Foreign Affairs Litigation in
United States Courts

Edited by
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8 SOVEREIGN IMMUNITY AND THE INTERNATIONAL COURT OF JUSTICE:
THE STATE SYSTEM TRIUMPHANT
Paul B. Stephan*

the traditional conception of international law depicts it as the product of states.
particular, states alone make treaties and customary law. While proponents of
view hope to see states bring certain values into the project—religious com-
ments in an earlier day, the greatest manifestations of reason in the modern
secural world—they maintain that only states can be the portals for bring-
these values into international law.1

The constitution of the post-war international system complicated this picture.
First, the victorious allies—the United Nations—began creating international
izations endowed with lawmaking power. While these delegations came
states, they left the power to create international law in the hands of the
diplomats, bureaucrats and technical specialists who served these organizations.2
Second, the enormity of the atrocities perpetrated by the defeated states, Nazi
Germany in particular, opened up an argument about introducing into interna-
law constraints that transcended mere national interests. Humanity, some
argued, must have a seat at the table when international law is made, aside from
the states themselves.

For the first thirty years of the post-war period, the argument about transcen-
dental sources of international law concentrated on limiting what international
law could do. One strain in the conversation looked at the network of treaties

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misjudgments, errors and elisions is mine alone.

1 See, e.g., Jeremy Bentham, Principles of International Law, in 2 THE WORKS OF JEREMY
BENTHAM 550 (John Bowring ed. 1843); J.L. Briery, THE LAW OF NATIONS 1 (6th ed.
1963).

2 See Andrew T. Guzman, Against Consent, 52 VA. J. INT'L L. 747 (2012); Laurence R. Helfer,
constructed by Nazi Germany during its ascendance and argued that the obligations they created should have no legal force. Somewhat later, the Soviet Union and its allies made a different claim, that the fundamental principle of the international legal system must be the prevention of instability in the superpower competition that they characterized as a struggle between socialism and capitalism. This principle, which they called peaceful coexistence, functioned as a check on international law formation. States should regard treaties, as well as custom, that violated this principle as a nullity.

During the 1960s, members of the United Nations turned to this issue as part of a general effort to codify the law of treaties. It is largely the Soviet arguments that prevailed. Countries from the Soviet bloc strongly supported the text that became Article 53 of the Vienna Convention on the Law of Treaties, which states that treaties that contradict peremptory norms of international law have no force. They understood that this formulation provided a portal through which the principles of peaceful coexistence, as understood by their side, would enter international law. The Western states opposed this text for the same reason, the United States and France so much so that they refused to join the treaty.

Only in the late 1970s did there emerge widespread discussion of international law norms that did not depend on state consent, and which operated as positive obligations of states rather than as limits on state lawmaking power. Peremptory norms, proponents argued, now imposed duties, rather than simply constraining the capacity of states to make international law. Principally these norms comprised fundamental human rights, which international law was said to impose on states without the need for state consent. The Final Act of the 1975 Helsinki Conference, although not intended to have any legal force, galvanized an international movement that operated outside of state structures and invoked international law to protect basic human interests. Much of the impetus of this movement was the declining power of the Soviet Union with respect to its satellites and a growing demand for dignity and representation among the captive nations of Central and Eastern Europe, but the movement also had in its sights the authoritarian regimes of Latin America and Africa.

With the collapse of authoritarian regimes in Southern Europe, the break-up of the Soviet Union and the liberation of Central and Eastern Europe, and the end of international relations seemed to have entered a new stage. New international organizations emerged, and old ones took on more authority. At this point it became common to talk of the hollowing out of the state. International economic law and human rights law alike seemed to bind states like never before. Moreover, the process of generating these bodies of law seem to have slipped away from the foreign offices of states, to be taken over by international organizations, independent courts, nongovernmental organizations and individual scholars.

