Immunity vis-à-vis the ECJ. The Potential Effects of a European 'Counter-Limit' Approach

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Abstract: Immunità alla prova della CGUE. I possibili effetti di un approccio europeo dei 'controlimiti' – The extension of State immunity to private actors, to whom are delegated functions typically undertaken by sovereign States, is posing some challenges to the international legal order. The Judgement C-641/18 of the ECJ has intervened on the matter setting important criteria and boundaries to such extension of immunity. However, the importance of this judgement extends beyond the boundaries of immunity as the Court intervened in the, hitherto uncertain, relation between customary international law and the fundamental rights enshrined in the European Charter of Fundamental Rights. This contribution investigates the relevance of the judgement in the configuration of the interaction between these two different sources of law.

Keywords: State immunity; ECJ; Private actors; Counter-limit; Right to an effective remedy

1. Introduction

There are a number of principles framing the international legal order. One such principle is "*par in parem non habet imperium*"[1], limiting the jurisdictional power of States over foreign sovereign countries. It participates in the construction of what is commonly known as the "Westphalian model"[2], according to which states are equal and sovereign in the international arena. From this principle descends State immunity. Understood as a customary principle of international law, it prevents a sovereign State from being subjected to the jurisdiction of the judge of another State, precisely because, pursuant to the Westphalian model, the sovereign power of a State ends where the sovereign power of the other begins.

If the traditional model of international law identifies *States* as the "normal types" of legal persons and the primary subjects of the international community[3],

[1] Y. Dinstein, *Par in Parem non Habet Imperium*, in 1 *Israel L. Rev.* 3, 407-420 (1996); A. Atteritano, *Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years*, in 19 *The Italian Yearbook of Int'l L. Online* 1, 31-56 (2009); P.T. Stoll, *State Immunity*, in *Max Planck Encyclopedia of Public Int'l L., online edition* (2009), available at www.mpepil.com.

[2] S. Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, in 8 *Australian J. of Legal History*, 181 (2004); A. Peters, *Immune Against Constitutionalisation?*, in A. Peters, E. Lagrange, S. Oeter, and C. Tomuschat, *Immunities in the Age of Global Constitutionalism*, Leiden, 2014, 2.

[3] J. Crawford, *Brownlie's Principles of International Law*, Oxford, 2008, 116; A. Cassese,

the past century witnessed a gradual reshaping of this idea together with that of international society[4]. The fragmentation and informalisation of the sources of international law, as well as the technological and commercial developments, have bolstered the appearance of new entities known as 'non-State actors' in the international legal landscape[5].

Against this backdrop, States are increasingly delegating the execution of activities to private entities or, better, non-State actors. This trend entails a plethora of consequences, among which emerges the mutation in the relation between State immunity and non-State actors[6]. In particular, the foregrounding of this type of actors in the exercise of activities typically undertaken by States is posing the question of the extension of immunity of sovereign States to the delegated private subjects. The recent case *LG and others v Rina* (the *Rina* case) of the European Court of Justice (ECJ)[7] has set some relevant criteria for and limits to the possibility of according immunity to delegated non-State actors. The relevance of the ECJ judgment is not confined in the elaboration of criteria for the extension of immunity common to EU Member States. It also intervened in clarifying the, hitherto uncertain, relation between customary international law (CIL) and the fundamental rights enshrined in the European Charter of Fundamental Rights. This contribution explores the importance of such clarification in the configuration of the system of sources of law believing that it constitutes a landmark case reassessing the hierarchy between international law and EU law.

In order to do so, the contribution will first present immunity as a principle of CIL (section 2). It will then investigate the challenges posed to immunity by the emergence of non-State actors and will introduce the Judgment of the ECJ therein (section 3). Sections 4 will focus on the limits to immunity, expressed by the Court, deriving from art. 47 of the Charter of Fundamental Rights of the European Union. Section 5 will investigate the relevance that such finding of the ECJ has on the system of sources of law of the EU in relation to CIL. This section will address as well the effect that the ECJ judgement might have in the mutation

International Law, Oxford, 2005, 72; W. Friedmann, *The Changing Structure of International Law*, New York, 1964, 67, quoting P. Jessup, *A Modern Law of Nations*, 1948.

[4] *See* generally, Cassese, *International Law*, 22-45. The processes of mutation taking place at the international level are characterised by different patterns – like the absence of a unitary sovereign – that make such processes happening at a slower pace if compared to the ones happening within national borders, on this point see A. Pellet, *L'adaptation du droit international aux besoins changeants de la société internationale*, in 329 *Collected Courses of the Hague Academy of International Law*, 18 ff. (2007).

[5] This notion includes all those actors in international relations that are not states: international organisations, individuals, international corporations, and non-governmental organizations (NGO); See M. Wagner, *Non-State Actors*, in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Oxford, 2009, 1; and H. Thirlway, *The Sources of International Law*, Oxford, 2014, 17.

[6] A. Cutler, *Critical reflections on the Westphalian assumptions of international law and organization: A crisis of legitimacy*, in 27 *Review of International Studies*, 2, 133-150 (2001).

[7] Court of Justice, judgment of 7 May 2020, case C-641/18, *LG and Others v. Rina and Ente Registro Navale*.

of the international law principle of immunity. The last section will draw some conclusions on the effects of the ECJ Judgement on the shaping of the principle of immunity.

2. Immunity: A principle of customary international law

Immunity excludes the jurisdictional power of a State over sovereign acts of another country. This norm is understood as an essential component of the recognition of State sovereignty, as well as a by-product of the formal legal equality of States and their duty of non-interference[8]. The reciprocal recognition of foreign States' sovereign powers at the interstate level determines that the activities, which can be qualified an exercise of public authority, are considered by other States a prerogative descending from international law[9]. This latter, in order to facilitate the exercise of such public functions provides states with immunities for those events in which they might be prosecuted in foreign courts.

