

INTERNATIONAL LAW IN DOMESTIC COURTS AND THE JURISDICTIONAL IMMUNITIES OF THE STATE CASE

INGRID WUERTH*

National court litigation in Greece and Italy prompted Germany to bring suit before the International Court of Justice ('ICJ'), resulting in the Jurisdictional Immunities of the State judgment. The history of that litigation, as well as the ICJ's judgment itself, raise two questions about the relationship between executive branches and courts. First, if national court decisions conflict with the views of the forum state's executive branch, which controls for the purpose of determining state practice in customary international law? Secondly, are national courts more likely to produce 'outlier' decisions that challenge or undermine existing international law when the forum state's executive branch fails to take a position in the litigation? This commentary explores these two questions and explains their significance in light of current developments in immunity and universal jurisdiction cases.

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I INTRODUCTION

It is a tumultuous time for the international law of state immunity. The traditional, sovereignty-based law of immunity that protects states from suit in foreign national courts has come under pressure generated by the logic and normative underpinnings of international human rights law, which demands accountability for egregious violations of human dignity. Despite the calls for change and the uncertainty they have produced, the International Court of Justice ('ICJ') recently reaffirmed, in strong and certain terms, the immunity of states from human rights claims made in foreign national courts.¹ The *Jurisdictional Immunities of the State* case was accordingly a landmark decision for the law of state immunity. It was also, however, an important decision in another respect. The ICJ case itself was based on national court litigation in Italy and Greece that applied international law but concluded that it did not afford immunity to Germany. Thus the impetus for the case was a much-discussed

* BA (University of North Carolina); JD (University of Chicago); Professor of Law, Director of International Legal Studies Program, Vanderbilt University Law School. For very helpful comments on an earlier draft I am grateful to Suzanne Katzenstein. Liz Berk, Sean Richardson and Jenna Stern provided excellent research assistance.

¹ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) ('*Jurisdictional Immunities of the State*').

development in the production and application of international law over the past few decades: the growth of international law in domestic courts.²

The decision itself relies more extensively on national court cases as evidence of state practice than any prior ICJ decision, confirming the important role for domestic courts in the development of customary international law, especially that of immunity. The underlying litigation in Italy and Greece, as well as the subsequent national court cases that rejected those decisions, also shed light on how and when national court decisions upset, and potentially change, settled norms of international law. This commentary considers these two aspects of the *Jurisdictional Immunities of the State* case: the use of national court decisions to show state practice and *opinio juris* and the process of domestic litigation that produces these national court decisions. It argues that both aspects raise questions about the relationship between courts and executive branches that have implications well beyond doctrinal developments in immunity.

Part II of this commentary discusses how the ICJ in the *Jurisdictional Immunities of the State* case relied upon national court cases to show state practice and *opinio juris*. The judgment does not fully explain how state practice should be determined in the face of national court cases and potentially conflicting practice by the forum state's executive branch, which has long posed difficulties in evaluating national court decisions. The same problem may arise in other immunity contexts and with respect to the extraterritorial application of the *Alien Tort Statute* ('ATS'),³ where decisions of United States courts may be at odds with the views of the executive branch. Where national courts and executive branches produce conflicting state practice, this commentary argues that both should count in ascertaining the requirements of customary international law.

Part III of this commentary considers theoretical approaches to the relationship between domestic courts and the development and enforcement of international law. The domestic litigation that gave rise to the *Jurisdictional Immunities of the State* case confirms certain aspects of these theories but it also reveals weaknesses and problems. In particular, the executive branch appears to play an important role in cases around the world that involve contested questions of state or official immunity that are not governed by statute. Major cases from Hong Kong, Italy and the US demonstrate the point and might suggest that this control is on a global upswing. If so, such a development would

² See, eg, Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997); Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501; Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011) 7. However, little of that literature has considered national courts' decisions on foreign state and official immunity. Exceptions include: Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International & Comparative Law Quarterly* 57; Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue' in Ole Kristian Fauchald and André Nollkaemper (eds), *Practice of International and National Courts and the (De-) Fragmentation of International Law* (Hart Publishing, 2012) 245.

³ *Alien's Action for Tort*, 28 USC § 1350 (2006).

be consistent with the increased role of executive branches in universal jurisdiction cases in some European countries. These changes may limit the role of national courts in enforcing human rights norms and may make them less likely to innovate and issue decisions that challenge or undermine existing limits on jurisdiction or expansive immunity doctrines. On the other hand, as the Italian and Greek cases at issue in the *Jurisdictional Immunities of the State* case demonstrate, executive branch practice is not monolithic and is likely informed by a variety of domestic constraints that may push toward accountability and enforcement.

II CUSTOMARY INTERNATIONAL LAW, NATIONAL COURTS AND EXECUTIVE BRANCHES

National court decisions are widely, but perhaps not uniformly, accepted today as one form of state practice relevant to determining the content of customary international law.⁴ A variety of sources are used to show the actual practice of states, including military orders, diplomatic correspondence, executive decisions, domestic legislation and comments made by governments in international fora.⁵ Historically, national court decisions were controversial as evidence of state practice. Some argued that only the branch of government capable of giving binding consent to international agreements (usually the executive branch) could create state practice.⁶ The *Jurisdictional Immunities of the State* case confirms the significance of domestic decisions to customary international law by explicitly stating that they can constitute both state practice and *opinio juris*.⁷ The judgment goes on to canvass a wide variety of cases to support its conclusion that there is no exception to state immunity either for acts of war on the territory of the forum state or for violations of *jus cogens* norms.⁸ Previous decisions of the ICJ have also referred to national court decisions as state practice,⁹ but the heavy reliance on them and citation of a large number and

⁴ See Sir Robert Y Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1, 41. Cf Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 23 (emphasis altered) (noting that decisions of national tribunals provide 'indirect evidence of the practice of the state of the forum on the question involved').

⁵ Brownlie, above n 4, 6–7; Jennings and Watts, above n 4, 26–7. This commentary takes a broad view of state practice, which includes verbal acts and statements. For a narrower definition of state practice, see Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 88. See also Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Yearbook of International Law* 1, 10, 21–2 (arguing that state practice includes verbal acts and statements).

⁶ See, eg, International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law' (Report, Committee on Formation of Customary International Law, 2000) 17–18 ('*ILA Report*') (discussing and dismissing this position); Philip Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?' (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 259 (discussing this position).

⁷ *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [55], [77].

⁸ *Ibid* [72]–[77], [83]–[85], [96].

⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, 24 ('*Arrest Warrant*'). See also the Permanent Court of International Justice decision on this point: *SS Lotus (France v Turkey)* (Judgment) [1927] PCIJ (ser A) No 10, 23, 26, 28–9.

wide variety of national court cases makes the *Jurisdictional Immunities of the State* case exceptional.¹⁰

The relationship between decisions of national courts and the views of the forum state's executive branch still complicates the analysis of national court decisions for the development of international law, however. In particular, if national court decisions conflict with the views or practice of the executive branch, which receives priority?¹¹ In some systems this problem may occur only infrequently, if at all. For example, immunity determinations might be controlled by legislation as interpreted by the courts¹² or might be constitutionally committed to the courts, leaving little room for conflict between courts and executives and allowing for the emergence of a consistent state position.¹³ Conversely, the executive branch might control immunity determinations in domestic courts, leaving judges little opportunity to issue conflicting opinions.¹⁴ Yet conflicts do arise, as the discussion below demonstrates.¹⁵ As another recent example, the Swiss executive branch appears to believe that former US President George W Bush would be entitled to immunity from the Swiss courts,¹⁶ while the Swiss Federal Criminal Court recently held that a former Algerian Defence

¹⁰ See André Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 *Chinese Journal of International Law* 301, 303–4.

¹¹ See Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2nd ed, 2008) 20–3.

¹² Both legislation and cases interpreting and applying legislation may count as state practice and *opinio juris*. Sometimes *opinio juris* may be hard to discern because courts may accord immunity where international law does not require it: *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [55].

¹³ In many countries, especially common law ones, foreign state immunity is generally regulated by statute: Fox, above n 11, 206–22. Courts and the executive branch might nonetheless disagree about the interpretation of the statute: see *Austria v Altmann*, 541 US 677 (2004) (applying the *Foreign Sovereign Immunities Act*, 28 USC §§ 1330, 1602–11 (2006) ('*Foreign Sovereign Immunities Act*') retroactively, contrary to the views of the executive branch). That conflict could persist beyond the resolution of a particular case. Courts and the executive branch may also disagree about immunity issues that are not covered by the statute: cf *Samantar v Yousuf*, 130 S Ct 2278 (2010) ('*Samantar*') (holding the *Foreign Sovereign Immunities Act* §§ 1330, 1602–11 inapplicable to official immunity determinations). In Italy, immunity determinations are made by courts that apply international law: Andrea Bianchi, '*Ferrini v Federal Republic of Germany*' (2005) 99 *American Journal of International Law* 242, 242. As discussed below, conflicts between courts and the executive have arisen in Italy and Greece, although the national courts appear to have final control over immunity questions that arise in cases before them.

¹⁴ See below nn 95–108 and accompanying text (describing executive control over some immunity determinations in Italian, United States, Chinese and Hong Kong courts).

¹⁵ See also Lewis S Yelin, 'Head of State Immunity as Sole Executive Lawmaking' (2011) 44 *Vanderbilt Journal of Transnational Law* 911; Riccardo Pavoni, 'The American Anomaly: On the ICJ's Misuse of United States Practice in *Jurisdictional Immunities of the State*' (2012) 21 *Italian Yearbook of International Law* 143.

¹⁶ Ewen MacAskill and Afua Hirsch, 'George Bush Calls Off Trip to Switzerland', *The Guardian* (online), 6 February 2011 <<http://www.guardian.co.uk/law/2011/feb/06/george-bush-trip-to-switzerland>> (noting that 'a spokesman for the Swiss Justice Ministry ... [said] that the department's initial assessment was that Bush would have enjoyed immunity from prosecution for any actions taken while in office').

Minister was not immune from suit in a case alleging war crimes.¹⁷ In the US, the Court of Appeals for the Fourth Circuit recently concluded that it was not bound by the views of the executive branch on the issue of immunity *ratione materiae*, and adopted different reasoning than that advanced by the State Department.¹⁸ When conflicts do arise, various approaches to state practice have been advocated. One might favour the executive branch, as it ‘has primary responsibility for the conduct of foreign relations’,¹⁹ one might attempt the potentially difficult determination of which branch has domestic ‘authority over the matter’²⁰ or one might conclude that conflicting domestic views or actions mean that there is no relevant state practice at all.²¹

This issue arose in the *Jurisdictional Immunities of the State* case in two ways. First, to support its argument that Germany was not entitled to immunity, Italy cited decisions of Greek national courts that denied Germany immunity from claims related to a massacre in Distomo, Greece, perpetrated by German soldiers during the Second World War.²² The Greek Minister of Justice had refused, however, based on the immunity of Germany, to give consent to enforce the *Prefecture of Voiotia v Germany* (‘*Distomo*’) judgment²³ against German property in Greece, a decision upheld by the European Court of Human Rights.²⁴ The practice and reasoning of the Greek executive branch thus appeared to conflict with the outcome and reasoning of the *Distomo* decision, raising the question of whether, and the extent to which, each should ‘count’ as state practice. A subsequent 5:4 decision of the Greek Special Supreme Court in the *Germany v Margellos* (‘*Margellos*’) decision backtracked from the reasoning of the *Distomo* case, however, and concluded that there was no generally accepted exception to state immunity, even for gross violations of the laws of war that

¹⁷ Gabriella Citroni, ‘Swiss Court Finds No Immunity for the Former Algerian Minister of Defense Accused of War Crimes: Another Brick in the Wall of the Fight against Impunity’ on *EJIL: Talk!* (15 August 2012) <<http://www.ejiltalk.org>> (describing the 25 July 2012 judgment in the case against Major-General Khaled Nezzar). One possible distinction between these cases is that the US Government may have invoked (or said that it would invoke) immunity on behalf of former US President George W Bush, while the Algerian Government may not have invoked immunity on Nezzar’s behalf: see Ingrid Wuerth, ‘Reassessing Pinochet’s Legacy’ (2012) 106 *American Journal of International Law* (forthcoming).

¹⁸ *Yousuf v Samantar* (4th Cir, No 11-1479, 2 November 2012).

¹⁹ *ILA Report*, above n 6, 18.

²⁰ Cf Roberts, above n 2, 62 (‘[w]here inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter’).

²¹ Akehurst, above n 5, 21–2; *ILA Report*, above n 6, 21–2.

²² ‘Counter Memorial of Italy’, *Jurisdictional Immunities of the State (Germany v Italy)*, International Court of Justice, General List No 143, 22 December 2009, [4.47], [4.71], citing *Prefecture of Voiotia v Germany*, Areios Pagos [Greek Court of Cassation], No 11, 4 May 2000 reported in (2007) 129 ILR 513.

²³ Court of First Instance of Leivadia, No 137, 30 October 1997 reported in (1998) 92 *American Journal of International Law* 765 (‘*Distomo*’).

