recodification of the terrorist state exception is now found at § 1605A. See 28 U.S.C. § 1605A (2008).

28. See Jonathan B. Schwartz, *Dealing with a “Rogue State”: The Libya Precedent*, 101 AM. J. INT’L L. 553, 563 (2007) (discussing the role of victims’ relatives in motivating the abrogation of sovereign immunities for countries designated as state sponsors of terrorism).

29. The tort exception of § 1605(a)(5) was limited to conduct occurring in the United States. 28 U.S.C. § 1605(a)(5) (2006) (current version at § 1605A).

30. *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 242, 245–46 (2d Cir. 1996) (dismissing the suit and rejecting the argument that a state impliedly waives sovereign immunity whenever it violates fundamental *jus cogens* norms).

Circuit was not persuaded by any of these innovative approaches.³¹ Congress, however, was convinced that justice would be better served by opening the U.S. forum to this category of suits—which involved personal injury or death from acts committed by terrorist states—on several conditions, including:

- (1) the acts on which suit could be brought would be limited to torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such an act;
- (2) the act must be committed by an agent of a foreign state acting within the scope of employment;
- (3) the defendant state must be designated by the Department of State as a state sponsor of terrorism;
- (4) the claimant or victim must be a U.S. national; and
- (5) the claimant must have offered the foreign state an opportunity to arbitrate the claim.³²

The terrorist state exception has given rise to quite interesting litigation, as well as several efforts to enforce judgments against states subject to the exception, mostly in cases where the foreign state defaulted in the U.S. proceeding.³³ Congress has lent some support to those efforts through several amendments, culminating in the 2008 recodification of the terrorist state exception.³⁴

I will comment only on one aspect of this intriguing series of cases, in relation to the pending litigation at the ICJ involving claims of immunity (litigation that was the focus of other presentations on this symposium panel).³⁵ At the time of enactment of the terrorist state exception to the FSIA, which Congress clearly intended to apply to Libya,³⁶ Libya was already suing the United States and the United

31. *Id.* at 242–45 (concluding that Congress did not intend to include an implied waiver when drafting 1996 amendment to FSIA).

32. 28 U.S.C. §§ 1605–1605A (2006). For discussion and critique, see Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 172–76 (1997) (criticizing the requirement of U.S. citizenship and raising questions about making availability of judicial remedy turn on political determination of state sponsorship of terrorism, but noting that “[o]n balance . . . Congress made a reasonable choice not to open up every State in the world to these kinds of suits”).

33. *See, e.g., Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 54 (D.D.C. 2008) (applying the terrorist state exception in suit against Syrian government for material support of Al-Qaeda in Iraq).

34. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 1083 (2008).

35. *See Elena Sciso, Italian Judges’ Point of View on Foreign States’ Immunity*, 44 VAND. J. TRANSNAT’L L. 1201 (2011); Tomuschat, *supra* note 10.

36. *See Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998) (applying amendment in face of Libyan argument that it retroactively expanded Libya’s liability to suit in the United States).

Kingdom at the ICJ in an effort to forestall or deflect the application of UN Security Council sanctions to Libya.³⁷ Libya was unsuccessful in its request for provisional measures to restrain the two permanent members of the Security Council from proceeding with their efforts to mobilize compulsory measures of coercion against it,³⁸ but it did continue to litigate the matter for several more years. Ultimately, Libya reached agreements with the United States and the United Kingdom to settle some of their demands, and eventually settled all matters then in dispute.³⁹

It would require only a small variation from the real-world facts of Libya's ICJ case to suppose that Libya could have framed its claims at the ICJ in such a manner as to call into question the exercise by U.S. courts of jurisdiction over Libya under the terrorist state exception.⁴⁰ Focusing just on the merits of the issues that might have been raised in such a claim, we can see that the structure of the argument would bear some similarity to the theories that Germany is urging to the ICJ in its application against Italy in its presently pending case.⁴¹ The applicant state would contend that the respondent state subjected the applicant to the jurisdiction of respondent's courts under circumstances that are essentially unprecedented. Therefore, the argument would continue, jurisdiction cannot be grounded in preexisting customary practice, and accordingly jurisdiction is contrary to a baseline understanding of sovereign immunity as the default rule, from which the only exceptions have to be justified in terms of custom.