"Immunities are a messy affair" wrote Peters in 2014[10]. Their complexity may be grasped by looking at the evolution that the principle underwent throughout its evolution, that witnessed the appearance of immunity as a matter of "mere grace, comity, or usage"[11]. Indeed, this was the case in what is referred as the first judicial decision on immunity: the US Supreme Court decision *Schooner Exchange v. McFaddon*, in which the Court granted immunity to a French public/national military vessel as "a matter of grace and comity"[12]. Paradoxically, traces of this conception of immunity can still be found in those legal systems that carried out greater enterprises of codification of matter in domestic law; *i.e.* common law systems in which domestic statute law represents the primary, if not the sole, ground for judgements on immunity. The judgement *Samantar v. Yousuf* is one such example where the exclusive legal basis referenced were the American Foreign Policy Act and the policy of the State Department, whereas there was no mention of international law whatsoever[13].

From the perspective of international law, immunity is directed to the protection of the legal order, the stability of international relations, inter-state cooperation, and secure the discharge of public functions of the relevant actors[14]. However, the function of State immunity would be frustrated if applied beyond its

[8] M. Shaw, *International Law*, Cambridge, 2008, 697; immunity is grounded on the international law principle "*par in parem non habet imperium*" confirmed in the relative case law, see for instance *Mahamdia v. Algeria*, Court of Justice, Judgement of 19 July 2012, C-154/11.
[9] R. Luzzatto, I. Queirolo, *Sovranità territoriale, jurisdiction e regole di immunità*, in G. Carbone *et al.* (eds), *Istituzioni di Diritto Internazionale*, Torino, 2011, 240.
[10] Peters, *Immune Against Constitutionalisation?*, 1.
[11] L. Damrosch, *Changing International Law of Sovereign Immunity Through National Decisions*, in 44 *Vanderbilt Journal of Transnational* L., 1186 (2001).
[12] US Supreme Court, *Schooner Exchange v. McFaddon*, judgment of 24 February 1812, 11 us (7 Cranch) 116–147.
[13] US Supreme Court., *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, 1 June 2010, 560.
[14] *Ibid.*, p. 17.

rationale. It should not be granted "*au-delà de sa veritable justification*"[15] in order to prevent its degeneration into forms of privileges, unjustifiable in the contemporary international legal order. In this sense, the evolution of immunity saw an important reconfiguration, or dimensioning. Indeed, from an absolute conception – historically linked to the person of the sovereign – immunity is understood today as relative; *i.e.* relating exclusively to the acts of the State that are expression of its sovereign power. These are the *acta iure imperii*, that are distinguished from the other acts, *iure gestionis*, performed by the State, and which are not expression of its public authority[16]. This conception has been adopted by the United Nations Convention on Jurisdictional Immunities that, as results from the phrasing of article 10, explicitly excludes "commercial transactions" from the activities of the State covered by immunity[17]. However, in the absence of a black letter law norm on immunity – in fact, if the UN Convention constitutes a point of reference, it is not yet in force – immunity remains a principle of CIL[18].

Particularly relevant appears the ICJ judgement of 2012, stating that the application of immunity is a requirement of international law, and that «whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity»[19]. In this sense, State immunity is a reflection of the structure of the international legal order. As Lady Hazel Fox argued, any «study of State immunity directs attention to the central issues of the international legal system. [...] Ultimately the extent to which international law requires, and municipal legislations and courts afford, immunity to a foreign State depends on the underlying structure of the international community»[20].

Therefore, an important premise, that has to be taken into consideration in the analysis of this matter, is that the discipline of immunity is driven by courts[21]. Differently from other aspects of international law, a crucial role in the configuration of the law of immunity is played not much by the governments of

[15] S. El Sawah, *Les immunités de l'Etat et des organisations internationales: immunités et procès équitable*, Bruxelles, 2012, 22.
[16] See C. Sun, A. Llamzon, *Acta iure gestionis and acta iure imperii*, in *Max Planck Encyclopedia of Comp. Const. L.*, June 2018.
[17] The United Nations Convention on Jurisdictional Immunities, New York, 2004, at art. 10(1) states: «If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction».
[18] A. Spagnolo, *Imprese private delegate di funzioni pubbliche e immunità dalla giurisdizione civile nella prassi recente*, in *Questione Giustizia*, 3 ff. (2015). As emerged from a study conducted more than two decades ago, relative state immunity was a rule of international customary law formed through the convergence of state practice and *opinio iuris* since the late 1970s; see Y I. Pingel-Lenuzza, *Les immunités des États en droit international*, Bruxelles, 1997, 4-11.
[19] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, judgment of 3 February 2012, ICJ Reports 2012, para. 56.
[20] H. Fox, F. Webb, *The Law of State Immunity*, Oxford, 2013, 7.
[21] Peters, *Immune Against Constitutionalisation?*, 6.

States, their executive branches, or NGOs as much as it is done by the judiciary. In many cases, NGOs play an important part in motivating victims to bring their claims to court as well as in providing them legal counsel, but the issues at stake are ultimately dealt by courts.

Against this backdrop, the role played by international courts on the matter appear somehow modest. It is only recently that the ECtHR and the ICJ began to address a number of cases concerning immunity. The ECtHR developed a limited case-law on the issue of immunity, with particular reference to employment disputes raising the question of immunity of international organizations, which has been heavily relied upon by national courts of both members to the ECHR and other European countries[22]. Besides this specific case-law, a small number of judgements of the ECtHR have been the object of a horizontal interaction with the ICJ[23], which was respectively cited "as authoritative" by the ECtHR[24].

However, besides the case law of the two international courts, the discipline of State immunity has primarily been a concern of domestic courts, which rely on foreign cases to induce the rules applicable to the issue at hand[25]. This pattern appears quite unusual in international law, and this is arguably due to the fact that immunity becomes a question when a controversy is brought before a national court. Therefore, domestic case-law matters in the configuration of the international law of immunities under at least three aspects[26]. First, domestic judgements could develop national practices as well as constitute pronouncements of *opinio iuris*, contributing to the international customary law[27]. Second, domestic court decisions may constitute "subsequent practice" for the interpretation of treaty law – in the sense of Art. 31(1)(b) of the Vienna Convention on the Law of Treaties – and for the "interpretation" of international customary rules. Third, as of Art. 38(1)(d) of the ICJ Statute, domestic "judicial decisions" amount to a «subsidiary means for the determination of rules of law». In this scenario, the recent Judgement of the ECJ *LG and others v Rina* results of particular importance because it sets out the rules for the extension of immunity to non-State actors – an increasingly relevant aspect – with a binding effect on all domestic jurisdictions of the Member States, establishing a common standard or *opinion iuris* on the matter.

