Developments

Is There State Immunity in Cases of War Crimes Committed in the Forum State? On the Decision of the International Court of Justice (ICJ) of 3 February 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*

By Hermann-Josef Blanke[*] *& Lara Falkenberg*[**]

A. Uncertainties in the Area of the Decision of the ICJ Relating to the Principle of Immunity

On 3 February 2012, in a case brought by the Federal Republic of Germany against Italy, the ICJ decided that state immunity protects the state against compensation claims even in cases of extreme violations of human rights.[1] With this ruling, the court established a provisional conclusion to the question of possible exceptions to state immunity in respect of jurisdictional immunity of the state and constraint measures in civil claims. This question has repeatedly arisen in recent years not only in international and European cases, but also in other national cases.

The scope of the principle of immunity has been continuously changing since the end of the Second World War; this is attributable to a change in the understanding of statehood and sovereignty as well as a re-evaluation of the role of the individual in international law. The economic interweaving of states in the context of globalization leads to a "denationalisation" and a reduction of the importance of sovereignty, which limits the claims to immunity of the state over time, particularly among European states.[2] The expansion of the protection of human rights has led to developments in the second half of the twentieth century that appear to bring the principles of state sovereignty and territorial

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[1] *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 143 (Feb. 3), http://www.icj-cij.org/docket/files/143/16883.pdf.

[2] *See* Christoph Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State,* 13 GERMAN L.J. 77, 779–80 (2012); Norman Paech, *Staatenimmunität und Kriegsverbrechen*, 47 ARCHIV DES VÖLKERRECHTS 36, 51–53 (2009), Julia Saarschmidt, DIE REICHWEITE DES VÖLKERRECHTLICHEN IMMUNITÄTSSCHUTZES—DEUTSCHLAND V. ITALIEN VOR DEM IGH, BEITRÄGE ZUM EUROPA- UND VÖLKERRECHT 12–14 (2010).

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

integrity into conflict with the principle of the universality of human rights.[3] Behind these developments lies the controversy as to whether an exception to the principle of immunity in the case of severe breaches of human rights or in the case of a violation of *jus cogens* has been established, regardless of whether these violations are to be qualified as *acta iure imperii* or as *acta iure gestionis*.

The starting point of the conflict was the decision of the local Greek court of Livadia of 30 October 1997.[4] The ruling held the Federal Republic of Germany responsible for a war crime carried out by the SS in June 1944 against the citizens of the Greek town of Distomo.[5] The court ordered the Federal Republic of Germany to compensate the victims and the surviving members of their families, collectively, for up to 28 million Euros.[6] The massacre of innocent civilians violated international humanitarian law—particularly articles 46, 50, and 52 of the Convention (IV) Respecting the Laws and Customs of War on Land and its Annex (hereinafter the Hague Convention)—and qualified as a crime against humanity according to Article 6(c) of the Nuremberg Charter.[7] After the case, numerous suits followed from Italian and Greek victims of fascism.[8] While these reparation claims found no success in German courts,[9] the *Corte di cassazione*, the Italian Court of Cassation

[3] *See* Paech, *supra* note 2, at 36–92; Eibe Riedel, *Der internationale Menschenrechtsschutz. Eine Einführung, in* MENSCHENRECHTE. DOKUMENTE UND DEKLARATIONEN 11 (Bundeszentrale für Politische Bildung ed., 2004).

[4] *See* Monomeles Protodikeio Livadeiasin [Mon. Pr.] [District Court of Livadia], 137/1997 (Greece); s*ee also* Ilias Bantekas, *International Decisions: Prefecture of Voiotia v. Federal Republic of Germany*, 92 AM. J. INT'L L. 765 (1998).

[5] *See generally* Ger. v. It., 2012 I.C.J. 143, para. 20. On June 10, 1944, in the Greek village of Distomo, a Wehrmacht armored infantry troop, integrated into the SS, brutally murdered 218 men, women and children and burnt the village to the ground as "an act of atonement." This massacre of innocent civilians was retaliation for the deaths of three soldiers from a partisan ambush.

[6] *See generally* Bornkamm, *supra* note 2, at 773–76; Christian Tomuschat, *The International Law of State Immunity and its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105, 1107–16 (2011); *see* Paech, *supra* note 2, at 8–9. See Paech, *supra* note 2, at 36–48 for decisions of individual courts.

[7] *See* Ger. v. It., 2012 I.C.J. 143, para. 52. This was not contested by Germany and was assumed by the ICJ because of its distinction between the jurisdiction over the acts on the one hand and jurisdiction regarding the Italian judgments on the other hand; Ger. v. It., 2012 I.C.J. 143, paras. 45–46, 97. Article 3 of the Hague Convention provides for the duty to make reparation.

[8] Since the decision in the Case of *Ferrini*, over 50 individual and class action lawsuits against Germany were pending in which the plaintiffs has sought redress for crimes of the Third Reich during the Second World War; BT-Drucks., 13/8933, at 5.

[9] The district court of Bonn, the regional appeal court of Cologne, and the Federal Court denied the existence of an individual right to compensation and excluded measures of constraint against a foreign state because of the principle of state immunity. Landgericht [LG–Regional Court], Case No. 1 0358/95 (June 23, 1997); Oberlandesgericht Köln [OLG Köln–Higher Regional Court], Case No. 7U 167/97 (Aug. 8, 1998); Bundesgerichtshof [BGH–Federal Supreme Court], Case No. III ZR 245/98, 155 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 279, 281–85 (June 26, 2003) (the subsequently raised constitutional complaint was rejected by the Federal Constitutional Court on Feb. 15, 2006). Bundesverfassungsgericht [BVERFG –Federal Constitutional Court],

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

(hereinafter the Corte), held in its decision of 11 March 2004 in the *Ferrini* Case that recourse to the Italian courts was open.[10] This case set a dramatic precedent and led to many other individual and class action lawsuits. Specifically, the ICJ dealt with the claims of four different groups of victims: Former Italian forced laborers, who had been captured in Italy; former Italian military internees (referred to as "IMIs"), whose status as prisoners of war was denied and who had to suffer forced labor; and the survivors of massacres in Italy and of massacres in Greece.[11]

The *Corte* declared the Greek court's judgments concerning German property in Italy enforceable and therefore took measures of constraint against Villa Vigoni, an Italian-German cultural institute on Lake Como.[12] The Federal Republic of Germany denied that the Italian courts had this right and, to avoid further proceedings, filed a suit in the ICJ on 23 December 2008 to initiate proceedings against Italy. The suit claimed the Corte violated German rights to immunity by assuming jurisdiction over civil claims, declaring Greek judgments enforceable, and taking measures of constraint against Villa Vigoni. The ICJ, nevertheless, held that all of these claims were inadmissible because the principle of state immunity precludes suits by individuals in the courts of another state.[13] The decision of the *Corte* cannot be based on the current rules of international law and is therefore unlawful.[14]

Against this background, this article will examine the main grounds for the judgment, in

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Case No. 2 BvR 1476/03, 7 BVerfG-K 303 (Feb. 15, 2006); *see also* Markus Rau, *State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court*, 7 German L.J. 701, 701–20 (2005).

