Developments

State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in *Jurisdictional Immunities of the State*

By Paul Christoph Bornkamm [*]

A. Introduction

The recent judgment of the International Court of Justice (ICJ) in the *Case Concerning Jurisdictional Immunities of the State* (Germany v. Italy; Greece Intervening)[1] marks the climax of a series of legal proceedings before Greek, Italian, and German courts, as well as the European Court of Human Rights (ECHR) stretching over a period of more than fifteen years. The international community had eagerly awaited the ICJ's findings on the issue at the heart of the dispute, namely the scope of state immunity before foreign courts in cases concerning claims arising from serious violations of international humanitarian law. While most expected the Court to rule in favor of Germany and to uphold state immunity in principle, it was unclear whether the Court would acknowledge the increasing erosion of immunity with respect to serious violations of human rights or international humanitarian law. To the disappointment of many, the Court took a conservative approach and rejected the idea of an emerging exception from state immunity.

B. The Factual Background of the Case

Germany and Italy called on the ICJ to decide their dispute concerning proceedings before Greek and Italian courts brought against Germany with respect to damage claims arising from serious violations of international humanitarian law committed by the German *Wehrmacht* in Greece and Italy between 1943 and 1945. Forces of the German Reich occupied both Italy and Greece during that time. Following the removal of Benito Mussolini from office in 1943, Germany seized control over much of Italian and nearly all of Greek territory, part of which had been occupied by Italian forces prior to Mussolini's fall.[2] The *Wehrmacht* is responsible for a large number of serious crimes committed in both

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[1] Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 143 (Feb. 3).

[2] 6 EUROPA UNTERM HAKENKREUZ: DIE OKKUPTATIONSPOLITIK DES DEUTSCHEN FASCHISMUS 1938-1945, 63–64, 68, 83–84 (Bundesarchiv ed., 1992).

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countries during the occupation. These include massacres against the civilian population and deportation of civilians or prisoners of war to Germany to perform forced labor in the armaments industry.[3]

Only a small number of the victims of these crimes were eligible for compensation under the regime established after the war. The Federal Compensation Law Concerning Victims of National Socialist Persecution, enacted in 1953,[4] did not apply to these victims because they did not qualify as victims of National Socialist persecution and lacked the necessary territorial link to Germany.[5] While forced laborers would generally benefit from compensation made available through the foundation *Erinnerung, Verantwortung, Zukunft* (Remembrance, Responsibility, Future, EVZ), those entitled to prisoner of war status were exempt from any payments,[6] even though they had been denied that status during the war. Others were unable to prove that they had been confined under conditions comparable to those in a concentration camp, as required by the EVZ law.[7]

Victims of the Distomo massacre of 10 June 1944 brought the proceedings in Greece. On that day, in revenge for an attack by Greek partisans, an SS unit that formed part of the *Wehrmacht* shot between 200 and 300 innocent inhabitants of Distomo in central Greece and burned down the village.[8] In 1997, the Greek Court of First Instance of Livadia ordered Germany to pay damages of $30 million to victims of the Distomo massacre.[9] In 2000, the Hellenic Supreme Court rejected Germany's appeal, invoking jurisdictional immunity.[10]

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[3] *See* Ger. v. It., 2012 I.C.J. 143, para. 52; Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105, 1108–10 (2011).

[4] Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung [BEG] [The Federal Compensation Law Concerning Victims of National Socialist Persecution], Sept. 18, 1953, BGBL. I (Ger.).

[5] *See id.* §§ 1, 4(1), 160(1); *see also* Counter-Memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It.), 2009 I.C.J. 143, para. 2.24 (Dec. 22.).

[6] *See* Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung, Zukunft" [EVZ] [The Law on the Creation of a Foundation "Remembrance, Responsibility, Future"], Aug. 2, 2000, BGBL. I at 1263, § 11(3) (Ger.); *see also* Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, Oct. 18, 1907, art. 6 (permitting belligerents to "utilize the labour of prisoners of war").

[7] *See* Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung, Zukunft" [EVZ] [The Law on the Creation of a Foundation "Remembrance, Responsibility, Future"], Aug. 2, 2000, BGBL. I at 1263, § 11(1)(1) (Ger.); *see also* Associazione Nazionale Reduci Dalla Prigionia dall'Internamento e dalla Guerra di Liberazione v. Germany, App. No. 45563/04 (Eur. Ct. H.R. Sept. 4, 2007).