[22] ECtHR, *Waite and Kennedy*, Appl. No. 26083/94, judgment of 18 February 1999.
[23] ECtHR, *Al-Adsani v. United Kingdom* (Grand Chamber), application No. 35763/97, judgment of 21 November 2001, ECHR Reports 2001-xi, p. 101, and *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, decision of 12 December 2002, ECHR Reports 2002-x, p. 417, quoted in ICJ, *Jurisdictional Immunities* (n.3), para. 90.
[24] ECtHR, *Jones and others v. United Kingdom*, appl. nos. 34356/06 and 40528/06, judgment of 14 Jan. 2014, para. 197.
[25] See X. Yang, *State Immunity*, 4 ff., when explaining the practice of national courts to rely on foreign cases the author states that "such references constitute a persistent feature in cases of State immunity".
[26] See, among others, A. Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International law*, in *Int'l and Comp. L. Quarterly*, 60, 62-63.
[27] See X. Yang, E. Kadens, and E.A. Young, *How Customary is Customary International Law?*, in 54 *William & Mary L. Rev.*, 3, 885 (2013).

3. The Judgement of the ECJ

The ECJ Judgement is a preliminary ruling requested by the Italian tribunal of Genoa upon the interpretation of Articles 1(1) and 2 of the Council Regulation (EC) No 44/2001 of December 2000 on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter "the Charter") and of recital 16 of the Directive 2009/15/EC of the European Parliament and of the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

The proceedings before the national judge, between LG and Others, on the one side, and the Rina companies on the other, concerns the compensation by the latter, by means of civil liability, of the pecuniary and non-pecuniary losses suffered by the actors resulting of the sinking of the vessel *Al Salam Boccaccio '98* ("the Vessel") occurred in February 2006 in the Red Sea. In particular, the relatives of the victims and survivors of the sinking of the Vessel – causing more than 1000 victims – brought an action before the Tribunale di Genova (District Court, Genoa, Italy) against the ship classification and certification societies, the Rina companies, seating in Genoa. In claiming compensation, the actors argue that the classification and certification operations for the Vessel carried out by the Rina companies under a contract concluded with the Republic of Panama, in order to obtain the flag of the State for the Vessel, were the cause of the sinking.

On their hand, the defendants contend that the Italian judge lacks jurisdiction, relying on the international law principle of State immunity from jurisdiction. Such defense is based on the assertion that the classification and certification operations were conducted by the Rina companies upon delegation from the Republic of Panama and constitute, therefore, expression of the sovereign powers of the delegating State.

By contrast, the claimants affirm the jurisdiction of the Italian court, arguing that the Rina companies have their seat in Italy and that the dispute is of civil nature, therefore falling within the meaning of Articles 1 and 2(1) of the Regulation No 44/2001. Moreover, the claimants submit that the plea of immunity from jurisdiction, relied upon by the defendants, does not cover activities governed by non-discretionary technical rules which are unrelated to the political decisions and prerogatives of a State[28].

The Italian Tribunal raised the question of its jurisdiction in so far as, if it is undisputed that the Rina companies have their seat in Italy, it is claimed that they acted upon delegation from the Republic of Panama. In referring to the ECJ for a preliminary ruling, the Italian Court referred to the case-law of the Italian Constitutional Court[29] and of the Supreme Court of Cassation[30] concerning

[28] Judgement of the 7 May 2020, *LG and Others v. Rina and Ente Registro Navale*, C-641/18, EU:C:2020:349, para. 17.
[29] Italian Constitutional Court, judgment No. 238 of 22 October 2014.
[30] Court of Cassation, Italy, in Joint Session, judgment No. 15812 of 29 July 2016.

immunity from jurisdiction. Pursuant to this case-law immunity from jurisdiction is precluded only with regard to the acts of foreign States consisting in war crimes and crimes against humanity, or where such recognition undermines the principle of judicial protection.

Hence, the preliminary ruling requested to the ECJ verts on whether a non-State actor, performing activities delegated by a sovereign State, may be granted immunity from the foreign jurisdiction over the ascertainment of its liability deriving from the carrying out of such activities. The issue is of particular relevance due to the increasing trend of attribution of public functions by States to private entities, by means of delegation or special investitures. A phenomenon that brings those non-State actors to seek the protection from foreign jurisdiction proper of State immunity, adducing a public nature or relevance of the activities performed[31]. The recognition of immunity has been demanded by both public and private enterprises advocating a 'special' relationship with the State, from which would descend the extension of the jurisdictional protection of the State to those non-State entities. The issue has been raised with particular regard to the widespread phenomenon of privatisation of hitherto public activities. An example is the privatisation and outsourcing of security activities to private military contractors[32]. Other examples of delegation of State power are that of private companies running detention facilities, or of airline companies, carrying out activities of immigration control.

The *Rina* case, raised before the ECJ, is one such example. Indeed, the defendants claim to be covered by immunity from the Italian jurisdiction because the classification and certification activities object of the proceedings were performed by the companies on behalf and upon delegation by the Republic of Panama and, therefore, in the exercise of public power[33]. With particular regard to the matter of the case, the defendants claim that their activities, for the reason above, qualify as administrative matters, therefore falling out of the scope of application of the Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters. Indeed, this Regulation of private international law defines the jurisdiction of Member States over civil and commercial matters[34] establishing, should the subject matter of the case be qualified as civil, the jurisdiction of the Italian judge.

[31] See A. Oddenino, D. Bonetto, *The issue of Immunity of Private Actors exercising public authority and the new paradigm of international law*, in *Global Jurist*, 1 (2020).
[32] See generally F. Francioni, N. Ronzitti, *War by Contract, Human Rights, Humanitarian Law and Private Contractors*, Oxford, 2011; and C. Bakker, M. Sossai (ed), *Multilevel regulation of military and security contractors*, Oxford-Portland, 2012.
[33] See the defendant's argument as summarised in the Opinion of AG Spzunar delivered on 14 January 2020, case C-641/18, *LG and Others v. Rina and Ente Registro Navale*.
[34] The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states as follow: Art. 1(1) «This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters»; Art. 2(1) «Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State».