²⁴ *Kalogeropoulou v Greece* [2002] X Eur Court HR 415. There is no indication that Greece made any submission to the Greek courts in the *Distomo* cases, although one author maintains that the courts’ decisions to deny immunity comported with the position of the Greek Foreign Office in diplomatic negotiations with Germany: see Ilias Bantekas, ‘*Prefecture of Voiotia v Federal Republic of Germany*’ (1998) 92 *American Journal of International Law* 765, 768.

took place on the territory of the forum state.²⁵ Despite the *Distomo* decision and the litigating position of the Greek Government in the *Jurisdictional Immunities of the State* case itself,²⁶ the ICJ concluded that ‘Greek State practice taken as a whole actually contradicts, rather than supports, Italy’s argument’, citing in part the position of the executive branch in refusing to permit enforcement of the judgments in Greece.²⁷ In a later discussion of Greek state practice, the Court made no mention of the executive position, relying instead on the impact of the *Margellos* decision.²⁸

Secondly, the position of the Italian executive branch had its own complexities. In the litigation in Italy, a 2004 decision of the Italian Court of Cassation in *Ferrini v Germany* (*‘Ferrini’*) overruled the lower courts and held that Germany had no immunity from claims by Italian soldiers captured in Italy and taken to Germany to perform forced labour during the Second World War.²⁹ In reaching this conclusion, the Court of Cassation cited decisions of national and international courts to show that immunity cannot be maintained for international crimes, that immunity is often denied for tortious conduct in the forum state and that the distinction between public and private acts has been eroded in the context of torts (thus countering the argument that immunity should be maintained for war crimes as public acts, even when the conduct takes place in the forum state).³⁰ Its reasoning was based both on the domestic tort exception to immunity and the argument that *jus cogens* norms trump immunity.³¹ The Court of Cassation re-affirmed *Ferrini* in 2008 in a case which denied immunity to Germany in respect of a series of other forced labour claims brought by Italians.³²

The Italian executive branch took no formal position in the *Ferrini* litigation itself.³³ The two Italian lower court decisions afforded immunity to Germany,³⁴

²⁵ Anotato Eidiko Dikastirio [Greek Special Supreme Court], No 6, 1 AED 11, 17 September 2002 reported in [2002] Oxford Reports on International Law in Domestic Courts 87, [H1] (*‘Margellos’*).

²⁶ In its submission to the Court after it was granted leave to intervene, Greece argued that the law in this area is developing toward an exception to immunity for violations of *jus cogens* norms, based in part on the duty to compensate: ‘Written Statement of the Hellenic Republic’, *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 3 August 2011.

²⁷ *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [76].

²⁸ *Ibid* [83].

²⁹ Corte di cassazione [Italian Court of Cassation], No 5044, 11 March 2004 reported in (2005) 128 ILR 658 (*‘Ferrini’*).

³⁰ *Ibid* 660–1, 664–6.

³¹ *Ibid* 668–74.

³² *Germany v Mantelli*, Corte di cassazione [Italian Court of Cassation], No 14201, 29 May 2008 reported in [2008] Oxford Reports on International Law in Domestic Courts 1037, [H8] (*‘Mantelli’*). See also *Germany v Milde*, Corte di cassazione [Italian Court of Cassation], No 1072, 13 January 2009 reported in [2009] Oxford Reports on International Law in Domestic Courts 1224, (*‘Milde’*) (denying immunity to Germany in civil claims for crimes against humanity, brought as part of a criminal case). For a detailed description of the civil claims in the *Milde* litigation, see Annalisa Ciampi, ‘The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case relating to the Second World War’ (2009) 7 *Journal of International Criminal Justice* 597.

³³ Email from Elena Sciso to Ingrid Wuerth, 6 June 2011 (Professor Sciso is an expert on immunities law at the University of Rome).

so the Italian Government may not have seen any need to submit its views to the Court of Cassation. In any event, the Italian Government subsequently reversed course. In the *Germany v Mantelli* ('*Mantelli*')³⁵ and *Maietta v Germany* ('*Maietta*')³⁶ cases from 2008 that reaffirmed *Ferrini*, the Italian Government did submit its view that Germany was entitled to immunity.³⁷ Indeed, the Italian Government specifically called into question the *Ferrini* case itself, saying that it 'does not seem to be in line with the current position of international law although it emphasizes some relevant aspects'.³⁸ The Italian Government's efforts were to no immediate avail: the Court of Cassation again denied immunity to Germany.

Germany emphasised the Italian Government's position in the *Mantelli* and *Maietta* litigation as it briefed the case before the ICJ.³⁹ For its part, Italy characterised its own submissions in *Mantelli* and *Maietta* as efforts to avoid the contentious issue of immunity.⁴⁰ Italy also characterised its arguments based on

³⁴ *Ferrini*, Corte di cassazione [Italian Court of Cassation], No 5044/2004, 11 March 2004 reported in (2005) 128 ILR 658, 661–2.

³⁵ Corte di cassazione [Italian Court of Cassation], No 14201, 29 May 2008 reported in [2008] Oxford Reports on International Law in Domestic Courts 1037.

³⁶ Corte di cassazione [Italian Court of Cassation], No 14209, 29 May 2008 reported in (2008) 91 *Rivista di Diritto Internazionale* 896 ('*Maietta*').

³⁷ Procura Generale della Repubblica presso la Corte di Cassazione [Italian Attorney General's Office at the Court of Cassation], Submission in *Mantelli v Germany*, No 14201, 22 November 2007, quoted in 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy)*, International Court of Justice, General List No 143, 12 June 2009, [24]–[26]. The Memorial states that the Italian Government's submission in the 2008 cases maintained that:

it is not at all easy to contend that in the international legal order conventional or customary rules have emerged pursuant to which the jurisdictional immunity yields if the civil responsibility of the State for the commission of international crimes is invoked.

The Memorial also says that the Italian Government 'concluded that the *Corte di Cassazione* should determine that the Italian courts lacked jurisdiction in the case under consideration': at [24]. The Italian Government apparently also took this position in the *Milde* litigation: Andrea Gattini, 'The Dispute on *Jurisdictional Immunities of the State* before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 *Leiden Journal of International Law* 173, 176:

the Italian government itself had in various circumstances unmistakably shared Germany's view on the non-existence of an exception of state immunity for egregious violations of international law. Most notably, that position was formally expressed as late as May 2008 by the Italian Attorney-General before the Court of Cassation in the proceedings related to the *Milde* case.

³⁸ Avvocatura Generale dello Stato [Solicitor General of Italy], Submission in *Germany v Mantelli*, No 14201, 28 April 2008, quoted in 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy)*, International Court of Justice, General List No 143, 12 June 2009, [26].

³⁹ 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy)*, International Court of Justice, General List No 143, 12 June 2009, [24]–[26].