[8] Sigrid Boysen, *Kriegsverbrechen im Diskurs nationaler Gerichte*, 44 ARCHIV DES VÖLKERRECHTS 363, 364 (2006).

[9] *See* Monomeles Protodikeio Livadeiasin [Mon. Pr. - District Court of Livadia], Case No. 137/1997, Oct. 30, 1997 (Greece); s*ee also* Ilias Bantekas, *International Decisions:* Prefecture of Voiotia v. Federal Republic of Germany, 92 AM. J. INT'L L. 765 (1998).

[10] *See* Areios Pagos [A.P. - Hellenic Supreme Court], Case No. 111/2000, May 4, 2000, 129 I.L.R. 513 (Greece).

Since Germany refused to comply with the ruling, the claimants instituted enforcement proceedings. The proceedings were stayed, however, for lack of consent by the Minister of Justice, which is a precondition for enforcement against a foreign state in Greece. The plaintiffs then filed an application with the ECHR against Greece and Germany, invoking their right of access to justice under Article 6(1) of the European Convention on Human Rights. The ECHR held that state immunity constituted a legitimate limitation on the plaintiffs' rights and declared the application inadmissible by a majority ruling.[11] At the same time, the plaintiffs unsuccessfully sought to pursue their claims before German courts. Both the ordinary courts as well as the *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG) rejected their submissions, holding that German courts were not bound by the decision of a Greek court passed in violation of Germany's sovereign immunity.[12]

Simultaneously, a number of similar cases brought against Germany were pending before Italian courts. In 2004, the Court of Cassation ruled in the *Ferrini* case that Italian courts had jurisdiction over a claim brought against Germany by a civilian forced laborer. The Court held that the scope of state immunity had to be determined in light of other principles lying "at the heart of the international legal order," and that peremptory norms of international law, such as the prohibition of war crimes, superseded state immunity.[13] The ruling was followed by a number of similar cases relating to deportation and forced labor, as well as to the massacres of Civitella/Val di Chiana, Cornia, and San Pancrazio, with the Court of Cassation confirming Italian jurisdiction over war crimes claims against Germany.[14]

Following the *Ferrini* decision, the plaintiffs in the *Distomo* case, in light of the failure to have their claims executed in Greece or Germany, initiated *exequatur* proceedings in Italy in order to enforce their damage awards obtained before Greek courts. The Court of Cassation ruled at last instance that the Greek judgment was enforceable in Italy with

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[11] *See* Kalogeropoulou v. Greece & Germany, 2002-X Eur. Ct. H.R. 417, 428–29; *see also* Kerstin Bartsch & Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN L.J. 477 (2003).

[12] *See* Bundesgerichtshof [BGH - Federal Supreme Court], Case No. III ZR 245/98, Jun. 26, 2003, 155 BGHZ 279, 281–85 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 1476/03, Feb. 15, 2006, 7 BVERFGK 303 (Ger.); s*ee also* Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the* Distomo *Case*, 5 GERMAN L.J. 15 (2004); Markus Rau, *State Liability for Violations of International Humanitarian Law–The* Distomo *Case Before the German Federal Constitutional Court*, 7 GERMAN L.J. 701 (2005).

[13] *See* Corte di cassazione [Cass. - Court of Cassation], Case No. 5044, Mar. 11, 2004, 128 I.L.R. 658, 669–70 (It.).

[14] *See* Corte di cassazione [Cass. - Court of Cassation], Case No. 14,201, May 29, 2008, 134 FORO IT. I 1568 (It.); Corte di cassazione [Cass. - Court of Cassation], Case No. 14,209, May 29, 2008, 91 RIVISTA DI DIRITTO INTERNAZIONALE 896 (It.).

respect to both the legal expenses for the judicial proceedings, as well as the award on the merits.[15] The execution of the judgment against Villa Vigoni, a German state property in northern Italy, was finally stayed, pending a decision of the ICJ.[16]