The ECJ, in judging on the request of preliminary ruling,[35] established that «Article 1(1) of Council Regulation (EC) No 44/2001 […] must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine. The principle of CIL concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law».

The Court judgement appears of particular relevance for the discipline of immunity and its eventual extension to delegated non-State actors with particular regard to three different aspects addressed in the reasoning: 1) The central role of the effective exercise of public powers by the non-State actor as a requisite for the recognition of immunity by a foreign court; 2) The competence of the judge, against which immunity is opposed, to assess the existence of the conditions for the recognition of immunity to the party to the dispute; 3) The limits to the recognition of immunity deriving from Article 47 of the Charter, in situations where such recognition would result in the impossibility for the claimants to seek an effective remedy. The first two findings of the Court are extremely important as they set common criteria for a case-by-case assessment of immunity to delegated private actors and establish a general presumption of non-applicability in such cases. Presumption that can be overcome in each case by the ascertainment of an actual exercise of public powers by the non-State actor. With the third finding the Court poses a limit to the applicability to immunity and establishes an important clarification of the relation between the principle of CIL and the fundamental rights of EU law; clarification whose impact may extend beyond the specific conflict of law raised by the subject matter of the case.

4. The (counter-)limit of art. 47 of the Charter

In order to better understand the relevance of such position adopted by the Court, it is necessary to look at the reasoning that brought the judge to such conclusion. The Italian court, in referring the case to the ECJ, posed the question of to what extent art. 47 of the Charter of Fundamental Rights of the European Union would influence the eventual recognition of immunity to the respondent.

Art. 47 of the Charter titles «Right to an effective remedy and to a fair trial» and comprises, among its various elements, the right of access to a tribunal. In particular, paragraph 2 corresponds to art. 6(1) of the European Convention of Human Rights (ECHR) in which the right of access to a court is inherent in the

[35] *LG and Others v. Rina and Ente Registro Navale*, cit., para. 27.

first paragraph of the article stating the right to a fair trial. From the ECtHR case-law emerges that the granting of immunity amounts to a restriction of the right of access to a court provided for by art. 6(1). Nonetheless, such restriction is understood by the ECtHR as legitimate because in compliance with international law to promote comity and good relations at the interstate level by respecting State's sovereignty. This restriction of art. 6(1) has also been deemed proportioned because it reflects generally recognised principles of international law in State immunity[36].

In the *Rina* case, the question is whether the granting of immunity would entail a restriction of the right of access to a court provided by art. 47 and, if so, which effect would derive by such restriction. In his conclusions, AG Spzunar analyses the matter and grounds his reasoning on three major assertions. First, a national court that derives its jurisdiction from Regulation No 44/2001, must apply EU law in accordance with art 52(1) of the Charter. Since the principle of effective judicial protection is a general principle of EU law, when the scope of protection of art. 47 of the Charter is limited for some reason in accordance with art. 52(1) of the Charter, the principle of effective judicial protection should 'fill the gap'[37]. Second, art. 47 of the Charter is sufficient in itself, with no need to further specification by any EU or national provision, to confer on individuals a right which they may rely on as such[38]. Moreover, provided that the principle of effective judicial protection comprises the right of access to a tribunal, individuals must be able to exercise, before national authorities, their right to apply to the court having jurisdiction[39]. Lastly, AG Spzunar argues as follow: «the Court has already held that the obligation to disapply any provision of national law which is contrary to a provision of EU law that has direct effect is not altered by the fact that the legal position of an individual might change once a national court disapplies a provision of national law on jurisdiction and rules on the action brought before it. The same must be true of the implications of the exercise of

[36] See, in particular, ECtHR, 21 November 2001, *Al-Adsani v. United Kingdom*, CE:ECHR:2001:1121JUD003576397, para. 5; and ECtHR, 14 January 2014, *Jones and Others v. United Kingdom* CE:ECHR:2014:0114JUD003435606, paras. 186 to 189. This case-law developed in the context of disputes between individuals and States. That imply a set of different considerations and may explain why the ECtHR did not consider whether other effective alternative means of securing redress existed and held that the restriction on the right of access to a tribunal was not disproportionate. On the contrary, in a dispute involving individuals and an international organisation, with no particular forum State, the ECtHR did consider whether there were reasonable alternative means to protect effectively the rights under the ECHR. See ECtHR, 18 February 1999, *Waite and Kennedy v. Germany*, CE:ECHR:1999:0218JUD002608394, para. 68.

[37] S. Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, in C. Paulussen, T. Takacs, V. Lazic, and B. van Rompuy (eds), *Fundamental Rights in International and European Law. Public and Private Law Perspective*, Berlin, 2016, 148-149.

[38] See, with reference to the possibility of relying on Article 47 of the Charter, Court of Justice, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 78.

[39] Opinion of AG Spzunar, para. 151.

balancing obligations under international law and obligations arising under EU law»[40].

These assertions of the AG appear to constitute the implicit base of the reasoning of the ECJ in the development of the argument on the matter. In particular, the Court articulates the reasoning drawing on the assertion that «the rules which constitute an expression of CIL are binding, as such, upon the EU institutions and form part of the EU legal order»[41]. The Court recognises CIL as producing its binding effect and, therefore, constituting a source of law in the legal system of the EU. The role played by this source of international law within the EU was already recognised in previous cases[42]. One such example is the *Racke* case, in which the Court affirmed that the (then) European Community is required to comply with the rules of CIL when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country[43].

Nonetheless, the Court affirms that «a national court implementing EU law in applying Regulation No 44/2001 must comply with the requirements flowing from Article 47 of the Charter. [...] Consequently, in the present case, the referring court must satisfy itself that, if upheld the plea relating to immunity from jurisdiction, [the claimants] would not be deprived of their right of access to the courts, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter»[44]. With this conclusion, the ECJ reaffirms the horizontal applicability of the Charter to the subject matter, determined by the application of Regulation No 44/2001[45]. National courts are bound to apply such EU principle whenever they are implementing Union law.