[10] Luigi Ferrini v. Bundesrepublik Deutschland, *see* Cass., 6 novembre 2003, n. 5055-04, 87 Rivista Di Diritto Internazionale (RDI) 539 (2004), 128 Int'l L. Rev. 659 (2006), http://www.uniurb.it/scipol/pretelli/3%20ferrini.pdf, (It.). S*ee also* Pasquale de Sena & Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 Eur. J. Int'l L. 89 (2005); *see* Paech, *supra* note 2, at 7–8.

[11] *See generally* Application of the Federal Republic of Germany, Jurisdictional Immunities of the State (Ger. v. It.), Dec. 23, 2008, at 14.

[12] Thereby, the *Corte* confirmed a decision of the appellate court, the Corte Florence, which had declared the decision of the Greek Aeropag in respect of German property in Italy enforceable. Even though the *Corte* overturned the decision of the appellate Florence Corte, Corte d'Appello di Firenze, 2 maggio 2005, n. 308/0), regarding the application of EuGGVO, it recognized the jurisdiction of Italy and the enforceability of the judgment of the Aeropag on the basis of article 64 of the Italian IPR law, law No. 218/1995, *available at* http://www.iusreporter.it/Testi/legge218-1995.htm) firmly. *See* Cass., 29 maggio 2008, n. 14.201, 134 Foro Italiano I 1568, 91 RDI, at 896.

[13] *See* Application of the Federal Republic of Germany, Jurisdictional Immunities of the State (Ger. v. It.)*, supra* note 11, at 4, 18.

[14] The Federal Republic of Germany criticized the case law of the *Corte*, which did not explicitly reflect the current state of international law and considered that it did not constitute a trend in international law, but a development of the law that placed Italy in the position of outsider. Memorial of the FRG, Ger. v. It., paras. 57–64 (June 12, 2009).

particular the nature of state immunity as a consequence of state sovereignty; the scope of the judgment, especially given recent developments in international law; and the effect of the breach of *jus cogens* principles on immunity. In addition, the article questions whether a state, through its officials, that commits serious violations of the international law of human rights has forfeited its right to immunity in the courts of another state in respect to a compensation claim arising from these violations. In the proceedings, the ICJ specifically and solely examined the scope of immunity as an obstacle to civil claims, [15] but not its effect on international criminal law.[16]

B. State Immunity as a Procedural Principle

In its decision, the ICJ held that the Italian courts had violated Germany's immunity. This holding confirmed its own jurisprudence[17] and the jurisprudence of the European Court of Human Rights (ECtHR).[18] At the same time, it strengthened the principle of state immunity as a guarantee of order in international law, resisted tendencies seeking to limit the principle of immunity, and to allow individual civil actions in certain circumstances. It left open the question of whether the Federal Republic of Germany has an obligation to pay compensation for the crimes committed by the German Reich against Italian victims.[19]

The ICJ based its rejection of the Italian court's arguments essentially on the procedural character of state immunity. The rules of state immunity limit the submission of a state to the jurisdiction of another state. Fundamental to this is the sovereign equality of all states, which is enshrined in Article 2 Section 1 of the Charter of the United Nations.[20] Following the maxim *par in parem non habet imperium*, states are subject to international law but

[15] *See* Ger. v. It, 2012 I.C.J. 143, paras. 81–91 ("The Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.").

[16] *See* Helmut Kreicker, *Die Entscheidung des Internationalen Gerichtshofs zur Staatenimmunität—Auswirkungen auf das (Völker-Strafrecht?,* 4 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 107 (2012).

[17] *See* Arrest Warrant of April 11, 2000, Dem. Rep. Congo v. Belg., 2002 I.C.J. 3, para. 58. In its justification for the immunity of the then-reigning Congolese foreign minister, the ICJ, for the duration of the term of his office, held that there was absolute immunity in criminal proceedings without regard to whether the actions were of an official or private nature.

[18] *See* Al-Adsani v. United Kingdom, ECHR App. 35763/97, 2001-XI EUR. CT. H.R. 101; McElhinney v. Ireland, ECHR App. 31253/96, 2001-XI EUR. CT. H.R. 763.

[19] *See* Ger. v. It., 2012 I.C.J. 143, para 48 ("The Court is therefore not called upon to rule on those questions.").

[20] *See* U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

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not to the jurisdiction of the courts of other states.[21] From the principle of jurisdictional immunity of states before national courts there is derived the ban on measures of constraint against the properties of a foreign state which are in use for sovereign purposes.[22]

With reference to its decision in the case *Congo v. Belgium*, the Court makes it clear that the procedural institution of immunity concerns the exercise of jurisdiction in respect to a particular act, and as such it precedes all substantive questions about the legality of the act.[23] The very different regulatory objectives of the substantive principles of international law of human rights protection, on the one hand, and the procedural rule of state immunity, on the other hand, therefore cannot conflict and hence cannot be weighed against each other. As a consequence of granting immunity, the right to exercise national jurisdiction must be withheld. The court cannot begin, therefore, to examine a potential breach. German law reflects this distinction as well.[24] The grant of state immunity thus says nothing about the legality of a state's conduct because that cannot be subjected, by virtue of the principle of immunity, to the jurisdiction of another state.[25] The substantive claim that cannot be adjudicated because of jurisdictional immunity does not, in any way, lose its validity.

The central question that the ICJ had to answer was, therefore, whether the Italian courts violated the procedural legal protection accorded to the Federal Republic of Germany under customary international law in the period between 2004 and 2011, in that they denied immunity by way of an exception with regard to the claims asserted or whether the injured substantive object of legal protection affects the procedural obstacle—regardless of this strict separation between procedural and substantive rights—in the case of high legally protected interests, so that the immunity may exceptionally be restricted?

The arguments asserted by Italy for a possible exception to immunity are individually examined below in order to determine whether, as a result in the developments in international law, there should be recognized exceptions. These exceptions would affect the immunity principle by restricting the scope of this procedural principle that limits the

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[21] *See* Peter-Tobias Stoll, *State Immunity*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL) para. 4 (2011); Herdegen, *in* VÖLKERRECHT 10, ch. 37 paras. 1 et seqq. (2011); Hailbronner, Kay & Kau, Marcel, *Der Staat und der Einzelne als Völkerrechtssubjekte*, *in* VÖLKERRECHT 5, paras. 89 et seqq. (Wolfgang Graf Vitzthum ed., 2010); *see* Paech, *supra* note 2, at 10–12.

[22] *See* Ger. v. It., 2012 I.C.J. 143, para. 109 et seqq.; Hailbronner, *Kay, Der Staat und der Einzelne als Völkerrechtssubjekte*, *in* VÖLKERRECHT 4, para. 93 (Wolfgang Graf Vitzthum ed, 2007).

[23] *See* Ger. v. It., 2012 I.C.J. 143, para. 58 ("[T] he law of immunity is essentially procedural in nature.").