C. The Judgment of the ICJ

The ICJ found three distinct violations of Germany's immunity committed by Italy.[17] The first concerned the civil proceedings brought against Germany before Italian courts with respect to crimes committed against Italian nationals. Here, the Court was called upon to decide on possible exceptions from immunity under customary international law. In particular, Italy argued that state immunity did not apply to an act carried out in the territory of the forum state that resulted in physical damage to persons or property, regardless of whether the act was one of sovereign authority or an act of a private law character.[18] While it is unclear whether this so-called "territorial tort exception" to state immunity forms part of customary international law, the exception finds a basis in two international conventions on state immunity,[19] both of which were not applicable between the parties. Without ruling on the customary nature of the territorial tort principle in general, the Court observed that the principle had emerged in the context of insurable risks, in particular with regard to traffic accidents involving vehicles belonging to foreign states.[20] The rationale of that principle is the idea that insurance companies liable to pay the damage should not benefit from state immunity,[21] a reasoning that does not apply to war damages. Against this backdrop, and given the fact that only Italian state practice and,

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[15] *See* Corte di cassazione [Cass. - Court of Cassation], Prefecture of Voiotia v. Ger., May 6, 2008, 92 RIVISTA DI DIRITTO INTERNAZIONALE 594 (It.) (regarding legal expenses); Corte di cassazione [Cass. - Court of Cassation], Prefecture of Voiotia v. Ger., Jan. 12, 2011 (It.) (concerning the merits).

[16] *See* Ger. v. It., 2012 I.C.J. 143, paras. 27–29, 30–35 (concerning the legal proceedings relating to the Italian nationals and relating to the Distomo massacre).

[17] *See id*. at para. 139.

[18] *See id.* at para. 62; Counter-Memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It.), 2009 I.C.J. 143, paras. 4.27–4.42 (Dec. 22.).

[19] *See* European Convention on State Immunity, art. 11, May 16, 1972, E.T.S. 74 (ratified by eight states, including Germany, but not Italy); U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 12, Dec. 2, 2004, U.N. Doc. A/59/508 (not yet in force, ratified by 13 states, excluding both Germany and Italy); *see also* Oliver Dörr, *Staatliche Immunität auf dem Rückzug?*, 41 ARCHIV DES VÖLKERRECHTS 201, 207–10 (2003).

[20] *See* Ger. v. It., 2012 I.C.J. 143, para. 64.

[21] Draft Articles on Jurisdictional Immunities of States and Their Property, 2 Y.B. INT'L L. COMM'N 13, 45 (1991) [hereafter Draft Articles].

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to a more limited extent, that of Greece, supported the extension of the territorial tort principle to war damages, the Court rejected Italy's argument.[22]

In addition, Italy contended that immunity could not shield a state from responsibility for violations of peremptory norms of international law (*jus cogens*).[23] The Court stated that this line of argumentation required the existence of a conflict between the law of state immunity and a *jus cogens* rule. However, no such conflict was present. While the rules violated by the German army might have been of a peremptory nature, those governing claims arising from these violations were not. Granting immunity against these claims did "not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule."[24] Moreover, the Court found no state practice supporting the argument that immunity could be derogated from as a last resort in order to award damages to victims of *jus cogens* violations.[25]

The second violation of Germany's immunity related to measures of execution taken against German property on Italian soil. The Court confirmed that execution against foreign state property is impermissible if it is directed against assets serving governmental and non-commercial functions. By taking measures against a German institution dedicated to such purposes, Italy had violated Germany's immunity from execution.[26]

Finally, the Court found a violation of Germany's immunity on the ground that Italian courts had declared Greek judgments against Germany enforceable in Italy. The Court held that a national court, seized of a request to declare enforceable a foreign judgment against a third state, must examine a hypothetical question: Would the national court be obliged to grant immunity to that third state, had it been seized itself of a case identical to that before the foreign court? Based on the reasons set out in its findings on the Italian proceedings for damages against Germany, the ICJ held that Italian courts violated Germany's jurisdictional immunity by allowing *exequatur* proceedings in Italy.[27]

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[22] *See* Ger. v. It., 2012 I.C.J. 143, paras. 70–79. Subsequent to the *Distomo* judgment, the Greek Special Supreme Court had upheld Germany's immunity in a similar case concerning the massacre in the village of Lidoriki. *See* Anotato Eidiko Dikastirio [AED - Special Supreme Court], Margellos v. Germany, Sept. 17, 2002, 129 I.L.R. 525 (Greece). Thus, the jurisprudence of Italian courts in *Ferrini* and the other cases in dispute between the parties was the only unambiguous practice supporting Italy's contention.

[23] *See* Counter-Memorial of Italy, 2009 I.C.J. 143, para. 4.67.

[24] Ger. v. It., 2012 I.C.J. 143, paras. 93–94.

