

**Should Judges be Front-Runners?  
The ICJ, State Immunity and the Protection of  
Fundamental Human Rights**

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## Abstract

The present essay critically analyses the ICJ's ruling in *Jurisdictional Immunities of the State (Germany v. Italy)*. To contextualise the Court's judgment the essay begins with a brief reflection on the law of state immunity and recalls the historical and factual background of the case. The essay then discusses the ICJ's analysis of the claims of the parties. The main focus is not a challenge of the conclusions of the Court based on a positivist approach to customary international law. Instead, it is argued that faced with a methodological challenge and an institutional dilemma concerning the determination of customary international law, the Court opted for an approach which did not serve the progressive development of international law well.

## Keywords

ICJ; State Immunity; Human Rights; Customary International Law

## I. Introduction

The law of state immunity has been subject to numerous proceedings before domestic and international courts in recent years. Academic writings on the subject are abundant. In particular, the question whether the protection of fundamental human rights or the prosecution of serious violations of international law justify limitations of state immunity has been debated with passion and intellectual rigour.

The judgment of the ICJ in the matter of *Jurisdictional Immunities of the State (Germany v. Italy)* rendered on 3 February 2012<sup>1</sup> was therefore eagerly awaited by commentators and political actors alike. Not surprisingly the court's ruling in favour of Germany was welcomed by some and criticized by others. Unusually though, both par-

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<sup>1</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, <[www.icj-cij.org](http://www.icj-cij.org)>.

ties seemed to be satisfied with the outcome<sup>2</sup> even though Italy lost on all counts – an issue to which we will return. In any event, supporters and critics of the ICJ’s decision will probably agree that the judgment is among the more important ones in recent years as it addresses fundamental issues of public international law which are of interest to the entire international community. It is quite likely that the decision will become one of the leading cases of the ICJ.

In a nutshell, the ICJ decided that Italy violated Germany’s sovereign immunity by allowing Italian courts to adjudicate on claims against Germany even though Germany invoked its state immunity. The Italian courts were seized by victims of German war crimes during World War II in Italy who sought compensation. Furthermore, Italian courts allowed the enforcement of Greek judgments against Germany for compensation of victims of similar atrocities in Greece and placed constraint measures against German property in Italy in order to enforce those judgments. The ICJ rejected the argument of Italy (and its courts) that state immunity cannot be invoked where serious violations of international humanitarian and human rights law are at stake. The ICJ relied on a positivist analysis of customary international law and concluded that there was simply not enough state practice to support the Italian view.

Apart from deciding on Germany’s claims and answering the question which had been debated so intensely in the past, the judgment of the ICJ raises important questions concerning its own role in the process of a progressive development of international law protecting individual rights. The case also highlights the methodological dilemma of determining customary international law. It showed that this is an exercise which cannot be disassociated from fundamental value choices. Furthermore, the ICJ’s judgment affects the potential of cooperation between domestic and international courts in the development of international law in a multi-layered and decentralised system.

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<sup>2</sup> See Auswärtiges Amt, Pressemitteilung: Außenminister Westerwelle zum IGH-Urteil in Sachen Deutschland/Italien, 3 February 2012, <[www.auswaertiges-amt.de](http://www.auswaertiges-amt.de)>. The Italian Foreign Minister welcomed the judgment’s encouragement of dialogue and is quoted saying that “the sentence provides a useful clarification, especially considering the court’s reference to the importance of negotiators to work with both sides to find a solution”, *The Daily Telegraph*, “UN court rules against Italy in Nazi war claims row”, 3 February 2012, <[www.telegraph.co.uk](http://www.telegraph.co.uk)>.

The present article aims to address these issues while critically analysing and commenting on the ICJ's ruling. It goes without saying that not all issues can be explored fully, but it is hoped that the contribution will stimulate debate, because the judgment of the ICJ should not be the last word concerning these issues.

In order to contextualise the Court's judgment we begin by briefly recalling the main contours of the law of state immunity (II.). In this section we show that state immunity is not a static concept, but subject to changes and reformulation reacting to changes in the international system. Furthermore we argue that state immunity is best understood and justified as a functional concept aimed at serving basic principles and values of the international community. Both aspects will be used in our analysis of the judgment to which we then turn.

We begin by recalling the historical and factual background of the case which is important to explain the sensitivity of the issues and the political importance of the case (III.) We then turn to a discussion of the ICJ's analysis of the claims of the parties, discussing the Court's arguments in the order of the judgment (IV.). Based on this we develop our critique of the judgment (V.). Like some of the distinguished authors of Dissenting and Separate Opinions our main focus is not a challenge to the conclusions of the Court based on a positivist approach to customary international law. Instead, we argue that faced with a methodological challenge and an institutional dilemma concerning the determination of customary international law, the Court opted – unnecessarily and regrettably in our view – for an approach which did not serve the progressive development of international law well. The penultimate section (VI.) of this contribution will then turn to related, but distinct developments in international law, namely the relationship between immunity of state officials and diplomatic immunity on the one hand and the protection of fundamental human rights on the other. We conclude with a brief outlook (VII.).

## II. Establishing and Revisiting State Immunity

### 1. State Immunity, Sovereign Equality and the Law of Coexistence

The development of the contemporary understanding of state immunity is intrinsically linked to the development of the concept of state sovereignty and of sovereign equality of states.<sup>3</sup> State sovereignty implies two principles which would be affected if a foreign sovereign became the defendant in a domestic court of another nation: the principle of territorial jurisdiction of the forum state and the principle of sovereign equality of states.<sup>4</sup> The former demands unlimited exercise of jurisdiction, the latter implies that two equals cannot rule over each other (*par in parem non habet jurisdictionem*).<sup>5</sup> The resulting dilemma can only be avoided if state immunity is accepted as a deviation from the principle of unlimited territorial jurisdiction. This basic idea was already recognised by the United States Supreme Court in its famous 1812 judgment of *The Schooner Exchange v. McFaddon and Others*<sup>6</sup> which is generally seen as the first articulation of the principle of state immunity.<sup>7</sup>

Chief Justice *Marshall* delivering the judgment for the court wrote:

“[The] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect

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<sup>3</sup> P.T. Stoll, “State Immunity”, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, Vol. IX, 498 et seq., para. 4.

<sup>4</sup> L.M. Caplan, “State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory”, *AJIL* 97 (2003), 741 et seq. (745).

<sup>5</sup> I. Brownlie, *Principles of Public International Law*, 7th edition, 2008, 325.

<sup>6</sup> *The Schooner Exchange v. McFaddon and Others*, 11 U.S. 116 (1812).

<sup>7</sup> R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, 2008, 12.

equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”<sup>8</sup>

Throughout the 19th century, the idea of absolute state immunity was generally accepted by domestic courts even though justifications of this principle differed. In particular, two issues seem to have been (and continue to be) controversial: first, whether state immunity was granted as a matter of law or on the basis of judicial discretion (comity) and second, whether state immunity was rooted in international or domestic law.<sup>9</sup> For the purposes of the present analysis both issues need not to be discussed because the ICJ and the disputing parties in *Jurisdictional Immunities of the State* agreed that state immunity was an issue of international law.<sup>10</sup>

The ICJ also recalled that state immunity derives from the principle of sovereign equality of states and therefore underlined the close connection between state immunity and sovereignty.<sup>11</sup> This aspect of the law of state immunity gives rise to a first important question in our context: if state immunity is a corollary of state sovereignty it has to be asked whether limitations of state sovereignty would also lead to limitations of state immunity. In fact, it is noteworthy that the basic principle of state immunity was developed at a time when the idea of absolute state sovereignty of the nation state was developed. However, the concept of state sovereignty underwent significant changes and limitations in the course of the second half of the 20th century, in particular through the adoption of the United Nations Charter and the recognition of inalienable human rights. Furthermore, most contemporary constitutional systems build the idea of sovereignty on the will of the

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<sup>8</sup> *The Schooner Exchange v. McFaddon*, see note 6, 137. This quote – though undeniably the starting point of the modern doctrine – has been and continues to be interpreted in different ways in order to support different theories of state immunity, see J. Finke, “Sovereign Immunity: Rule, Comity, or Something Else?,” *EJIL* 21 (2010), 853 et seq. (871).