[24] *See generally* GERICHTSVERFASSUNGSGESETZ [GVG] [German Judicature Act], Jan. 27, 1887, 20 (Ger.).

[25] *See* Ger. v. It., 2012 I.C.J. 143, paras. 80, 93.

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admissibility of a lawsuit against a state. The ICJ examined whether international law recognizes possible exceptions to immunity in accordance with current developments in customary international law.[26] Since Italy is not a Contracting Party to the European Convention on State Immunity of 1972 (hereinafter Basel Convention)[27], and neither Germany nor Italy have yet ratified the United Nations Convention on Jurisdictional Immunity of States and Their Property of 2004 (hereinafter UN Immunity Convention)[28]—which in any event has not yet entered into force—the immunity of Germany must be determined exclusively on the basis of customary international law.[29]

C. Possible Exceptions to the Principle of Immunity

I. Invocation of the Territorial Tort Exception

Following the restrictive theory of immunity, state immunity only applies to sovereign acts of a state (*acta iure imperii*), while commercial or private acts (*acta iure gestions*) may be subject to the jurisdiction of the forum state.[30] Italy argued before the ICJ that states are not entitled to immunity with regard to tortious conduct in the forum state, even if it takes the form of *acta iure imperii*.[31] Therefore, the Italian courts have jurisdiction to rule on violations of international humanitarian law committed by the German army in Italy, and can award civil damages for such claims.

In current international agreements other than the Statute of the International Criminal Court (ICC), no exceptions to immunity are provided in cases concerning serious human rights violations.[32] Regardless, Italy invoked the so-called "territorial tort exception." Such

[26] In accordance with article 13 of the "Draft Articles on the Responsibility of States for internationally wrongful acts" of the ILC, the legality of a measure is measured only at the level of the then-current international law. Ger. v. It., 2012 I.C.J. 143, para. 58; ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, UN Doc. A/56/10, 43 (2001). *See* Helmut Kreicker, *supra* note 16, at 109.

[27] *See* European Convention on State Immunity, May 16, 1972, BGBL. II at 34 (Ger.).

[28] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, U.N. Doc.A/59/508, *reprinted in* 44 ILM 803 (2005).

[29] *See* Ger. v. It., 2012 I.C.J. 143, para 54.

[30] The restrictive immunity theory was received in 1976 by the United States, for example, in § 1605 of the Foreign Sovereign Immunities Act (FSIA) and 1978 of the United Kingdom in § 3 of the State Immunity Act (SIA), *reprinted in* 15 ILM 1388 (1976) and 17 ILM 1123 (1978); *see* European Convention on State Immunity, *supra* note 21, at 37 para. 5.

[31] *See* Counter-Memorial of Italy (Ger. v. It), paras. 4.27–4.42 (Dec. 22), *available at* http://www.icj-cij.org/docket/files/143/16648.pdf.

[32] *See* Statute of the International Court of Justice, art. 27 (2); *see* Helmut Kreicker, *supra* note 16, at 113.

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an exception can be found in Article 11 of the Basel Convention, which provides for an exception to immunity in case of the occurrence of injury to the person or damage to tangible property in the territory of the state of the forum.[33] Furthermore, the person causing the injury or damage must be present in the forum state at the time the relevant facts occurred. Article 12 of the UN Immunity Convention requires states to submit to the jurisdiction of foreign courts in proceedings that relate to pecuniary compensation for someone's death or injury or damage or loss to tangible property in the forum state.[34] Again, this is provided that the person causing the injury or damage was present in the forum state at the time of the act or omission. These provisions, which have not yet entered into force, do not distinguish explicitly between *acta jure imperii* on one hand and *acta iure gestionis* on the other, but provide a specific exception to immunity based on the territorial principle.[35]

In search of customary international law that binds parties to the dispute, the ICJ has not only examined the question of whether international law recognizes general tort exceptions, but also whether this exception applies to the acts of armed forces.[36] The ICJ did not consider Italy's argument that the tort exception is to be understood as an indication of the increasing restriction of state immunity.

In accordance with the decisions of the ECtHR in the *McElhinney* Proceedings, the ICJ determined that the territorial tort exception applies to insurable risks, but not to core areas of state acts such as the acts of the armed forces in the territory of the forum state.[37]

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[33] European Convention on State Immunity, art. 11 (1972), http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm ("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.").

[34] G.A. Res. 59/38, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc. A/59/49, at art. 12 (Dec. 2, 2004) ("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.").

[35] For the development, application and meaning of tort clauses, *see generally supra* note 2, at 51–88. See Paech, *supra* note 2, at 16–20 for the I.C.J.'s position. *See* section IV.3.

[36] *See* Ger. v. It., 2012 I.C.J. 143, para. 65.

[37] This is the conclusion of the ICJ on the basis of Article 31 of the Basel Convention, which excludes military action, and from the interpretation of the ILC on the UN Immunity Convention. Ger. v. It., 2012 I.C.J. 143, para. 67–69; *but see* the commentary cited by the ICJ of the International law Commission on Article 12 of the UN Immunity Convention; 2 Y.B. Int'l L. Comm'n 46, U.N. Doc.

Furthermore, it was not intended to cover the acts of armed forces in armed conflicts,[38] nor can an exception for tortious conduct of armed forces due to a "territorial tort principle" be derived from state practice, particularly from the decisions of national courts.[39]

The acts of armed forces in armed conflict, which are classified as *acta jure imperii*, are covered by absolute immunity from civil proceedings and from the enforcement of civil judgments by foreign courts. The conclusions of this review of the current customary international law are by no means beyond argument, as the assessment of the ILC shows. The decisions of national courts in regard to state immunity lie therefore in a "grey area" and also illustrate that different positions on tort exception clauses are consistent with customary international law.[40] Some of the literature on the subject maintains that there is an exception to immunity even in cases concerning sovereign acts of a state on foreign territory.[41]

II. Possible Exceptions to State Immunity in Cases Concerning International Crimes

According to the ICJ's judgment, there is no exception to the principle of state immunity for cases concerning claims that are made in the forum state alleging international crimes, including war crimes or crimes against humanity. The position of Italian courts, that in view of the gravity of the violations committed immunity in such cases cannot be maintained, is rejected by the ICJ on the grounds that the illegality of an act from an international law perspective can have no influence on its classification as *acta iure gestionis* or *acta jure imperii*. This is because a purely functional distinction must be made regarding the objective of the immunity.[42] The ICJ's holding is confirmed in particular by decisions made by French, Polish, and Slovenian courts, which were faced with claims relating to similar wrongful acts from the Second World War.[43] Thereby, the Court rejected Greek jurisprudence, which did not reflect the position of the Greek government.[44]

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[38] *See id.* para. 67–69.

[39] *See id.* para. 70–75.