[25] *Id.* at para. 101.

[26] *See id.* at paras. 118–19.

[27] *See id.* at paras. 130–31.

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D. The Dynamic Development of Immunity: Critical Remarks on the ICJ's Approach

For the past decades, many national courts have been called upon to rule on the relationship between state immunity and the individual right of access to justice.[28] The tension between immunity and individual rights has been a major focus of academic debate.[29] The latest judgment of the ICJ has now set landmarks that will most likely influence the further evolution of the discussion on the subject. The Court's reasoning relies on an extensive survey of state practice and takes a realistic approach, in the sense that it undoubtedly reflects the prevailing opinion in capitals around the world. As such, the judgment provides an accurate restatement of the current position under international law regarding the relationship between immunity and individual claims based on serious violations of individual rights.

That said, the view adopted by the majority of the judges is rather shortsighted. It fails to take note of the increasing erosion of immunity that goes hand in hand with the retreat of sovereignty and the emergence of the individual as a holder of rights and responsibilities under international law. When the Court holds that "[i]mmunity cannot . . . be made dependent on a balancing exercise,"[30] the judges appear to regard state immunity as a concept standing unchallenged amidst the rapidly changing landscape of international law. The Court risks being outrun by the development of international law by finding Italy in violation of international law without taking into account that Italy's conduct may in fact constitute an expression of a new emerging exception to immunity.[31]

[28] *See, e.g.*, Ontario Court of Appeal, Bouzari v. Iran, June 30, 2004, 71 O.R. 3d 675 (Can.); Cour de Cassation [Cass. - Court of Cassation], Bucheron v. Germany, Dec. 16, 2003, BULL. CIV. I 206–207 (Fr.); Sąd Najwyższy [Supreme Court], Natoniewski v. Germany, Oct. 29, 2010, IV CSK 465/09 (Pol.); House of Lords [H.L.], Jones v. Saudi Arabia, June 14, 2006, 1 A.C. 270; Princz v. Germany, 26 F.3d 1166 (D.C. Cir. 1994).

[29] *See, e.g.*, Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403, 420–23 (1995); Xiaodong Yang, Jus Cogens *and State Immunity*, 3 N.Z. Y.B. INT'L L. 131 (2006); Andreas Zimmermann, *Sovereign Immunity and Violations of International* Jus Cogens*—Some Critical Remarks*, 16 MICH. J. INT'L L. 433, 438 (1995).

[30] Ger. v. It., 2012 I.C.J. 143, para. 106.

[31] *See* Separate Opinion of Judge Koroma, Ger. v. It., 2012 I.C.J. 143, para. 7 ("[N]othing in the Court's Judgment today prevents the continued evolution of the law on State immunity.").

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I. Challenges to State Immunity

State immunity is a principle firmly recognized as customary international law.[32] It has its roots in the sovereign equality of all states and the ensuing principle that no state can be subject to the jurisdiction of another state (*par in parem non habet jurisdictionem*).[33] While state immunity was regarded as absolute for a long time, it has increasingly given way to exceptions, some of which are widely accepted today. In particular, a state is no longer deemed to enjoy immunity against a lawsuit brought before a foreign court with respect to the state's commercial activities (*acta jure gestionis*).[34] This may be taken as the common denominator of state immunity law today, even though there is no agreed upon definition in order to distinguish commercial activities from acts of sovereign authority (*jure imperii*).

Beyond the acceptance of state immunity as a principle and the customary exception for commercial activities, there is a "twilight zone"[35] where some states grant immunity and others do not. In several states, courts recognize the "territorial tort exception" and refuse to grant immunity with respect to physical injury or damage to property caused by a foreign state in their territory.[36] The scope of this exception is controversial. As mentioned above, the exception is generally believed to cover only accidental damage or insurable risks.[37] United States courts, however, went beyond that and held that political murder fell within the scope of the territorial tort principle.[38]

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[32] Helmut Steinberger, *State Immunity*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 615, 616 (Rudolf Bernhardt ed., 2000).

[33] *See, e.g.*, House of Lords [H.L.], Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte, Jan. 19, 1999, 1 A.C. 147, 147–52; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 325 (7th ed. 2008); Volker Epping, *Der Staat im Völkerrecht, in* VÖLKERRECHT 373 (Knut Ipsen ed., 5th ed. 2004); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 177–78 (1999).