<sup>9</sup> H. Fox, *The Law of State Immunity*, 2nd edition, 2008, 13 et seq.

<sup>10</sup> ICJ, see note 1, para. 53.

<sup>11</sup> ICJ, *ibid.*, para. 57.

people and not on the existence of the state.<sup>12</sup> Yet, the law of state immunity as applied in practice does not seem to have reflected these changes.<sup>13</sup> Instead, the basic ideas of state immunity are closer to 19th century ideas of absolute state sovereignty than to an understanding of the early 21st century which sees a reformulation of the idea of sovereignty as a principle aimed at protecting human security and human rights.<sup>14</sup> One may even go as far as stating that the idea of state immunity remains a left-over of the traditional international law of co-existence, which was firmly rooted in the concept of sovereignty and sovereign equality.<sup>15</sup> As state immunity construes a boundary between two sovereign equals regardless of the underlying conflict or purpose of a claim it does not accommodate an understanding of sovereignty as responsibility to protect human rights and values of humanity.

## 2. Modifications and Contestations

Despite the observation that the idea of state immunity does not mirror modern reinterpretations of the concept of sovereignty, the law of state immunity is not static. Rather, the rules on state immunity have been subject to constant change.<sup>16</sup> In particular, the early 20th century saw the emergence of a significant modification of the doctrine relating to commercial or private law activities of the state. It is now widely accepted that these activities (*acta jure gestionis*) are exempt from state immunity and therefore subject to foreign jurisdiction.<sup>17</sup> It is usually argued that this shift in the doctrine of state immunity was a result of

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<sup>12</sup> G.M. Badr, *State Immunity: An Analytical and Prognostic View*, 1984, 73 et seq.

<sup>13</sup> L. McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty", *EJIL* 18 (2007), 903 et seq. (913).

<sup>14</sup> A. Peters, "Humanity as the A and Ω of Sovereignty", *EJIL* 20 (2009), 513 et seq. (524 et seq.).

<sup>15</sup> J. Kokott, "States, Sovereign Equality", in: Max Planck Encyclopedia, see note 3, Vol. IX, 571 et seq., para. 71. On the development from the law of coexistence to the law of co-operation see W. Friedman, *The Changing Structure of International Law*, 1964. See also van Alebeek, see note 7, 301.

<sup>16</sup> R.F. Lengelsen, *Aktuelle Probleme der Staatenimmunität im Verfahren vor den Zivil- und Verwaltungsgerichten*, 2011, 19.

<sup>17</sup> A. Aust, *Handbook of International Law*, 2nd edition 2006, 145, 152; M. Shaw, *International Law*, 6th edition, 2008, 707.

increased commercial activities in the late 19th and early 20th century.<sup>18</sup> The dynamic nature and its relativity was summarised by *Lady Fox*, one of the most eminent commentators on the matter, in 2008 as follows: “The last hundred years have seen enormous changes in the doctrine and the practice, and indeed in the last decade the changes have accelerated in response to the changing priorities of society.”<sup>19</sup> It is possible that this sentence will be rephrased in the next edition of the book reflecting the ICJ’s ruling. However, the quote highlights two aspects which are important for our analysis of *Jurisdictional Immunities of the State*.

First, the quote underlines that the changes of the law of state immunity were generated by changes in doctrine and practice, in particular changing approaches of the respective domestic courts seized with claims involving state immunity and through changes in domestic legislation.<sup>20</sup> In this context it needs to be recalled that the *acta jure gestionis*-exception was developed by domestic courts as a deviation from the doctrine of absolute state immunity which existed until then. Belgian and Italian courts were among the first to refuse to grant immunity to foreign states unless they acted in official capacity.<sup>21</sup> This approach gained rapid support in other countries in the early 20th century. It is important to note that the courts which dealt with this issue at the time were clearly aware that such a rule would be a deviation from earlier practice. In fact, the courts which adhered to the new approach based their decisions on the understanding that the law of state immunity was subject to changes developed and expanded through the practice of national courts.<sup>22</sup>

Second, and potentially even more important, the quote cited above, establishes a connection between state immunity and the priorities of the international society. When more and more states (and state-owned

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<sup>18</sup> A. Cassese, *International Law*, 2nd edition 2005, 100.

<sup>19</sup> Fox, see note 9, 2.

<sup>20</sup> L.F. Damrosch, “Changing International Law of Sovereign Immunity Through National Decisions”, *Vand. J. Transnat’l L.* 44 (2011), 1185 et seq. (1196 et seq.).

<sup>21</sup> van Alebeek, see note 7, 14.

<sup>22</sup> German courts were relatively late in accepting the restrictive approach, but when the German Federal Constitutional Court accepted the doctrine in the Iranian Embassy case, it did so fully aware of the historical context of the issue, see Bundesverfassungsgericht, Decision of 30 April 1963, 2 BvM 1/62, BVerfGE 16, 27 et seq. (33 et seq.).

enterprises) became actively engaged in commercial activities, the absolute understanding of state immunity no longer served the needs of the community of states. The courts therefore approached state immunity on a functional basis<sup>23</sup> trying to justify the refusal to exclude sovereign states from the jurisdiction of another state on the basis of practicability and a general understanding of fairness. It is precisely this aspect of state immunity which is closely connected to recent attempts of domestic courts limiting state immunity in order to protect fundamental human rights.<sup>24</sup>

Regardless of the respective legal approach of the courts (*jus cogens*, territorial tort exemption or special status of human rights<sup>25</sup>) they are (or were) united in the quest for a just and fair balance between the needs of inter-state relations warranting state immunity and the needs to protect fundamental values of the international community calling for an exception from state immunity. Indeed, it seems difficult to accept that states acting commercially would be subject to foreign jurisdiction while states violating fundamental human rights and humanitarian law would benefit from immunity.<sup>26</sup> This process of trial and error was nothing unusual regarding the development of the doctrine of state immunity which was always oriented towards the needs of the international community. The process may, however, have come to an end, or at least be put on hold by the ICJ's judgment of 3 February 2012 to which we turn now.

### III. History and Factual Background of the ICJ's Judgment *Jurisdictional Immunities of the State*

On 23 December 2008, Germany initiated proceedings against Italy before the ICJ claiming a violation of international law by judicial actions brought against the Federal Republic of Germany before Italian courts.

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<sup>23</sup> Brownlie, see note 5, 327.

<sup>24</sup> Fox herself, however, argues against a limitation of state immunity on those grounds, see note 9, 141.

<sup>25</sup> For a comprehensive treatment of these approaches before the ICJ's judgment see C. Appelbaum, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen*, 2007. The ICJ also addressed these arguments, see under IV. 2.

<sup>26</sup> N. Paech, "Staatenimmunität und Kriegsverbrechen", *AVR* 47 (2009), 36 et seq. (89).