However, this Court's assertion might have further implications on the relation between EU law and CIL. Indeed, the reasoning of the ECJ seems to imply that art. 47, as part of the Charter of Fundamental Rights, constitutes a principle of the EU legal order which, when Union law applies, cannot be limited by the principle of CIL. Consequently, national courts, when implementing EU law, are bound to apply such EU principle and, in the event of a conflict with a norm of CIL, the former should prevail.

[40] *Ibid.*, para. 152
[41] *LG and Others v. Rina and Ente Registro Navale*, cit., para. 54.
[42] See, to that effect, Court of Justice, judgments of 16 June 1998, Racke, C-162/96, EU:C:1998:293, para. 46; judgement of 25 February 2010, Brita, C-386/08, EU:C:2010:91, para. 42; and judgement of 23 January 2014, Manzi and Compagnia Naviera Orchestra, C-537/11, EU:C:2014:19, para. 39.
[43] *Racke*, cit. para 47.
[44] See Court of Justice, judgment of 25 May 2016, *Meroni*, C-559/14, EU:C:2016:349, para. 44.
[45] The immediate reference here is to the issue of the limits of application of the Charter. Indeed, the attention of the ECJ to the relation between the Charter and the competences of the EU is linked to the tension between the "expansive" character of fundamental rights and the "limitative" rationale of the principle of conferral; on this tension see, for instance, the ECJ opinion upon the adhesion of the EU to the ECHR, EU:C:2014:2454, para. 165. For a more exhaustive account on the matter see N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione*, Milan, 2018, 133 ff.

This implication stands in contrast with the position of the ECtHR held in the case *Jones v. United Kingdom*, where the Court denied access to justice to UK citizens seeking redress for their alleged torture in Saudi Arabia due to the application of immunity[46]. A similar position has been adopted by the ICJ in the case *Germany v. Italy* of 2012, in which the court asserted the prevalence of the principle of immunity over the right of the victims, of Nazi crimes during World War II, to seek judicial restoration[47].

Contrary to the positions so far adopted by the ICJ and the ECtHR, the ECJ judgement seems to imply a determined position concerning the role of CIL within the EU legal order. Principles of CIL are to be understood as binding norms by national courts of Member States. However, when EU law applies, these international law principles encounter a limit in the funding principles laid down in the Charter[48]. This role of CIL is not new in the case law of the Court. In the mentioned *Racke* case, the ECJ held that CIL, just like treaty law, was a standard of assessment in the review of the validity of EU secondary legislation, hence ranking CIL in a higher position within the EU legal order than secondary legislation[49]. The *Rina* judgement recalls this hierarchy asserting that, if CIL ranks higher than secondary legislation, its application is subordinated to the compatibility with the fundamental rights expressed in the Charter of the EU.

Besides the diversification in the ranking of EU primary and secondary legislation, a further hierarchy within EU law has emerged from the *Kadi* I judgement of 2008 (later reinforced in the 2013 *Kadi* II judgement)[50]. Within EU primary legislation there is a distinction between "ordinary" primary law and primary law constituting the "foundations" of the Union, namely «the constitutional principles of the EU from which no derogation is possible»[51]. In *Kadi* I these are, in particular, identified with «the principle of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article [6(3) TEU] as a foundation of the Union»[52]. In the *Rina* case, the ECJ appears to adopt this hierarchical distinction between sources of primary legislation in order to subordinate the principle of CIL to article 47 of the Charter, *i.e.* a funding principle of the EU legal order.

The position adopted by the Court recalls the "counter-limit" doctrine famously expressed by the Italian Constitutional Court in the case No 238 of

[46] *Jones v. United Kingdom*, App. Nos. 34356/06 and 40528/06, Eur.Ct.H.R. 14 January 2014. Similarly see *Al Adsani v. United Kingdom*, App. No. 35763/97, Eur.Ct.H.R. 1 November 2001.
[47] ICJ case *Germany v. Italy*, judgement of the judgment of 3 February 2012.
[48] *LG and Others v. Rina and Ente Registro Navale*, cit., para. 54.
[49] *Racke*, cit. paras. 46 ff., see also K. Ziegler, *The Relationship between EU Law and International Law*, University of Leicester School of Law, Research Paper No. 15-04., p. 7.
[50] Joined Cases C-402 and 415/05 P. Yassin Abdullah Kadi and Al Barakaat International Fundation v. Council and Commission of the European Union, 2008, ECR I-6351, para. 317 ("Kadi I"), judgment of 18 July 2013 ("Kadi II").
[51] Ziegler, *The Relationship between EU Law and International Law*, 11.
[52] Kadi I, n 1, para 303, see also paras. 282 ff, 304 ff.

2014[53]. This judgement came in the aftermath of the ICJ decision *Germany v. Italy* and, in posing a limit to the applicability of the CIL principle of immunity in those situations where the right to judicial remedy would be denied, the Court intervened in the hierarchical relation between domestic law and international law[54]. It reviewed the compatibility of the CIL principle of State immunity – ranking at the same level as the Italian Constitution through the automatic adaptation of article 10(1) of the Italian Constitution – with the right to a judge of article 24 of the Constitution, in conjunction with the principle of protection of fundamental human rights (Article 2). The Court concluded that the principle of State immunity, as defined in its scope by the ICJ, conflicts with the constitutional standards and, consequently, it has neither entered the Italian legal order nor it has any effect therein[55].

With this judgement the Italian Constitutional Court established a hierarchy between the founding principles of the constitutional order of the State and the other norms contained in the constitution. Moreover, the principles of CIL, such as immunity, enter in the Italian legal system, by means of the "*trasformatore permanente*"[56] of article 10 Cost., at the same hierarchical level of the ordinary constitutional norms. However, as the Constitutional Court argued[57], the entry in the national order of these rules of international law is subordinated to the compatibility with the core principles contained in the Constitution. If the CIL principle results incompatible with a core principle, like the one provided for by article 24 Cost., article 10 does not operate and the international norm does not enter into the domestic legal order[58].