[34] Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes, 336 F.2d 354 (2nd Cir. 1964); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvM 1/62, Apr. 30, 1963, 16 BVerfGE 27, 33 (Ger.); *See also* BROWNLIE, *supra* note 33, at 328 n. 25.

[35] JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 139 (1997).

[36] *See, e.g.*, Oberster Gerichtshof [OGH - Supreme Court], Holubek v. U.S., Feb. 10, 1961, 40 I.L.R. 73 (Austria); Law No. 24488, May 31, 1995, art. 2(e), B.O. 28/06 (Arg.); Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Law No. 24 of 2009, art. 10 (Japan); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) (2008); European Convention on State Immunity, art. 11, May 16, 1972, E.T.S. No. 74; United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 12, Dec. 2, 2004, U.N. Doc. A/59/508.

[37] *See* Draft Articles, *supra* note 21.

[38] Letelier v. Chile, 488 F.Supp. 665 (D.D.C. 1980); Liu v. China, 892 F.2d 1419 (9th Cir. 1989). For discussion of the territorial tort principle and its scope, see HAZEL FOX, THE LAW OF STATE IMMUNITY 569–91, 577–79 (2nd ed. 2008).

State immunity is also challenged when serious violations of individual rights are at bar. Greek and Italian courts do not stand alone with their findings to that effect. In *Al-Adsani v. United Kingdom*, the ECHR found, only by the narrowest possible majority of nine to eight, that the immunity of the state of Kuwait prevailed against a damage claim brought by a torture victim before a British court.[39] In 1992, five years before the first *Distomo* judgment, the District Court of the District of Columbia claimed jurisdiction over a suit filed against Germany by a Holocaust survivor[40]—a finding that was later overturned on appeal.[41] Again, courts in the United States have passed a number of judgments on "state sponsors of terrorism" for violations of individual rights, applying an exception to immunity provided for under the Foreign Sovereign Immunities Act.[42]

At the same time, the law relating to reparation for serious violations of human rights and international humanitarian law is evolving rapidly. While in the past, individual reparation for serious violations of fundamental rights was the exception rather than the rule, the UN Commission on Human Rights has focused on the subject for over twenty years now, resulting in the Basic Principles on the Right to a Remedy and Reparation adopted by the UN General Assembly.[43]

That said, these developments are certainly not sufficient to prove the existence of an exception to state immunity for claims of serious violations of individual rights. They may not even suffice to assume an emerging exception. However, this short overview of developments in the law relating to immunity and to individual reparation claims demonstrates that immunity is not as solid a principle as it might appear from the Court's reasoning. To use the words of Judge Yusuf in his Dissenting opinion to the ICJ's judgment, "[s]tate immunity is, as a matter of fact, as full of holes as Swiss cheese."[44]

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[39] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 101, para. 61. *See also* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 101 (Rozakis, J., Caflisch, J., Ferrari Bravo, J. & Loucaides, J., dissenting).

[40] Princz v. Germany, 813 F.Supp. 22 (D.D.C. 1992).

[41] Princz v. Germany, 26 F.3d 1166 (D.C. Cir. 1994).

[42] Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (2008). *See also* Flatow v. Iran, 999 F.Supp. 1 (D.D.C. 1998); Owens v. Sudan, 531 F.3d 884 (D.C. Cir. 2008).

[43] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). *See also* PAUL CHRISTOPH BORNKAMM, RWANDA'S GACACA COURTS: BETWEEN RETRIBUTION AND REPARATION 120–25 (2012).

[44] *See* Dissenting Opinion of Judge Yusuf, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 143, para. 26 (Feb. 3).

II. Revisiting the ICJ's Reasoning: State Immunity Versus Jus Cogens

The dispute between Germany and Italy provided the Court with a new opportunity to rule on the relationship between immunity and *jus cogens* ten years after its judgment on the personal immunity of a Minister of Foreign Affairs in the *Arrest Warrant* case.[45] In its new judgment, the Court expanded on its construction of state immunity. By finding that no conflict existed between jurisdictional immunity on the one hand, and the peremptory character of the prohibition of war crimes on the other, the Court went beyond a mere survey of state practice and added some substance to its argument. The Court thus adopted the widely-held view in academic debate that the peremptory character of a norm under international law does not extend to the rights and obligations related to its enforcement in court. In other words, the fact that war crimes or crimes against humanity are prohibited by *jus cogens* does not mean that victims' right of access to justice or the state's duty to extradite or prosecute these crimes are of a peremptory nature as well.[46]