The judicial proceedings in question had been engaged by Greek and Italian nationals who sought redress for purportedly uncompensated war crimes perpetrated by German forces in Greece and Italy in the later stages of World War II.<sup>27</sup>

## 1. German War Crimes during World War II

After post-Mussolini Italy had broken away from the Axis powers to surrender to the Allies and declare war on Germany in September 1943, German forces began to inflict numerous atrocities on the population of the Italian territories it still occupied. It is uncontested and openly acknowledged by Germany that those perpetrations between October 1943 and the end of the War amounted to serious violations of international law.<sup>28</sup> In its present decision the ICJ classified those perpetrations into three different categories.<sup>29</sup>

The first category comprises murders and massacres of the civilian population in an occupied territory as part of political reprisals for resistance fighters' ambushes against the occupying forces. One of those massacres with relevance to the present judgment took place on 29 June 1944 in *Civitella in Val di Chiana* and its neighbouring villages when 203 civilians were taken hostage and killed by German soldiers in what was understood to serve as retaliation for the killing of four German servicemen. This large-scale killing was only adjudicated much later in the *Max Josef Milde* case in October 2006<sup>30</sup> – one of several proceedings that prompted Germany to sue Italy before the ICJ. Another war crime of similarly ferocious scale within this category which also underlies the present decision is the massacre of *Distomo*, a small Greek village where German occupying forces killed more than two hundred civilians on 10 June 1944.<sup>31</sup>

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<sup>27</sup> See also C. Tomuschat, "The International Law of State Immunity and Its Development by National Institutions", *Vand. J. Transnat'l L.* 44 (2011), 1105 et seq. (1107 et seq.). For a summary of the main facts in German see J. Schaarschmidt, "Die Reichweite des völkerrechtlichen Immunitätsschutzes – Deutschland v. Italien vor dem IGH", in: C. Tietje (ed.), *Beiträge zum Europa- und Völkerrecht*, Heft 5, 2010, 6 et seq.

<sup>28</sup> Joint Declaration of Germany and Italy, Trieste, 18 November 2006.

<sup>29</sup> ICJ, see note 1, para. 52.

<sup>30</sup> ICJ, *ibid.*, para. 29.

<sup>31</sup> ICJ, *ibid.*, para. 30.

The second category relates to the deportation of members of the civilian population from Italy to Germany where they were subsequently subjected to forced labour. One of those victims, Mr. *Luigi Ferrini*, whose claims for compensation in Italian courts also formed grounds for Germany's application at the ICJ, was arrested in August 1944 and deported to Germany where he was held in custody and used as forced labourer in a munitions factory until the end of the war.<sup>32</sup>

The third category involves deportation of Italian servicemen to Germany and German-occupied territories where their status as prisoners of war was negated in order to exploit them also as forced labourers.

## 2. Peace Agreements and Compensation Schemes after the End of World War II

From the aftermath of the war to as late as the year 2000, unilateral and bilateral avenues were explored by the Allies, Germany and Italy to provide indemnification to Italy and Italian nationals for the atrocities and agonies suffered during the war. While the Peace Treaty of 1947, concluded between the Allied Powers and Italy, addressed the restitution of identifiable property of Italy and Italian nationals, the two bilateral Agreements concluded between Germany and Italy in 1961 aimed at solving outstanding economic questions as well as settling redress for Nazi war crimes. The 1961 Agreements *inter alia* stipulated that Germany would be exempt from future legal actions by Italian nationals related to war crimes against Italian nationals as it in turn entered into an obligation to pay a two-tier compensation to Italy settling both property-related economic issues and redress for Italian nationals who were "subjected to National-Socialist measures of persecution." Both the 1947 Peace Treaty and the 1961 Agreements contained waivers of claims against Germany by Italy or its nationals which became a major bone of contention in the parties' exchange of arguments as their validity and binding character was challenged by Italy. It remained, however, a moot point for the ICJ as its ruling did not attribute any relevance of a possibly persisting responsibility of Germany in respect of war crimes against humanity to the question of Germany's entitlement to immunity.<sup>33</sup>

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<sup>32</sup> ICJ, *ibid.*, para. 27.

<sup>33</sup> ICJ, *ibid.*, para. 48.

Unilaterally, Germany enacted two laws seeking to compensate victims of wartime persecution. The Federal Compensation Law of 1953 amended in 1965, however, only applied to a small number of claims by Italian nationals. In fact, many claimants were either not considered victims within the definition of the law or were lacking permanent residence in Germany or refugee status. Consequently, the majority of claims by Italian nationals were dismissed by German courts.

The second law of 2 August 2000 establishing a “Remembrance, Responsibility and Future” Foundation allowed funds to partner organisations which allocated payments to victims of forced labour and other means of National-Socialist persecution. A significant number of former military captives, though, did not qualify for compensation as the law excluded those applicants from compensation who had held the status of prisoner of war at the time of the war. The Court observed this stance with “surprise-and regret-”<sup>34</sup> as Italian military internees were *de facto* deprived of their status as prisoners of war. Yet, German authorities argued that the German Reich had never been legally capable of altering the captives’ status. According to the German view Italian military internees had never lost their prisoner of war status, effectively barring them from any benefits of the Foundation. This led to a strange consequence: the rights of the Italian military internees were first violated by the German Reich denying them the effects of the status of prisoners of war. The successor of the German Reich, the Federal Republic of Germany, does not maintain this position, which, however, effectively excludes them from compensation.

### 3. Proceedings and Measures of Constraint taken by the Italian Judiciary

The denial of Germany’s jurisdictional immunity by the Italian judiciary can be summarised as an alleged three-pronged violation which saw lawsuits initiated before Italian courts against Germany not dismissed *a limine*, Greek judgments granting relief to war crime claims declared enforceable in Italy and eventually measures of constraint issued against German state property.

On 23 September 1998 Mr. *Luigi Ferrini* initiated proceedings which led to the present case by filing a lawsuit in the Court of Arezzo against Germany seeking relief for forced labour. After both the court of first

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<sup>34</sup> ICJ, *ibid.*, para. 99.

instance and the Court of Appeal in Florence had dismissed Mr. *Ferrini's* claims on the grounds of jurisdictional immunity, the Italian Court of Cassation ruled on 11 March 2004<sup>35</sup> that jurisdictional immunity does not apply where the act that the claim is based on amounts to an international crime. The case was then referred back to the Court of first instance in Arezzo which dismissed it again as time-barred, before the Court of Appeal in Florence rendered the final judgments on 17 February 2011, condemning Germany to pay damages to Mr. *Ferrini*.

The landmark ruling of the Italian Court of Cassation on 11 March 2004 most likely enticed twelve other victims to follow suit as *Giovanni Mantelli and others* started legal action against Germany in the Court of Turin only two days later. On 28 April 2004, another claim against Germany was brought before the Court of Sciacca by *Liberato Maietta*. In both cases, which were also founded on acts of deportation and forced labour, Germany lodged an interlocutory appeal requesting the Court of Cassation to suspend the proceedings due to a lack of jurisdiction. The Court of Cassation, however, dismissed the appeals by two orders of 29 May 2008 confirming that the Italian courts had jurisdiction to hear the cases.<sup>36</sup>

The Court of Cassation further cemented its view that immunity has to give way where international law is violated by war crimes on the occasion of deciding over Germany's appeal in the *Max Josef Milde* case on 21 October 2008,<sup>37</sup> after the Military Court of La Spezia and the Military Court of Appeals in Rome had sentenced Mr. *Milde* to life imprisonment and ordered him and Germany to pay damages to the relatives of the war crime victims. The jurisprudence of the Court of Cassation on allowing claims for compensation against Germany constituted the first alleged violation of Germany's state immunity.

The second aspect of Germany's claim concerned decisions declaring Greek judgments enforceable in Italy. In 1995, Germany was brought to court over the *Distomo* massacre with the Greek Court of first Instance of *Livadia* granting relief to claims for damages of the vic-

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<sup>35</sup> *Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004, *Riv. Dir. Int.* 87 (2004), 539 et seq., *ILR* 128 (2006), 658 et seq. On this case see also P. De Sena/ F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case", *EJIL* 16 (2005), 89 et seq.

<sup>36</sup> Italian Court of Cassation, Order No. 14201 (*Mantelli*), *Foro italiano* 134 (2009), I, 1568; Order No. 14209 (*Maietta*), *Riv. Dir. Int.* 91 (2008), 896 et seq.

<sup>37</sup> ICJ, see note 1, para. 29.

tims' successors in title on 25 September 1997. After Germany's appeal claiming the violation of state immunity was rejected by the Hellenic Supreme Court (*Areios Pagos*) on 4 May 2000,<sup>38</sup> the Greek claimants' success was effectively voided as they were denied the necessary authorisation from the Greek Minister of Justice to render the judgment enforceable.