This is the context that frames and gives significance to the decision of the International Court of Justice (ICJ) in Jurisdictional Immunities of the State (Germany v. Italy). The dispute grew out of civil suits brought in Italian domestic courts by Italian nationals who had suffered at the hands of the German Reich during World War II. The plaintiffs were members of the Italian armed forces whom Germany seized at the time of Italy's surrender in 1943, then transported to Germany and conscripted into forced labor. The suits asserted that Germany had committed grave breaches of international humanitarian law and owed compensation. The Italian Corte Suprema di Cassazione allowed the litigation to proceed against Germany, ruling that the traditional immunity accorded a foreign state did not extend to such serious war crimes. After a successful litigant attached Italian real estate belonging to Germany to enforce his judgment, Germany invoked the jurisdiction of the ICJ. In February 2012 the Court ruled that Italy had violated the customary international law of state immunity by allowing its courts to entertain the suits. Three judges dissented.

The ICJ decision unmistakably represents a victory for the traditional conception of international law. The immunity of foreign sovereigns in national courts

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3 A precursor of these arguments is Alfred von Verdross, Forbidden Treaties in International Law, 31 AM. J. INT'L L. 571 (1937).
4 See analysis of the theory, see Leon Lipson, Peaceful Coexistence, 29 LAW & CONTEMP. PROBS. 871 (1964); The Rise and Fall of "Peaceful Coexistence" in International Law, 1 PAPERS ON SOVIET LAW 6 (1977).
10 In spite of the various peace treaties, which tended to discharge Germany of its obligations to compensate, between 1953 and 2000 Germany adopted increasingly broad (although hardly generous) reparations schemes for various classes of Nazi victims. In particular, it signed two agreements with Italy in 1961 that finalized Germany's obligations to Italian subjects. The German courts interpreted the various compensatory statutes as not extending to persons who had been held as prisoners of war in Germany, even if the Reich had not itself recognized their status as prisoners of war.
has ancient roots, argued the Court. Any exceptions have to derive from express state consent through a treaty or implicit consent through a change in state practice accepted as affecting legal obligations. The growing recognition of fundamental human rights does not suffice by itself to create an exception to immunity. Rather, the Court demanded evidence that states separately had equated human rights violations with surrender of immunity. Such evidence, it concluded, did not exist.

This essay proceeds in three parts. First, it discusses the jurisdiction of the ICJ to decide this question. The Court’s approach to its jurisdiction, this part will show, indicated early on its emphasis on states as the significant actors in international law and its reluctance to let other considerations detract from that role. The second part describes the Court’s analysis in some detail. In its final part, the essay discusses the implications of the decision for the litigation of human rights claims in domestic courts. It also considers the reasons why the ICJ would take a more traditional, not to say conservative, approach to international law formation than do some national courts.

I have argued elsewhere that breaking the link between state consent and international lawmaking risks dangers that advocates of particular outcomes, impatient with the conventional process of norm formation, ignore at their peril. The ICJ’s judgment complements that perspective. At its most fundamental level, the judgment indicates that rules of law must have sovereign choices somewhere in their ancestry. Anything else, the judgment suggests, would undermine, not bolster, the international legal system.

I. JURISDICTION OF THE ICJ

The ICJ, to put it mildly, is not a court of general jurisdiction. Advisory opinions aside, which face their own jurisdictional limits, the Court may address a dispute only if the parties have consented. This consent often is prior to the dispute, in the form of a declaration to accept the Court’s jurisdiction in a particular class of cases. In every case, then, the Court must determine whether a declaration exists as well as its extent.

Illustrative is the Court’s decision in *Barcelona Traction.* The dispute involved Spain’s expropriation of the property of a Canadian company that had mostly Belgian shareholders. Spain in a treaty had consented to ICJ jurisdiction over such disputes with respect to Belgium, but no such treaty existed for Canada. The ICJ controversially ruled that the right of foreign investors to diplomatic protection was limited to the direct owners of property, and therefore did not extend to owners of an entity when the entity suffered an injury. As a result, the Court lacked the power to provide any relief to either the company (no jurisdiction) or its shareholders (no right).

The Court is not always this cautious about its jurisdiction, but the instances where it has acted expansively have tended to redound to its detriment. Perhaps the most notorious instance is *Military and Paramilitary Activities in and against Nicaragua.* There the Court’s majority simultaneously rejected the United States’ withdrawal of consent to jurisdiction, found the terms of the prior U.S. consent satisfied on very problematic grounds, and side-stepped the U.S. reservation with respect to issues involving multilateral treaties by finding norms of customary international law that mimicked the treaties in question.