⁴⁰ 'Counter-Memorial of Italy', *Jurisdictional Immunities of the State (Germany v Italy)*, International Court of Justice, General List No 143, 22 December 2009, [1.4] (citations omitted):

As Germany admits, the Italian Government has consistently tried to avoid immunity becoming a contentious issue before Italian courts. The positions taken in the framework of judicial proceedings by the *Avvocatura dello Stato* and by the *Procura Generale* can be explained in this light.

the gravity of Germany's conduct as part of the emergence of a new exception to immunity.⁴¹ The ICJ relied on this characterisation, as well as the uncertainty in the Italian Court of Cassation's orders in the *Mantelli* and *Maietta* litigation, when deciding the *Jurisdictional Immunities of the State* case in favour of Germany.⁴² It is unclear what weight the Court accorded Italy's submissions in *Mantelli* and *Maietta* (which were emphasised by Germany in its Memorials), but its mention of these cases may suggest that prior practice of the executive branch is relevant to determining state practice, even if contrary both to a subsequent litigating position by the executive branch and to national court decisions in the forum. On the other hand, the ICJ cited only court decisions and did not list the views of the executive branch in domestic litigation as indicative of state practice.⁴³

Potential conflicts between courts and the executive branch have recently arisen in other immunity contexts⁴⁴ and also in another uncertain area of customary international law: universal civil jurisdiction. To the extent that state practice is cited in support of universal civil jurisdiction, it draws heavily on US national court cases brought pursuant to the *ATS*.⁴⁵ The statute has become the main engine for international human rights litigation in the US since the seminal decision in *Filártiga v Peña-Irala* in 1980.⁴⁶ Many of the early cases were brought against defendants with few resources and who had apparently severed ties with the foreign government for whom they worked when the alleged conduct took place.⁴⁷ The early litigation was generally favoured by the US executive branch,⁴⁸ but involved no contested issues of immunity or jurisdiction. As the cases have increased in complexity and monetary value, foreign states have increasingly raised issues of both jurisdiction and immunity, often by filing amicus briefs.⁴⁹ This development, along with changes in administration, has complicated the position of the US executive branch considerably.

The US Government filed a series of briefs during the Bush Administration generally opposing the extraterritorial application of the *ATS*, arguing that the general presumption against extraterritoriality should apply to the *ATS*.⁵⁰ Although not mentioning universal jurisdiction (or even international law) explicitly, these briefs voiced concerns about foreign policy problems that might arise if the statute was applied to conduct abroad that involved neither a US

⁴¹ Ibid [4.108].

⁴² *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [86].

⁴³ Ibid [55], [84]–[86].

⁴⁴ See sources cited at above n 15 and accompanying text at above nn 16–18.

⁴⁵ See, eg, *Arrest Warrant* [2002] ICJ Rep 3, 70 (Judges Higgins, Kooijmans and Buergenthal); Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142, 146–8. 630 F 2d 876 (2nd Cir, 1980).

⁴⁶ Julian Ku, 'The Third Wave: The *Alien Tort Statute* and the War on Terrorism' (2005) 19 *Emory International Law Review* 105, 107–10.

⁴⁷ Alvarez-Machain, 'Brief for Respondent', Submission in *Sosa v Alvarez-Machain*, No 03-339, 27 February 2004, [59].

⁴⁸ Ku, above n 47, 109–10.

⁴⁹ United States, 'Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance', Submission in *Kiobel v Royal Dutch Petroleum*, No 10-1491, 13 June 2012, [15]–[16], [27].

plaintiff nor a US defendant.⁵¹ Similar arguments have also been made to the Supreme Court in *Kiobel v Royal Dutch Petroleum* ('*Kiobel*')⁵² but this time without invoking the presumption against extraterritoriality and also without the signature of the State Department on the brief, suggesting that there was disagreement between the Justice Department and the State Department, with the latter favouring broader applicability of the *ATS*.⁵³ At any rate, Breyer J (the other Justices did not address this issue) reasoned in the *Sosa v Alvarez-Machain* ('*Sosa*') case that the *ATS* could be applied extraterritorially in appropriate cases based on universal jurisdiction.⁵⁴ If this position is followed by the majority in *Kiobel*, the Court's decision would conflict with the Government's position that the statute should not be applied extraterritorially. The *ATS* litigation also highlights the problem of changes in the position of the executive branch over time, or conflicts within it, which can also create internally inconsistent state practice.⁵⁵ The increase in executive branch participation in universal jurisdiction cases in Europe suggests that these issues may arise in that context as well.⁵⁶

The *Jurisdictional Immunities of the State* case did not explicitly address the issue of internally conflicting state practice. In evaluating Greek and Italian state practice, however, the Court did not determine which branch (courts or the executive) controlled questions of immunity and then count only that practice. It did reason that the most recent Greek Supreme Court decision (which Greek courts are bound to follow) and executive practice both favoured immunity and to that extent it avoided a direct conflict between the branches.⁵⁷

Had the ICJ been confronted with directly conflicting practice, it might have resolved it, as suggested above, by determining which domestic actor (courts or the executive branch) has formal control over the issue as matter of domestic law, by favouring the executive or by concluding that the conflict means that there is no state practice until internally consistent practice develops. None of these solutions are convincing, however. Privileging the executive branch is unsatisfactory because a national court decision invokes the responsibility of the state as a matter of international law and it often provides clearer evidence of the *opinio juris* than executive branch practice. As well, to some extent these approaches appear to depend on the assumption that state practice will ultimately

⁵¹ Ibid [12], [16]–[19].

⁵² Ibid [22]–[26]. At time of publication, the Court had heard two rounds of oral argument in *Kiobel* but had not yet issued an opinion.

⁵³ John Bellinger, 'Kiobel: Obama Administration Supports Shell, Argues *ATS* Should Not Apply to Aiding-and-Abetting Suits against Foreign Corporations, Leaves Open Possibility of Suits against US Corporations' on *Lawfare* (13 June 2012) <<http://www.lawfareblog.com>>.

⁵⁴ *Sosa v Alvarez-Machain*, 542 US 692, 762 (2004).

⁵⁵ Although this commentary on the *Jurisdictional Immunities of the State* case focuses on the conflict between courts and executive branches, conflict can also arise between either of those branches and the legislature.

⁵⁶ See Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1. See also Nollkaemper, *National Courts and the International Rule of Law*, above n 2, 270 (suggesting that greater independence of the courts will lead to more conflicts between courts and executive branches).

