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Access to justice for atrocities in the comparison of land-mark cases on state immunity in Brazil and Italy*

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ABSTRACT

This article investigates differences and similarities in the approach of Italian and Brazilian domestic courts to the topic of access to justice for atrocities and the role of state immunity, taking particular note of the limited and select dialogue between the two judiciaries and reflecting on the potential for further developments of the customary international law rule on state immunity. To do so, the article first outlines the rule on state immunity and offers an overview of the articulated Italian case law on why state immunity cannot bar access to justice for atrocities, considering the judicial developments occurred after 2004. The paper moves on to describe the recent 2021 decision of the Brazilian Supremo Tribunal Federal, in which the Brazil judiciary seemingly joined the Italian trend against state immunity when atrocities are committed. The two different judicial trends are then compared and analysed, with a discussion on the limited explicit reference to Italian decisions by the Supremo Tribunal Federal. The article concludes the research by describing the likely impact of these judicial trends on future developments on the relationship between access to justice for atrocities and state immunity.

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What jeopardizes or destabilizes the international legal order are the international crimes and not individual suits for reparation in the search of justice. In my perception, what troubles the international legal order, [sic] are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice.[1]

1. Introduction

This article explores the dialogue or absence of dialogue between national judges in Brazil and Italy on the topic of access to justice for atrocities and the role of state immunity, comparing the attitude taken by the Italian and Brazilian judiciary in concluding that state

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immunity cannot bar justice for atrocities.[2] State immunity is one of the rules of international law that is more directly influenced by the judicial activity of domestic courts since domestic courts are primarily tasked with its application.[3] In the absence of a universal treaty on state immunity in force,[4] domestic courts have developed national case laws on the circumstances in which state immunity applies, contributing to the emergence and development of customary international law in this field.[5] Particularly delicate are those cases in which domestic courts have to decide whether state immunity can bar access to justice for atrocities committed by a state: while scholars have suggested different legal solutions to this issue,[6] various domestic courts have in parallel provided different answers.

In light of the goals of the special issue hosting this research, this article investigates in particular the solutions offered by two domestic judicial systems: Italy and Brazil. The choice of Italy is determined by the fact that, since 2004, Italian courts have denied that state immunity can be invoked to bar access to justice when certain violations of fundamental rights occur. As it is known, the International Court of Justice (ICJ) addressed this subject in the 2012 *Jurisdictional Immunities* case, rejecting the Italian argument that sovereign immunity can be disregarded in order to adjudicate reparations claims for international crimes.[7] Nonetheless, as detailed below, the Italian judiciary keeps denying the subsistence of state immunity vis-à-vis certain violations of fundamental rights, departing from the decision of the ICJ. The choice of Brazil as the second case study is due to the fact that the Brazilian Supreme Court (Supremo Tribunal Federal, henceforth STF) in 2021 declared that no state immunity can be invoked when human rights are violated.[8] Subsequently, in 2022, the Brazilian Supreme Court confirmed these findings, clarifying that these apply for violations occurring on Brazilian territory only.[9]

These two domestic jurisprudential trends share some similarities and, at the same time, present some differences in the outcomes and in the legal reasoning advanced. This article explores these convergences and divergences, taking particular note of the limited and select judicial dialogue between the Brazilian and the Italian case laws. With the wider perspective of national judicial dialogue in international law matters in the background,[10] the article explores the significance of the Italian and Brazilian case laws in further developments of the customary international law on state immunity. In light of the goals of the special issue where this article appears and of the boundaries of the analysis that focuses on Italian and Brazilian case law, particular – but not exclusive – attention is given to scholarship authored by Italian and Brazilian commentators.

This study is structured as follows: section 2 outlines briefly the rule on state immunity and offers an overview of the articulated Italian case law on why state immunity cannot bar access to justice for atrocities, taking in particular account judicial developments that occurred after 2004. Section 3 describes the recent 2021 decision of the Brazilian Supremo Tribunal Federal, in which the Brazil judiciary apparently joined the Italian trend against state immunity when atrocities are committed, taking into account subsequent 2022 developments as well. The two different judicial trends are compared and analysed in section 4, where the limited explicit reference to Italian decisions by the Supremo Tribunal Federal is discussed. Section 5 concludes the research by describing the likely impact of these judicial trends on future developments on the relationship between access to justice for atrocities and state immunity.

2. State immunity, access to justice for atrocities, and the Italian Case Law

2.1. State immunity in a nutshell

The rule on state immunity posits that 'no state can claim jurisdiction over another' on the basis of the principle of equality of states.[11] Accordingly, a state, as such, cannot be convened before the courts of another states, except in cases in which the former has consented to the exercise of jurisdiction by the latter.[12]

State immunity emerged as a rule protecting states in relation to any kind of activity. Yet, already at the beginning of the XX century some domestic courts started distinguishing between acts covered by state immunity, i.e. those acts undertaken as manifestation of the state's sovereignty (*jure imperii*), and acts not covered by state immunity because they are undertaken by a state as if it acts as a commercial entity (*jure gestionis*). Although the contours of these two categories are not always easy to discern, this distinction is considered part of customary international law on state immunity.[13]

As mentioned afore, at the time of writing, there is no binding treaty on state immunity at universal level. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property never entered into force due to a lack of ratifications.[14] Accordingly, at the international level, state immunity is mainly governed by customary international law.

2.2. A new hope: does jus cogens trumps state immunity?

Since 2004, Italian courts have started arguing that there is yet another exception to state immunity beyond the acts *jure imperii* / acts *jure gestionis* dichotomy: according to this view, usually labelled as humanitarian exception, state immunity cannot be used to deny access to justice to victims of atrocities. For the purposes of this article, the decision of the Italian Supreme Court (Corte di Cassazione) in the *Ferrini* case will be taken as the starting point of this story. It should be noted that before 2004 other national jurisdictions – e.g. in Greece – had reached similar results.[15] However, the stubbornness of Italian courts in denying state immunity to bar access to justice for atrocities, coupled with the perceived leading role of Italian courts in shifting from absolute to relative immunity, resulted in a recognisable Italian position on the issue at hand.

In the *Ferrini* decision of 11 March 2004, the Italian Supreme Court denied state immunity to Germany for some crimes committed by the Nazi army in the north of Italy during World War II.[16] In particular, the decision regarded illegal deportations and denials of the status of prisoners of war, which were prohibited under international humanitarian law even prior to the adoption of the 1949 Four Geneva Conventions. In the Supreme Court's view, these actions amount to international crimes and the protection of human rights against these crimes amounts to *jus cogens*. Accordingly, state immunity, which is not a rule of *jus cogens*, cannot bar the access to justice to rights which have *jus cogens* status.[17] As a result, Germany could not invoke state immunity to bar justice for international crimes.

The *Ferrini* decision sparked significant academic debate[18] and was followed by a series of other Italian decisions that applied the same rationale.[19] For the purposes of this study, suffice it to note that the Italian Supreme Court argued on the basis of international law *only*: the conclusion that Germany did not enjoy immunity was, according to the judges, a consequence of a hierarchy between different international law rules that

existed at the international level, rather than the result of the application of Italian domestic law. What the Italian Supreme Court did was simply identifying this international law hierarchy, recognising its transposition into the Italian legal system, and using this hierarchy to solve an apparent normative conflict between the ban on international crimes and state immunity.[20] The soundness of this conclusion was tested very soon.

2.3. The empire strikes back: the ICJ and the rejection of the Italian rationale

Germany did not stay idle in front of the Italian case law and the danger to be asked to pay for reparations for the crimes committed by the Nazis during their occupation of northern Italy. Rather, Germany convened Italy in front of the ICJ, lamenting that the Italian judiciary had violated German state immunity.

In 2012, the ICJ passed its judgement in favour of Germany. The Court rejected the idea that Germany could not invoke state immunity before Italian courts when it barred access to justice for victims of atrocities, stating that 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict'.[21] According to the ICJ, there is no normative conflict between the procedural rule on immunity and the rules that are relevant for the merits of a case pending before a domestic court.[22]

Although the ICJ's decision sparked an animated debate among scholars,[23] it was implemented diligently by Italy. A number of Italian judgments, both by the Supreme Court and by lesser tribunals, acknowledged the ICJ's decision and denied Italian jurisdiction over similar cases.[24] The Italian parliament also intervened, by adopting Law no. 5/2013,[25] with which Italy acceded to the United Nations Convention on Jurisdictional Immunities of States and Their Property. Article 3 of this Law stated that Italian judges had to comply with the ICJ judgment, denying their jurisdiction in similar cases.[26]

The ICJ's ruling on this matter also affected the development of case law on state immunity outside Italy, both at national level and before the European Court of Human Rights, resonating in a series of backward national and international judgments that confirmed the application of state immunity even when atrocities occurred.[27] In light of the influence of the ICJ's case law in matters of international law, some held that this was the final position on the relationship between state immunity and access to justice for atrocities.[28] However, a reaction by Italian courts was underway.