So that all this creative manufacturing of jurisdiction would not go to waste, the Court then held the United States responsible for what it regarded as illegal use of force against Nicaragua and ordered reparations. The United States blocked enforcement of the Court’s judgment in the Security Council, and Nicaragua, after ridding itself of the Sandinista regime, withdrew the suit. Although some observers saw the ICJ’s conduct in this episode as courageous, others saw it as ineffectual and feckless.

In *Jurisdictional Immunities*, the existence of some ICJ jurisdiction was unquestioned, but its scope was controversial. Germany and Italy, as parties to the European Convention for the Peaceful Settlement of Disputes, were obligated to

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15 Treating the various treaty norms as also constituting custom was not by itself so problematic, but using this strategy to bootstrap jurisdiction in the face of an express reservation was. A useful contrast to *Military and Paramilitary Activities in Nicaragua* is *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of Congo v. Rwanda), [2006] I.C.J. Rptr. 6 ¶ 64: …[T]he mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Accordingly, the Court refused to accept jurisdiction over the case, regardless of the gravity of the allegations at issue.

submit disputes to the ICJ in the absence of any other available jurisdictional forum.\textsuperscript{17} Italy did not contest that this treaty gave the ICJ the power to address the legality of its courts’ practice in entertaining suits against Germany. It did, however, assert a counterclaim against Germany for compensation on behalf of its nationals.

Italy’s counterclaim faced a jurisdictional difficulty. Article 27(a) of the European Convention limited the ICJ’s authority by stipulating that it did not extend to disputes relating to “facts and situations” that occurred before the signing of the Convention. The ICJ thus had to decide whether the counterclaim related to the original harmful conduct of Germany, which ended with the war, or instead to the ongoing refusal to compensate the victims, which had continued up to the present.

Every member of the Court except one agreed that it lacked jurisdiction over the counterclaim. Rather than deciding whether the dispute involved the initial war crime or an ongoing duty to compensate, the majority focused instead on Italy’s Peace Treaty with the victorious allies. In the view of the majority, the “facts and situations” on which the counterclaim rested necessarily implicated the 1947 Peace Treaty, under which Italy waived any claim to compensation from Germany. It could not address Italy’s rights without determining the legal significance of that waiver.\textsuperscript{18} Judge Cançado Trindade dissented on this point, foreshadowing his position on the merits.

The differences between the majority and dissenting jurisdictional opinions are instructive. The majority noted Italy’s assertion that the dispute concerned the existence and scope of Germany’s obligation to compensate, but ruled that this duty depended fundamentally on the meaning of the 1947 waiver.\textsuperscript{19} Later decisions by Germany to accord compensation to many victims, but not to those involved here, did not affect the legal obligations as constituted by the Peace Treaty.\textsuperscript{20} There were, of course, legitimate arguments as to whether Germany could invoke a provision in a treaty to which it was not a party, and whether Italy had the capacity to waive its nationals’ claims. Each of the arguments, however, required resolving a dispute based on events that occurred before 1947, well before the European Convention’s grant of jurisdiction. Because the dispute thus depended critically on “facts and situations” that occurred before the European Convention’s cutoff, the Court could not address it.

Cançado Trindade wrote a lengthy dissent. The dispute, he argued, turned on the duty of Germany to make reparations. The Peace Treaty had no impact on the facts that underlay this duty. By entering into negotiations in 1961 to provide compensation to some Italian victims of Nazi atrocities, Germany had recognized its general duty, notwithstanding Italy’s waiver. The real question, he insisted, was whether a right of reparation for war crimes existed. Moreover, the true holders of the claim to reparation were individuals, whose “rights are not the same as their State’s rights.”\textsuperscript{21} This ongoing situation came well within the European Convention’s cutoff.

Underlying the gap between these two positions is a profound difference about the significance of the state. For the majority, Italy’s actions in 1947 were critical. It could not press its counterclaim without accounting for the legal consequences of its Peace Treaty waiver, and the European Convention did not give the Court competence to consider those issues. That Italy purported to waive the individual rights of its subjects, as well as its rights as a state, presented no problem: It was Italy, and not the victims, who came to the Court to seek relief.