[40] *See* 2 Y.B. Int'l L. Comm'n 23, U.N. Doc. A/CN.4/SER.A/1991/Add.1.; Dissenting Opinion of Judge ad hoc Gaja, Ger. v. It., 2012 I.C.J. 143, section 9 (referring to the commentary of the ILC on article 5 of the UN Immunity Convention). *See also* Letelier v. Chile, 488 F.Supp. 665 (D.D.C. 1980); Liu v. Peoples Republic of China, 892 F.2d 1419 (9th Cir. 1989).

[41] *See* MARTIN SEEGERS, DAS INDIVIDUALRECHT AUF WIEDERGUTMACHUNG 246 (2005); *see* Paech, *supra* note 2, at 71–74; KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM 94 (1990); Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUSTRIAN J. PUBL. INTL L. 195, 217 (1994).

[42] *See* Mon. Pr. [District Court of Livadia], *supra* note 4, at para. 60.

[43] *See* Ger. v. It., 2012 I.C.J. 143, para. 73, 74.

[44] The district court of Livadia explained its decision that state acts that violate *jus cogens* are not considered as *acta jure imperii* and thus do not fall under immunity. The Greek Supreme Civil Court, the Areopagus, rejected a

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As a result, up to the time of Germany's initiation of proceedings before the ICJ, only the Italian courts had held that there was an exception to immunity under customary international law in cases of serious war crimes or crimes against humanity.[45] The ICJ assessed this case law as contrary to international law and pointed out that Italian cases do not conform to the practice of states or the case law of the ECtHR, such as in the cases of *Al Adsani* and *Kalogeropoulou v. Greece and Germany*; moreover, such an exception is provided neither in the European Convention on State Immunity, nor in the UN Immunity Convention.[46] The *Pinochet* case, in which the House of Lords decided that a former foreign Head of State may be prosecuted for implementing official acts of torture,[47] expressly viewed the ICJ as not setting a precedent because the protective effect of state immunity in civil cases should be distinguished from that in criminal proceedings. The ICJ pointed out that this distinction was emphasized by several of the judges in the House of Lords in *Pinochet* and was further clarified in the case of *Jones v. Saudi Arabia* in 2007.[48] The majority decision that Pinochet as a former head of state was not immune from extradition proceedings based on criminal proceedings concerning the crime of torture,[49] therefore, cannot be applied to the civil liability of states in cases of serious human rights violations.[50]

III. Exceptions as a "Last Resort?"

Italy pleaded in favor of enforcing the claims of victims without fundamentally calling into question the immunity principle. Rather, Italy contended that the immunity could be set aside as a "last resort"[51] when individuals would be left with no other remedies against the

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revision of the German Federal Government against the decision; in the case of disproportionate tortious acts under international law an exception to the principle of state immunity must be applied. The ruling in Greece, although legally binding, could not be enforced because the required permission, according to the Law of Civil Procedure in Greece, was not given by the Minister of Justice.

[45] *See* Ger. v. It., 2012 I.C.J. 143, para. 76.

[46] *See id.* at paras. 79–91; *see Kalogeropoulou et al. v. Greece and Germany*, ECHR App. 59021/00, EUR. CT. H.R. (Dec. 12, 2002), *available at* http://hudoc.echr.coe.int.

[47] *See* British House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, Judgment of 24 March 1999, [2000] AC 147.

[48] *See* Ger. v. It., 2012 I.C.J. 143, para. 87.

[49] *See* British House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, Judgment of 24 March 1999, [2000] AC 147. *See also* Isabelle Buffard, *Der Fall Pinochet: Für und wider die Immunität: Auslieferungsspezifische Aspekte im Fall Pinochet und Argumente für die Immunität*, *in* VÖLKER UND EUROPARECHT, ÖSTERREICHISCHER VÖLKERRECHTSTAG UND HERBERT-MIEHSLER GEDÄCHTNISVORLESUNG 25 (W. Karl & U. Brandled eds., 2000).

[50] *See* Ger. v. It., 2012 I.C.J. 143, para. 87; *see* Paech, *supra* note 2, at 56–58.

[51] *See* Counter-Memorial of Italy (Ger. v. It.), Dec. 22, 2009, para. 6.26.

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violating state. Thus, the individuals could bring claims for damages as a result of serious violations of their rights under the rules of international humanitarian law before the courts of their home states.[52] In this way, the permitted exceptions to the principle of state immunity are assumed to be limited and the objections to admitting a further derogation from state immunity are avoided.

This approach was not so much about the full enforcement of *jus cogens* in the forum state, but—according to the formula of *G. Radbruch*—about justice and compensation for violations that affect the fundamental values of the international community, when this is not available by any other means. A similar idea seems to underlie the report of the Institut de droit international in its session in Naples in 2009, which proposed the codification of exceptions to immunity.[53]

IV. Paid Reparations

Pursuant to this notion of "last resort," contractual agreements between states regarding compensation payments should always be given priority. So the question in the cases leading to the proceedings in *Germany v. Italy* is whether there are still unsettled reparation claims, or whether an intergovernmental settlement already took place and eliminated government and individual compensation claims through satisfaction, waiver, or limitation.

The ICJ agreed with the Italian counterclaim that a large number of victims did not obtain compensation because Germany's bilateral agreements with Italy and Greece were limited to the compensation of victims of Nazi persecution, and did not cover victims of war crimes.

The reparation claims of the survivors of the Distomo massacre and the Italian victims have not been extinguished by the German-Greek Treaty of 1960,[54] the two treaties signed with Italy in June 1961,[55] or through the compensation payments[56] arising out of them. These

[52] *Id.* at para. 6.26–6.28.

[53] *See Institut de Droit International, Third Commission: Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes*, *in* 73 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL SESSION DE NAPLES 2009, *available at* http://www.idi-iil.org/idiF/navig_ann_2009.html. The rapporteur Lady Fox notes that an exception to immunity for any *jus cogens* violation would be too far. *See id.* at 58.

[54] *See* Vertrag über Leistungen zugunsten griechischer Staatsangehöriger, die von nationalsozialistischen Verfolgungsmaßnahmen betroffen worden sind, Sept. 14, 1961, BGBL. II at 1597 (Ger.) (Treaty concluded with Greece to compensate victims of specific national-socialist measures of prosecution).