An attempt to challenge this denial of authorisation before the European Court of Human Rights (ECtHR) was of no avail as the ECtHR held that the application of the Greek claimants was inadmissible.<sup>39</sup> Subsequently, the German Federal Court of Justice (*Bundesgerichtshof*) was seized to declare the Greek title enforceable in Germany. The German Court, however, ruled that the Livadia judgment was issued in breach of Germany's immunity and that therefore such decision could not be recognised in Germany.<sup>40</sup> After the landmark decision of the Italian Court of Cassation, the Greek claimants eventually turned their sights to Italy where their applications to declare the Greek awards enforceable in Italy, both in relation to the incurred legal costs as well as the awarded damages, were accepted by the Court of Appeal in Florence on 2 May 2005 and 13 June 2006 respectively. Germany's appeals against both decisions were each rejected by the Court of Cassation on 6 May 2008 and 12 January 2011.

In this context it appears also worth noting and of certain relevance for the ICJ's ruling that the Special Supreme Court (*Anotato Eidiko Dikastirio*) held in the *Margellos* case on 17 September 2002 – contrary to the Hellenic Supreme Court (*Areios Pagos*) which was initially seized with the case – that according to international law Germany's jurisdictional immunity barred claims for compensation of war crimes.<sup>41</sup>

Measures of constraint issued against German state property in Italy constituted the third alleged violation of state immunity. After the Greek judgment of the Court of Livadia in the *Distomo* case had been accorded *exequatur* by the Court of Appeal of Florence, the Greek

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<sup>38</sup> *Prefecture of Voiotia v. Federal Republic of Germany*, case No. 11/2000, *ILR* 129, 513 et seq.

<sup>39</sup> *Kalogeropoulou and others v. Greece and Germany*, Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, 417; *ILR* 129, 537 et seq.

<sup>40</sup> *Greek Citizens v. Federal Republic of Germany*, case No. III ZR 245/98, *NJW* 2003, 3488, *ILR* 129 (2007), 556 et seq.

<sup>41</sup> *Margellos v. Federal Republic of Germany*, case No. 6/2002, *ILR* 129 (2007), 525 et seq.

claimants registered a legal charge over *Villa Vigoni*, a property of Germany, with the pertinent Land Registry Office in the Province of Como.<sup>42</sup> Located near Lake Como, *Villa Vigoni* serves as cultural centre of excellence founded to promote cultural exchanges between Germany and Italy and is used exclusively for such governmental purposes. By virtue of a decree-law the Italian authorities suspended, albeit not cancelled, the legal charge pending the decision of the ICJ.

#### IV. The ICJ's Analysis of the German Claims

The ICJ enters into its legal analysis by outlining the subject-matter – the alleged violation of Germany's jurisdictional immunity by the actions summarized above – of the decision before ascertaining its own jurisdiction by drawing reference to the European Convention for the Peaceful Settlement of Disputes which both Germany and Italy are parties to.<sup>43</sup>

The establishment of the Court's jurisdiction remained unchallenged by the parties, but the parties disagreed on *ratione temporis* limitations thereof. Their disagreement centred on determining the applicable temporal version of the law of state immunity.

Whereas Germany pleaded for the version valid during the underlying war crimes of 1943-1945, Italy advocated the application in its contemporary form due to its link with the pertinent Italian courts' decisions between 2004 and 2011. The Court followed Italy in that point by emphasising that Germany's application is based on the judicial proceedings before Italian courts and not on the war crimes of the German Reich which gave rise to the victims' lawsuits. In fact, the Court found that the law of immunity is procedural in nature and distinct from the substantive law that governs the acts of the German armed forces, which let the ICJ come to the conclusion that the law of immunity existing at the time of the proceedings in Italy has to be applied in the present case.<sup>44</sup>

The structure of the Court's substantive arguments follows the three claims of Germany outlined above, starting with the examination of the proceedings against Germany in Italian courts before turning to the de-

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<sup>42</sup> ICJ, see note 1, para. 35.

<sup>43</sup> ICJ, *ibid.*, para. 41.

<sup>44</sup> ICJ, *ibid.*, para. 58.

cisions granting *exequatur* of Greek titles in Italy and the legal charge against *Villa Vigoni* as a measure of constraint.

We will broadly follow this approach but focus more on the legal points and less on their application to the facts which were relatively straightforward and undisputed between the parties. Consequently we begin by briefly commenting on the Court's general view on the basic principles of the law of state immunity (1.) and then turn to the four main sets of arguments concerning exceptions from that law (2.): the territorial tort exemption, the gravity of war crimes, the *jus cogens* argument and finally, the *ultima ratio* claim. Based on this, we briefly recall the Court's final decisions on Germany's claims (3.).

## 1. Basic Principles of the Law of State Immunity

The Court began its analysis by clarifying that the source of law for state immunity can only be derived from international customary law in relation to Germany and Italy as neither state is signatory to the United Nations Convention on Jurisdictional Immunities of States and their Property (UN Convention on Jurisdictional Immunities), while Italy has not acceded to the European Convention on State Immunity (European Convention). Following Article 38 (1) (b) of its Statute the Court notes that it has to identify the existence, scope and extent of international customary law documented in settled practice coupled with *opinio juris*.<sup>45</sup> It does so by referring to the ILC which showed that state immunity had become a general rule of law<sup>46</sup> deriving from the principle of sovereign equality set forth as one of the fundamental principles of international law in Article 2 (1) of the Charter of the United Nations.<sup>47</sup>

The Court then addressed the distinction between *acta jure gestionis* which entails limited immunity while *acta jure imperii* accorded imperious immunity to date. The Court concluded that the illegality of the underlying acts – not even the horrendous crimes of World War II – changes nothing in qualifying the deeds in question as *acta jure imperii*

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<sup>45</sup> ICJ, *ibid.*, para. 55.

<sup>46</sup> *ILCYB* 1980, Vol. II (2), 147, para. 26.

<sup>47</sup> ICJ, see note 1, para. 57.

as they genuinely signify sovereign power without any traces of private or commercial activities that *acta jure gestionis* require.<sup>48</sup>

While there is no question about the characterisation of the war crimes and violations of human rights as non-commercial, the Court did not address the question whether there is a third category of state acts apart from *acta jure gestionis* and *acta jure imperii*. This question was raised by Judge *Cançado Trindade* in the oral hearings. He asked the German delegation: “Can war crimes be considered as acts *jure* – I repeat, *jure – imperii*?”<sup>49</sup>

Indeed, it might have been worth contemplating whether certain crimes committed in the name of a state are so outrageous that no civilised nation could meaningfully claim that they are a legitimate exercise of its sovereign power. Developing the doctrine of state immunity on the basis of a modern concept of sovereignty as the responsibility to protect fundamental rights and principles of humanity could have led the Court to the conclusion that a third category would in fact be necessary to adequately evaluate such crimes: *Tertium datur!* Yet, the question of Judge *Cançado Trindade* remained unanswered by the Court as it did not address the idea of a third category.

In his Dissenting Opinion, Judge *Cançado Trindade* stated his own views claiming that international crimes labelled *delicta imperii* are neither acts of the state nor private acts and should not be covered by state immunity.<sup>50</sup> Unfortunately, the Dissenting Opinion does not reach this conclusion on the basis of an analysis of the changing ideas of sovereignty, but bases its view on a moral philosophical understanding of public international law which places individuals at the centre of a *jus gentium*.<sup>51</sup> As desirable as this perspective of international law might be, it can only be achieved if one closely analyses the function of state immunity in an era which sees a radically different notion of sovereignty compared to the 19th century.

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<sup>48</sup> ICJ, *ibid.*, paras 59-60.

<sup>49</sup> ICJ, Public sitting held on Friday 16 September 2011, 2:30 p.m., Verbatim Record, 54, <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>50</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Dissenting Opinion of Judge *Cançado Trindade*, paras 181 and 184, <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>51</sup> *Cançado Trindade*, see note 50, paras 179 et seq.