For Cançado Trindade, the focus remained on the individuals who suffered at German hands. Even though only Italy had the power to invoke the Court’s jurisdiction, it acted not in its own capacity but rather as the representative of victims of war crimes. To afford these people a hearing, he was willing to stretch the jurisdictional limits grounded in the “facts and situations” language of the Convention. For him, the 1947 waiver was irrelevant because the questions it posed were so easy to answer: Of course Italy could not waive its subjects’ right to compensation for grave war crimes.

Here we see in a nutshell the methodological commitments that would play out on the merits. For the majority, jurisdiction depended on state consent and declarations of consent would be interpreted carefully, if not strictly. Cançado Trindade focused primarily on the underlying claim. When faced with a case involving a serious war crime, the Court should seize any opportunity it had to hear it. Even though the Court has jurisdiction only over states, who alone can appear before it, the real parties in interest were individuals. Actions by a state that impaired their interest, such as Italy’s purported waiver of any claims against Germany, were to be disregarded.

The Court resolved one other procedural issue before reaching the merits. Greece sought to intervene in the case, but did not claim to be a party to the dispute. Even before the Italian litigation, a Greek court had carved out an exception to sovereign immunity, allowing relatives of victims of German atrocities to sue Germany for damages. But the Greek government had refused permission for enforcement of the judgment, and a special supreme court later ruled that Greece...
would not recognize any exception to sovereign immunity in war crime cases. Barred from obtaining recourse in either Greece or Germany, the Greek plaintiffs sought to enforce their judgment in Italy. Germany in turn cited these efforts in its claim before the Court. The ICJ's decision thus could have an impact on the ability of Greek nationals to bring an action against Germany in Italy. The majority noted that the question over which the Court had jurisdiction included the enforceability of Greek judgments against Germany in Italy. Because the Court already was seized of this issue, allowing Greece to participate as a non-party would present no problems. Cançado Trindade concurred. He referred to the significance of the individual rights at stake in the Greek case and the limits of the ability of states to foreclose consideration of such interests. Again, the majority saw its responsibility as adjudicating state rights and obligations, while Cançado Trindade concentrated on individual rights and the imperative of vindicating them.

II. The Decision

In Italy, the question of a foreign sovereign's immunity from judicial process in civil litigation rests exclusively on customary international law, which operates directly in Italian law. Neither Germany nor Italy was party to any treaty that altered this customary international law. The question that the ICJ faced thus was precisely what customary international law requires. As the Court indicated, the doctrine of state immunity has a long history, but its content has changed over time. In an earlier day states usually enjoyed complete immunity in civil cases. Over the course of the twentieth century, however, at least two exceptions have received widespread, but not universal, acceptance. First, many states, including the United States, now limit immunity to acta jure imperii, that is the public acts of sovereigns. Thus, states that engage in commercial transactions often lose their immunity as to such transactions. Second, many states, also including the United States, recognize an exception for public acts that wrongfully result in an injury on the territory of the state where immunity is invoked, that is a domestic tort. Italy argued that customary international law now incorporates these exceptions. Because Germany's misconduct began on Italian territory, where its armed forces seized the plaintiffs in the Italian litigation, Italy maintained that their claims satisfied this widely accepted exception to sovereign immunity.

The majority opinion, supported by twelve of the fourteen permanent members of the Court, found it unnecessary to determine whether customary international law had embraced either the public act limitation or the domestic tort exception. Germany's wrongful conduct involved its armed forces and not any commercial activity. Thus its acts, however wrongful, were public. The majority's review of national practice regarding the domestic tort exception indicated that no state had applied that exception to misconduct by armed forces. The European Convention on State Immunity contains a general carve-out to its immunity exceptions for claims relating to armed forces. The UN Convention, while not addressing the issue directly, comes with clear background evidence of an intention to exclude acts by national militaries. Nor had any state applied the domestic tort exception to military acts, other than the Italian and Greek courts in the cases that triggered the ICJ proceeding. Accordingly, the majority ruled that the domestic tort exception did not apply to the suits at issue.