[55] *See* Vertrag über Leistungen zugunsten italienischer Staatsangehöriger, die von nationalsozialistischen Verfolgungsmaßnahmen betroffen worden sind, June 28, 1963, BGBL. II at 793 (Ger.) (Treaty concluded with Italy to compensate victims of specific national-socialist measures of prosecution).

treaties are related to the crime of persecution as set out in the Federal Compensation Act and thus do not include damage to property or personal injury arising from warlike events. Germany regards these treaties, though, as final lump-sum compensation, especially since the peace treaty with Italy in 1947 and the 1961 treaty include waiver clauses.[57] As thousands of Italian military internees have been denied the status as prisoners of war, although they were entitled to it, they could not receive compensation from the foundation "Remembrance, Responsibility and Future," set up in 2000.[58] The London Debt Agreement of 1953 has deferred these compensation claims, which arose from warlike events, until "the final settlement of the problem of reparation."[59] The ICJ recognizes the gaps in German reparations that Italy complains about and that particularly exclude the Italian military internees. The ICJ also "regrets" the decision by Germany to deny compensation to a group of victims.[60]

The Greek and Italian courts, though, regard the "2+4" Treaty of September 1990 as a peace settlement that ends the deferral of the London Debt Agreement and makes the enforcement of the unsettled reparation claims possible. In contrast, for Germany it constitutes the final settlement of all outstanding claims and a waiver by the creditor

[56] Germany has paid 115 million marks to Greece and 40 million marks to Italy. *See* German Federal Law Gazette (BGBL. II) 1597 (1961), art. 1, para. 1 ("contract services for the benefit of Greek nationals who have been affected by nationalist persecution"); *id.*

[57] Both in Article 77 (4) of the Peace Treaty and Article 2 (1) of the "Abkommen über die Regelung gewisser vermögensrechtlicher, wirtschaftlicher und finanzieller Fragen" ("Agreement between the Federal Republic of Germany and the Italian Republic Governing Certain Property-Law, Economic and Financial Questions") German Federal Law Gazette [BGBL. II] 669 (1963). *See* Counter-Memorial of Italy (Ger. v. It.), Dec. 22, 2009, paras. 2.9–2.19 (Italy waived all claims against Germany and German nationals . . . if they are based on rights and conditions which arose in the period from September 1939 and 8 May 1945. From Italy's perspective, however, these clauses were like the London Schuldenmoratorium aimed at deferring the reparation payments to a later, more appropriate time).

[58] *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. 1263, at § 11 (3) (Ger.). On this basis, the majority of the Italian military internees were rejected. The Constitutional Court ruled in 2004 that this is not an infringement of the principle of equality in Article 3 of the German Basic Law. Bundesverfassungsgericht [BVERFG —Federal Constitutional Court] Case No. 2 BVR 1379/01, 3 BVERFG-K 227 (June 28, 2004), http://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20BvR%201379%2F01&Suche=2%20BVR%201379%2F01.

[59] *See* Article 5 para. 2 LDA ("Consideration of claims arising out of the second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the problem of reparation."); German Federal Law Gazette (BGBL II) 331 (1953).

[60] *See* Ger. v. It., 2012 I.C.J. 143, para. 99.

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countries of entitlement to further reparations.[61] Since these issues are outside the jurisdiction of the ICJ, the ICJ leaves open the question of whether the Federal Republic of Germany fulfilled its duty to make reparations according to international law.[62] The fact that victims could not raise their claims, which was the basis for the ICJ decision, before the conclusion of the "2+4" Treaty and that the Federal Republic repeatedly relied on this deferral[63] indicates that the "2+4" Treaty did not include a final waiver of the creditor states involving the remaining reparation claims. Accordingly, Germany may still have unsettled reparation obligations.

V. Germany's Duty to Make Reparations

The ICJ discussed whether the non-performance of the reparation duty could lead to an exception to the principle of immunity. In the view of the ICJ, there is no conflict between state immunity and the state's obligation to provide compensation for entitled individuals because the duty to make reparations is exclusively a matter of substantive law.

State immunity restricts the means by which the duty to make reparation may be adjudicated and enforced, but does not concern the duty itself. Article 31 of the draft articles on state responsibility emphasized the duty to make full reparations. Centuries of state practice in which wars have been settled by peace treaties and material consequences of wars have been settled by agreements on payment of reparations at inter-state level demonstrate, though, that an individual right to compensation cannot be regarded as a peremptory norm of international law.[64]

Even if it were accepted that whole groups of victims have not been compensated through the payment of reparations in the past, the non-performance of the duty to make reparations has no effect on state immunity. To impose sanctions on a possible wrong, one has to fall back on other remedial instruments of international law.

VI. Potential Repercussions of Jus Cogens *on Immunity*

Italy's statement of defense put the nature of violated norms at the heart of its argument. These norms of international humanitarian law, already applicable during the Second World

[61] *See* Bernhard Kempen, *Der Fall Distomo: griechische Reparationsforderungen gegen die Bundesrepublik Deutschland*, *in* FESTSCHRIFT FÜR HELMUT STEINBERGER, 179 (Cremer et. al. eds., 2002); Dietrich Rauschning, *Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in Bezug auf Deutschland*, *in* Das Deutsche Verwaltungsblatt 1275, at 1279 (1990); *See* Paech, *supra* note 2, at 82–83.

[62] *See* Ger. v. It., 2012 I.C.J. 143, paras. 46–48.

[63] *See* Paech, *supra* note 2, at 80–83.

[64] *See* Ger. v. It., 2012 I.C.J. 143, para. 94.

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War,[65] amount to *jus cogens*, described in Article 53 of the Vienna Convention as norms "accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted."[66] They prevail over other international obligations in the event of conflict. Against this background, the ICJ discussed the concept of *jus cogens* as a possible exception to immunity and confirmed—supported by the case law of the ECtHR—its position, which it had already taken in *Congo v. Belgium*. This detailed judicial examination of the peremptory norms of international law contributes significantly to the understanding of the concept.[67]

VII. Development of a Jus Cogens *Exception in Case Law*

In *Congo v. Belgium*, two judges in a dissenting minority held that there was an exception to immunity in the case of *jus cogens* norms.[68] The ICJ did not explicitly address the consequences of the classification of a norm as *jus cogens*, but it stressed that state immunity as a procedural law does not affect the individual criminal responsibility of a state official.[69] In light of state practice, no abrogation of immunity in customary international law could be established. Even the ECtHR similarly characterized the principle of state immunity in its decision in *Al-Adsani* on 21 November 2001.[70] It held the view that a *jus cogens* violation does not lead to an exclusion of immunity because such a consequence is not recognized under customary international law and immunity and *jus cogens* belong to different legal categories, so a comparison cannot be made.[71] A conflict

[65] In the *Distomo* case, the armed forces of the SS violated in particular Article 46 and 50 of the Land Warfare Convention of 1907. In regards to the Italian war victims, other provisions of the Land Warfare Convention and the Geneva Convention on the Treatment of Prisoners of War of 1929 come into question. The duty to make reparation is provided in Article 3 of the Hague Convention.

[66] *See* Merlin M. Magallona, *The Concept of Jus Cogens in the Vienna Convention on the Law of the Treaties*, *in* 51 PHILIPPINE L.J., 521 (1976); Stefan Kadelbach, ZWINGENDES VÖLKERRECHT 26–35, 324341 (1992); KIRSTEN SCHMALENBACH, *ART. 53*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES, 897 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

[67] *See* Ger. v. It., 2012 I.C.J. 143, paras. 81–97.

[68] In the case of *Congo v. Belgium*, Judge Al-Khasawneh of Jordan and the Belgian ad hoc Judge Van den Wyngaert argued for an exception to immunity and justified this with the developments in international criminal law and the *jus cogens* character of the violated norms. (Dissenting Opinion of Judge Van den Wyngaert (Dem. Rep. Congo v. Belg), 2002 I.C.J. 3, para. 28; Dissenting Opinion of Judge Al-Khasawneh (Dem. Rep. Congo v. Belg), 2002 I.C.J. 3, para. 7).