One can speculate that the ICJ would not have looked favorably on Libya's claim to be immune from the exercise of national civil jurisdiction by states whose nationals died in a terrorist attack (assuming that the U.S.-UK position attributing the attack to the Libyan state—which Libya disputed—could have been established on facts proved in the litigation). Undoubtedly, part of the legally relevant context would have been the Security Council resolutions demanding that Libya be held accountable for the destruction of Pan

37. Questions of Interpretation and Application of 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Order, 1992 I.C.J. 3, 114 (Apr. 14) (request for the indication of provisional measures).

38. *Id.*

39. For a complete account of the settlement, see Schwartz, *supra* note 28, at 567-73.

40. For purposes of argument, we would need to assume that Libya could have maintained such a claim in the jurisdictional context of its suit against the United States under the jurisdictional clause of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention], and that Libya could have amended its ICJ application after the enactment of the 1996 terrorist state exception to the FSIA.

41. Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, *supra* note 3, at 4.

Am Flight 103.⁴² But those resolutions did not create the obligation, nor would they have been the source of the best legal reasons for rejecting a Libyan argument of entitlement to sovereign immunity on claims against it for having perpetrated a terrorist act.

Of course, we do not have any adjudication by the ICJ on the hypothetical legal challenge by Libya to the terrorist state exception. But we do know that at the end of the day, incentivized in no small measure by the fact that Congress created this exception to immunity for the benefit of the Lockerbie plaintiffs, Libya did in fact pay \$2.7 billion into an escrow account, which was to be paid out as reparations to the victims' families.⁴³ In the end, the removal of immunity pursuant to the FSIA amendment was one of the most formidable elements of leverage against a wrongdoer state to induce it to reach a just settlement.

A similar lesson can be drawn from the *Altmann* case, which involved the application of the FSIA's expropriation exception. In *Altmann*, the plaintiff alleged that during or after World War II, Austria wrongfully took several paintings by Gustav Klimt belonging to an Austrian Jewish family.⁴⁴ Congress, in enacting the expropriation exception in 1976, did not follow any preexisting practice of disallowing immunity in such circumstances. Austria argued that immunity should be ascertained under the law applicable at the time of the alleged taking, when foreign states would have been considered absolutely immune under then-prevailing views of immunity in U.S. and international law.⁴⁵ The U.S. Supreme Court found the 1976 FSIA to be the sole and exclusive source of law, even as to claims arising decades before its enactment.⁴⁶ That view of the statute, which was correct as a matter of interpretation of the text and congressional intent, did not violate international law, even in the absence of a prior international practice of treating expropriation as coming under an exception to immunity from national judicial jurisdiction.

After the Court's ruling in *Altmann*, which held only that the FSIA provided the relevant rules of law and not how the law should be applied on the facts of the particular case, the parties decided to

42. S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993) (imposing further sanctions to enforce Resolution 748); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (making Resolution 731's request binding pursuant to Councils' compulsory powers under Chapter VII of UN Charter); S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan. 21, 1992) (urging Libya to provide a "full and effective response").

43. Schwartz, *supra* note 28, at 571 n.105.

44. Republic of Austria v. Altmann, 541 U.S. 677, 680–81 (2004).

45. *Id.* at 686.