Having taken care of the legal underbrush, the Court then confronted the central and most compelling question, whether there exists a separate exception to sovereign immunity for violations of peremptory norms of international law. The logic of this argument is clear enough: If international law imposes certain obligations on states regardless of state consent, then it ought to ensure that mechanisms exist to ensure full compliance with those obligations. If the absence of state consent does not impair the obligation, it also should not impair the
remedy. Once peremptory norms enter the system, the very logic of their creation implies that they should be peremptory all the way down.30

Conceptually, this argument requires a kind of clumping. The more the right and the remedy are seen as different aspects of the same thing, the more compelling seems the argument for an exception to state immunity. Conversely, the greater the conceptual distance between the right (untethered from state consent) and the remedy (exceptions to sovereign immunity traditionally rested on consent), the easier it is for the right and immunity to coexist.

The majority responded to this challenge first mechanically, then more abstractly. It began by reviewing state practice. Victims of alleged human rights violations had presented variations of Italy's argument to numerous courts and tribunals during the past decade. Aside from Italy, and the one instance in Greece that its highest court later repudiated, every nation's courts had rejected it.31 Moreover, the European Court of Human Rights, admittedly closely divided, had ruled that the specific obligations of the European Convention on Human Rights did not compel the creation of a peremptory-norm exception to sovereign immunity.32 In light of this evidence, the majority could not see any basis in state practice for recognizing the exception.

The majority then confronted the logical argument. It emphasized the functional difference between rules of liability and rules of susceptibility to judicial process:

Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants, the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural. The State owes a duty of reparation.
Two general points stand out from Cançado Trindade’s extensive and passionately argued opinion. First, no other member of the Court agreed with him. Even though two other judges would have vindicated Italy’s right to refuse immunity, none embraced his argument for a categorical peremptory-norm exception. Second, state practice nowhere figured in his argument. Rather, academic claims coupled with moral imperatives did all of the doctrinal work. In particular, prior decisions of the Court that gave priority to procedural rules over peremptory-norms claims were not distinguished, but rather condemned.

In broader perspective, the Court’s decision strikes a strong blow for the continuing vitality of state consent in the production of international law. The rise of international organizations and human-rights discourse after World War II, and especially since the end of the Cold War, encouraged imagination of a body of law that legal actors could access and create without any need to obtain the approval of states. Indeed, some argued that efforts by states to erect barriers to the vindication of this body of law, such as by limiting the jurisdiction of international tribunals or recognizing state immunity from national jurisdiction, themselves violate international law. This position was presented fully to the Court, nowhere more forcefully than in Cançado Trindade’s dissent. A strong majority resoundingly and unambiguously rejected it.

III. IMPLICATIONS

The ICJ’s decision has significant implications both for the law of sovereign immunity and the underlying structure of international law. In particular, it suggests that U.S. practice constitutes a violation of the rights of the very small set of states that come under its terrorism exception to foreign sovereign immunity. More generally, it indicates structural limits on the recognition of nonstate actors in the formation of international law.

A. U.S. Practice

Since 1976, the Foreign Sovereign Immunities Act has codified U.S. practice regarding the immunities of foreign states. In 1996, Congress created a new exception to immunity for states designated by the President as sponsors of terrorism. That provision allows a person suffering personal injury or death due to “an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking” to sue a state, providing the state was covered by a presidential designation and its agent either carried out the act in question or provided material support for it. Currently designated states include Cuba, Iran, Syria and Sudan. At various times the President also identified Iraq, Libya, North Korea and South Yemen as state sponsors of terrorism, but diplomatic rapprochements or regime changes led to their removal from the list.

The practical consequences of the U.S. terrorism exception are limited, but concrete. In most if not all cases, states refuse to recognize these suits as legitimate and thus allow default judgments to enter. In a handful of cases involving Cuba and Iran, the United States has paid judgments out of its own resources and then subrogated the claims, to date without any recovery. In a few instances, however, states have had to appear in U.S. proceedings to fend off attachments of their assets. Moreover, Libya made significant payments in accordance with a global settlement of outstanding civil suits, as part of its resumption of normal relations with the United States.