[69] *See* Sigrid Zeichen & Johannes Hebenstreit, *Kongo v. Belgien. Sind Außenminister vor Strafverfolgung völkerstrafrechtlicher Verbrechen immun?*, *in* 41 ARCHIV DES VÖLKERRECHTS 182–83, 199 (2003); Dem. Rep. Congo v. Belg., 2002 I.C.J. 3, para. 60.

[70] *See* Al-Adsani v. United Kingdom, App. No. 35763/97, EUR. CT. H.R. (2001)..

[71] The English Court of Appeal had dismissed a civil claim raised by Kuwaiti nationals for compensation for torture against the Kuwaiti government on the ground of the state immunity. *Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, Jan. 21, 1994, *reprinted in* 100 ILR 465 (1995). The applicant then submitted to the European Court of Human Rights an individual complaint for breach of the right to legal protection provided in

could therefore only exist with procedural guarantees for human rights, such as the right to access to a court under Article 6(1) of the European Convention on Human Rights (ECHR). This provision does not, though, have the status of *jus cogens*.[72] Therefore, the ECtHR dismissed the claim in *Al-Adsani* to access to court as part of a proportionality test and confirmed this reasoning in the case of *Kalogeropoulou v. Greece and Germany* (2002).[73] States in civil proceedings may also be able to rely on the principles of state immunity when they are sued for breach of peremptory norms of international law. This is because the protection of state immunity in order to promote good relations between nations and to recognize another state's sovereignty is a legitimate reason for limiting even the procedural guarantees for human rights in the ECHR.[74] Italy's demand for a right to access to a court, described by Italy as access to justice, was not discussed again in the ICJ's judgment.[75]

In contrast, the ECtHR made clear in *McElhinney v. Ireland* that, in the case of human rights violations, although a number of states have a tendency in international law to restrict state immunity, the restriction does not yet constitute a universal phenomenon. In regards to civil claims, the ECtHR could not identify a change in the customary international law.[76] The dissenting opinions in the decisions *Al-Adsani v. United Kingdom* and *McElhinney v. Ireland* mention, though, a transition to a new, more restrictive view of state immunity[77] and argue an exception to immunity exists by virtue of the legal nature of *jus cogens* as

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Article 6 of the European Convention on Human Rights (ECHR). The decisive argument in the ruling of *Al-Adsani* was not the distinction between procedural and substantive rights but the State's practice. The question of whether there was indeed a conflict has been treated in an inadequate manner. Christian J. Tams, *Schwierigkeiten mit dem Ius Cogens* , 40 AVR 331, 341 (2002).

[72] *See* Al-Adsani v. United Kingdom*, supra* note 18, para. 53.

[73] In its Judgment of 12 December 2002, the ECtHR dismissed a complaint because of a violation of the right to a fair trial (Article 6 I (1) ECHR) and the right to an effective remedy (Article 13 ECHR) as inadmissible. Kalogeropoulou v. Greece and Germany, ECHR App. 59021/00, EUR. CT. H.R. n. 43 (Dec. 12, 2002). *See also* SAARSCHMIDT, *supra* note 2, at 27–28.

[74] *See* Al-Adsani v. United Kingdom, *supra* note 18, paras. 54, 35.

[75] *See* Counter-Memorial of Italy (Ger. v. It.), Dec. 22, 2009, para. 4.88–4.101.

[76] *See* Al-Adsani v. United Kingdom, *supra* note 18, at para. 38 ("The Court observes that, on the material before it . . . there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum state, but that this practice is by no means universal.").

[77] *See id.* Dissenting Opinion of Judge Rozakis, para. 2 ("Yet, the fact that the law on state immunity was - and still is - at a stage of transition, and that the clear preference of the international community was - and is - to limit it in specific States' actions, . . . [t]he plea of state immunity loses much of its weight in view of the developments of international law and the current status of the law on state immunity.").

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higher-ranking and peremptory norms.[78] A year later, the ECtHR stressed in *Kalogeropoulou v. Greece and Germany* that in the face of the doubts about the scope of the immunity principle, a different approach might possibly be taken in the future.[79]

In the jurisprudence of international courts and in state practice itself—with the exception of Italy—aspirations were thus indicated that postulate an exception to the principle of state immunity in cases of breaches of peremptory international law. The Italian Corte sought, through the adoption of an exception to immunity in cases of violations of *jus cogens*, to uphold fundamental values of the international community. The Corte did this in order to consider a development that it interpreted as a continuous change in the principle of state immunity, as well as to bring about the effective prosecution of crimes against humanity. In this way, the foundations of coexistence between nations would be strengthened and international law as a value system would be consolidated.[80] Without explicitly mentioning *jus cogens*, the Corte, like Italy in its counter-claim, based its assertion of an exception to immunity on the status of the violated human rights as *jus cogens* and the special obligations effect flowing from these rights. As the *jus cogens* norm stands hierarchically at a higher level than other, non-peremptory rules, state immunity as a conflicting rule, which does not have the status of *jus cogens*,[81] does not produce legal effect.[82] This effect-oriented and value-based reasoning is based on the development of the legal concept of *jus cogens* norms. Italy therefore assumed both the existence of a conflict between the immunity and the human rights guarantees, as well as a hierarchy of norms in

[78] *See id.* Dissenting Opinion of Judge Rozakis et. al., para. 3 ("Due to the interplay of the jus cogens rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.").

[79] *See Kalogeropoulou et al. v. Greece and Germany* ECHR App. 59021/00, EUR. CT. H.R. n. 46 (Dec. 12, 2002) (under the heading "The Court's assessment.")

[80] *See Al-Adsani*, ECHR App. No. 35763/97 (the Corte relates inter alia on the minority votes from this judgment); Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143 (Feb. 3) (the Corte also relates to an obiter dictum from this judgment). *See also* Alkotmánybíróság [AB—Constitutional Court] 1993.53 (Hung.); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/case/furundzija/4; Prosecutor v. Kupreskic, Case No. IT-95-16-T (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/case/kupreskic; *Ferrini*, n. 5055-04 (It.), paras. 8.3, 9 ("fundamental human rights that are rooted by irrefutable standards in the international legal order and are at the forefront of the international legal order and that over all other conventional and customary norms take priority . . . , and thus also towards those concerning steps the State Immunity.").

[81] *See Al-Adsani*, ECHR App. No. 35763/97, para. 2 (Rozakis, J. et al., dissenting) (emphasizing explicitly—although most ICJ and ECtHR judgments implicitly assume—that state immunity does not have the status of *jus cogens*) ("The Court's majority do not seem . . . to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens.*"). *See also* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 741–742 (2003).

[82] Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42, 42 (1991); Andreas L. Paulus, Die internationale Gemeinschaft im Völkerrecht 354–356 (2001) (unpublished Ph.D. dissertation, Universität München).