46. *Id.* at 698.

arbitrate their dispute.⁴⁷ Maria Altmann's claim against the Republic of Austria for ownership of the paintings was ultimately vindicated in arbitration.⁴⁸ She subsequently sold Klimt's portrait of her aunt, Adele Bloch-Bauer, to Ronald S. Lauder for \$135 million, and it now hangs in the Neue Galerie in New York City.⁴⁹

As with the Libyan hypothetical, one could readily imagine a scenario under which an arbitral tribunal, or conceivably the ICJ, would be asked to determine whether Austria enjoyed immunity under customary international law from a claim of expropriation of property confiscated from victims of racial or religious persecution. Leaving aside other issues of factual and legal dispute (such as whether Adele Bloch-Bauer's will required or merely requested that the portrait be donated to the Austrian state museum after her husband's death) and focusing just on whether customary international law requires a default rule of immunity and prohibits an exception to rectify such a profound injustice, the answer must be that customary international law does not freeze the law as it might have existed during World War II to prevent national courts from affording a remedy for wrongful expropriation.

IV. INNOVATIVE SUITS IN NATIONAL COURTS

U.S. courts in the FSIA era were not the first national courts to forge new approaches to holding foreign states accountable for wrongful acts, nor are they the only ones to have extended the available exceptions to immunity to reach Holocaust-related injuries. Already in the early years of the twentieth century, Italian and Belgian courts were taking the first steps to apply a then-new restrictive theory of state immunity to allow foreign states to be sued on their commercial or other private acts.⁵⁰ As Italian scholars point out, the fact that Italian courts were among the first to allow lawsuits to proceed against foreign states under the restrictive theory does not mean that those first judgments violated international law.⁵¹ The Italian courts may have correctly applied a hitherto-unacknowledged exception implicit in existing customary international law, or they may have effectively transformed the law by articulating a rule that other states in due course embraced.⁵² More recently, Italian courts

47. See William Grimes, *Maria V. Altmann, Pursuer of Family Klimts, Dies at 94*, N.Y. TIMES, Feb. 9, 2011, at B19.

48. *Id.*

49. *Id.*

50. Atteritano, *supra* note 25, at 37.

51. *Id.*

52. For thoughtful exposition of this distinction, see *id.* at 34–39.

have allowed suits against foreign states on Holocaust claims in the series of cases that Germany is now contesting at the ICJ.⁵³

The impact of such national judicial decisions on the customary international law of sovereign immunity can only be discerned with attention to the persuasiveness of the judicial reasoning advanced in the cases themselves, which may or may not incline decision makers in other countries to follow the same path.⁵⁴ It appears that the rulings of the Italian courts have elicited spirited reactions from judges confronting comparable claims in other contexts.⁵⁵ On the international level, Greece recently applied to the ICJ for permission to intervene in Germany's case against Italy, in order to protect and preserve Greece's position regarding attempts to enforce the judgments of Italian courts against German assets in Greece.⁵⁶

In order for the customary international law of sovereign immunity to continue to evolve in response to actions and reactions of diverse decision makers in a variety of countries (judicial, legislative, and executive), an active dialogue among institutions should be encouraged. Inter-judicial dialogue—the process by which courts take note of previous rulings elsewhere and determine whether or not to follow them—can illuminate the issues and articulate reasons either for maintaining traditional conceptions of state immunity or for adjusting preconceptions in light of evolving views on the optimal role for national courts in providing remedies for wrongs committed by foreign states.

V. THE ICJ CASE AND ITS POTENTIAL RECEPTION IN ITALY

In advance of the closing of the pleadings in Germany's suit against Italy at the ICJ and the holding of oral hearings which will give a transparent exposition of both sides' legal arguments, it is imprudent to venture speculation as to how the ICJ might rule. In my view, the ICJ should refrain from a ruling that would interfere with

53. See, e.g., Cass., sez. un., 11 marzo 2004, n. 5044 (It.), summarized in Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, *Italian Court of Cassation*, *March 11, 2004*, 99 AM. J. INT'L L. 242 (2005); see also Cass., sez. un., 29 maggio 2008, n. 14199 (It.), summarized in Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, *Order No. 14201*, 103 AM. J. INT'L L. 122, 126 (2009) (discussing several other cases allowing such suits against foreign states).