Even if Italy had prevailed in establishing a jus cogens exception to sovereign immunity, it is unclear whether U.S. practice would fit. Torture generally is regarded as subject to a peremptory norm, but the other items on the list are more problematic. The (il)legality of extrajudicial killings in noninternational armed conflicts is deeply controversial. That relatively recent multilateral conventions
address aircraft sabotage and hostage taking at least suggests that peremptory norms do not.\textsuperscript{48} A further complication is the selectivity of the U.S. exception, which turns on specific designations by the government. Exposing Cuba to liability, for example, while leaving out other states credibly accused of extrajudicial killings and substantial support for terrorist organizations, such as Russian and Venezuela, smacks much more of realpolitik than of a commitment to principle.

Thanks to the Jurisdictional Immunities decision, however, this line of defense has collapsed. Even if one could characterize the U.S. exception as corresponding to one for violations of peremptory norms, the Court has made clear that, at a minimum, it regards such an exception as illegitimate. A defender of U.S. practice would have to maintain not only that it tracks a peremptory norm exception, but that the Court’s conclusions on the right of a state to carve out such an exception to sovereign immunity are wrong.

In one respect, however, the U.S. approach might seem more defensible than Italy’s. Italy’s executive defended its exception but did not create it or have any role in managing it. Its approach thus failed to tie the sanction (loss of immunity) to a determination of a prior international law violation. Under international law, immunity from judicial process comprises the initiation of litigation, not only the outcome. A state that is sued in a domestic court but ultimately found to owe nothing nonetheless has suffered an injury under international law. Italy allowed courts to be the gatekeepers, which meant that states that objectively violated no international obligation still could be sued, subject to later dismissal by the court.

The U.S. exception, by contrast, involves a collaboration of all three branches, with management of its application shared by the executive and the judiciary. Structurally, it ties the suspension of sovereign immunity to a failure by the state in question to comply with international law, with the executive as arbiter as to the state’s status as a law-breaker.\textsuperscript{49} In other words, the U.S. approach, unlike Italy’s, ensures that only states that an authoritative actor (the executive) has determined to have violated international law suffer a loss of immunity.

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\item This argument works, however, only if “material support” for a violation of the international obligations in question itself violates international law. If not, then the U.S. exception is over inclusive and thus indefensible as a lawful countermeasure, because it extends to states that do not themselves transgress any international legal obligation. Cf. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012) (material support for terrorism is not an international-law war crime).
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So structured, the U.S. immunity exception invites characterization as a lawful countermeasure against breaches of international law.\textsuperscript{50} For a countermeasure to satisfy the requirements of customary international law, it must meet both substantive and procedural standards.\textsuperscript{51} Substantively, it must be proportional to the breach and not itself in violation of any peremptory norm. Procedurally, the state taking a countermeasure must first demand that the wrongful state rectify its breach and announce its intention to impose a countermeasure. The U.S. exception arguably satisfies the procedural requirements, but not the substantive ones.

The process of creating and applying the U.S. exception probably satisfies the procedural component of countermeasures law. Presidents do not designate a state as terrorist without some prior protest of particular conduct that violates international law (if not necessarily a peremptory norm) and a demand for reparation. The statute gives such states clear notice as to the legal risk that they face if they do not satisfy this demand. Unlike Italy’s judicially created exception to immunity, the U.S. approach seems to work precisely as a tit-for-tat response to another state’s breach of international law, with the executive having responsibility for calibrating the U.S. response.

The difficulty with the U.S. approach, however, is one shared with Italy’s. Ultimate control over the countermeasure lies in the hands of private actors. Jurisdictional immunity under international law means not simply freedom from judgments, but freedom from judicial process simpliciter. As noted above, putting a state to the choice of defending itself in a foreign court or running the risk of a default judgment completes the violation of international law. Under the U.S. system, private actors can produce this outcome regardless of the merits of their individual claim. Exposing states to nonmeritorious claims arguably is a disproportionately broad response to the offending state’s default in failing to make reparations for meritorious claims.

It is an open question whether customary international law allows the delegation of retaliatory power to private actors. An ancient precedent would be letters of marque and reprisal, enshrined in the U.S. Constitution and established in British practice for centuries at the time of the founding.\textsuperscript{52} The letters were official licenses to engage in conduct that otherwise would violate the law of nations, conduct that the licensee undertook at its own expense and for its own reward. But

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\item For the suggestion that the U.S. terrorism exception might be defended as a lawful countermeasure, see Kimberley N. Trapp & Alex Mills, note 9 supra, at 165–66.
\item U.S. Constitution, Art. I, sec. 8, cl. 11.
\end{enumerate}
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this device has disappeared from international practice for more than a century. Many now see the outsourcing of state violence as deeply problematic, given the profound differences in incentives that private actors and ongoing states face.