The Judgment 238/14 of the Italian Constitutional Court locates into a long debate upon the relation between immunity and the right to effective remedy originated with the *Distomo* case back in the late '90s concerning the responsibility

[53] Some aspects of the doctrine of "counter-limit" trace back to the 60s, when the Constitutional Court addressed the issue of equivalence between the jurisdictional protections deriving from Community law and the principle of art. 24 of the Italian Constitution (Const. Court. No 98 of 1965). The Doctrine has then been fully developed by the Court, with the judgement No 183 of 1973, as a counterbalance to the primacy of Community law, and extended to the generally recognized norms of international law by the judgement No 48 of 1979. See L. Gradoni, *Giudizi costituzionali del quinto tipo. ancora sulla storica sentenza della corte costituzionale italiana*, *SidiBlog*, 10 November 2014, available at http://www.sidiblog.org/2014/11/10/giudizi-costituzionali-del-quinto-tipo-ancora-sulla-storica-sentenza-della-corte-costituzionale-italiana/.

[54] Italian Constitutional Court, Judgement of 22 October 2014, No. 238.

[55] *Ibid.*

[56] On the point see F. Salerno, *Giustizia costituzionale versus giustizia internazionale nell'applicazione del diritto internazionale generalmente riconosciuto*, in *Quaderni costituzionali*, 45 ff. (2015).

[57] Italian Constitutional Court, Judgement of 22 October 2014, No. 238.

[58] The authority of the Italian Constitutional Court to assess the compatibility of international law norms with the Constitution exceeds its competences. However, the Court elaborated the mechanism according to which art. 10 does not operate when the CIL norm is incompatible with a core domestic principle already in the judgement No 48 of 1979, which extended the application of the mechanism already applied to EU law to the relation to international law. On this matter see Gradoni, *Giudizi costituzionali del quinto tipo*, 3 ff.

of the German State for the massacre that took place in Distomo during World War II[59]. However, the Constitutional Court moved out of the debate concerning the determination of the actual content of the norm of international law. Debate in which the case *Ferrini*, of the Italian Court of Cassation[60], constituted probably the most significant turning point. The Italian Constitutional Court did not question the content of the CIL principle of immunity as understood by the ICJ in the judgment *Germania v. Italia*. It did not rule 'upon' international law, but 'against' the entrance of the rules of international law standing in contrast with the core principles of the domestic legal order[61].

The same approach seems to adopt the ECJ in *Rina* where it affirms that the referring court should verify that, if upheld the plea relating to immunity from jurisdiction, the claimants must not be deprived of their right of access to the courts[62]. Thus, the ECJ judgement appears to determine that, in cases where EU law applies, if a principle of CIL conflicts with a core element of the EU legal order the former should not find application before the judge *a quo*. In this respect the approach of the ECJ differentiates from the one adopted by the Italian Constitutional Court insofar as it attributes the competence to assess the compatibility between the norms to the referring judge[63]. This European counter-limit doctrine reticently expressed by the ECJ may also shed some light upon the relation between CIL and EU law.

5. The relation between customary international law and EU law

The relation between international law and the EU legal order has long been – and, to some extent, still is – debated[64]. Indeed, the European Union presents a multifaceted nature that makes the configuration of its system of sources a difficult exercise. With the *Rina* case, the ECJ seems to shed some light on such relation. In the judgement, the Court adopts a somewhat constitutionalist approach assimilating the relationship between EU law (in particular: the Charter) and

[59] See E. Handl, *Introductory Note to the German Supreme Court: Judgement in the Distomo Massacre Case*, in 42 *International Law Materials*, 1027 ff. (2003).
[60] Corte di Cassazione 5044, 11 Mars 2004.
[61] See L. Gradoni, *Corte costituzionale italiana e corte internazionale di giustizia in rotta di collisione sull'immunità dello stato straniero dalla giurisdizione civile*, in *SidiBlog*, 27 October 2014, available at http://www.sidiblog.org/2014/10/27/corte-costituzionale-italiana-e-corte-internazionale-di-giustizia-in-rotta-di-collisione-sullimmunita-dello-stato-straniero-dalla-giurisdizione-civile/.
[62] One may wonder whether it could also constitute an extension of such approach beyond the limits of *ius cogens*, on the matter see M. Ferri, *Attività di certificazione delle navi svolte da società private su delega di stati: tra immunità e tutela giurisdizionale delle vittime*, in *Rivista di Diritto Internazionale*, 3, 2020, pp. 789 ff.
[63] The Italian Constitutional Court instead attributes to itself such competence. Attribution already determined in the cases Nos. 348 and 349 of 2007, and extended to CIL in general with the case No. 238 of 2014.
[64] For an overview see, among others, K.S. Ziegler, *The Relationship between EU Law and International Law*, in D. Patterson, A. Södersen (eds), *A Companion to European Union Law and International Law*, Chapter: 4, Hoboken, 2016, 42-61.

international law in many respects to the relationship between international law and national law[65]. This appears particularly true having in mind the *Solange* approach consistently adopted by the Court in cases like *Bosphorus*, *Kadi* or *Schrems I*. Approach recently confirmed in *Schrems II* where the Charter constituted the legal device for the Court to raise the level of data protection by transforming the parameter of 'adequacy' into 'essential equivalence'[66]. At the same time, however, the ECJ acts as an international court scrutinising the practice of the EU[67].

With particular regard to CIL, it is well-known that article 38(1) of the Statute of the ICJ makes it explicit that international custom is part of international law[68]. However, if the ECJ's case law on international treaties expresses the EU dualist approach to conventional international law, from the relevant judgements of the Court concerning international custom is more difficult to decode the kind of relationship – monist or dualist – between the EU legal order and CIL. Indeed, the dualist approach adopted by the EU with reference to international treaties does not imply *ipso iure* its extension to custom. For instance, article 3(5) TEU[69] prompts a monist approach of the EU with regard to custom.

The ECJ, in judging upon the preliminary ruling in *Rina*, clarifies the relation between these two sources and sets forth two elements. 1) CIL constitutes a source of law of the EU legal order whose implementation is, however, subjected to its compatibility with the primary (constitutional) legislation of the EU, encompassing its fundamental rights. 2) The judge before which arises a conflict between these two sources of law must satisfy itself that the application of the principle of CIL would not take place to the detriment of those fundamental principles[70].