## 2. Potential Limitations of State Immunity

### a. The Territorial Tort Exemption

As a first line of defence, Italy argued that customary international law has nurtured an exception to the strict rule of impermeable immunity for acts qualified as *acta jure imperii* that were conducted in the forum state and caused personal injury and death. Italy based its argument on article 11 of the European Convention<sup>52</sup> and article 12 of the UN Convention on Jurisdictional Immunities<sup>53</sup> as both contain territorial tort exceptions, albeit not legally binding for the non-signatory parties, as well as on legislation on immunity enacted by a number of states which incorporated similar provisions.

The Court assessed Italy's argument by briefly pointing towards the development of the idea of the territorial tort exception stemming from road traffic accidents and other insurable risks before observing that, although originally designed for *acta jure gestionis*, contemporary legislation reveals that it in principle also applies to *acta jure imperii*.<sup>54</sup> The Court, however, dismissed Italy's assertion that the widely despised<sup>55</sup> European Convention and the UN Convention on Jurisdictional Immunities alone would suffice to constitute customary international law limiting state immunity.

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<sup>52</sup> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

<sup>53</sup> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

<sup>54</sup> ICJ, see note 1, para. 64.

<sup>55</sup> As of August 2012 the United Nations Convention on Jurisdictional Immunities has 28 Signatories and 13 Parties; the European Convention a total number of ratifications/accessions of 8 – including Germany.

With regard to article 11 of the European Convention this follows from article 31 of the European Convention which provides a saving clause for the actions of armed forces of one contracting state on the territory of another contracting state. Contrary to Italy's view that article 31 was merely intended to avoid conflicts with the instruments governing the status of visiting forces, the Court holds that article 31 effectively excludes armed forces from the scope of the European Convention as clearly stipulated by the language of article 31<sup>56</sup> and in particular by the Explanatory Report,<sup>57</sup> a detailed commentary drafted during the negotiating process. This reasoning can also be found in a number of earlier European state court decisions – *inter alia* the Greek Special Supreme Court (*Anotato Eidiko Dikastirio*) in the *Margellos* case.<sup>58</sup>

Notwithstanding that a similar saving clause does not exist within the legal framework of the UN Convention on Jurisdictional Immunities, the Court ruled that article 12 of this Convention equally does not amount to customary international law in relation to jurisdictional immunity for acts of armed forces. The Court held that the ILC's commentary<sup>59</sup> on the text as well as statements of the Chairman of the Drafting *Ad Hoc* Committee<sup>60</sup> unequivocally suggest that article 12 of the UN Convention on Jurisdictional Immunities is not applicable to military actions.<sup>61</sup> This was not contested by the signatory states. Quite the contrary, two states officially declared their interpretation that the UN Convention on Jurisdictional Immunities does not affect the immunity of armed forces' actions.

Italy's attempt to construe an exception in customary international law by pointing to the fact that nine out of ten states which enacted legislation on jurisdictional immunity included territorial tort exceptions in the respective laws was also rejected by the Court on the grounds that at least two of those states explicitly excluded military acts, while

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<sup>56</sup> “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”

<sup>57</sup> “The Convention is not intended to govern situations which may arise in the event of armed conflict;...”

<sup>58</sup> ICJ, see note 1, para. 68.

<sup>59</sup> *ILCYB* 1991, Vol. II (2), 46, para. 10.

<sup>60</sup> Official Records of the General Assembly, 59th Sess., Sixth Committee, 13th Mtg, Doc. A/C.6/59/SR.13, 6, para. 36.

<sup>61</sup> ICJ, see note 1, para. 69.

there was no case-law in the other seven states that would support Italy's interpretation of the national legislation. In contrast, there are multiple judgments of national courts from a broad range of jurisdictions which granted immunity to acts of military forces both when visiting a foreign state by consent and during armed conflicts.<sup>62</sup> The only judgment outside Italy which did not explicitly exempt acts of armed forces from the territorial tort principle was the Hellenic Supreme Court's (*Areios Pagos*) ruling in the *Distomo* case. This reasoning, however, was subsequently disapproved with binding effect for all courts in Greece by the Greek Special Supreme Court (*Anotato Eidiko Dikastirio*) in the *Margellos* case. Given the fact that Greek courts, including the Supreme Court, adhered to that decision, the Court overall concluded that there is neither any state practice nor *opinio juris* upholding Italy's argument.

The analysis and discussion of the territorial tort exemption by the ICJ indicate that this exemption was not created to address war crimes and atrocities of the scale which were at stake in the present case. However, this observation does not exclude the possibility of applying it to such crimes. Even if one accepts that the territorial tort exemption did not apply to activities of military forces during armed conflicts, it is possible to argue that this would only apply to general war damages, but not to specific war crimes.<sup>63</sup> It should also be noted that the ICJ's approach to the question whether the territorial tort exemption could be applied to war crimes is based on a positivist understanding of customary international law: as long as there is not sufficient state practice following this approach, it is not part of the law.

Yet, state practice and *opinio juris* can be interpreted in various ways. For example, the fact that two states officially declared that the UN Convention on Jurisdictional Immunities does not affect the immunity of armed forces' actions can be interpreted as evidence that this is the view of the majority of the states – as the ICJ did – or as evidence of the contrary because two states felt that it was necessary to state their opposing view. As often, the analysis of state practice in order to detect a (new rule) of customary international law depends on the value choice

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<sup>62</sup> ICJ, *ibid.*, paras 72-75.

<sup>63</sup> For this line of arguments see Paech, see note 26, 74 et seq. A similar approach is developed by J. Bröhmer, *State Immunity and the Violation of Human Rights*, 1997, 204 et seq., who distinguishes between general violations of international law and individualised violations.

or on the normative *Vorverständnis* (pre-determination) with which one approaches the analysis.

### b. Grave War Crimes as a Limitation to State Immunity

Despite discovering a “logical problem”<sup>64</sup> with the argument that serious violations of international humanitarian law would justify limitations of jurisdictional immunity as courts would always violate jurisdictional immunity by entering into the merits to examine whether an alleged serious violation of international law really exists, the Court scrutinised state practice to inquire whether international customary law has evolved in the way Italy alleges.

Apart from the *Distomo* decision of the Hellenic Supreme Court (*Areios Pagos*) which was repudiated, though, by the Special Supreme Court (*Anotato Eidiko Dikastirio*) in the *Margellos* case, the Court did not find any state practice that would support Italy’s view.<sup>65</sup> It particularly deemed the United Kingdom’s High Court decision in the *Pinochet* case as not pertinent for it concerned the immunity of a former head of state from criminal prosecution in a foreign country which High Court judges expressly distinguished from the immunity of the state itself.<sup>66</sup> The Court also noted that the ECtHR rejected the idea of limited immunity in the *Al-Adsani v. The United Kingdom* case in 2001.<sup>67</sup>

The ICJ also draws particular significance from the silence of the European Convention and the UN Convention on Jurisdictional Immunities on the issue of limitation of immunity in case of serious violations of international law as this question was raised and discussed at length within the Working Group and the United Nations Committee, but was eventually discarded as the members and states understood that customary international law did not limit state immunity in such cases.<sup>68</sup> In sum, the Court rejected Italy’s argument that customary international law had developed to the point that it allowed exemptions from state immunity for claims based on serious war crimes.

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<sup>64</sup> ICJ, see note 1, para. 82.

<sup>65</sup> ICJ, *ibid.*, paras 83-85.

<sup>66</sup> ICJ, *ibid.*, para. 87.

<sup>67</sup> *Al-Adsani v. United Kingdom* [GC], Application No. 35763/97, Judgment of 21 November 2001, ECHR Reports 2001-XI, 101, para. 61, *ILR* 123 (2003), 24.

<sup>68</sup> ICJ, see note 1, para. 89.