Moreover, the analogy to letters of marque and reprisal is inexact. Issuance of a letter required a determination by the political branches that a particular person appropriately could invoke the sovereign’s rights of retaliation. A categorical withdrawal of immunity, by contrast, leaves the political branches out of the process of making particularized determinations about claimants. Anyone can trigger the judicial process by filing a complaint, whatever its merits and whether the executive approves of the claim or not.

Ligitation, of course, is not violence as such. Historically, however, the law of nations regarded the subjection of a foreign sovereign to a domestic court’s jurisdiction as a violation of that sovereign’s “perfect rights” and thus as legitimating retaliation, up to and including war.53 Opening up a state’s courts to unscreened plaintiffs, who merely have to allege an injury from an international law violation to engage in a practice that constitutes a violation of a traditional international legal obligation, thus seems excessive and disproportionate relative to the international legal injury used to justify this action.

Assuming that other states will conclude that the U.S. exception does not meet the standards for countermeasures and otherwise violates customary international law, there will be some, admittedly modest, consequences for those who obtain judgments (presumably default) from U.S. courts. A host state wishing to protect assets held on its territory by any listed state could disregard the U.S. judgment as obtained in violation of international law. As a result, plaintiffs would have less of a chance of collecting from the defendant government, and would instead have to hope to persuade Congress to fund their enterprise. This would accentuate a trend already apparent in U.S. practice, namely victims of foreign terrorism recovering from the U.S. taxpayer, and not the wrongful government, for their injuries.54

B. The Structure of International Lawmaking

The clash of views between the Corte Suprema di Cassazione and the ICJ over sovereign immunity illustrates two competing approaches to the formation and recognition of customary international law. One method, used by the ICJ


56 For a full throated defense of a contractarian approach to international lawmaking that highlights the central role of the state, see Robert E. Scott & Paul B. Stephan, The Limits of Leviathan—Contract Theory and the Enforcement of International Law (2006).
To be clear, the argument is not that all or even most national courts will be idiosyncratically inventive in the recognition of claims about international law. Many, for example, will refuse to recognize even well-established international legal obligations for reasons of expediency and peculiar domestic institutional constraints. The point is that the forces producing greater diversity in outcomes make it more likely that some national courts also will deviate from general practice in favor of expansion. What a single national court says about international law is likely to vary around a mean more greatly than what a body such as the ICJ will do.

This argument about idiosyncratic approaches to international law also applies to the political branches of states, which have plenty of reasons to bend international law to their particular needs. But one crucial difference exists. A national government, when it makes a claim about international law, must face the consequences. Other states may use the argument opportunistically to thwart the claiming government’s interests, or otherwise may impose costs on that government as punishment for its idiosyncrasy. To put it conceptually, executive branches are more likely to engage in iterative interactions with other governments, resulting in different incentives regarding cooperation and opportunism. Moreover, acquiring a reputation for idiosyncrasy might also reduce the set of opportunities such a government might have to achieve valuable cooperation with other states.

Domestic courts, by contrast, engage in no direct interactions with foreign governments or, for that matter, foreign courts. In a limited number of instances involving transnational litigation, conduct by one national court might have some impact on other judicial bodies. These instances of joint management of a single proceeding, however, are unusual. To a far greater extent than national governments, a domestic court cannot be rewarded or punished for the effect at its work has on foreign actors. As a result, its incentives to curb extravagant claims about binding international law are greatly reduced. Given their diverse contexts and incentives, it is not surprising that some national courts would ascribe to international law rules and norms otherwise available. Opening up the pool to ideas that some prominent person has forwarded, without waiting for any government to agree, greatly expands the repertoire of the courts in question.

On the function of reputation in encouraging compliance with international law, see Robert E. Scott & Paul B. Stephan, note 56 supra, at 118–22. A strong claim for transnational judicial interdependence can be found in Anne-Marie Slaughter, A New World Order 65–103 (2004). For the most part, Slaughter’s argument is aspirational rather than descriptive, and in particular fails to specify persuasively a mechanism that would cause domestic courts to internalize the foreign consequences of their actions.