2.4. The return of the Jedi: the Italian Constitutional Court against German immunity

The Italian decision of implementing the ICJ's judgment did not end the state immunity saga because of the intervention of the Italian Constitutional Court in 2014. A different Italian judicial body was ready to offer its rationale on why, notwithstanding the ICJ's decision, state immunity could not have barred the access to justice for atrocities.

At the time of the writing of this article, Italy is *not* complying with the ICJ's decision because of its Constitutional Court decision no. 238 of 2014.[29] The Italian Constitutional Court held that as a matter of Italian domestic law, the right to access justice is a fundamental principle guaranteed by Articles 2 and 24 of the Italian Constitution, and as a such, it cannot

be set aside in favour of state immunity when the latter shields war crimes and crimes against humanity, which breaches fundamental human rights.[30] In this regard, Articles 2 and 24 are considered to be 'counter-limits' to the application of customary international law on state immunity in the Italian legal order.[31] Consequently, the Italian Constitutional Court ordered the Italian government and judges to disregard the ICJ's decision and considered null and void the Italian legislation that implemented the judgment. As a result, reparation trials against Germany for atrocities committed by the Nazis resumed before Italian courts.[32]

The main difference between the positions of the Italian Supreme Court and the Italian Constitutional Court is that while the former tried to argue on the basis of international law (*jus cogens* argument), the latter employed Italian constitutional law as the basis of its reasoning. The Italian Constitutional Court openly acknowledged the primacy of the ICJ in interpreting international law, even if it regretted the conclusions reached in the 2012 decision.[33] However, the Italian Constitutional Court emphasised its role to guarantee the application (and prevalence) of the rights protected by the Italian Constitution, a field which is outside the remit of the ICJ. External observer may dislike the outcome of the Italian Constitutional Court's decision, but nobody could context its primacy in the interpretation of the Italian Constitution. Conversely, on matters purely based on international law, the authoritativeness of the ICJ is far more significant than that of the Italian Supreme Court, and thus the ICJ's judgment appears to be more authoritative of the *Ferrini* decision.

The decision of the Italian Constitutional Court received extensive coverage by commentators in and outside Italy,[34] even if Brazilian scholars have not been particularly active in analysing it. On the plan of the relationship between Italy and Germany, it resulted in a lack of Italian compliance with the ICJ 2012 decision. As predictable, Germany did not stay idle.

2.5. The (phantom) menace of a new ICJ case between Germany and Italy on immunity

Following the Italian Constitutional Court's decision no 238 of 2014, Italy has resumed its violation of German immunity and has violated the duty to implement ICJ's decisions under Article 94 of the UN Charter. As a result, and as foreseen by many observers, Germany brought Italy again before the ICJ in 2022.[35]

At this stage, there is little to add to this development. Originally, Germany asked for provisional measures against the enforcement of some Italian judgments.[36] The Italian government, in response, has adopted urgent legislative measures to paralyse the implementation of judgments against Germany.[37] Accordingly, Germany has withdrawn the request for provisional measures,[38] but the case is still pending before the ICJ.

In parallel, a case was launched before the Italian Constitutional Court on the lawfulness, under the Italian constitution, of the urgent legislative measures adopted to paralyse reparation cases against Germany, which provided that Italy would have been responsible to pay the compensation owed by Germany.[39] In 2023, with decision no. 159, the Italian Constitutional Court has concluded that these measures are not in conflict with the Italian Constitution since the victims are provided with reparations even if this is materially paid by Italy rather than Germany.[40]

In the meantime, international law scholars have already shown an interest these new developments involving Italy and Germany on State immunity.[41]

3. The recent Brazilian case law on state immunity when atrocities occur

Comparatively, Brazilian courts have not dealt as extensively with the doctrine of state immunity as Italian courts have. Traditionally, the Brazilian domestic judiciary would understand and apply state immunity from jurisdiction as absolute.[42] However, the entry into force of the 1988 Republican Constitution generated a momentum for courts to restrict state immunity, specifically in the context of labour (law) cases.[43] As of then, Brazilian case law has followed consistently the *acta iure imperii* / *acta iure gestionis* categorisation and applied the restrictive doctrine accordingly. Yet, up until very recently, no exception was identified by either Brazilian lower courts or the Brazilian Superior Court of Justice in cases of *acta iure imperii*, regardless of the alleged (il)legality of the foreign state's act, whether occurred on the territory of Brazil, and/or in absence of alternative means of redress.

This stance has taken a radical U-turn with the decision on *Changri-La* case of the Brazilian Supreme Court, adopted in August 2021,[44] whereby, as already mentioned, the STF decided – with a slight 6–5 majority – that immunity from jurisdiction does not apply in cases of foreign states' unlawful acts constituting human rights violations.[45] The case was heard following the extraordinary appeal procedure. This procedure is employed in those cases where the STF recognises that a case may have 'general repercussions' extending beyond the *petitum* of the case. These are to be examined by the Supreme Court in plenary to establish a thesis that becomes a precedent. This makes the *Changri-La* case particularly important.[46]

Two petitions were filed to 'clarify' and circumscribe the scope of the decision adopted by the STF. The first one by the *Ministero Publico Federal*, requesting the scope of the decision to be limited to international crimes implying grave violations of human rights in the territory of the state; the second one by the *Advocacia-Geral da União* to delimit the scope of the decision to war crimes as recognised by international tribunals. The STF partially accepted the first petition, explicating the territorial requirement, in line with the tort exception case-law,[47] while rejecting the limitation *ratione materiae* to international crimes. The Court rejected the second petition on war crimes in full.[48]

The case concerned the sinking of a fishing boat during WWII, the *Changri-La*, and the death of the ten fishermen aboard, along the coasts of Rio de Janeiro, in the Brazilian territorial waters. Around sixty years after the facts, new findings revealed that the boat was intentionally sunk by a German submarine. This allowed the *Tribunal Maritimo* in 2001 to establish the facts and suggest that Brazil extended moral or monetary compensation to the victims.[49] This took the form of a symbolic public ceremony officially including the name of the victims in the Brazilian World War II memorial. This notwithstanding, in 2007, the descendants of one of the victims decided to start a judicial proceeding against Germany and sought compensation before Brazilian courts for the material and non-pecuniary damages incurred. The STF decision is the last step of a long judicial journey.

The following analysis reflects the order of the arguments articulated by the STF.

The Court constructed its decision starting from the characterisation of the sinking of the boat and consequent death of the crew. The STF framed the act as a war crime, and a violation of both the laws of armed conflict and human rights.[50] The Court spilled admittedly – while not fully convincingly – a lot of ink in trying to frame the relevant act as a

violation of either international humanitarian law or human rights law. From an international humanitarian law perspective, it did so by relying first on Article 46 of the Regulations Annexed to the Convention (IV) respecting the Laws and Customs of War on Land[51] and the Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War.[52] The latter reference seems more fitting in relation to immunity of non-military vessels in naval war (and possibly, by extension, a prohibition of killing civilians aboard as non-military targets). Yet, the reference to the Hague Regulations is quite inaccurate, not only because it was adopted to govern war on *land,* but particularly because its Article 46 applies only to occupied territory; leaving aside the debate on whether certain maritime zones can be occupied,[53] nothing suggests that that portion of Brazilian territorial waters was under occupation at the time of the sinking of the boat.[54] Equally puzzling, albeit for different reasons, is the reference to the prohibition to kill persons at sea in the Statute of the Nuremberg Tribunal[55] as a war crime and the violation of the right to life as codified under Article 6 of the ICCPR. Here, the STF avoided engaging in the highly relevant question of intertemporality and hence validity of the two provisions mentioned above for the facts of the case, which occurred before the two instruments entered into force.[56] This line of arguments was of course necessary and instrumental for the STF to reach the conclusion it did.