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international law by which the conflict is to be resolved by application of the higher rule. Whether such a hierarchy in international law exists at all is questionable;[83] the ICJ does not discuss this, though, because the Court already denied the existence of a conflict situation.

The terms and the extent of the ECtHR decisions show that the principle of state immunity was open to development, at least until the decision of the ICJ of February 2012. Thus, the Corte based its decision explicitly on the dissenting opinions in these decisions.[84] There is also a tendency in the literature to argue in favor of the concept of *jus cogens* in the context of human rights, and to simultaneously strengthen the status of the individual in international law—particularly in cases brought by individuals arising out of war damages—at the expense of state immunity.[85] In its decision in this case, the ICJ thus faced the question of how far it should open the door to a possible restriction of state immunity in cases involving *jus cogens* violations.

VIII. The Substantive Character of Jus Cogens

The door to a *jus cogens* exception, which the Italian courts and some academic writers had tried to open, was at least for the time being shut again vigorously by the ICJ. As long as states enjoy immunity before national courts, the qualification of violated human rights as *jus cogens* norms will not extend the possibility of restricting immunity since the Court maintained that there is no conflict between these rules and the rules of state immunity.

The ICJ stated that no conflict exists between state immunity and alleged violations of rules of *jus cogens* because a procedural right cannot be derived from a substantive *jus cogens* rule. Furthermore, under customary international law, no procedural enforcement

[83] *See* Martti Koskenniemi, *Hierarchy in International Law: A Sketch,* 8 EUR. J. INT'L L. 566 (1997*);* Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law,* 8 EUR. J. INT'L L. 583 (1997)*;* Joseph H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?,* 8 EUR. J. INT'L L. 545 (1997).

[84] *Al-Adsani*, ECHR App. No. 35763/97, para. 66 ("The Court . . . *does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State*.") (emphasis added); *McElhinney*, ECHR App. No. 31253/96 para. 38 ("[T]*here appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State*") (emphasis added).

[85] Stoll, *supra* note 21, at para. 84 ("However, legal developments in this area cannot stop at this point. There is an urgent need further to consider the role that human rights and *jus cogens* should play in the context of State immunity."). For a current opinion, see CHRISTIAN APPELBAUM, EINSCHRÄNKUNGEN DER STAATENIMMUNITÄT IN FÄLLEN SCHWERER MENSCHENRECHTSVERLETZUNGEN 79 (2007). *See also* PHILIPP STAMMLER, DER ANSPRUCH VON KRIEGSOPFERN AUF SCHADENSERSATZ (2009).

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obligation concerning *jus cogens* can be identified.[86] The Court followed the legal argument of the Federal Republic of Germany that drew a distinction between the violation of a norm and legal proceedings in respect of this breach of law.[87] Therefore it could not be assumed that *jus cogens* rules have a procedural character that creates a conflict of norms with the rules of state immunity. Referring to the ICJ's earlier ruling in the case *Congo v. Belgium*, the ICJ did not refuse to apply an international rule that would conflict with a *jus cogens* norm, not directly, but that it prevents legal consequences. Since immunity as a preliminary procedural question does not characterize the violation of *jus cogens* as lawful, there is no violation of Article 41 of the draft articles on state responsibility.[88] Additionally, international law does not determine what legal consequences are to be drawn from a violation of *jus cogens* or specifically what implications such violation will have on immunity.

Hence, the ICJ contributes through its decision not only to the illumination of the function of state immunity, but also to clarify the effects of *jus cogens* in international law; the law enforcement character of a *jus cogens* norm is limited. In the case of violation of such a norm, damage claims by individuals resulting from the act of infringement cannot be enforced if it would involve a breach of the principle of state immunity. The ICJ recognizes that a consequence of this interpretation is that the enforcement of these fundamental values on the international community is restricted.[89] However, the ICJ finds itself

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[86] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143 para. 94 (Feb. 3). *See* APPELBAUM, *supra* note 85, at 270 (the author also holds this view).

[87] Mem'l of the Federal Republic of Germany (Ger. v. It.), 2009 I.C.J. paras. 57–64 (June 12) (demonstrating the separation between the ban and the obligation to legal protection is not further substantiated by the ICJ because the duty to prosecute human rights violations and to guarantee legal protection is of more recent origin than human rights). *See, e.g.,* Geneva Conventions of 1949, Aug. 12, 1949, arts. 51, 52, 131, 148; Protocol Additional to the Geneva Conventions of Aug. 12 1949 (Protocol I), June 8, 1977, art. 85; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. 4, 6; International Convention on the Suppression and Punishment on the Crime of Apartheid, Nov. 30, 1973, art. 4(b) (enshrining the duty to prosecute human right violations in treaties). *See* Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf) (only after this judgment is it discussed seriously whether there is a general obligation to prosecute human rights violations); *see, e.g.* Kai Ambos, *Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen*, 37 ARCHIV DES VÖLKERRECHTS 318 (1999).

[88] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143 para. 93 (Feb. 3). *Accord*, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10, art. 41 (2001) ("*Particular consequences of a serious breach of an obligation under this chapter:* 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."). *But see* Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms*: *Why the House of Lords Got It Wrong*, 18.5 EUR. J. INT'L L. 955, 963–970 (2007); Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18.5 EUR. J. INT'L L. 964, 967 (2007).

[89] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 95 (Feb. 3) ("To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the

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prevented from drawing any consequences from this.

IX. Repercussions due to the Erga Omnes *Effect of* Jus Cogens*?*

Violations of *jus cogens* human rights have a special effect: Rules under this category lay down *erga omnes* obligations toward the community of nations as a whole,[90] and because of their fundamental importance, all states have a legal interest in protecting these rules. However, the legal consequences of a breach of *erga omnes* obligations are controversial.

According to the opinion of the Italian Corte, the imperative norms of international law form the bedrock of the international community. Violations of human rights' guarantees having *jus cogens* character represent an offense against the international community as a whole.[91] Therefore, every state has the responsibility to enforce their legal effects procedurally as well; this excludes the granting of immunity in cases concerning compensation claims raised by individuals in the forum state.[92] A violation of an *erga omnes* obligation should lead on the one hand to the extension of the jurisdiction of a state and on the other hand to an exception to state immunity. Thus, to determine the consequences of the violation of a *jus cogens* norm, not only the explicit contractual consequence (Article 53 of the Vienna Convention on the Law of Treaties VCLT) or the international law practice, but also the effectiveness of the *jus cogens* norm is crucial. Without explicitly analyzing the *erga omnes* effect of norms, the ICJ denied, on the contrary, that exceptions to the immunity for violations of *jus cogens* have developed under customary international law and determined that even the violation of fundamental human rights does not justify the assumption of jurisdiction over a foreign state before national courts.[93]

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enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.").

[90] Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 33–34 (Feb. 5).

[91] *See* Court Judgment of 06 November 2003, INT'L L.REV., *supra* note 10**,** at 668–669.

[92] *See* 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, 487–488 (2003).