The Greek and Italian courts’ decision to create a new exception to sovereign immunity illuminates how the process works. The courts in both countries perceived a need to judicialize claims for reparations for war crimes, perhaps because they perceived that opportunities for diplomatic settlement had ended. Both faced a barrier in the ancient and well-developed doctrine of sovereign immunity. Both recognized that the trend in international law since the collapse of the Soviet system was in the direction of greater and more direct enforcement of human rights, even though this trend had not yet entailed a breach of the barrier raised by immunity. Both seized the opportunity, looking more to the future of international law than the past.

Symmetrically, the caution of the ICJ in constructing a new rule of international law illustrates what happens when multinational participation constrains decisionmaking. As noted above, the judges of the ICJ, while completely independent, are selected to reflect certain national outlooks and state interests. It is unlikely that many states would send judges off to the Hague to create new rules that those states had not adopted or endorsed. While such judges may not be immune to normative imperatives, the diversity of their backgrounds and perspectives is likely to narrow the range of claims that they could agree compel adherence regardless of provenance. Nor is there likely to be much space for log-rolling, where one coalition trades imperative norms that they prefer for adherence to those that another coalition advocates. Instead, we see a conservative methodology for norm formation that puts the onus for legal change on other institutions.

It is instructive, for example, to compare the one decision implicating international human rights that the ICJ has decided since Jurisdictional Immunities. In Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), the court addressed the duty of a state under the Convention Against Torture to initiate a criminal prosecution against someone located in its own territory who was accused of violating the Convention. An ancillary question involved the temporal scope of the duty. The former dictator of Chad, who had found refuge in Senegal, was accused of crimes across a lengthy period, including the time between promulgation of the Convention and Senegal’s joining it. The Court ruled that “nothing in the Convention … reveals an intention to require a State party to criminalize … acts of torture that took place prior to its entry into force for that State.” The principle of legality, in particular a prohibition of retroactive criminalization of conduct, applied even with respect to the most heinous international wrongs. Cançado Trindade, in turn, indicated that he would recognize a customary rule against torture to make the retroactivity problem go
away.\textsuperscript{62} Again, the majority believed that an international obligation could not arise before a state had acted to accept it, while the most outspoken proponent of human rights among its members would sweep away such a concern to strengthen the protection of individuals against their state.

IV. Conclusion

In the last three decades, private civil litigation has become an increasingly attractive avenue for human rights advocates to advance their preferences and values. The move enjoys enormous support in the academic community, but attracts somewhat less enthusiasm in the foreign offices of many states, great powers in particular. Litigation shifts rulemaking authority from legislatures and executives to the judiciary. It also greatly augments the influence of private actors. While a few official actors are relieved to have the burden of policy formation in this area lifted, most prefer to hold on to the authority to formulate and enforce human rights norms.

The ICJ decision in \textit{Jurisdictional Immunities} represents a setback for the private-civil-litigation trend. Most directly, it indicates that sovereign immunity remains available even in the most egregious cases. This defense removes from civil litigation an easily accessible defendant, leaving available only government officials who may not be susceptible to process and who may not have attachable assets, as well as private actors to whom liability might be imputed under various complicity theories.

More generally, the decision casts doubt on the entire concept of transcendent norms in international law. By bringing states back into the lawmaking process, the ICJ restores a veto that can limit the work that international law can do. Whether such veto points also allow international law to do the work that it does more effectively remains a matter of debate.

\textsuperscript{62} Cançado Trindade agreed with the court that the parties had not properly raised the question of whether Senegal had violated customary international. He nonetheless explained that he would have ruled that a rule of customary international law prohibiting torture had existed before the Convention, and then states could and perhaps had to punish torture that had occurred before any assumption of a treaty obligation. Continuing the theme of breaking the tie between international law and state consent, he proclaimed in closing:

\textit{Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the International Law of Human Rights—and indeed of international legal thinking—in the second half of the XXth century, amounting to a true and reassuring juridical revolution.}

\textit{Id. ¶ 184 (Separate opinion of Cançado Trindade), available at http://www.icj-cij.org/docket/files/144/17072.pdf.}