Assuming that this last statement is true, the Court's reasoning is coherent. That said, it has in fact been argued that secondary rights and obligations arising from a violation of *jus cogens* are also of a peremptory character, with the Inter-American Court of Human Rights being the most prominent supporter of this position.[47] Yet even beyond that, the ICJ's reasoning appears somewhat formalistic. It does not allow for a more dynamic understanding of immunity that reflects the reality of international law today. From the perspective of human rights law, an understanding of immunity quite different from that of the Court is needed. Immunity from jurisdiction is an exception to the fundamental right of access to justice.[48] Just like any other limitation on individual rights, a limitation on the right of access to justice on the basis of state immunity is subject to a proportionality test.[49] While the ECHR has always found that immunity does not constitute

[45] *See* Arrest Warrant of April 11, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, para. 58.

[46] Ger. v. It., 2012 I.C.J. 143, paras. 93–94. *See also* Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 AM. J. INT'L L. 122, 126 (2009); Thomas Giegerich, *Do Damage Claims Arising from* Jus Cogens *Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 203, 212–16 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Tomuschat, *supra* note 3, at 1130; Zimmermann *supra* note 29, at 438. *But see* Reimann, *supra* note 29, at 420–23.

[47] *See* Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, para. 131 (Sept. 22, 2006); La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006). This jurisprudence was most likely influenced by Judge Cançado Trindade of the Inter-American Court who is a judge at the ICJ today. S*ee also* Dissenting Opinion of Judge Cançado Trindade, Ger. v. It., 2012 I.C.J. 143, paras. 214–20.

[48] *See also* Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982).

[49] *See* Waite & Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393, para. 59 (Feb. 18, 1999); *see also* Smith & Grady v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, para. 87 (Sept. 27, 1999); BRÖHMER, *supra* note 35, at 186–88.

disproportionate interference with individual rights,[50] the proportionality test implies that the right of access to justice can, depending on the circumstances of the particular case, prevail over immunity. The ICJ appears to ignore this aspect when it finds "a logical problem" in the fact that balancing access to justice against immunity would presuppose "an enquiry into the merits of the case" before immunity can be granted, meaning that the respondent state would have to subject itself to foreign jurisdiction in order to determine whether or not it enjoys immunity.[51]

E. Outlook

The Court's findings in the *Case Concerning Jurisdictional Immunities of the State* are likely to discourage national courts from assuming an exception to immunity applicable to claims arising from serious violations of human rights or international humanitarian law. However, the approach taken by the Court should not be understood as an obstacle to possible new developments of the law in that field. In fact, hope remains that the relationship between state immunity and the right of access to justice will continue to be a dynamic one. This hope rests in the fact that the main actors here are courts, not governments. It is up to courts to determine the scope of jurisdictional immunity in a particular case—and they are more likely to be driven by considerations of justice than by political concerns. Given the dynamic of immunity law, a court claiming jurisdiction over a state on the basis of a well-reasoned assessment of the law should no longer be regarded as breaching the law. Instead, the *Ferrini* jurisprudence may be understood as having opened up a "grey area" that allows courts to take either approach—be it to deny or to grant state immunity.[52]

Accepting a wisely and narrowly construed *jus cogens* exception from state immunity would not unsettle the structure of contemporary international law. A workable solution would be to permit the state where the *jus cogens* violation occurred to claim jurisdiction as a last resort, that is, if all other remedies available to the victim have been exhausted.[53] The territorial state's jurisdiction over the state responsible for the violation would thus motivate that state to ensure that the victims' needs are addressed—either by allowing them to bring their claims before the courts of that state, or by providing them with some form of lump-sum or administrative compensation.

[50] *See* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 101, paras. 55–56; Kalogeropoulou et al. v. Greece & Germany, 2002-X Eur. Ct. H.R. 417, 428; Grosz v. France, App. No. 14717/06 (Eur. Ct. H.R. June 16, 2009).

[51] *See* Ger. v. It., 2012 I.C.J. 143, para. 82.

[52] *See* Dissenting Opinion of Judge *ad hoc* Gaja, Ger. v. It., 2012 I.C.J. 143, para. 9.

[53] *See* Dissenting Opinion of Judge Yusuf, Ger. v. It., 2012 I.C.J. 143, paras. 49–54.