Yet, what also emerges from this characterisation is that the judgement does not circumscribe the exception to the gravity of the violations – thus seemingly opening the door for a limitation to states' immunity for *acta iure imperii* to *any* violations of human rights, albeit committed in the territory of the state. Admittedly, this significantly expands the exception already formulated by other domestic courts, whether based on international or constitutional law.[57] Yet, the arguments advanced by the STF in relation to the humanitarian exception mostly engage with doctrine and case law related to *serious* violations. As mentioned above, the *Ministero Publico Federal* had asked the Court to circumscribe the decision to *international crimes* implying grave violations. The STF has rejected this delimitation in its latest decision, albeit due to the alleged unintelligibility of the category of international crimes. According to Cavalcanti, the STF failed to circumscribe the decision to gross violations, due to a wrongly conflation of the *jus cogens* category with the broader concept of human rights.[58]

The STF's analysis of both case law and legal instruments moves along the territorial tort exception (and specifically on Article 12 on the UN Convention on state immunity and national legislation across continents) and the humanitarian exception, with the Court relying on the Italian, Greek and South-Korean jurisprudence. As already noted in the literature,[59] the Tribunal did engage in a (comparative) analysis of both national and international instruments and case-law, albeit dismissing easily domestic and international case law moving in an opposite direction. It remains however surprising that the judges did not derive any prescriptive or operative conclusion from this analysis, somewhat undermining the dialogic nature of these references. The STF merely indicated that this plethora of evidence shows that exceptions to the rule of state immunity are conceivable and that the rule is neither static, nor insurmountable.[60] In doing so it also took a specific position towards the ICJ decision of 2012, relying both on Article 59 of the ICJ Statute and trying to distinguish the context of the present case from the Italian case, as will be explained further below.[61] In fact, most interaction with the *Jurisdictional*

Immunities decision occurred with extensive passages of the late Judge Cançado Trindade's dissenting opinion and the arguments formulated in the Italian counter-memorial.

How did then the Court come to exclude state immunity in the case at hand? The STF moved forward to focus on the right of access to justice and the right to truth. Specifically, it indicated that refusing to grant access to court to the claimants in Brazil would create an anomy, a state of exception, a 'zone of indifference of law within law', *à la* Agamben, whereby the victims would be left without justice.[62] The right of access to judicial review is identified both at a constitutional level (Article 5(XXXV)) and internationally, as provided in Articles 8, 10, and 14 of the ICCPR.

More interestingly perhaps, the decision of the STF is the only one so far establishing the inconsistency of state immunity with the full realisation of the right to truth.[63] This is not particularly surprising, given the regional context.[64] For historical reasons, Latin American countries have a solid tradition on the concept of both individual and collective truth, and the Inter-American Commission of Human Rights has been a forerunner in that regard. [65] While the reliance of the STF on the right to truth is not exceptional, the way the Court constructed its argument in the specific case is somewhat dubious. The judges relied on Article 32 of the 1977 Additional Protocol I, concerning the (fate of) the missing and the death. Yet, as already noted by commentators,[66] that specific provision does not integrate an individual human right *per se*. It rather entails a due diligence obligation on the parties to the conflict which, however, does *not* apply to its own nationals. Regardless of the (mis)interpretation of the Court concerning Article 32, the decision further enlarges the scope of friction between the doctrine of state immunity and the quest for justice.

For victims of violations of human rights or humanitarian law and their family members, the right to truth would imply an obligation for the perpetrator state to provide specific information on the circumstances of the violation and the fate of the victim. This 'procedural' dimension[67] of truth reflects the remedial evolution of individual human rights violations, which implies a jurisdictional or quasi-judicial assessment of the specific case, geared towards reparation. It has been argued that the right to truth is endowed with the character of inderogability. The non-derogable nature of this right would be an immediate reflection of its material scope (in matters of serious violations of international humanitarian or human rights law) and, as such, preclusive of any derogation.[68] The argument is that denial to (judicial) fact-finding could turn into acts of psychological torture, or the detriment of other rights related to, for example, private and family life, if such conduct prevents from seeking and knowing the truth about the fate of their loved ones. In this context, while taking the form of an autonomous rule, the right to truth becomes instrumental to the assertion and protection of other substantive rights and, among them, the right to an effective remedy.[69]

The STF concludes its reasoning with a (seemingly) constitutionally based decision: state immunity shall be delimited in cases of human rights violations. According to Article 4(II) of the Brazilian Constitution,[70] its domestic legal order cannot tolerate such a zone of indifference, as the article gives prevalence to human rights as a principle that guides Brazil in its international relations. As such, in the case at hand, the right to life, truth and access shall prevail over the immunity of Germany. According to the STF,

Article 4 of the Constitution instates a new normative paradigm whereby state sovereignty is no longer preponderant.[71]

As further elaborated below,[72] this reconstruction is particularly interesting, since the STF produces a singular hybrid in trying to reconstruct both the relevant normative provisions and violations through an overlapping (and not always rigorous) series of arguments based both on international and domestic law. This leaves the readers wondering first whether the violations have already occurred as a result of the German unlawful act or whether these would materialise in case state immunity is recognised, thus denying the claimants access to justice.[73] More relevantly, though, is the question of the *site*, more specifically of where the violation materialised. At an international level? At a constitutional level? Both? The answer to these questions reverberates also on how these parallel violations interact with state immunity.

4. Dialogues and encounters between Italian and Brazilian decisions

4.1. Mutual references to Italian and Brazilian case law, practice, and scholarship in Italian and Brazilian decisions on lack of state immunity

The Italian case law on the lack of state immunity when atrocities are at stake does not engage with Brazilian decisions. Notwithstanding a rich survey of relevant national and international case law,[74] the *Ferrini* decision by the Italian Supreme Court does not refer to any Brazilian case on state immunity. Similarly, the Italian Constitutional Court does not refer to any Brazilian precedent in its decision no 238 of 2014. This is unsurprising since the 2021 and 2022 Brazilian decisions discussed in this article are the first Brazilian cases dealing with state immunity when atrocities occur. More regrettable is that the 2022 order by the Tribunal of Rome referring the Italian legislation to the Italian Constitutional Court and the subsequent 2023 decision no. 159 by the Italian Constitutional Court do not take into account the Brazilian decisions. As a matter of doctrine, since the two Italian courts are not permitted to cite scholars in their decisions,[75] no reference to Brazilian authors (or any other) can be found in the text of the judgments.

Conversely, the 2021 *Changri-La* decision discusses in detail Italian case law and scholarship. The majority focuses its attention on the *Ferrini* case,[76] which is cited alongside with the subsequent *Milde* case.[77] A long portion of the *Ferrini* decision is quoted with approval, with reference both to its English and Portuguese translations. The *Ferrini* decision is considered by the majority as a portion of a wider customary international law patchwork comprising domestic legislation from US, UK, Australia, and Argentina, as well as domestic judgments from Greece, US, and South Korea.[78] In this, the majority in the *Changri-La* decision employs the *Ferrini* judgment to suggest, albeit not conclusively, that customary international law includes elements of flexibility when dealing with state immunity and atrocities. Moreover, the majority in the *Changri-La* decision quotes with approval the Italian official position presented before the ICJ in defence of the approaches taken in the *Ferrini* judgment.[79] The majority of the STF further quotes the opinion of the Brazilian General-Prosecutor, which incorporates references to scholarly criticisms against the 2012 ICJ's decision, including to three articles by Italian scholars (written in English).[80]

The dissenting opinions in the *Changri-La* case engages less with Italian case law and scholarship. The dissenting opinion by Gilmar Mendes assesses some domestic

legislations on state immunity: domestic legislations from US, UK, Singapore, South Africa, Pakistan, Canada Australia, and Argentina are mentioned without significant elaboration, whereas Italian legislation is ignored.[81] The *Ferrini* decision is discussed in a long quote summarising the opinion of the Brazilian General-Prosecutor, with the aim of demonstrating that state immunity is applicable to atrocities as per the 2012 ICJ's decision.[82]

The dissenting opinion by Marco Aurélio Mello refers to the 2012 ICJ decision as 'o caso *Ferrini*'.[83] The judge goes on to describe in wide brushstrokes the context of the ICJ's proceedings, with reference to the Italian Supreme Court's judgement,[84] concluding that state immunity should apply. No direct reference to Italian case law, practice, or scholarship is provided by the dissenting opinion by Alexandre de Moraes.[85]

Overall, the *Ferrini* decision by the Italian Supreme Court and, to a lesser extent, the Italian position before the ICJ, the *Milde* decision, and Italian scholarship (in English) are taken into account in the *Changri-La* case, chiefly by the majority. This is not surprising from the perspective of the outcome reached by the majority, that is, the fact that state immunity cannot shield access to justice for atrocities. On the other end, the absence of any reference to the Italian Constitutional Court's decision no 238 of 2014 is striking, especially in light of the role played by Brazilian constitutional law in concluding that state immunity was inapplicable.

4.2. A comparison between the Italian and Brazilian approaches to the relationship between national and international law in the context of state immunity

There are two main aspects of comparison that are worth highlighting between the Italian and Brazilian case-law on state immunity. First, the role of existing alternatives to *judicial* remedies for victims; second, and perhaps most importantly, the relationship between international and constitutional law in cases involving state immunity.