54. Cf. Focarelli, *supra* note 53, at 130 (discussing the need for courts to justify their "deviating" rulings with reasons that could form the basis for a generalizable rule of reciprocal and universal application).

55. For a discussion of the assessments by the UK Law Lords of the Italian ruling in *Ferrini*, see *id.* at 126 n.17, 130 n.31.

56. Jurisdictional Immunities of the State (Ger. v. It.), *Order*, *supra* note 3.

the ability of national institutions—judicial or otherwise—to provide remedies for the kinds of wrongful conduct at stake in the Italian cases. Germany's ICJ application makes reference to a series of Italian lawsuits exemplified by the *Ferrini* case, involving German conduct during World War II, from which Germany claims to be shielded by immunity on the theory that the acts in question were public acts of the German state (*jure imperii*).⁵⁷ There may well be approaches to the customary international law of sovereign immunity that would allow at least some such litigation to proceed in domestic courts.⁵⁸ It would be unwise to curtail the ongoing development of that law by virtue of an international judicial ruling precluding Italy from providing a forum for redress of otherwise uncompensated wrongs.⁵⁹ Nothing in the reasoning of previous ICJ judgments on immunities issues would lead to the conclusion that Italy violated international law by allowing these suits to proceed.⁶⁰

If the ICJ should find that Italy's denial of immunity does violate international law, how might such an international ruling be received within domestic law? From outside the Italian legal system it may not be possible to answer the question posed in that way; indeed, Italian courts have not yet addressed the effects in Italian law of an ICJ judgment.⁶¹ There is a growing and perhaps still unsettled jurisprudence of the *Corte Costituzionale* and the *Corte di Cassazione* on the reception in the Italian legal system of judgments emanating from the European Court of Human Rights, which may potentially be

57. *Id.*

58. As one illustration (by no means exclusive), some of the actions involved in the Italian lawsuits were committed by German actors in Italian territory (and also against Italian nationals). Surely the international law of sovereign immunity should not *a priori* foreclose the courts (or other organs) of the territorial state from settling questions of reparation for wrongful acts committed within its territorial jurisdiction. Indeed, even the Convention, which generally takes a narrow approach to exceptions to immunity, would provide for nonimmunity for torts committed within the forum's territory. UN Convention on Jurisdictional Immunities, *supra* note 1, art. 12.

59. We may recall in this connection that it was only after numerous Holocaust-related lawsuits had been brought in the United States that Germany and other states agreed, decades after the postwar peace treaties which led to partial reparation for some but not all such claims, to establish new funds for Holocaust-related claims. *Cf.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 (2003) (giving effect to executive branch policy expressed in international agreement with Germany on Holocaust claims, concluded in the face of Holocaust-related litigation in the United States).

60. In *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), the ICJ did find a core of immunity applicable to sitting heads of state, heads of government, and foreign ministers, and did instruct Belgium to cancel an arrest warrant issued in respect of one such official, which Belgium did do. *See id.* at 33. But nothing in the reasoning (which was not very fully explained) or result of *Arrest Warrant* suggests that the state itself is shielded by customary international law from all exercises of national judicial jurisdiction in respect of the kind of conduct involved there or in the pending case between Germany and Italy.

61. Pavoni, *supra* note 25, at 82.

relevant by analogy.⁶² We could also venture some comparisons to the U.S. Supreme Court's recent refusal to give effect to an ICJ judgment as directly applicable law in the United States.⁶³

The Italian government and Parliament did enact new legislation in response to Germany's ICJ case, essentially suspending enforcement of judgments against Germany (or any similarly situated applicant) while the ICJ proceedings are pending.⁶⁴ However, this is not permanent legislation; it is currently set to expire at the end of December 2011.⁶⁵ It is not clear whether the suspension will be extended through the completion of the pending case or made applicable in respect to any new cases that might be brought in future years.