In order to understand the kind of relation between the two sources of law, it might be useful to understand whether the ECJ frames the relationship in terms of a balance between principles or whether it applies the logic of subsumption

[65] Ziegler, *The Relationship between EU Law and International Law*, 2.
[66] See Judgement of the 7 May 2020, *Schrems v. Facebook Ireland Ltd.*, C-311/18, ECLI:EU:C:2020:559. See O. Pollicino, "Diabolical Persistence: Thoughts on the Schrems II Decision," VerfassungBlog, 2020/7/25, available at https://verfassungsblog.de/diabolical-persistence/.
[67] On this point see A. Spagnolo, *A European Way to Approach (and Limit) the Law on State Immunity? The Court of Justice in the* Rina *Case*, in *European Papers*, 11 (June 2020); see also S.D. Murphy, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, in *American J. of Int'l L.*, 824 (2017).
[68] For more on international custom, see O. Sender, M. Wood, *The Emergence of Customary International Law*, in C. Brö Imann, Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham, 2016; R.B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, in 21 *European J. of Int'l L.*, 1, 173 (2010); B.D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge, 2010; M.P. Scharf, *Customary International Law in Times of Fundamental Change: Recognising Grotian Moments*, Cambridge, 2013.
[69] Art. 3(5) TEU: "In its relations with the wider world, the Union [...] shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."
[70] See *LG and Others v. Rina and Ente Registro Navale*, cit., paras. 54-55.

between legal rules[71]. In its reasoning the ECJ does not operate any balancing between immunity and article 47 of the Charter. Quite the opposite, it affirms that, in cases governed by Union law, the CIL principle should find application without being subjected to any balancing process, unless it impedes the exercise of the right of access to the courts (article 47). In that event, immunity does not find application within the EU legal order. The reasoning of the ECJ, very much like the operation undertaken by the Italian Constitutional Court in 2014, resolves the relationship between CIL and EU primary law with a clear cut. If the former is incompatible with the latter, it does not find application. Such neat, even though not explicitly expressed, position on the relation suggests a dualist approach of EU law towards CIL[72]. The ECJ establishes a limit to the operability if CIL principles within the EU legal order constituted by the core principles and the fundamental rights of the EU. One may wonder whether the Court implicitly framed the relation in terms of internal hierarchy – envisaging the entrance of CIL within the EU legal system, which is then subsumed in article 47 of the Charter – or as an external limit to the entrance of CIL in the EU legal order. The Court did not express itself on this point. Nonetheless, the logic underlying its reasoning seems to follow the blueprint of the mechanism of suspension of the Italian '*trasformatore permanente*' in the event of incompatibility between the sources, leaving CIL out of the EU legal order[73]. This seems to be confirmed by the recent judgement of the Italian Court of Cassation, which considers the position of the ECJ in the preliminary ruling in close relation with the Italian Constitutional Court counter-limit approach[74].

Such reassertion of the system of hierarchy of sources of the EU legal order by the ECJ may produce a further effect upon the principle of CIL involved. Indeed, the Court poses a limit to the possibility of recognising immunity. Given the customary nature of this principle, one should wonder about the effects of the Court's decision on the modification of the principle itself. Immunity, as a principle of CIL, is shaped by the practice of the international actors abiding to such rule with the belief of its compulsory nature. The question, then, may be whether the relevant practice is solely that of States or whether international organisations (IO) and the EU, in its *sui generis* configuration, could contribute to the formation of such practice.

[71] The reasoning draws on the dichotomy between rules and principles, and the related subsuming and balancing operations applied thereto. See R. Dworkin, *The Model of Rules*, in *University of Chicago L. Rev.*, 14 ff. (1967-68); R. Alexy, *On Balancing and Subsumption. A Structural Comparison*, in *Ratio Juris*, 433 (2003).

[72] On this point see P. De Sena, *Spunti di riflessione sulla sentenza 238/2014 della corte costituzionale*, in *SidiBlog*, 30 October 2014, available at http://www.sidiblog.org/2014/10/30/spunti-di-riflessione-sulla-sentenza-2382014-della-corte-costituzionale/.

[73] See *Ibid.* and Gradoni, *Corte costituzionale italiana e corte internazionale di giustizia*, 3 ff.

[74] Italian Court of Cassation, United Sections, no. 28180/20, p. 19: «La Corte di giustizia ha dimostrato di considerare altamente problematica un'estensione dell'immunità giurisdizionale al di là del limite dell'interpretazione restrittiva. [...] Convergente è l'ottica del diritto interno costituzionale, nel senso che la necessità di una interpretazione restrittiva [...] è l'unica compatibile coi controlimiti offerti dall'ordinamento costituzionale italiano».

A strict conception of international custom would understand the element of *diuturnitas* as constituted by State practice; accordingly IOs practice would not generate custom. Nonetheless, it can be acknowledged that EU law can express a general, consistent and uniform practice, and a perception of legal obligation upon Member States. Moreover, the EU, like most IOs, is recognised international legal personality and can participate in international relations in its own capacity, independently of its Member States[75]. So far, the EU has not been a significant generative force of international custom, at least one that transcends the regional level. Nonetheless, it has had a primary role in reinforcing and consolidating some emerging international customary rules. An example could be the principle of legitimate expectations and the strength with which it is assessed in the EU legal order. As it has been argued, the protection it provides for may have raised the principle to the level of custom in the international arena[76].

To this regard, the EU has been indicated by the Special Rapporteur on the "Formation and evidence of customary international law", appointed by the International Law Commission in 2012, as the "most clear-cut" example of an international organization contributing to the formation and identification of rules of CIL "as such"[77]. In particular, the Special Rapporteur has acknowledged the possibility that the EU's practice contributes to the formation of CIL, provided that the practice is directly attributable to the EU and that it is an 'external' practice, *i.e.* a practice involving the organization's relationships with third States and organizations[78].