As to the first aspect, it is worth recalling that the Italo-German situation in relation to reparations for the victims of World War II Nazi crimes is a particularly complex one. The 1961 Bonn Agreement between Germany and Italy concerning Settlement of Certain Property-Related, Economic and Financial Questions has represented a significant bone of contention in the immunity saga, both at a political and judicial level. Generally speaking, the Italian position[86] – at least until 2022[87] – was that the 1961 Agreement did in fact *not* settle the reparation issues for Italian victims of Nazi crimes, with the two states fundamentally disagreeing on the extent of the treaty and its scope of application. Italian claimants have also unsuccessfully seized German domestic courts to obtain reparations for the same acts.[88] This *impasse* has, in turn, given shape – albeit with different formulations and argumentations – to the 'last resort' argument, with the Constitutional Court insisting in particular in judgement no. 238 of 2014 on a *judicial* remedy being necessary for the victims to obtain justice, based on the lack of meaningful and effective judicial and non-judicial alternatives.[89] The STF does also sketch this argument, albeit with much less emphasis and 'merely' to distinguish *Changri-La* from the ICJ case.[90] More specifically, the Tribunal employs the argument of the absence of any compensatory schemes between Germany and Brazil for Nazi crimes merely to differentiate the Italian precedent from the Brazilian situation. The

rather incidental nature of the consideration makes it difficult to discern whether this element has played a role for the STF in excluding the application of state immunity in the case at hand. Similarly, one can only find a very brief passage on the possibility for the victims to turn to German courts, when the STF states that: '… requiring the victims to turn to foreign jurisdiction would imply reserving the victims [a situation of] anomy …'.[91] While we can imply that this short line dismisses the effectiveness of recourse to German courts, there is no engagement as to the parameters of effectiveness and feasibility of a different *judicial* remedy and – again – no clarity as to whether the STF considers that state immunity should succumb only in cases where no alternative judicial or non-judicial remedies are available to the victims. The arguments used by STF seem to work rather *ad adiuvandum* and not as part of the core reasoning of the decision. In the Italian case-law, instead, the absence of other effective and meaningful means of redress comes rather across as a *constitutive* element of the exception to state immunity in the cases of serious violations, both from an international and constitutional perspective.

The most interesting difference, however, between the Italian and Brazilian judicial attitude to state immunity is the way the difference courts approach(ed) the relationship between international and domestic law in shaping the exception to or non-applicability of the rule. As already mentioned in the previous paragraphs, *Ferrini* and decision no. 238 of 2014 concretely obtained the same result. Yet, the two Italian Courts elaborated their reasonings in diametrically opposed ways. While in *Ferrini*, the Italian Supreme Court based its reasoning in international law, identifying a humanitarian exception to the rule on state immunity already in the international legal framework, decision no. 238 of 2014 employed the counter-limits doctrine. It is worth recalling that this doctrine allowed the Constitutional Court to argue that a rule on state immunity that extends to *acta iure imperii* constituting serious violations of human rights of international humanitarian law cannot 'enter' the Italian legal order, by virtue of the inviolable right enunciated in Articles 2 and 24 of the Constitution, the right of access to justice for the victims. The Constitutional Court thus based its conclusions on constitutional law. These constitutional law-international law iterations across (civil) domestic courts and the Italian Constitutional Court have been extensively explored. [92]

The STF entertains instead a peculiar hybrid of difficult framing that requires closer analysis. First, it considers that the relevant German actions are crimes and violations of both human rights and humanitarian law under *international law*. In its operative part, it shifts focus on the remedial dimension of these rights, reasoning around the right to truth and access to justice as human rights protected both at *international* and *domestic* (constitutional) levels, without any further mention of the right to life. It then concludes that by virtue of Article 4(II) of the Constitution the right to life, truth and access to justice shall be given prevalence over the rule on state immunity. Seemingly, the relevant violations have occurred (or *might* occur)[93] both at domestic and international level, at least for the right to truth and access to justice. For the right to life, the reasoning seems to be limited to Article 6 ICCPR, without any further reference to domestic law.

This strange blend of international and domestic levels opens up two possible scenarios of interpretations as to where the *site* of conflict between human rights and the rule on state immunity might be located according to the STF. It also blurs the similarity that other commentators have identified between decision no. 238 of 2014 and the STF decision.[94]

The first possible way to read the judgement is as a starkly dualist decision. The STF does refer to (international) human rights in its line of argument. Yet, if we take on this dualist interpretation, these rights are relevant insofar as they have been transposed from international to *domestic* law. Accordingly, the reasoning of the STF would be firmly embedded entirely in constitutional law.[95] The STF establishes the prevalence of substantive and procedural human rights *as transposed* in the Brazilian domestic constitutional order. These *constitutional* fundamental rights are in conflict with the rule on state immunity,[96] and the latter shall thus succumb pursuant to Article 4(II). In this dualist scenario, the conflict with the rule on state immunity is *constitutional* in nature and can go two ways. Either as a conflict between two domestic norms, constitutional fundamental rights on one side and the rule on state immunity on the other side, as equally transposed into the Brazilian legal system. Or as the protection of the integrity of the Brazilian constitutional legal order against the international rule on state immunity that cannot enter the domestic 'fence' – *à la* decision no. 238 of 2014. In the context of this dualist interpretation, the hypothesis of the conflict between two domestic sets of norms, constitutional fundamental rights and state immunity as both transposed in domestic law, seems slightly more in line with a literal reading of the judgement for essentially two reasons. First, the STF does not explicitly theorise a counter-limits doctrine. Second, the STF indicates that the Constitution codifies an explicit normative option for a new paradigm where human rights prevail on the sovereignty of states in the international relations of Brazil,[97] whereby equality of states is cited in the very same article at paragraph V.[98]

The second scenario of interpretation is a rather monist one, whereby international and national law are considered together as part of one single permeable system. And it is this permeability that determines the outcome of the decision. If we take this monist reading of the judgement, the *site* of conflict differs from the dualist scenario. The relevant human rights (and international humanitarian law) violations have occurred (or *might* occur) at the level of international law, including the ones on the right to truth and access to justice. As such, the relevant provisions would also be identified as a matter of international law. This means that the conflict between human rights and international humanitarian law rules and the rule on state immunity would occur at an *international* level, an antinomy between two sets of *international* norms – *à la* Ferrini. Yet, the *prevalence* of human rights over state immunity is constitutional in nature as it is dictated by Article 4(II), which obliges Brazilian courts to forego the international rule on state immunity. This means that in this monist scenario, while the conflict is international in nature, the prevalence that determines the decision is constitutional. The reasoning of the Supreme Court thus has elements of both international and constitutional law.[99] Such a monist reading would give way to a rather fluid and dynamic understanding of the relationship between international and national law and perhaps better stand the criticism to STF of 'not sufficiently' engaging with or disregarding international law.[100]

The difficulty in locating the site of conflict – and perhaps the reticence of the STF itself in situating it – might be due to the seemingly unsettled debate over the monist or dualist nature of the Brazilian legal order.[101] While mostly focused on the incorporation of treaties, and more recently human rights treaties, the debate has significant bearing on the role of customary international law in the Brazilian domestic order.

Depending on one's standing on the matter, this also influences the understanding and resolution of the normative conflict under analysis. When it comes to the position of human rights (treaties), Brazilian scholarship appears to oscillate among several variations of either *moderate* dualism or *moderate* monism.[102] The 'moderate' characterisation is mainly linked to the addition of Constitutional Amendment 45/2004 (henceforth CA 45/04) to Article 5(3) of the Brazilian Constitution, which explicitly accords constitutional status to international human rights treaties adopted with a 3/5 majority. CA 45/04 was possibly prompted by an understanding in case law,[103] which would (already) recognise infra-constitutional value to human rights treaties adopted with simple majority. CA 45/04 'enhanced' the constitutional nature of those agreements adopted with the 'aggravated' procedure. The progressive prominence gained by human rights in the Brazilian constitutional architecture could be traced back to the proposal of late judge Cançado Trindade to include paragraph 2 to Article 5 of the Constitution.[104] This provision clarifies that rights and guarantees included in the Constitution do not exclude those deriving from international treaties ratified by Brazil, giving way to the so called 'dialogic internationalist monism' doctrine. In virtue of the direct applicability clause at Article 5(1), rightsholders would become beneficiary of the most favourable human right norm, regardless of its source, either constitutional or conventional.[105] The apparatus sketched above clearly indicates a constitutional tendency to place human rights at a higher hierarchical level. Any normative conflict with human rights norms should thus be assessed through a contextual interpretation of the Constitution that properly considers this prominence.