This part of the judgment is of great importance as it highlights – again – the dilemma in which the ICJ was forced by Germany’s application: on the basis of a positivist approach towards Italy’s argument any finding but an outright rejection would have been a surprise. Even to the most favourable commentators it was clear that the evidence Italy could rely on would hardly amount to sufficient state practice. The Court’s answer to Italy’s argument was therefore entirely correct if seen from a strict legalistic perspective. If the answer is correct, but the outcome is nevertheless unsatisfying, it is worth asking whether the problem lies not within the answer but within the question. As will be elaborated further in our critique of the judgment, Germany pushed the Court to search for the status of the law at a time when it would have been better to observe the development of a potentially new rule, rather than being forced to give a definite statement on something that could have been only an intermediate step in the process of the emergence of a new rule.

### c. *Jus cogens* and the Hierarchy of Norms

The idea of a hierarchy of international norms claiming that human rights and humanitarian law is above the law of state immunity and therefore derogates from the latter has been discussed by some scholars and in a number of court cases.<sup>69</sup> Italy also followed this line of argument in its defence. It maintained that where peremptory rules of law, such as international humanitarian law, conflict with rules of a lower rank, as is the case for the rules of state immunity, the former renders the latter inapplicable.

However, the ICJ held that there is no such conflict in the present case as the two sets of rules govern entirely different matters as the law of state immunity by virtue of its preliminary and procedural nature does not address the questions of the substantive international humanitarian law.<sup>70</sup> The Court further reasoned that this stance remains unchallenged, even in the light of lacking compensation towards individual victims as there is no international rule of law which requires full reparation for each individual in the background of peace treaties that

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<sup>69</sup> A. Orakhelashvili, “State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong”, *EJIL* 18 (2007), 955 et seq. (963 et seq.). For critical views see Caplan, see note 4, 771 et seq. and Schaarschmidt, see note 27, 21 et seq.

<sup>70</sup> ICJ, see note 1, para. 93.

either operate waiver clauses or lump sum settlements. The Court found this rationale affirmed by a series of decisions by national courts<sup>71</sup> which equally denied that *jus cogens* would set aside the rules of jurisdictional immunity and therefore also repudiated this strand.

This section of the ICJ's judgment is probably the most convincing one. Apart from the fact that it is still open to debate which international norms can be deemed to be *jus cogens*, the relationship between these norms is also not entirely clear. According to the law of treaties as stipulated in the Vienna Convention on the Law of Treaties, a treaty provision which violates *jus cogens* is void. This may establish a hierarchy between the two norms if there is a formal conflict, yet it is difficult to see how such a hierarchy could lead to a limitation of state immunity.<sup>72</sup> It would need to be shown that state immunity prevents a state from fulfilling its obligation not to violate norms of *jus cogens*. However, state immunity does not have this effect as can easily be seen in the present case: Germany was not prevented from compensating the Italian and Greek victims of war crimes through the notion of state immunity. Instead, it deliberately chose to invoke state immunity and therefore extend its violations of public international law.

#### d. The Last Resort Argument

Italy finally argued that the denial of jurisdictional immunity was justified by the fact that a significant number of Italian victims did not experience any form of redress despite all agreements and efforts emphasised by Germany during the proceedings before the Court. Similarly to the Court's reasoning on the *jus cogens* argument it rejected Italy's proposition by stating that the rules of state immunity are entirely distinct from the set of rules governing the state's responsibility and obligation to pay reparation. The Court further held that no customary international law has been developed to the point that would allow limiting jurisdictional immunity in favour of claims for alleged lack of compensation as no state practice in national courts or legislation can be found.<sup>73</sup> The Court therefore rejected this strand and additionally argued from a practical viewpoint that it would overstretch the national courts' tasks and abilities should they be seized with the questions to

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<sup>71</sup> ICJ, *ibid.*, para. 96.

<sup>72</sup> On this point see also O. Dörr, "Staatliche Immunität auf dem Rückzug?", *AVR* 41 (2003), 201 et seq. (215).

<sup>73</sup> ICJ, see note 1, paras 100-101.

determine if a state has failed in its obligation of compensation and if so to what extent.<sup>74</sup>

Two aspects are worth noting: first, Italy's argument was rather weak from the beginning, because Italy itself was apparently reluctant to exercise diplomatic protection to Italian victims of war crimes *vis-à-vis* Germany. In fact, Judge *Simma* specifically asked Italy to:

“describe in detail the attempts undertaken by the Italian Government at the diplomatic level to induce Germany to make reparation to Italian victims of German war crimes that is precisely the category of Italian victims allegedly excluded from German reparation measures during the period following the 1947 Peace Treaty up until the *Ferrini* case.”<sup>75</sup>

Italy's answers to this question are not publicly documented, but the question shows that these activities of Italy – if any – were not widely known.

This leads to a second comment: the Court could have used the lack of significant Italian efforts as an argument to distinguish this case from other situations in which suits by individual war crime victims constitute the last resort to receive compensation. If a state which is responsible for international crimes seriously and continuously refuses to recognize its international obligations, in particular for reparation, the last resort argument could become more convincing. In his Separate Opinion Judge *Bennouna* supports this view arguing that a state could lose the benefits of its immunity if “the state presumed to be the author of unlawful acts rejects any engagement of its responsibility, in whatever form.”<sup>76</sup> The Court's majority did not refer to this perspective. Yet, by developing a number of criteria for accepting the last resort argument and then showing that they are not met in the present case, the Court might have been able to escape the dilemma created by Germany's claim. Adopting such a line of argument would have at least saved the

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<sup>74</sup> ICJ, *ibid.*, para. 102.

<sup>75</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting held on Friday 16 September 2011, 2:30 p.m., Verbatim Record, 53, <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>76</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Separate Opinion of Judge *Bennouna*, paras 15 et seq. <[www.icj-cij.org](http://www.icj-cij.org)>.

Court from coming down so forcefully on a potentially emerging new international rule.<sup>77</sup>

### 3. Decision of the ICJ on Germany's Claims

Having concluded that none of Italy's arguments were convincing, the Court found by a majority of twelve to three<sup>78</sup> that the denial of jurisdictional immunity in proceedings before Italian courts amounts to a breach of Italy's international legal obligations towards Germany.

As for the second German claim, the Court turned to the decision to declare the Greek decision enforceable in Italy.

It held that the legality of the Italian *exequatur* with regard to state immunity is not linked to the question whether the Greek judgment violated Germany's immunity as the two proceedings have to be regarded as entirely separate.<sup>79</sup> The Court drew this conclusion from the consideration that the foreign court's decision on immunity must not necessarily run synchronously with the decision on immunity of the court granting *exequatur*.<sup>80</sup> This might happen for instance when the state waived its right to immunity in the country where proceedings were brought against it while its immunity still bars enforcement in the forum country where *exequatur* is sought.<sup>81</sup> The ICJ observed that although the Court of *exequatur* did not examine the merits, it exercises jurisdictional power by deciding whether to grant or deny *exequatur*.<sup>82</sup> Consequently, a Court which declares foreign judgments enforceable must adhere to the rules of immunity in the same fashion as it would if it had been seized to rule on the merits, for such decision affects the state party in a very similar way.<sup>83</sup> Therefore, the Court held with fourteen to one<sup>84</sup> that the decision on granting *exequatur* violated Germany's jurisdictional immunity on the same grounds as established above.

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<sup>77</sup> See under V. 2.

<sup>78</sup> Judges *Cançado Trindade* and *Yusuf* and Judge *ad hoc Gaja* voted against this finding, see note 1, para. 139.

<sup>79</sup> ICJ, see note 1, paras 124-127.

<sup>80</sup> ICJ, *ibid.*, para. 127.

<sup>81</sup> ICJ, *ibid.*, para. 132.

<sup>82</sup> ICJ, *ibid.*, para. 128.

<sup>83</sup> ICJ, *ibid.*, para. 130.