⁵⁷ *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [76].

converge under the control of one domestic actor or another.⁵⁸ This is not necessarily true, however, as an executive branch may take a position as a matter of diplomatic practice that is inconsistent with their domestic courts' resolution of an issue, even if the courts ultimately control the question as a matter of domestic law. More fundamentally, however, state practice ought not be limited to one state practice attributed to each state, for this fails to capture in important ways what state practice actually is.⁵⁹

Consider a traditional rule of immunity. Assume that in States A and B an exception has developed. In State C, court decisions hold that there is an exception. The executive branch in State C maintains that there is no exception. As a matter of domestic law, C's courts control the issue. One might conclude that State C has no relevant state practice for the purposes of ascertaining customary international law, because of the internal conflict.⁶⁰ Alternatively, State C might be counted as recognising an exception (following its courts) or as not recognising an exception (following its executive branch). But none of these approaches reveals that the traditional state rule may be undergoing change in State C. That the traditional rule is contested and in flux makes State C different from a state in which the traditional rule remains in full force or a state in which there is no state practice at all. So the practice of State C supports both sides.⁶¹ This is not the same as saying that it cancels out in the end. In this example, it supports the claim that an exception is developing, because it points toward change in one direction. To be sure, the significance assigned to one form of internally conflicting practice or the other should, of course, vary based on the likelihood that it will be reversed through other internal practice and the extent to which the decision carefully considered the issue in question. Finally, counting the practice of State C on both sides allows the reasoning of both the executive branch and the courts to be considered together with that of other states that reach the same conclusion. Understanding why states behave in certain ways helps determine the uniformity and scope of purported developments in customary international law.

Thus the *Distomo* litigation, had it not been undercut by subsequent case law in Greece, should count as state practice along with the practice of the executive branch. Subsequent actions by other countries, and perhaps by other actors in the

⁵⁸ See Akehurst, above n 5. See above n 28 and accompanying text.

⁵⁹ Cf *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [76] ('the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument'); *ILA Report*, above n 6, 21:

For State Practice to create a rule of customary law, it must be virtually uniform, both internally and collectively. 'Internal' uniformity means that each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. 'Collective' uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another.

⁶⁰ The question addressed here is how to consider internally conflicting practice as practice of the forum state. This discussion does not address how uniform and consistent state practice must be as a whole to demonstrate the existence of custom.

⁶¹ Understanding each state as having only one relevant practice may reduce ambiguity, but it may also limit change. Suzanne Katzenstein, 'International Adjudication and Custom Breaking by Domestic Courts' (2013) 62 *Duke Law Journal* 671, 680–1.

forum state, will then determine whether a new norm of customary international law develops, a topic taken up in the following section.

III THEORETICAL FRAMES: INTERNATIONAL LAW IN DOMESTIC COURTS AND THE EXECUTIVE BRANCH

The Italian and Greek cases that generated the ICJ litigation serve as important examples of how national courts can contribute to the change and development (or fragmentation) of customary international law.⁶² These decisions denying immunity to a state based in part on the nature and severity of the state's conduct, although not entirely without antecedents, opened a wide door for national courts and other actors to develop a *jus cogens* or human rights-based exception to state immunity. But that did not happen. Instead, as the *Jurisdictional Immunities of the State* judgment details, subsequent national court decisions firmly supported state immunity as a requirement of customary international law even in cases alleging egregious human rights violations.⁶³

What accounts for the 'outlier' decisions in cases like *Ferrini* and *Distomo* and for the failure of later courts to follow them? The subsequent decisions appear to contradict some of the literature on international law in domestic courts, which suggests that national courts will tend to promote and advance human rights and accountability, especially if they are aware of each other's decisions and engage in 'judicial dialogue'.⁶⁴ As they consider cases with transnational aspects or implications, some theorists argue, national judges become part of an epistemic community that not only enforces international law but also recognises an underlying normative commitment to protect human rights and ensure accountability.⁶⁵ The later decisions engage in such dialogue by

⁶² See, eg, Knop, above n 2, 529–34 (emphasising the role of domestic courts in translating international law in distinct legal and cultural contexts and arguing that such decisions should inform the meaning of international law itself); Roberts, above n 2 (analysing the unique role of domestic court decisions as sources of international law because they both create and enforce international law).

⁶³ *Jurisdictional Immunities of the State* (International Court of Justice, General List No 143, 3 February 2012) [77]–[78], [83]–[84], [91].

⁶⁴ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 134 (a 'final consequence of increased transjudicial communication would be the spread and enhanced protection of universal human rights'); William J Aceves, 'Liberalism and International Legal Scholarship: The *Pinochet* Case and the Move toward a Universal System of Transnational Law Litigation' (2000) 41 *Harvard International Law Journal* 129, 141 ('the underlying normative feature of transnational law litigation recognizes the need to establish individual accountability for human rights violations'); Melissa A Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 *Georgetown Law Journal* 487 (focussing on transnational judicial dialogue in the development of international law).

⁶⁵ William W Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 *Michigan Journal of International Law* 1, 96–7, quoting Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organizations* 1, 3:

citing and discussing the *Ferrini* and *Distomo* decisions, but they deny rather than effectuate human rights claims.⁶⁶

Other theoretical work emphasises the role of national courts in terms of the ‘enforcement’ of international law against the forum state, a foreign state or related individuals.⁶⁷ Both civil and criminal actions in national courts have the potential to bring the forum and foreign states and their nationals into compliance or to punish violators; this is particularly important to a legal system that largely lacks a centralised enforcement system.⁶⁸ Enforcement also has a more robust side based on how different participants in the international legal system interact to encourage compliance with international law through common interpretive communities and norms of behaviour that become internalised.⁶⁹ National courts, in this view, do not just issue commands to be obeyed, but they foster the deep integration of international law into domestic legal norms and society as a whole. In some ways the state immunity decisions fit the ‘enforcement’ literature. The national court opinions that came after the seminal Greek and Italian cases reinforced and maintained international law’s traditional immunity rules, sometimes emphasising the sovereign equality of states and the contribution of immunity to maintaining friendly relations.⁷⁰ But they do not help make sense of the ‘outlier’ cases that disrupt and potentially change the course of customary international law.

The judges’ views of their own role as ‘developing’ international law on the one hand, or merely enforcing pre-existing norms on the other, may partially explain the difference.⁷¹ But there is another causal variable that merits examination: the position of the executive branch. The Greek and Italian executive branches did not make formal submissions on the question of

[Judges] share a set of ‘normative and principled beliefs’ in the rule of law as well as the ‘common policy enterprise’ of accountability. Seeing themselves as an epistemic community with shared values and methods may help generate the mutual respect and coordination essential to the successful operation of the emerging community of courts ... As judges come to see themselves as part of a common community — the bearers of dual national and international obligations — they will enhance the global pursuit of accountability.

⁶⁶ *Zhang v Zemin* (2010) 79 NSWLR 513, 534 (‘Zhang’).

⁶⁷ See Knop, above n 2, 515–18 (describing and critiquing some of this literature); Conforti and Francioni, above n 2; Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press, 1964).