Where does this leave the incorporation of customary international law? So far, scholars seem to either exclude questions around the incorporation of customary international law from the analysis[106] or tend to solve it rather straightforwardly.[107] Mostly, the position seems to be that customary international law enters the Brazilian domestic legal order without any act of incorporation necessary and shall be immediately applied by the judiciary. The question was rarely entertained by courts and only arose before Brazilian courts in relation to the customary rule on state immunity from jurisdiction.[108] As mentioned already, judges relied then on the status of the rule under international law when endorsing either the absolute or restrictive approach. In his international law handbook, Husek purports that judges cannot deviate from customary international law, which – as he writes – cannot be 'contradicted'. Yet, this postulation is based on the idea that customary international law is in any event constitutionally-conform since it is (generally) reflected in the principles Brazil maintains in international relations pursuant to Article 4.[109] Quite relevantly to our purposes, this provision includes *inter alia* equality among states, which conceptually operates as the basis for sovereign immunity from jurisdiction.

While earlier restrictions on state immunity were solidly grounded in international law, the latest decision of the STF appears to move instead into a (new?) terrain of hybridity. Paradoxically, extending the debate to the *Changri-la* case, a dualist understanding of the conflict between human rights and the state immunity at the *constitutional law* level would seem more 'fitting' to explain the decision of the court. Sovereign immunity might be considered as enshrined in Article 4 of the Constitution via equality of states, and thus a 'domestic' rule. As such, it conflicts with a set of human rights also incorporated in the very same provision. The outcome reached by the STF is not surprising then, considering

the contextual preference the Constitution shows for human rights. Yet, one could also consider the decision to reflect somehow the dialogic internationalist monist doctrine, by which the constitutional prevalence of human rights is due to the identification of the most favourable 'regime' for rightsholders. In other terms, if the interaction between sovereign immunity and human rights at the *international law* level leaves a protection gap for individuals, the constitutional human rights prevalence clause will be triggered and require the most beneficial rule to apply (whatever the origin thereof).[110]

5. Conclusions

The analysis conducted so far has possibly tried to build a bridge, rather than conduct a strict comparison, between the Italian and Brazilian judicial attitude towards possible limitations of the rule on state immunity from jurisdiction in cases of atrocities. The judicial bodies of both countries have found their own ways to deal with this vexed question. This article has attempted to identify the points of similarity and divergence as to how they have constructed the limitations on one hand, and searched for judicial dialogue to reinforce their arguments, on the other. Of course, both judiciaries have produced decisions that are 'rich' in considerations of principles and 'grand' statements, particularly the two Constitutional Courts. And of course, their decisions can be subject to criticism on lack of rigour or poor sensitivity for potential future implications.

The Italian Constitutional Court has sought 'refuge' in constitutional law, seemingly without contradicting the ICJ's reconstruction of the rule on state immunity and the purported absence of a humanitarian exception. In other terms, per decision 238/2014, access to justice comes from *within* the Italian domestic legal system, leaving – at least formally – the international rule on state immunity untouched. As such, the two legal orders are – at present at least – walking decisively parallel to each other, with the Italian legal system taking on a 'reactive' rather than 'proactive' stance towards international law. That is, until the international rule on state immunity will not develop to the point of *not* triggering constitutional counter limits and, as such, become 'tolerable'. The Brazilian decision lends itself to two alternative implications qua development of international law. The first dualist scenario would rather be a reasoning on the (non)interaction between international and domestic law. As such it would seemingly respect the 'authority' of the ICJ as ultimate interpreter of the current status of the conflict between human rights and the rule on state immunity at an international level. The monist reading, instead, would be a reasoning on hierarchy and prevalence which, albeit dictated by Brazilian constitutional law, operates at the level of (and decides on) the conflict between two international norms. Both scenarios seem plausible, possibly including even further variants. The second (more monist) scenario would of course contribute more significantly – and directly – to the evolution of the rule of state immunity at an international level, rather than aligning with the trend of relying on constitutional law as a barricade to protect fundamental human rights.

If one takes the monist reading in the Brazilian decision, it becomes apparent how the two Courts operate at different levels, with the Italian Constitutional Court showcasing no relevant state practice for the development of customary international law, with the Brazilian Court providing instead an example to the contrary. Yet, what these impulses show is that judges sit uncomfortably in a situation where formalism would erase with a brush, and at a very early procedural stage, the possibility for victims of atrocities to

obtain justice. Domestic courts are progressively moving target in an attempt to circumscribe the rule of state immunity even further, in line with a parallel movement pushing human rights at the forefront of international law, be it relying on constitutional or international law, or a hybrid between the two. There is no reason to treat ICJ precedents as sacred and set in stone. And judicial courts are creatively dancing around them.

Notes

1. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, Dissenting Opinion of Judge Cançado Trindade, 228, para 129.
2. For practical reasons, the expressions 'jurisdictional immunities', 'state immunity', and 'sovereign immunity' are used as synonyms. Similarly, 'executive' and 'government' are used interchangeably.
3. On the role of the domestic jurisprudence in the application and reconstruction of international law, see E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', *European Journal of International Law* 4 (1993): 159; Conforti, 'Preliminary Report on the Activities of National Judges and the International Relations of their State', *Yearbook of the Institute of International Law* 65, no. 1 (1993): 371; A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', *International and Comparative Law Quarterly* 60 (2011): 57; A. Nollkaemper, Y. Shany, and A. Tzanakopoulos, eds, *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (New York: Oxford University Press, 2024).
4. The 1976 European Convention on State Immunity (1495 UNTS 181) is the only multilateral treaty in force and binds only 8 European States. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (2 December 2004, A/RES/59/3) is not in force because it has not gained the required minimum number of ratifications (30 ratifications are required; only 23 States are parties at the time of the writing of this article).
5. *Jurisdictional Immunities*, Judgment, para. 55. See, e.g. the excursus of judicial decisions in ILC, Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991), 36–38, paras 14–18.
6. See, generally, J. Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague/Boston/London, Martinus Nijhoff Publishers 1997); M. Gavouneli, *State Immunity and the Rule of Law* (Athens: Ant. N. Sakkoulas Publishers, 2001); F. De Vittor, 'Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali', *Rivista di Diritto Internazionale* 85 (2002), 573; C. Espósito Massicci, *Inmunidad del Estado y derechos humanos* (Cizur: Editorial Aranzadi, 2007); A. Bianchi, 'Human Rights and the Magic of Jus Cogens', *European Journal of International Law* 19 (2009): 491; C. Vicenci Fernandes, 'Violações aos Direitos Humanos e a Imunidade de Jurisdição do Estado Estrangeiro: Novas Tendências Jurisprudenciais em Relação à Proteção dos Indivíduos', *Revista Estudos Jurídicos UNESP* 14 (2010): 141; E. Cannizzaro and B. I. Bonafè, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights', in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, ed. Ulrich Fastenrath et al. (2011), 825.
7. *Jurisdictional Immunities*, Judgment, para. 93.
8. Supremo Tribunal Federal, Recurso Extraordinario Com Agravo 954.858 Rio de Janeiro, Plenario (*Changri-La* case), 23 August 2021.
9. Supremo Tribunal Federal, Emb.Decl. No Recurso Extraordinário Com Agravo 954.858 Rio De Janeiro, 23 May 2022.
10. See, e.g. L. C. Martins de Araújo, 'O diálogo institucional entre Cortes Constitucionais: Uma nova racionalidade argumentativa da jurisdição constitucional justificada pelos diálogos

institucionais transnacionais', *Revista da AGU* 13 (2014): 226; L. C. Martins de Araujo and P. E. Vauthier Borges De Macedo, 'O Diálogo Institucional Entre Cortes Constitucionais: A Jurisdição Constitucional Justificada Pelos Diálogos Transnacionais', in *Teoria Constitucional*, ed. P. R. Barbosa Ramos and M. Mont'alverne Barreto Lima (2015), 328; A. Ridolfi, 'Giurisdizione costituzionale, corti sovranazionali e giudici comuni: considerazioni a proposito del dialogo tra corti', *Rivista AIC* 3 (2016): 1, www.rivistaaic.it/images/rivista/pdf/3_2016_Ridolfi.pdf. See also the Introduction to this Special Issue for a further articulation on judicial dialogue.

11. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 1992), Vol. I, 341.
12. With specific reference to the Brazilian and Italian traditions, see, among others, R. Luzzatto, *Stati stranieri e giurisdizione nazionale* (Milan: Giuffre, 1972); N. Ronzitti and G. Venturini, eds., *Le immunità giurisdizionali degli stati e degli altri enti internazionali* (Padua: Cedam, 2008); L. de Oliveira Moll, *Imunidades Internacionais: Tribunais Nacionais ante a Realidade das Organizações Internacionais*, 2ª edição, (Brasilia: FUNAG2011); C. Tiburcio, *Extensâo e limites da jurisdiçâo brasileira: Competência Internacional e Imunidade de Jurisdiçâo* (Salvador: JusPODIVM, originally published in 2016), 285–311; R. Nigro, *Le immunità giurisdizionali dello stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale* (Padua: Cedam, 2018), 226–354. Outside Italy and Brazil, see e.g. H. Fox and P. Webb, *The Law of State Immunity*, 3rd ed. (Oxford: Oxford University Press, 2013); E. Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford: Oxford University Press, 2018), 21–230. See also the essays collected in A. Orakhelashvili, ed., *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015); A. Peters et al., eds, *Immunities in the Age of Global Constitutionalism* (Leiden: Brill Nijhof, 2015); T. Ruys and N. Angelet, eds., *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019).
13. *Jurisdictional Immunities*, Judgment, paras 59–61. See also the overview on state practice and opinio juris in ILC, *supra* note 5, 33–40.
14. Relevant data are available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.
15. See, e.g. Greece, Court of Cassation, '*Prefecture of Voiotia v Federal Republic of Germany* (*Distomo Massacre* case), case no 11/2000, 4 May 2000', 129 ILR 513.
16. Corte di Cassazione [Italian Supreme Court], Judgment no 5044/04, *Ferrini c Repubblica Federale di Germania*, 11 March 2004, para. 9, reprinted in *Rivista di diritto internazionale* 87 (2004): 539.
17. Ibid., para. 9.
18. See, e.g. A. Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella Sentenza *Ferrini*', *Rivista di diritto internazionale* 87 (2004): 643; A. Bianchi, 'Ferrini v. Federal Republic of Germany', *American Journal of International Law* 99 (2005): 242; P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', *European Journal of International Law* 16 (2005): 89; A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', *Journal of International Criminal Justice* 3 (2005): 224; M. Teixeira Thomé and Y. da Silva Felix, 'Imunidade de jurisdição e a efetividade dos direitos humanos sociais', *Revista de Direito Brasileira* 18 (2017): 173; E. Romeiro Fernandes Golin, *Imunidade de Jurisdição dos Estados e Direitos Humanos: Uma crítica ao Caso Ferrini* (São Paulo: Dialética, 2021).
19. See F. Marongiu Buonaiuti, 'Azioni risarcitorie per la commissione di crimini internazionali ed immunità degli Stati dalla giurisdizione: la controversia tra la Germania e l'Italia innanzi alla Corte internazionale di giustizia', *Diritti Umani e Diritto Internazionale* 5 (2011): 232; E. Sciso, 'Italian Judges' Point of View on Foreign States' Immunity', *Vanderbilt Journal of Transnational Law* 44 (2011): 1201.
20. N. Ronzitti, 'L'adattamento dell'ordinamento italiano alle norme imperative del diritto internazionale', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, ed. Andrea Giardina and Flavia Lattanzi (Naples: Editoriale Scientifica, 2004), Vol. I, 633.

21. *Jurisdictional Immunities*, Judgment, para, 91.
22. Ibid., at para. 93.
23. See, e.g. A. Ciampi, 'The International Court of Justice between «Reason of State» and Demands for Justice by Victims of Serious International Crimes', *Rivista di diritto Internazionale* 95 (2012): 374; R. Pisillo Mazzeschi, 'Il rapporto fra norme di *ius cogens* e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012', *Diritti Umani e Diritto Internazionale* 6 (2012): 310; P. Wojcikiewicz Almeida, 'O Caso Imunidades Jurisdicionais do Estado (*Alemanha c. Itália*): A Corte Internacional de Justiça Na Contramão da Evolução do Direito Internacional', *Revista do Instituto Brasileiro de Direitos Humanos* 13 (2013): 371; D. Valadares Vasconcelos Neto, 'O Caso sobre Imunidades de Jurisdição do Estado Perante a Corte Internacional de Justiça', *Revista do Instituto Brasileiro de Direitos Humanos* 13 (2013): 327; L. N. Caldeira Brant and B. de Oliveira Biazatti, 'A Imunidade de Jurisdição dos Estados à luz da Jurisprudência da Corte Europeia de Direitos Humanos e da Corte Internacional de Justiça', *Anuário Brasileiro de Direito Internacional* 20 (2016): 100. See also Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished', *Leiden Journal of International Law* 25 (2012): 979; Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case', *Gottingen Journal of International Law* 4 (2012): 809; Trapp and Mills, 'Smooth Runs the Water Where the Brook is Deep: The Obscured Complexities of Germany v. Italy', *Cambridge Journal of International and Comparative Law* 1 (2012): 153; Linderfalk, 'Jurisdictional Immunities of the State (Germany v. Italy): The Concept of a Normative Conflict Revisited', in *Essays in Honour of Michael Bogdan*, ed. P. Lindskoug, U. Maunsbach and G. Millqvist Juristförl (Visby: Juristförlaget i Lund, 2013), 243.
24. For a survey, see G. Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in *Germany v. Italy*', *Journal of International Criminal Justice* 11 (2013): 185.
25. Law 14 January 2013, no. 5, Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonchè norme di adeguamento all'ordinamento interno published in *Gazzetta Ufficiale*, Serie Generale no. 24, 29 January 2013.
26. See F. Maria Palombino, 'Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-Limits" Doctrine Matters?', *The Italian Yearbook of International Law* 22 (2012): 195.
27. See, e.g. ECtHR, *Jones and Others v. The United Kingdom*, applications 34356/06 and 40528/06, Judgment, 14 January 2014. On previous case law on state immunity before the European Court of Human Rights, see Marcella Distefano, 'Immunità degli Stati e art 6 della Convenzione europea dei diritti dell'uomo: coerenza sistemica e garanzie di non impunità' in *Le immunità nel diritto internazionale: Temi scelti*, ed. Alessandra Lanciotti and Attila Tanzi (Turin: Giappichelli, 2007), 117; Alessandra Lanciotti and Antonio Panetta, 'L'immunità dello Stato straniero dalla giurisdizione e il diritto dell'individuo di accesso alla giustizia per violazione dei suoi diritti fondamentali', in *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo*, ed. Luisa Cassetti (Naples: Jovene, 2012) 335.
28. See A. Bianchi, 'Il tempio e i suoi sacerdoti. Considerazioni su retorica e diritto a margine del caso *Germania c. Italia*', *Diritti umani e diritto internazionale* 6 (2012): 293, 307; Id., 'On Certainty', *EJIL:Talk!*, 16 February 2012, www.ejiltalk.org/on-certainty/.
29. Text in *Rivista di diritto Internazionale*, no. 96 (2015): 23 (unofficial English translation at https://itdpp.files.wordpress.com/2014/11/judgment-238-eng-alessio-gracisnr.pdf).
30. Ibid.
31. See, generally, Palombino, 'Italy's Compliance with ICJ Decisions'.
32. See, generally, C. Focarelli, 'State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On', *The Italian Review of International and Comparative Law* 1 (2021): 29.
33. Italian Constitutional Court, decision no. 238, 2014, para. 3.4.