The German-Italian dispute put the spotlight on a separation-of-powers angle to the ICJ litigation, namely the stance of the Italian government (Executive Branch), which has intimated that Germany's ICJ suit could provide a welcome avenue for putting to rest the diplomatic frictions that have arisen from the suits against Germany in national courts.⁶⁶ Italian scholars have deplored the fact that the Italian government criticized the Italian courts for deciding as they did in *Ferrini* and related cases and even overtly supported German positions, thereby potentially prejudicing the ICJ case.⁶⁷ It may appear that the Italian government prioritized the interest in friendly relations with Germany over Italy's other interests, namely obtaining reparations for victims of Germany's wartime crimes and maintaining the autonomy of the Italian judiciary in deciding claims brought in Italian forums. The inference is that if the ICJ were to rule against Italy, the result would not be entirely unwelcome to the government, which would then expect Italian courts to fulfill Italy's obligation under Article 94 of the UN Charter and Article 59 of the ICJ Statute to comply with a judgment adverse to Italy.⁶⁸

62. For a discussion of recent decisions by the Italian Constitutional Court restricting the use of European Court of Human Rights rules in domestic courts, see Giuseppe Cataldi & Massimo Iovane, *International Law in Italian Courts 1999-2009: An Overview of Major Methodological and Substantive Issues*, 19 ITALIAN Y.B. INT'L L. 3, 21-25 (2009).

63. *Medellín v. Texas*, 552 U.S. 491, 498-99 (2008) (holding ICJ decisions not to be directly enforceable domestic federal law).

64. See *supra* note 26.

65. Atteritano, *supra* note 25, at 46.

66. Pavoni, *supra* note 25, at 81.

67. *Id.* at 81-82.

68. Article 94(1) of the UN Charter provides that UN members "undertake to comply" with the decisions of the ICJ in cases to which they are parties. U.N. Charter art. 94, para. 1. Article 59 of the ICJ Statute makes judgments binding between the parties and in respect of the particular case. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

Italian courts appear to be fully independent in ascertaining the existence of rules of customary international law and in applying them to cases under their jurisdiction.⁶⁹ If the ICJ should instruct them that the contested national decisions were based on an erroneous understanding of customary international law, one might expect Italian courts to give “respectful consideration” to the views of that international tribunal, in the words of the U.S. Supreme Court in *Medellín v. Texas*.⁷⁰ It appears doubtful that an ICJ ruling would have the direct force of law within the Italian legal system, and it might well be necessary for some further legislative action to provide the legal basis for its implementation in Italy.⁷¹ Any such legislation would presumably be subject to constitutional scrutiny, in which Italian courts would then have to give further clarification to the priority of different sources of law, including the rights of individuals to remedies for wrongs, in relation to the ICJ’s expected clarification of only one of those bodies of law.⁷²

CONCLUSION

The evolution of the international law of foreign state immunity over the nineteenth, twentieth, and now twenty-first centuries has come about through changes in the practice of a variety of actors in national and international arenas. National courts have not shied away from taking the initiative to change state practice to meet the needs of justice. National legislatures have likewise moved the law forward in response to demands for change. The international treaty-making process, exemplified by the 2004 UN Convention, appears to be more conservative, in that it is more deferential to the state preference of not being sued in third-party courts. The lack of enthusiasm for the Convention, as evidenced by the slow pace of adoptions, should give pause to those who think that the customary international law of sovereign immunity should be frozen in place on the basis of lowest-common-denominator compromises. In light of this history, one can hope that the ICJ will not block national institutions from moving the international law of sovereign immunity in a direction that is responsive to contemporary demands for remedies due to wrongs committed by states.

69. Cataldi & Iovane, *supra* note 62, at 17.

70. *Medellín v. Texas*, 552 U.S. 491, 513 n.9 (2008) (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

71. Pavoni, *supra* note 25, at 82.

72. *Id.* (noting that the Italian Constitutional Court would have to decide whether such legislation “constitutes a legitimate and proportionate restriction of the right of access to justice enshrined in Article 24 of the Italian Constitution”).