⁶⁸ Burke-White, above n 65, 13 (‘domestic courts are playing and will continue to play a key role in the enforcement of international criminal justice’); Princeton Project on Universal Jurisdiction, ‘The Princeton Principles of Universal Jurisdiction’ (Working Paper, Princeton University, 2001) 24 (‘The primary burden of prosecuting ... perpetrators of [international] crimes will ... reside with national legal systems’).

⁶⁹ Harold Hongju Koh, ‘How Is International Human Rights Law Enforced?’ (1999) 74 *Indiana Law Journal* 1397, 1414. See also Philippe Sands, ‘Turtles and Torturers: The Transformation of International Law’ (2001) 33 *New York University Journal of International Law and Politics* 527, 552–5. See generally Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1.

⁷⁰ See, eg, Marcin Kaldunski, ‘State Immunity and War Crimes: The Polish Supreme Court on the *Natoniewski* Case’ (2010) 30 *Polish Yearbook of International Law* 235, 241; *Zhang* (2010) 79 NSWLR 513, 530–1.

⁷¹ Roberts, above n 2, 60–70.

immunity in the *Ferrini* and *Distomo* cases. Similarly, the British Government did not take a position on immunity in the most famous criminal case denying immunity: *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* ('*Pinochet*').⁷² In the litigation before the United Kingdom courts, Chile intervened and argued that the former dictator was entitled to immunity.⁷³

The views of the executive branch in the forum state may play an important role in immunity cases, as the following table listing well-known, civil, state immunity cases from around the world suggests. Table One lists immunity cases brought against states (or their officials who are treated as states)⁷⁴ in which the plaintiff argued for a human rights or *jus cogens* exception to immunity.⁷⁵

⁷² [2000] 1 AC 147 ('*Pinochet*').

⁷³ *Ibid* 172.

⁷⁴ The cases of *Zhang*, *Fang v Jiang* and *Jones v Ministry of the Interior for the Kingdom of Saudi Arabia* were brought against individual state officials but the courts treated them as cases against the state itself: *Zhang* (2010) 79 NSWLR 513; *Fang v Jiang* [2007] NZAR 420 ('*Fang*'); *Jones v Ministry of the Interior for the Kingdom of Saudi Arabia* [2007] 1 AC 270 ('*Jones*').

⁷⁵ Cases decided before *Distomo* are not included in this list: see, eg, *Al-Adsani v Kuwait* (1996) 107 ILR 536 (immunity); *Argentina v Amerada Hess Shipping Co*, 488 US 428 (1989) (immunity).

Table One: Domestic Immunity Cases

Forum Country	Country Arguably Entitled to Immunity	Formal Position of Forum Country's Executive Branch	Outcome
Greece (<i>Distomo</i>) ⁷⁶	Germany	None	No Immunity
Italy (<i>Ferrini</i>) ⁷⁷	Germany	None	No Immunity
Italy (<i>Mantelli</i> ; ⁷⁸ <i>Maietta</i>) ⁷⁹	Germany	Immunity	No Immunity
Canada (<i>Bouzari v Iran</i>) ⁸⁰	Iran	Immunity	Immunity
United Kingdom (<i>Jones v Saudi Arabia</i>) ⁸¹	Saudi Arabia	Immunity	Immunity
New Zealand (<i>Fang v Jiang</i> (' <i>Fang</i> ')) ⁸²	China	Immunity	Immunity
Australia (<i>Zhang v Zemin</i> (' <i>Zhang</i> ')) ⁸³	China	Immunity	Immunity

⁷⁶ Court of First Instance of Leivadia, No 137, 30 October 1997 reported in (1998) 92 *American Journal of International Law* 765.

⁷⁷ Corte di cassazione [Italian Court of Cassation], No 5044, 11 March 2004 reported in (2005) 128 ILR 658.

⁷⁸ Corte di cassazione [Italian Court of Cassation], No 14201, 29 May 2008 reported in [2008] Oxford Reports on International Law in Domestic Courts 1037.

⁷⁹ Corte di cassazione [Italian Court of Cassation], No 14209, 29 May 2008 reported in (2008) 91 *Rivista di Diritto Internazionale* 896.

⁸⁰ (2004) 243 DLR (4th) 406 (Ontario Court of Appeal) ('*Bouzari*').

⁸¹ [2007] 1 AC 270.

⁸² [2007] NZAR 420.

⁸³ (2010) 79 NSWLR 513.

Table One suggests that courts may be more likely to deny immunity in situations where the forum state's executive branch is silent. As noted above, this is consistent with *Pinochet*, a criminal case. Although the table is suggestive, the data has obvious limitations. The number of cases is small.⁸⁴ As well, the Greek, Italian and New Zealand cases did not involve an immunity statute and the courts resolved the immunity issues based on customary international law. In the Australian, UK and Canadian cases, by contrast, state immunity is governed by a statute, which arguably gave courts less leeway to find an exception. These cases all discuss international law, however, and all reject the approach taken by the Greek and Italian courts. Moreover, the *Jones*, *Fang* and *Zhang* cases named individual state officials as defendants and the courts might have concluded that the immunity statutes do not apply to individuals, as the US Supreme Court held in *Samantar v Yousuf* ('*Samantar*') (in keeping with the position of the executive branch in that litigation).⁸⁵

Some scholarship sees international law in national courts in domestic separation of powers terms. Courts might decide cases involving international norms by deferring to other branches of government or they might develop their own jurisprudence on issues relating to international law, which could in turn circumvent or directly counter the power of the legislative or the executive branches.⁸⁶ Recent literature has focused in particular on national courts and the executive branch. Professor Eyal Benvenisti argues that national courts of some countries have begun to cooperate with each other to counter the power of executive branches, which has grown in the course of globalisation in part because executive branches tend to control their states' participation in international organisations.⁸⁷ National courts have worked together, he argues, to thwart executive branches; this cooperation enhances democracy and accountability on both the national and international level.⁸⁸ In the immunity context, he predicts that national courts will not cooperate with each other at all, a development he sees in negative terms.⁸⁹

Again, the immunity cases support some aspects of the separation of powers literature, while undermining others. They seem to confirm that the separation of

⁸⁴ For some of the cases that followed *Distomo* and *Ferrini*, information about the position of the executive branch is lacking. See Kalduński, above n 70 (discussing *Natoniewski v Germany*, Polish Supreme Court (Civil Chamber), No CSK 465/09, 29 October 2010 but not mentioning the position of the executive branch). In the case against Germany before the Constitutional Court of Slovenia, the Slovenian Ministry of Foreign Affairs submitted information on immunity, but the nature of that information is unclear, including whether it took a position on the outcome of the litigation: *AA v Germany*, Ustavno Sodišče [Slovenian Constitutional Court], Up-13/99-24, 8 March 2001 reported in [2001] 28/1 *Official Gazette of the Republic of Slovenia*. No information is available about the executive branch and the *Bucheron* case: Cour de cassation [French Court of Cassation], 02-45961, 16 December 2003 reported in (2003) Bull civ n° 258, 206; or the *X Case*: Cour de cassation [French Court of Cassation], 03-41851, 2 June 2004 reported in (2004) Bull civ n° 158, 132. It seems very likely that in at least one of these cases the executive branch did not intervene, but the courts still found the forum state immune, adding cases like *Ferrini* and *Distomo* to Table One above, but with a different outcome.