34. See, e.g. R. Kolb, 'The Relationship between the International and Municipal Legal Order: Reflections on the Decision No 238/2014 of the Italian Constitutional Court' [2014] Questions of International Law, Zoom Out II, 5, http://www.qil-qdi.org/wp-content/uploads/2014/12/02_Constitutional-Court-238-2014_KOLB.pdf; E. Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014', *Rivista di diritto Internazionale* 96 (2015): 126; M. Longobardo, 'The Italian Constitutional Court's Ruling against State Immunity when International Crimes Occur: Thoughts on Decision no 238 of 2014', *Melbourne Journal of International Law* 16 (2015): 255; A. Tanzi, 'Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale', *La Comunità Internazionale* 70 (2015): 13; M. Iovane, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the "Constitutionalization" of International Law', *Journal of International Criminal Justice* 14 (2016): 595; Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 76 (2016): 193; V. Volpe, A. Peters and S. Battini, eds., *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Heidelberg: Springer, 2021).
35. *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy)*, Application instituting proceedings and request for the indication of provisional measures, 29 April 2022.
36. Ibid.
37. Decree-Law No 36 of 30 April 2022, converted into law by Law No 79 of 29 June 2022, published in *Gazzetta Ufficiale*, Serie Generale No 150, 29 June 2022.
38. *Questions of Jurisdictional Immunities*, *supra* note 35, Order of 10 May 2022.
39. Tribunale di Roma (Tribunal of Rome), *G. M.T. c. Repubblica Federale di Germania et als.*, order no. 154/22, 1 December 2022, www.sistemapenale.it/pdf_contenuti/1673820179_gazzettaufficiale-ord-nazisti-15422.pdf. For a comment, see P. Caroli, 'Sollevata la questione di costituzionalità della norma istitutiva di un Fondo (italiano) per le vittime dei crimini nazisti', *Sistema Penale*, January 23, 2023, www.sistemapenale.it/it/scheda/caroli-sollevata-qlc-norma-istitutiva-fondo-per-vittime-crimini-nazisti.
40. Italian Constitutional Court, decision no. 159 of 2023, text available at www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2023:159. For a comment, see A. M. Pelliconi, 'The Italian Constitutional Court's New Decision on State Immunity and the ICJ Germany vs Italy No. 2', *EJIL:Talk!* July 28, 2023, https://www.ejiltalk.org/the-italian-constitutional-courts-new-decision-on-state-immunity-and-the-icj-germany-vs-italy-no-2/.
41. See, e.g. K. Oellers-Frahm, 'Questions Relating to the Request for the Indication of Provisional Measures in the Case *Germany v Italy*', *Questions on International Law* 94 (2022): *Zoom-in* 5; R. Pavoni, 'Germany Versus Italy Reloaded: Whither a Human Rights Limitation to State Immunity?', *Questions on International Law* 94 (2022): *Zoom-in* 19.
42. On the evolution of the doctrine of state immunity in Brazil, see L. I. de Amorim Araújo, 'A imunidade de jurisdição trabalhista e o artigo 114 da Constituição', *Revista de Direito do Trabalho* 86 (1994): 37I; A. Cordeiro Pacheco, 'A justiça do trabalho e os entes de direito internacional público', *Revista dos Tribunais* 26 (2000): 211; M. L. Olivar and V. Raizer Borges, 'Las inmunidades de Estado Extranjero en la Pauta del Judiciário Brasileño', *Civil Procedure Review* 4 (2013): 99. Immunity from enforcement is still today considered as absolute.
43. *Changri-La* case, Majority Opinion, 1.
44. *Changri-La* case, Majority Opinion, 30.
45. The thesis (*Tema* 944) adopted by the Court dictates that 'unlawful acts committed by foreign States in violation of human rights do not enjoy immunity from national jurisdiction'. Note, however, that three judges – Mendes, Mello, and De Moraes – attached separate and dissenting opinions indicating that they consider immunity as absolute in cases of *acta jure imperii*.

46. See on the decision A.-T. Saliba and L. C. Lima, 'The Law of State Immunity Before the Brazilian Supreme Court: What is at Stake with the "Changri-La" Case?', *Revista de Direito Internacional* 18 (2021): 52; Id. 'The Immunity Saga Reaches Latin America: The *Changri-La* Case', *EJIL!Talk*, December 2, 2021, https://www.ejiltalk.org/the-immunity-saga-reaches-latin-america-the-changri-la-case/; E. Branca, 'Immunità degli stati e violazioni dei diritti umani. riflessioni a margine della sentenza "*Changri-la*" del Supremo Tribunal Federal brasiliano', *SIDIBlog*, January 24, 2022, http://www.sidiblog.org/2022/01/24/immunita-degli-stati-e-violazioni-dei-diritti-umani-riflessioni-a-margine-della-sentenza-changri-la-del-supremo-tribunal-federal-brasiliano/; V. Terzieva, 'State Immunity and Victims' Right to Access to Court, Reparation and the Truth', *International Criminal Law Review* 22 (2022): 780; Pavoni, 'Germany Versus Italy Reloaded', 34; J. A. Uriarte, 'Inmunidad de jurisdicción y derechos humanos: dos astillas no hacen fuego', *Revista Electrónica de Estudios Internacionales* 43 (2022): 1; S. T. Pereira Cançado Ribeiro, 'Novo caso das Imunidades na Corte Internacional de Justiça: Alemanha reage à Sentença N° 238', *International Law Agendas*, June 5, 2022, http://ila-brasil.org.br/blog/novo-caso-das-imunidades-na-corte-internacional-de-justica-alemanha-reage-a-sentenca-no-238/; E. Cavalcanti de Mello Filho, 'Karla Christina Azeredo Venâncio Da Costa and Others v. Federal Republic of Germany', *American Journal of International Law* 117 (2023): 309.
47. Supremo Tribunal Federal, Segundos Emb.Decl. No Recurso Extraordinário Com Agravo 954.858 Rio De Janeiro, 23 May 2022.
48. Ibid.
49. Processo No. 812/1943, Tribunal Marítimo, Acórdão de 31 de Julho 2001.
50. *Changri-La* case, Majority Opinion, 7–8.
51. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
52. Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, The Hague, 18 October 1907.
53. See generally T. Singer, 'Occupation of Sea Territory: Requirements for Military Authority and Comparison to Art. 43 of the Hague Convention IV', in *Operational Law in International Straits and Current Maritime Security Challenges*, ed. J. Schildknecht, R. Dickey, M. Fink and L. Ferris (Cham: Springer, 2018), 255; M. Longobardo, 'The Occupation of Maritime Territory under International Humanitarian Law', *International Law Studies* 95 (2019): 322.
54. The definition of occupied territory is embodied in Article 42 of The Hague Regulations.
55. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.
56. On the specific issue of intertemporality in the context of the relationship between *jus cogens* and state immunity see F. Marongiu Buonaiuti, 'La sentenza della Corte internazionale di giustizia relativa al caso Germania c. Italia: profili di diritto intertemporale', *Diritti Umani e Diritto Internazionale* 2 (2012): 335; P. B. Stephan, 'The Political Economy of *Jus Cogens*', Public Law and Legal Theory Research Paper Series 2015–48 Law and Economics Research Paper Series 2015–23 (2015), http://ssrn.com/abstract=2623212. This point is also signaled by Branca, , 'Immunità degli stati e violazioni dei diritti umani'.
57. See on this Branca, , 'Immunità degli stati e violazioni dei diritti umani'; Uriarte, 'Inmunidad de jurisdicción y derechos humanos', 19.
58. Cavalcanti, , 'Karla Christina Azeredo Venâncio Da Costa', 313; See also the doubts raised by Saliba and Lima, 'The Immunity', *supra* note 46.
59. Saliba and Lima, 'The Immunity', *supra* note 46.
60. *Changri-La* case, Majority Opinion, 9, 24.
61. *Changri-La* case, Majority Opinion, 22–23. On this specific aspect, Saliba and Lima, 'The Immunity', *supra* note 46; Uriarte, 'Inmunidad de jurisdicción y derechos humanos', 19.
62. *Changri-La* case, Majority Opinion, 24–25.
63. Terzieva, 'State Immunity and Victims' Right to Access to Court', 788.
64. Yet, see below note 68 on the specific approach on the right to truth within the Brazilian domestic legal system.