<sup>84</sup> Judge *ad hoc Gaja* voted against this finding, see note 1, para. 139.

Lastly, the measures of constraint taken against German State Property in Italy were also addressed. Similar to its reasoning with regard to the decision of *exequatur*, the Court held that immunity from contentious proceedings in court is distinct from the immunity with regard to enforcement of the award and that therefore the alleged breach of immunity must be considered separately from the Greek proceedings and the declaration of enforcement in Italy. Germany proposed that article 19 of the UN Convention on Jurisdictional Immunities, which provides a detailed catalogue of conditions for the violation of immunity by measures of enforcements, constitutes in its entirety international customary law, whereas the Court was satisfied if at least one condition that – in view of extensive state practice<sup>85</sup> – could be effortlessly deemed as customary international law is met. With that condition being the exclusive use of the property which is subject to measures of enforcement for governmental non-commercial purposes, the Court held with fourteen to one<sup>86</sup> that the registration of the mortgage on *Villa Vigoni* constituted a breach of Germany's immunity.<sup>87</sup>

## V. The ICJ's Judgment: "No surprise, but wise?"<sup>88</sup>

For most observers – even those in favour of limiting state immunity for international crimes – the ICJ's judgment should not have been a surprise. The Court could have only ruled otherwise if it had have adopted a different normative approach. However, any analysis of the existing state practice, in particular as evidenced by the judgments of a number of national and international courts, revealed that the doctrine Italy was relying on did not (yet) exist as a rule of customary international law. This was also the understanding shared by most commentators in the literature. In fact, those who argued that war crimes and gross violations of human rights should be exempted from state immunity did not base their arguments predominantly on a new rule of customary international law, but on a different understanding of the function and purpose of state immunity and the ultimate goal of public in-

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<sup>85</sup> ICJ, see note 1, para. 118.

<sup>86</sup> Judge *ad hoc Gaja* voted against this finding, see note 1, para. 139.

<sup>87</sup> ICJ, see note 1, paras 118-119.

<sup>88</sup> This expression is borrowed from M. Hilf, "The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?", *EJIL* 6 (1995), 245 et seq.

ternational law.<sup>89</sup> It was therefore not even particularly surprising that the outcome of the judgment proved to be relatively uncontroversial even among the Court's members.

If the principal judicial organ of the United Nations decides a case in a way expected – and hoped for? – by most states and anticipated by most scholars, one should assume a general satisfaction with the judgment. Yet, the judgment in *Jurisdictional Immunities of the State* cannot satisfy observers with an earnest interest in developing international law further in the interests of the protection of human rights. Three aspects which seem worth discussing further will be elaborated subsequently.

### 1. The Dilemma of Detecting Customary International Law without Affecting its Development

The judgment of the ICJ and its analysis of customary law on the day of the judgment show an effect which might be compared to an aspect of *Heisenberg's* uncertainty principle. One of the statements usually associated with this principle concerns the impossibility to measure the position of an object without disturbing its momentum.<sup>90</sup> In other words: the observation of an object will have influence on its location. For example, observing an object with the human eye requires that the object is illuminated which means it is subject to light waves affecting its exact position. Applying this idea to the analysis of customary international law by the ICJ in the present case, one could argue that the ICJ's attempt to measure the status of customary international law in relation to state immunity was not and could not have been without influence on the very development of the law at the moment of the ICJ's decision, i.e. the moment of observation.

In order to decide on Germany's claims, the ICJ analysed state practice and *opinio juris* regarding limitations on the principle of state immunity. It found a limited amount of practice supporting the claim that state immunity must be reduced if major international crimes are at hand. On the other hand, the Court found ample evidence of practice supporting the traditional view.

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<sup>89</sup> Ample evidence for this can be found in the Dissenting Opinion of Judge *Cançado Trindade*, see note 50.

<sup>90</sup> P. Busch/ T. Heinonen/ P. Lahti, "Heisenberg's Uncertainty Principle", *Physics Reports* 452 (2007), 155 et seq. (155).

So far, the ICJ simply attempted to “measure” customary law at a given time. However, by concluding that there is not sufficient evidence for a new customary international law rule limiting the immunity of the state, the Court also influenced the development of such a new rule, by giving additional weight to the old rule. It is not very likely that in the aftermath of the ICJ’s judgment many national courts will follow the example of the Italian courts and limit the immunity of the state in order to grant compensation to victims of gross violations of human rights and of humanitarian law.<sup>91</sup> Instead, it can be assumed that most – if not all – courts will take the judgment as an authoritative statement of the law and refrain from contributing to the development of a new rule.

This also reveals a structural methodological dilemma of the development of customary international law.<sup>92</sup> New rules of customary international law often emerge at first as a deviation, if not outright violation, of an old rule. The deviation only becomes the new rule if it finds a significant number of followers, as aptly recalled by Judge *Yusuf* in his Dissenting Opinion.<sup>93</sup> The establishment of a new rule therefore vindicates itself with hindsight: international law-breakers only become international law-makers when they attract a sufficient following to establish international practice.<sup>94</sup> Even if it was not its main intention, the ICJ ensured that the practice of the Italian courts will remain a transgression of international law for the foreseeable future.

The following thought experiment may highlight the problem associated with the Court’s ruling in the present case: suppose the Permanent Court of International Justice had been confronted with the question about the extent of state immunity for *acta jure gestionis* in the early 1920s. At that time, a number of domestic courts already adopted the doctrine of limited state immunity while others maintained the idea of absolute state immunity. It was only in the second half of the 20th

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<sup>91</sup> R. O’Keefe, “State Immunity and Human Rights: Heads and Walls, Hearts and Minds”, *Vand. J. Transnat’l L.* 44 (2011), 999 et seq. (1033).

<sup>92</sup> On this dilemma see also W. Cremer, “Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit”, *AVR* 41 (2003), 137 et seq. (151 et seq.).

<sup>93</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Dissenting Opinion of Judge *Yusuf*, paras 46 et seq. <www.icj-cij.org>.

<sup>94</sup> C.I. Keitner, “Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity”, *ASIL Insights* 16, Issue 5 (2012), <www.asil.org>.

century that the idea that a state would not enjoy immunity for *acta jure gestionis* became widely accepted.<sup>95</sup> This development would have been seriously influenced, if not halted, by a judgment of the Permanent Court of International Justice ruling that an immunity exception for *acta jure gestionis* did not (yet) exist as a rule of customary international law. It can only be speculated how national courts would have reacted to such a decision of the Permanent Court, but one can be certain that the development of the law of state immunity would have been a different one.

## 2. Choosing between the Preservation of the Law as it Stands and the Progressive Development of International Law

The dilemma described above and the ICJ's decision to intervene in the development of a potential new rule of customary international law also blocked the progressive development of international law and preserved the traditional understanding of state immunity. In fact, the Court closed a door that stood open for a few years. In this respect, the Court may have followed *Christian Tomuschat*, Germany's representative who declared during the oral hearings: "Judges cannot be front-runners."<sup>96</sup>

Yet, domestic and international courts have been front-runners at various times in history and have shaped international law. The development of the law of state immunity is clear evidence of this. In fact, domestic courts may even serve as additional layer of implementing and developing international law in a progressive way.<sup>97</sup> Prominent commentators have therefore called upon the ICJ before the adoption of its judgment not to block national courts from further developing the law of state immunity in a way amendable to demands of remedies for serious violations of international law.<sup>98</sup> Unfortunately, the ICJ did not welcome the contribution of domestic courts to a new development. In

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<sup>95</sup> Brownlie, see note 5, 704 et seq.; Cassese, see note 18, 327 et seq.

<sup>96</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Public sitting held on Monday 12 September 2011, 10 a.m., Verbatim Record, 22, <www.icj-cij.org>.

<sup>97</sup> A. Fischer-Lescano/ C. Gericke, *Der IGH und das transnationale Recht. Das Verfahren BRD./I. Italien als Wegweiser der zukünftigen Völkerrechtsordnung*, ZERP - Arbeitspapier 2/2010, 13 et seq.