⁸⁵ *Samantar*, 130 S Ct 2278 (2010).

⁸⁶ See Waters, 'Creeping Monism', above n 2.

⁸⁷ Benvenisti, above n 2, 241–2.

⁸⁸ *Ibid* 272–3.

⁸⁹ *Ibid* 269.

powers remains important in domestic litigation: outlier cases like *Pinochet*, *Ferrini* and *Distomo* were all produced when the executive branch in the forum state remained silent by not intervening to support the claim of immunity. But it undercuts Benvenisti's prediction that judges will cooperate when they act contrary to their executive branches and will not cooperate otherwise. Contrary to his prediction, judges also cite each other (ie, 'cooperate'), even when they act consistently with their executive branches.⁹⁰

If courts seem very likely to follow the preferences of executive branches, why might an executive branch fail to make its views known? A variety of factors may be at work, of course, including the possibility suggested above that they believe the courts will rule as they wish in any event or perhaps they underestimate the response of the foreign sovereign involved. But political constraints may also operate on the executive branch in some cases to increase the costs of intervening in favour of immunity. The literature on international law and domestic courts treats the preferences of the executive branch as exogenous to the dispute being litigated, without considering how the domestic litigation itself may shape those preferences.⁹¹ That is, executive branches may feel constrained in domestic litigation in ways that might not reflect their preferences when they engage in state-to-state negotiation. Domestic (and to some extent international) litigation pushes executive branches to make public, highly visible statements about immunity that may prompt them to consider domestic and transnational interest groups more than they would in other contexts. Note in particular that the *Ferrini* case involved Italian plaintiffs and the *Distomo* case involved Greek plaintiffs — perhaps this fact and the fact that the conduct actually took place in Italy and Greece respectively made the Italian and Greek executive branches initially hesitant to argue in favour of immunity. At least today, popular opinion in Greece overwhelmingly supports Greek efforts to claim 'by any means' war reparations and indemnities from Germany.⁹² The Greek Government's initial silence on immunity, its subsequent decision not to enforce the judgments within Greece and its last-minute decision to intervene on Italy's side in the ICJ case strongly suggest an executive branch under pressure from both directions.⁹³

⁹⁰ Benvenisti predicts that courts will cooperate to protect their own 'parochial, even selfish concerns' and that these concerns will lead domestic courts to act contrary to their executive branches: *ibid* 244. When courts are not threatened, they will not cooperate with each other — immunity is cited as an example: at 244, 268–9 (citing immunity cases to show that 'the recent decisions are standing proof that interjudicial cooperation is a strategy of choice, pursued purely for parochial ends. And when these ends change, we can expect that cooperation may end'). The problem with this argument is that national courts do cooperate in immunity cases even when they agree with their executive branches: see, eg, *Fang* [2007] NZAR 420; *Zhang* (2010) 79 NSWLR 513.

⁹¹ See, eg, Benvenisti, above n 2; Michael P Van Alstine, 'Executive Aggrandizement in Foreign Affairs Lawmaking' (2006) 54 *UCLA Law Review* 307.

⁹² VPRC, 'Greek Public Opinion about Germany and its Policy' (Polling Data, February 2012) 7 <<http://www.vprc.gr/en>>. This source does not explain its polling methodology, but the results are generally consistent with other news reports. See, eg, George Gilson, 'Greece Calls Hague on *Distomo*', *Athens News* (online), 3 February 2012 <<http://www.athensnews.gr>>.

⁹³ See Antonios Tzanakopoulos, 'The *Distomo* Case: Greece to Intervene in the Sovereign Immunity Dispute between Germany and Italy before the ICJ' on *EJIL: Talk!* (17 January 2011) <<http://www.ejiltalk.org>>.

By contrast, cases upholding foreign state immunity often involve plaintiffs that are not from the forum state and conduct that took place abroad. Domestic political calculations may explain the failure of the Italian and Greek executive branches to defend Germany's immunity in their own courts. Domestic court cases allow executive branches to see competing interests conflict over time and to develop positions in something of a dialogue with national courts. Ongoing conflict, with gradual changes in executive branches and national courts, with legislatures following later, is a hallmark of immunity law in both the human rights and commercial activity contexts.

Moreover, the literature focuses on judges as the active agents of change: judges who attend conferences and engage in dialogue or judges who choose to cite foreign case law, judges who have a 'growing awareness' of a 'new identity' as 'transnational actors'.⁹⁴ The immunity cases illustrate something different. They reveal domestic courts as sites of iterative conflict in which opposing and deeply held values embodied within international law clash over and over again. The dynamic movement is created not by judges and their transnational dialogue but instead by the conflict between the litigants and the pressure that they exert on the courts and executive branches of the countries involved. Sometimes these factors generate 'outlier' opinions.

IV EXECUTIVE BRANCH CONTROL OF TRANSNATIONAL LITIGATION: A GLOBAL EXPANSION?

Developments in three countries may herald greater executive control over immunity determinations. First, the Italian Court of Cassation has suggested that it may be more deferential to the executive branch in future cases than it was in the *Mantelli* and *Maietta* litigation. In *United States v Tissino*,⁹⁵ Italian citizens sued the US Government for damages arising out of the storage of nuclear weapons at an air force base, purportedly in violation of international law. The Court of Cassation held the US immune, noting that international practice since *Ferrini* favoured immunity, even when states are accused of international crimes,⁹⁶ and that the *Arrest Warrant of 11 April 2000* case makes clear that *jus cogens* violations alone do not provide the basis for lifting immunity.⁹⁷ The Court also commented on domestic separation of powers, noting that the traditional doctrine of state immunity 'reflected the principle of separation of powers, whereby the judicial branch could not encroach upon the relations between the executive or legislative branches and foreign states entitled to immunity'.⁹⁸

⁹⁴ Waters, 'Mediating Norms', above n 64, 491.

⁹⁵ Corte di cassazione [Italian Court of Cassation], No 4461, 25 February 2009 reported in [2009] Oxford Reports on International Law in Domestic Courts 1262 ('*Tissino*').

⁹⁶ *Ibid* [H6], [H9], citing national court decisions and decisions of the European Court of Human Rights: *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79; *Kalogeropoulou v Greece* [2002] X Eur Court HR 415; *Markovic v Italy* [2006] XIV Eur Court HR 233.