65. See, e.g. Inter-American Commission on Human Rights Annual Report, 1985–86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 26 September 1986. See also, *El-Masri v. the former Yugoslav Republic of Macedonia*, European Court of Human Rights, Judgement, 13 December 2012, para. 191: 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.
66. In respect to the *Changri-La* case, this has already been noted by Terzieva, 'State Immunity and Victims' Right to Access to Court', 788, who refers to the ICRC Commentary on this matter, that is, C. Pilloud, J. Pictet, Y. Sandoz, and C. Swinarski, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Leiden: Martinus Nijhof Publishers, 1987), para. 1212
67. D. Orentlicher, 'Principle 4', OHCHR, Report Study on the Right to Truth, UN Doc.E/CN.4/2006/91, 8 February 2006. See also P. De Greiff, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc., A/HRC/24/42, 28 August 2013, and lately UNGA, A/RES/68/165, 18 December 2013.
68. *Case of Ignacio Ellacrıaetal v El Salvador*, Inter-American Commission, Report of 22 December 1999; *Kurt v. Turkey*, European Court of Human Rights, Judgment of 25 May 1998. It should be noted that the Brazilian approach to the right to truth is quite specific as it still does not extend to the determination of the criminal responsibility of the (alleged) authors of the relevant violations. In this sense, it is not absolute or inderogable within the Brazilian domestic legal system. See for an extensive analysis C. Osmo, 'Mobilization and Judicial Recognition of the Right to the Truth: The Inter-American Human Rights System and Brazil' in *Comparing Transitions to Democracy. Law and Justice in South America and Europe*, ed. C. Paixão and M. Meccarelli (Cham: Springer, 2021): 137. For a comparison of the IACtHR and the Brazilian judicial decisions on the matter, see also L. Ayres França, 'The Inter-American Court of Human Rights' *Gomes Lund Et Al. (Guerrilha Do Araguaia) V. Brazil* Judgment and the Brazilian Federal Supreme Court Judgment on the Constitutionality and Conventionality of the 1979 Amnesty Law', *Revista Interamericana y Europea de Derechos Humanos* 7, no. 1-2 (2014): 141. The right to truth, however, has been successfully mobilized in domestic civil courts, both as the right for individuals (and specifically family members) and society as a whole to know. As such, this seems in line with the findings of STF in this case as this relates to the right of access to justice, rather than a criminal indictment.
69. Y. Q. Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?', *International Review of the Red Cross* 88 (2006): 245.
70. Art. 4(II) *The Federative Republic of Brazil governs its international relations by the following principles: […] II – prevalence of human rights.* Constitution of the Federative Republic of Brazil. English Version, Supremo Tribunal Federal, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022.
71. *Changri-La* case, Majority Opinion, 28, 30.
72. See *infra*, section 4.2.
73. Branca, , 'Immunità degli stati e violazioni dei diritti umani'.
74. *Ferrini* case *supra* note 16, paras. 6–11.
75. See Article 118(3), of the Disposizioni attuative del codice di procedura civile ('Implementig measures of the code of civil procedure').
76. *Changri-La* case, Majority Opinion, 1 March 2021, 12–13.
77. Italian Supreme Court, decision no 1072, 13 January 2009, text in *Rivista di diritto Internazionale* 90 (2009): 618. The *Milde* case is referred to in very generic terms in the Brazilian decision as a '2008' decision, but, in fact, although the case was discussed on 21 October 2008, the judgment was adopted in 2009.
78. *Changri-La* case, Majority Opinion, 12–17.
79. *Changri-La* case, Majority Opinion, 13–16 (with reference to *Jurisdictional Immunities*, Counter-Memorial of Italy, 22 December 2009, 65–67).
80. Ibid., 21–22 (referring to B. Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity', *Italian Yearbook of International*

Law 21 (2011): 135; De Sena and De Vittor, 'State Immunity and Human Rights'; R. Pavoni, 'An American Anomaly? On the ICJ's Reading of United States Practice in Jurisdictional Immunities of the State', *Italian Yearbook of International Law* 21 (2011): 143.

81. *Changri-La* case, dissenting opinion by O Senhor Ministro Gilmar Mendes, 9–10.
82. Ibid, 26–30.
83. *Changri-La* case, dissenting opinion by O Senhor Ministro Marco Aurélio, 3.
84. Ibid.
85. *Changri-La* case, dissenting opinion by O Senhor Ministro Alexandre de Moraes (who refers to the 2012 ICJ's decision in passing at 10).
86. *Jurisdictional Immunities*, Counter-Memorial of Italy, 22 December 2009, 16; *Milde* case, supra note 77, par. 8
87. On the recent development in the Italian domestic order, with particular reference to the extent and legitimacy of Italian Decree-Law no 36/2022 see Pavoni, , 'Germany Versus Italy Reloaded', 24.
88. As noted ibid., Italian claimants were not successful before German courts. The necessity identified in Italian case-law of *judicial* means of redress for Nazi crimes is thus not automatically generalisable and might be circumscribed to the specific case, allowing instead for non-judicial alternatives means of redress for future cases to satisfy the right to remedy.
89. The literature seems to be prone to acknowledge a right to a *judicial* remedy at an international level in cases of serious human rights violations, while serious international humanitarian law violations wouldn't entail the same right. See recently Terzieva, 'State Immunity and Victims' Right to Access to Court', 800–91.
90. *Changri-La* case, Majority Opinion, 23–24.
91. *Changri-La* case, Majority Opinion, free translation of the authors.
92. See *supra*, section 2.4.
93. See *supra*, section. 3.
94. Saliba and Lima, 'The Immunity', *supra* note 46; Branca, , 'Immunità degli stati e violazioni dei diritti umani', Uriarte, 'Inmunidad de jurisdicción y derechos humanos'.
95. This is the position taken by Uriarte, 'Inmunidad de jurisdicción y derechos humanos', 18.
96. It is interesting to note that a similar reasoning was conducted in the *Milde* case on Article 10 of the Italian Constitution and the constitutional relevance of fundamental human rights vis-à-vis international rules that would be in conflict with them.
97. *Changri-La* case, Majority Opinion, 28.
98. In his dissenting opinion, Judge Mendes criticised the balancing of the different principles in Article 4 of the Constitution, including 'equality among states' as arbitrary in tilting towards the prevalence of human rights.
99. Similarly, albeit somewhat more critical, Cavalcanti, , 'Karla Christina Azeredo Venâncio Da Costa', 314.
100. Saliba and Lima, *The Immunity*, *supra* note 46; Branca, 'Immunità degli stati e violazioni dei diritti umani'.
101. See amongst others G. Binenbojm, 'Monismo E Dualismo No Brasil: Uma Dicotomia Afinal Irrelevante', *Revista da EMERJ* 3 (2000): 180; A. Lipp Pinto Basto Lupi, 'O Brasil é dualista? Anotações sobre a vigência de normas internacionais no ordenamento brasileiro', *Revista de Informação Legislativa* 46 (2009): 29; B. Baía Magalhães, 'O sincretismo teórico na apropriação das teorias monista e dualista e sua questionável utilidade como critério para a classificação do modelo brasileiro de incorporação de normas internacionais', *Revista de Direito Internacional* 12 (2015): 78; A. C. Paulo Pereira and E. Silva Junior, 'Domestic Law an International Law in Brazil', *Panorama of Brazilian Law* 5–6 (2016): 197; A. Silva Oliveira, 'The Normative Hierarchy of Treaties in Brazilian Legal System', *Panorama of Brazilian Law* 9–10 (2018): 245.
102. See amongst others Binenbojm, 'Monismo E Dualismo No Brasil'; Magalhães, , 'O sincretismo teórico na apropriação das teorias'; M. Ariosi, *Conflitos entre tratados internacionais e leis internas: o judiciário brasileiro e a nova ordem internacional* (Rio de Janeiro: Renovar, 2000); N. Araujo and I. da Matta Andreiuolo, 'A Internalização dos Tratados no Brasil e os Direitos Humanos', in *Os Direitos Humanos e o Direito Internacional*, ed. C. Eduardo de

A. Boucault (Rio de Janeiro: Renovar, 1999), 82; H. Accioly, G.E. Nascimento e Silva, P. Borba Casella, *Manual de Direito Internacional Público*, 25th ed. (São Paulo: Saraiva Jur, 2021), chapter 2.4.

103. See e.g. ADI 1480 MC, Relator(a): Min. CELSO DE MELLO, Tribunal Pleno, julgado em 04/09/1997, DJ 18-05-2001 PP-00429 EMENT VOL-02031-02 PP-00213.
104. A. A. Cançado Trindade, 'Memorial em prol de uma nova mentalidade quanto à proteção dos direitos humanos nos planos internacional e nacional', *Boletim da Sociedade Brasileira de Direito Internacional* 113–118 (1998): 88–89. See Silva Oliveira, 'The Normative Hierarchy of Treaties in Brazilian Legal System', 254.
105. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* (Porto Alegre: Fabris Editor, 2003), 403; V. de Oliveira Mazzuoli, *Curso de direito internacional público* (São Paulo: Editora Revista dos Tribunais, 2011), 90.
106. See e.g. Magalhães, 'O sincretismo teórico na apropriação das teorias', 78.
107. C. R. Husek, *Curso de Direito Internacional Público* (São Paulo: Imprenta, 2017), 67–68.
108. Lupi, 'O Brasil é dualista?' 34–35.
109. Husek, *Curso de Direito Internacional Público*, 68: – 'the practice [*of customary international law]* has no possibility to be contradicted' (free translation of the authors).
110. Many scholars consider the categorisation deprived of any analytical function by now and suggest letting the interpretation be guided by the most favourable rule doctrine (see Magalhães, 'O sincretismo teórico na apropriação das teorias', 92; Binenbojm, 'Monismo E Dualismo No Brasil'). In fact, in the context of the *Changri-la* case, recent literature opines that the decision goes beyond matters of mere dualism or conflict between constitutional and international law; '[t]he Brazilian Constitution provides for how the international legal order must be apprehended by organs in the Brazilian legal order—specifically by prioritizing human rights' (Cavalcanti, 'Karla Christina Azeredo Venâncio Da Costa', 311).

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