The issue at hand requires a further reflection on the nature of the ECJ and on its ability to trigger changes in the international legal system. Indeed, some authors have maintained that the practice of the ECJ is closer to that of domestic courts, which are not responsible for providing authoritative interpretations of public international law[79]. However, it would be improper and problematic to compare the ECJ's case law to that of a domestic court. If the ECJ shares some features with national courts, it also functions as the court of an IO and «its jurisprudence, and the way in which it contributes to customary international law, reflects this important difference»[80]. The preliminary ruling of the ECJ in *Rina*

[75] Konstadinides, *Customary International Law as a Source of EU Law*, 526; see also N. Blokker, *International Organisations and Customary International Law*, in 14 *International Organisations L. Rev.*, 1-12 (2017).
[76] On the debate upon the role of the EU in the advancement of legitimate expectations in the international sphere see, Konstadinides, *Customary International Law as a Source of EU Law*, 530.
[77] ILC, Third Report on Identification of Customary International Law by M. Wood, Special Rapporteur, International Law Commission 67th Session, Geneva, (4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/682, para. 77.
[78] *Ibid.*, para. 70.
[79] As Rosas argues, 'it should be recalled that the ECJ, or the other EU courts, including the national courts of the Member States, are not international courts primarily called upon the deliver authoritative interpretations of public international norms,' A. Rosas, *International Responsibility of the EU and the ECJ*, in M. Evans, P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives*, Oxford, 2013.
[80] See J. Odermatt, *The Court of Justice of the European Union: International or Domestic Court?*,

appears to be suitable to produce effects on CIL as it represents a case, in the jurisprudence of the Court, where it acts as an international judge scrutinising the (external) practice of a *sui generis* international organisation[81].

Even in the hypothesis of not recognising such direct effect of the ECJ's judgement on CIL, it would still have an indirect effect as catalyst of Member States' behaviour which, in turn, would constitute a significant State practice for the purposes of the development of the international custom. Indeed, the triangular relationship between EU law, international law and EU Member States entails that the EU's approach to international law may influence and, in certain cases, like the one considered in this contribution, determine Member States' approaches to international law. When dealing with CIL, this relationship is likely to trigger a conformation of Member States' practice relevant for the identification of the principle of CIL.

6. Conclusions

The preliminary ruling requested by the Italian judge to the ECJ has raised important questions on the configuration of the principle of immunity. In particular the question concerning the relation between the principle of CIL and article 47 of the Charter has raised a crucial issue lying at the core of the EU legal order. Indeed, as discussed in the previous section, this relation is inextricably linked with the hierarchy of the system of sources of the EU.

In its preliminary ruling the Court established rather unambiguously that, when Union law applies, the grant of immunity cannot imply a deprivation of the counterparts of one of the fundamental rights of the EU and, in particular, of the right of access to the courts[82]. The decision expresses a somewhat firm and aware positioning of the Court in the imposition of limits to immunity deriving from EU primary legislation. Positioning that could imply a clarification of the supremacy of such fundamental rights over CIL more broadly. This constitutional configuration of the system of sources appears to establish a European counter-limit approach on the blueprint of the homonymous doctrine developed by the Italian Constitutional Court[83]. However, the fact that this position has been adopted by ECJ, as opposed to a domestic court, may be productive of consequences on the principle of CIL.

As argued, the immediate consequence of the judgement is the subordination of the rules of CIL to the primary legislation of the EU, that part which is

in 3 *Cambridge J. of Int'l and Comp. L.*, (2014).

[81] See on this point A. Spagnolo, *A European Way to Approach*, 11; see also Murphy, *Identification of Customary International Law*, 824. On the relevance of the ECJ to contribute to the production of international law see F. Casolari, *L'incorporazione del diritto internazionale nel diritto dell'Unione europea*, Milan, 2008, 84-108; and A. Giannelli, *Unione Europa e diritto internazionale consuetudinario*, Turin, 2004, 119 ff.

[82] *LG and Others v. Rina and Ente Registro Navale*, cit., paras. 55.

[83] Position recently confirmed with regard to the dispute analysed in this contribution by the Italian Court of Cassation, United Sections, in the judgement no. 28180/20.

considered to constitute the structure of the legal order of the Union and determines its fundamental characters. The other effect that the decision may produce is a modification of the very international law principle of immunity. The importance of this effect, and the rapidity with which it may modify the custom, will depend upon the role recognised to the ECJ's case law and the EU's practice.[84] If, as pointed out by the Special Rapporteur, the practice of the EU is recognised as contributing to the formation of CIL, then the ECJ's judgment represents a strong, significant and direct mutation of the practice underpinning immunity. If, on the other hand, EU's practice is not recognised as practice relevant *per se* for the identification of the *diuturnitas*, it would still have the indirect effect of catalysing Member States' behaviour.

It has been observed that the judgement of the ECJ diverges from the positions adopted in the past by other international courts. In fact, both the ECtHR[85] and the ICJ[86] in their case law have propended for the prevalence of the principle of immunity over the rights of the claimants to have their instances heard by a court. How significant may then be the judgement of the ECJ in contributing to the formation of a new relevant practice shaping immunity?

Unlike the cases decided by the ECtHR and the ICJ, the ECJ in *Rina* had to deal for the first time with the emerging phenomenon of immunity being raised by non-State actors. The foregrounding of this type of actors in the exercise of activities typically undertaken by States, and the correlated quest for the extension of immunity of sovereign States to the delegated private subjects as in *Rina*, may radically change the conditions and the *ratio* of the international law principle of immunity. A change that may bring to a widespread reconsideration of the relation of the CIL principle with the fundamental rights. Immunity is not going through a "Grotian Moment."[87] Nonetheless, the different consequences deriving from the application of immunity to non-State actors may determine a different approach to the CIL principle, of which the ECJ's preliminary ruling would constitute the landmark. Whether this is the turning point in the mutation of the relevant practice underpinning immunity is yet to be seen. What is already clear is that immunity is no longer absolute *vis-à-vis* the fundamental rights of the EU.

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[84] On the rapidity with which a custom may form and what constitutes a relevant practice Sender, Wood, *The Emergence of Customary International Law*, 143.
[85] *Jones v. United Kingdom*, App. Nos. 34356/06 and 40528/06, Eur.Ct.H.R. 14 January 2014.
[86] ICJ case *Germany v. Italy*, judgement of the judgment of 3 February 2012.
[87] The Grotian Moment is elaborated by Scharf as a moment of fundamental change determining a rapid formation of a custom, see M.P. Scharf, *Customary International Law in Times of Fundamental Change. Recognizing Grotian Moments*, Cambridge, 2013, 211-222.