⁹⁷ *Tissino*, Corte di cassazione [Italian Court of Cassation], No 4461, 25 February 2009 reported in [2009] Oxford Reports on International Law in Domestic Courts 1262, [H10]. See also *Arrest Warrant* [2002] ICJ Rep 3, 24.

⁹⁸ *Tissino*, Corte di cassazione [Italian Court of Cassation], No 4461, 25 February 2009 reported in [2009] Oxford Reports on International Law in Domestic Courts 1262, [H8].

Secondly, the US Supreme Court recently held in *Samantar* that cases brought against government officials are not governed by the *Foreign Sovereign Immunities Act*.⁹⁹ Courts in the UK and Australia had reached the opposite conclusion under their respective immunity statutes.¹⁰⁰ The *Samantar* decision has generated a great deal of uncertainty about how courts should decide official immunity claims, if not pursuant to the statute, and the executive branch has argued repeatedly that it controls this disposition of such claims as a matter of constitutional law.¹⁰¹ Lower courts since the *Samantar* decision have followed the executive branch, although the Court of Appeals for the Fourth Circuit recently held that it was not required to do so in official immunity cases.¹⁰²

Thirdly, the Hong Kong Court of Final Appeal recently held that the Chinese executive branch controls immunity policy and determinations in the Hong Kong courts.¹⁰³ Much of the decision focuses on the legal relationship between China and Hong Kong pursuant to Hong Kong's *Basic Law*.¹⁰⁴ The plaintiffs and the dissenting judges argued that Hong Kong common law — which had adopted the restrictive view of immunity — was determinative, rather than the views of the Chinese Government.¹⁰⁵ By rejecting this position, the Hong Kong courts (and the Standing Committee of the National People's Congress to which some questions were referred) unquestionably strengthened the role of the Chinese executive branch over immunity determinations in the Hong Kong courts. China submitted three letters to the Hong Kong courts during the litigation, each affirming in increasingly strong terms that China takes an 'absolute' approach to immunity and does not recognise exceptions for commercial activity and conduct.¹⁰⁶ Both the majority and dissenting opinions are lengthy and include substantial comparative analysis of whether and why courts or executive branches control immunity decisions.¹⁰⁷

These examples may be indicative of a broader trend toward executive control of immunity determinations. Of course, they are limited to just three countries, although the position of China in the Hong Kong litigation strongly suggests that the Chinese executive branch will control immunity determinations in China as well as Hong Kong. Even four countries do not constitute a global trend. The point here is just to note these common developments and to suggest the possibility that they might represent a broader trend. A similar development is taking place in Europe with respect to universal jurisdiction. In England, France and Belgium, recently enacted legislation enhances the role of prosecutors and

⁹⁹ 28 USC §§ 1330, 1602–11 (2006).

¹⁰⁰ *Jones* [2007] 1 AC 270; *Zhang* (2010) 79 NSWLR 513.

¹⁰¹ See Ingrid Wuerth, 'Foreign Official Immunity Determinations in US Courts: The Case against the State Department' (2011) 51 *Virginia Journal of International Law* 915, 918–19.

¹⁰² *Yousuf v Samantar* (4th Cir, No 11-1479, 2 November 2012).

¹⁰³ *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151.

¹⁰⁴ *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*. See also Eric T M Cheung, 'Undermining Our Judicial Independence and Autonomy' (2011) 41 *Hong Kong Law Journal* 411.

¹⁰⁵ *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKC 151 [84] (Bokhary PJ), [447]–[54] (Mortimer NPJ).

¹⁰⁶ Cheung, above n 104, 412–13.

¹⁰⁷ Again, it seems that courts will cooperate even to enhance executive power at the expense of courts. See above n 71 and accompanying text.

limits the role of individual plaintiffs in deciding which universal jurisdiction cases should go forward.¹⁰⁸

V CONCLUSION

Greater control of transnational litigation by executive branches is likely to favour traditional, sovereignty-based rules of jurisdiction and immunity. Limiting the exercise of universal jurisdiction is, after all, one of the points of the amendments to the European jurisdiction statutes.¹⁰⁹ The effect of Chinese executive branch control over immunity is to strengthen the traditional rule of absolute immunity, which most other countries have abandoned in favour of the restrictive approach.¹¹⁰ Italy and Greece defended their national court decisions denying immunity before the ICJ. But the Italian and Greek executive branches eventually appeared to favour immunity for Germany in their actions before their own domestic courts, despite Germany's lack of popularity in both countries. Overall, these developments suggest a pro-sovereignty, pro-executive branch trend in transnational human rights litigation, as does the ICJ's decision in the *Jurisdictional Immunities of the State* case.

Executive branches are hardly monolithic, however. Perhaps some or many will see the enforcement of human rights through national courts as an important way to advance foreign policy,¹¹¹ rather than working largely to avoid foreign cases against their own government and officials.¹¹² But in the ongoing effort to balance sovereignty and human rights in the area of enforcement by foreign national courts, greater control by executive branches, as well as the rulings of the ICJ, appear to weigh in heavily on the sovereignty side. To return to Part II of this commentary, perhaps this development provides another (admittedly context-specific) reason to consider national court decisions as state practice even if they conflict with the executive branch or subsequent decisions in the same jurisdiction. National court decisions rarely spring from nowhere, instead they generally represent powerful (if not universally accepted) social forces and pressures — some of which executive branches may be hesitant to adopt — that merit incorporation into the set of factors that determine the content of customary international law.

¹⁰⁸ See, eg, *Police Reform and Social Responsibility Act 2011* (UK), c 13, s 153; *Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale* [Law No 2010-930 of 9 August 2010 Adapting Criminal Law to the Institution of the International Criminal Court] (France) JO, 10 August 2010, 14678, art 8; *Loi du 5 août 2003 relative aux violations graves du droit international* [Law of 5 August 2003 relating to Grave Violations of International Humanitarian Law] (Belgium) *Moniteur Belge*, 7 August 2003, 21182, art 12; Langer, above n 56, 18–19, 25–6, 30–3.

¹⁰⁹ See Steven R Ratner, 'Belgium's War Crimes Statute: A Post Mortem' (2003) 97 *American Journal of International Law* 888 (discussing the background and effect of Belgian legislation); Langer, above n 56 (discussing the background and effect of legislation or proposed legislation in England, France, and Belgium).

¹¹⁰ Fox, above n 11, 201–35.

¹¹¹ See Sarah Cleveland, 'Online *Kiobel* Symposium: The Alien Tort Statute and the Foreign Relations Fallacy' on *SCOTUSblog* (13 July 2012) <<http://www.scotusblog.com>>.

¹¹² Bellinger, above n 53.