<sup>98</sup> Damrosch, see note 20, 1197, 1200.

the words of *Nikos Lavranos*, the ICJ has put itself in a “position of slowing down rather than shaping as a front runner the developments in international law.”<sup>99</sup>

But is the ICJ to blame? Could the Court have come to a different conclusion or should one criticize Germany for bringing its claims prematurely to the Court? As mentioned above, the Court could not have reached a different verdict on the basis of a positivist analysis of customary international law. Yet, the Court could have used language which would have indicated that the development is still in a state of flux or that its findings are restricted to the particularities of the case.<sup>100</sup> This could have left the door a bit open and would have allowed domestic courts to continue their quest for an adequate balance between the necessities of state immunity and the protection of fundamental human rights and principles of humanitarian law.

### 3. The Missing Voices: Representing the Victims by the Home State or through other Means

In its judgment the ICJ stated – although without any relevance to its analysis – that the war crimes at issue “can only be described as displaying a complete disregard for the ‘elementary considerations of humanity’”.<sup>101</sup> Furthermore, the Court considered it as “a matter of surprise and regret-” that Germany denied compensation to forced labourers on the grounds that they were prisoners of war even though Germany refused to recognize that status at the time.<sup>102</sup> Yet, surprise and regret were the only condolences the Court was prepared to offer to the Italian and Greek victims of German war crimes.

At the end of the day, the ICJ referred these victims to the traditional means of diplomatic protection which requires the victims of a violation of human rights to pursue their claims through their home state. Yet, this avenue can be inadequate as shown in the present case: first, diplomatic protection does not provide for a proper alternative to judicial proceedings because diplomatic protection is exercised at the

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<sup>99</sup> N. Lavranos, “National Courts, Domestic Democracy, and the Evolution of International Law”, *EJIL* 20 (2009), 1005 et seq. (1011).

<sup>100</sup> See under IV. 2. d.

<sup>101</sup> ICJ, see note 1, para. 52.

<sup>102</sup> ICJ, *ibid.*, para. 99. For a sharp, but convincing reaction to this expression see the Dissenting Opinion of Judge *Yusuf*, note 93, para. 10.

discretion of the state.<sup>103</sup> Victims will have to resort to political pressure which may or may not be successful.<sup>104</sup> Secondly, the home state may not be the best guardian of the interests of its citizens if it fears repercussions regarding its own potential violations of human rights and fundamental norms of international law. Italy, or rather the Italian government was, in fact, not very keen on defending the decisions of its courts denying Germany immunity,<sup>105</sup> because it might have feared similar cases against Italy for atrocities committed by its own military forces abroad. Even the Greek government did not appear with “clean hands” before the ICJ, because the Greek Minister of Justice refused to allow the execution of the judgment of the Hellenic Supreme Court (*Areios Pagos*) in the *Distomo* case.<sup>106</sup>

It could therefore be argued that the interests of the real victims were not present during the ICJ proceedings as their home states did not and could not argue forcefully in favour of the position of the victims. This leads to the question whether the procedural law of the ICJ needs to be amended to allow individual interests which are not adequately represented by the states to be heard through alternative means. In this context, it might be worth considering procedural instruments used in other international judicial bodies to compensate for the lack of representation of individual or collective interests not represented by the state.

WTO law and the law of international investment protection have developed the possibility of allowing so-called *amicus curiae* briefs submitted by non-state actors representing significant interests in the case at hand.<sup>107</sup> To date, the ICJ has never accepted any such briefs even though the possibility and desirability has been discussed repeatedly in the literature.<sup>108</sup> It might not even be necessary to change the ICJ Stat-

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<sup>103</sup> McGregor, see note 13, 908.

<sup>104</sup> But see O’Keefe, see note 91, 1041, who actually advocates this approach as potentially more successful than litigation against the predatory state.

<sup>105</sup> O’Keefe, see note 91, 1033.

<sup>106</sup> See under III. 3.

<sup>107</sup> F. Ortino, “The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes”, in: K.M. Meessen (ed.), *Economic Law as Economic Good*, 2009, 301 et seq.

<sup>108</sup> P. Palchetti, “Opening the International Court of Justice to Third States: Intervention and Beyond”, in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB 6* (2002), 139 et seq. (165 et seq.) with further references.

ute in order to accept such interventions.<sup>109</sup> *Jurisdictional Immunities of the State* could be a good starting point to reconsider *amicus curiae* briefs in proceedings before the ICJ, in particular if individual claims for compensation are at the heart of the matter.

## VI. Beyond State Immunity

Immunity issues in international law are not limited to state immunity.<sup>110</sup> Diplomatic immunity and immunity of state representatives are the two other areas of the law of immunity which are also of relevance *vis-à-vis* the protection of human rights and the prosecution of international crimes.<sup>111</sup> Even though the different types of immunity serve different functions and the ICJ refused to draw parallels between state immunity and the immunity of the heads of state in the present case,<sup>112</sup> it is worth noting that the development of international criminal law has significantly reduced the personal immunity of state officials.

Article 27 of the Rome Statute of the International Criminal Court (ICC) specifically states that the statute applies equally to all persons. In particular, official capacity does not exempt a person from criminal responsibility under the Statute. Furthermore, immunities shall not bar the ICC from exercising its jurisdiction over such a person. However, in the 2002 *Arrest Warrant* case the ICJ did not deduce from this and other developments in international criminal law a new rule of customary international law limiting the immunities of state officials in general.<sup>113</sup> Yet, in its recent judgment *Questions relating to the Obligation to Prosecute or Extradite* the Court did not pay any attention to the potential immunity of the former President of Chad *Hissène Habré*.<sup>114</sup> Arguably, the issue at hand in that case did not involve the question of immunity directly, because the obligation to prosecute or extradite according to article 7 of the Convention against Torture and Other Cruel,

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<sup>109</sup> Palchetti, see note 108, 170.

<sup>110</sup> Fox, see note 9, 665 et seq.; van Alebeek, see note 7, 103 et seq.

<sup>111</sup> D. Akande/ S. Sah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", *EJIL* 21 (2010), 815 et seq.

<sup>112</sup> ICJ, see note 1, para. 87.

<sup>113</sup> ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3 et seq. (24).

<sup>114</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, <[www.icj-cij.org](http://www.icj-cij.org)>.

Inhuman or Degrading Treatment or Punishment does not have a direct effect on state immunity. However, from a broader perspective, the ICJ accepted in this judgment that even the position of a former President of a sovereign state would not prevent judicial proceedings *per se*.

The route towards limiting the immunity of state officials if international crimes are at stake has been long and not without detours. Yet, the direction of the general trend of the law is clear. It is noteworthy that the judgment of the ICJ in the *Arrest Warrant* case did not slow down the momentum. Instead, more and more laws and statutes restrict the immunity of state officials for international crimes, despite the verdict of the ICJ that no such rule existed in customary international law. This could be a glimpse of hope for the issue of state immunity as well. States may create new rules – either domestically or internationally – restricting state immunity even if such rules would not be grounded in customary international law.

## VII. Conclusion

The judgment of the ICJ in the matter relating to *Jurisdictional Immunities of the State* supports the Court's position as a guardian of the *status quo* of international law. The Court made it clear that it does not see its role as promoter of a specific progressive judicial policy, but as an institution adjudicating disputes between states on the basis of a positivist analysis of public international law. This may be a relief to many, but a disappointment to some. Yet, this disappointment should not lead to frustration or unfair criticism of the ICJ. Instead, the judgment should be used as a stimulus to continue the quest for a modern law of state immunity. Such a law should be built on a reformulated understanding of state sovereignty allowing for proper balance between the protection of individual human and humanitarian rights and the functional necessity of allowing orderly processes of compensation for war crimes and violations of international law. Whether and how state immunity can play a useful role in these processes remains an open question.