[93] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 81–97 (Feb. 3).

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In other case law[94] and legal literature,[95] concerns are voiced. These concerns stress that obligations under international law will be meaningless if states do not enforce them effectively. So, in the event of a violation of *erga omnes* obligations, the circle of states entitled to enforce the law is to be expanded.[96] Yet, this does not apply to the means through which states may choose to enforce such rules.[97] From a universal criminal jurisdiction over the most serious crimes of individuals, no universal civil jurisdiction can yet be derived.[98] Italy moved on to argue that the concept of *erga omnes* also contains procedural enforcement mechanisms.[99] The ICJ however opposed this argument decisively in its judgment.

X. Forfeiture of Immunity in the Case of Jus Cogens *Violations?*

Italy tried in the context of its "last resort" argument to justify an exception to immunity due to a lack of enforcement means; it called for full and effective reparation as a legal consequence of *jus cogens* violations. Since Article 38.1(c) of the Statute of the ICJ also includes the general principles of law recognized by civilized nations among legal sources of international law, it is conceivable to make such an exception based on the general principle of forfeiture as the strongest remedy for the case of a lack of enforcement means.[100] Forfeiture as a general principle of law opens up the possibility of restricting the legal rights of states: When a state aspires to achieve a goal whose achievement

[94] *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9) (derives from the *erga omnes* obligation, the obligation of third States not to recognize the illegal situation created by the separation wall). *See also* Prosecutor v. Anto Furundzija, Case No. IT-95-17/1, para. 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[95] Bardo Fassbender, *Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EUGRZ) 1, 7 (2003).

[96] *See also* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, art. 48(1)(b) ("Any state other than the injured State is entitled to invoke the responsibility in accordance with paragraph 2 if . . . the obligation breached is owed to the international community as a whole.").

[97] APPELBAUM, *supra* note 85, at 240–252.

[98] SAARSCHMIDT, *supra* note 2, at 30–32.

[99] *See also* Bartsch & Elberling, *supra* note 92, at 486–487.

[100] Juliane Kokott, *Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstössen*, *in* FESTSCHRIFT FÜR RUDOLF BERNHARDT 135, 136–137 (Ulrich Beyerlein et al. eds., 1995) (demonstrating that the legal concept of forfeiture is a general principle of international law within the meaning of Article 38 paragraph 1 lit. c of the ICJ Statute); KARL DOEHRING, VÖLKERRECHT para. 417 (2004); Karl Doehring, *Zum Rechtsinstitut der Verwirkung im Völkerrecht*, *in* FESTSCHRIFT FÜR IGNAZ SEIDL-.HOHENVELDERN 51, 51 (Karl-Heinz Böckstiegel ed., 1988); Kreicker, *supra* note 16, at 114; Paech, *supra* note 2, at 59–60. *But see* Tomuschat, *supra* note 6, at 1123; APPELBAUM, *supra* note 85, at 280.

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

presupposes a right that is not recognized in the legal order, it "forfeits" this right.[101] The legal concept of forfeiture was also pleaded by Italy in its counterclaim on 22 December 2009.[102] It was used by Italy to bolster the interpretation of the "last resort" argument and to incorporate it into a legal framework. According to thoughts developed in the context of *jus cogens*, particularly by Juliane Kokott,[103] a state that commits gross human rights violations forfeits its right to state immunity and compensation in the courts of another state. Since the plea of forfeiture is of both procedural and substantive nature, it can also be directed against the procedural obstacle of immunity.

This possibility of breaching the principle of immunity in consequence of the legal concept of forfeiture is hardly discussed by the ICJ.[104] In essence, the court asks only whether an exception to state immunity can be identified in the state practice. The chief concern of the ICJ was only to establish whether derogation from immunity is possibly recognized under customary law.

As general principles of law can be applied only on a subsidiary basis, (1) a regulatory, or (2) a valuation gap in international law and customary international law must subsist, and (3) this conflict of values must be intolerable.

(1) Even if the ICJ did not explicitly discuss the principle of forfeiture, it is likely that it does not constitute an exception to jurisdiction immunity because in accordance with the principle of subsidiarity there is room for forfeiture as a general principle of law only if the issue in international law is not (otherwise) regulated by customary or treaty law.[105] Yet, the examination of state practice by the ICJ nevertheless shows that foreign states can invoke *acta jure imperii* immunity before foreign civil courts, and the non-performance of reparation claims will not affect the granting of state immunity.[106] Following centuries of state practice of settling reparation claims between states, in the view of the Court the

[101] Karl Doehring, *Zum Rechtsinstitut der Verwirkung im Völkerrecht*, *in* FESTSCHRIFT FÜR IGNAZ SEIDL-HOHENVELDERN 51, 52 (Karl-Heinz Böckstiegel ed., 1988).

[102] Counter-Memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It.) 2009 I.C.J. 143, paras. 4.69–4.71 (Dec. 22).

[103] *Id.* at para 4.69 (Italy referring to Kokott, *supra* note 100).

[104] Reply of the Federal Republic of Germany, Jurisdictional Immunities of the State (Ger. v. It.) 2010 I.C.J. 143, para. 60 (Oct. 5), *available at* http://www.icj-cij.org/docket/files/143/16650.pdf (Germany rejecting the forfeiture argument and describing it as theoretical speculation with no basis in international law or foundation in state practice; the ICJ did not address this argument).

[105] Wolfram Cremer, *Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit*, 41 ARCHIV DES VÖLKERRECHTS 135, 155 (2003); KARL DOEHRING, VÖLKERRECHT para. 414 (2004).

[106] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 104 (Feb. 3).

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

modality of reparation under customary international law is also sufficiently regulated. Consequently, the Court concluded that it is the duty of the forum state to distribute the funds from a global agreement appropriately.[107] Therefore, in the view of the ICJ, there is no regulatory gap.

(2) While the ICJ bases the settlement of this question on customary international law and excludes the possibility that an allegation of substantive unlawfulness might affect the granting of the procedural right of immunity, Juliane Kokott's approach aims at taking possible conflicts in values into account and closing them through the general principle of the law of forfeiture.[108] This would open up the possibility of balancing the procedural immunity law and the substantive violated right. Should the provisions of international treaties or customary laws regarding the issue in question undertake a false assessment of values or if they do not take into account the proper one, then such conflict of values, as viewed by Kokott, justifies an exception to immunity through the mechanism of forfeiture.[109]

Following Italy's argument as well as other dissenting opinions,[110] the granting of state immunity under current customary international law in light of the serious violations of fundamental norms of international humanitarian law and the refusal of Germany to provide further compensation, leads to such a conflict of values. In view of the meaning of *jus cogens* and the protection of fundamental human rights, the principle of immunity should give way in this case due to Germany's refusal to pay further compensation if immunity would result in injustice to the victims and an absolute impunity of the state.[111] From its part, Germany referred again and again in political discussions to the statement that granting immunity would not imply that *jus cogens* violations be regarded as lawful.[112]

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[107] *Id.* para. 102.

[108] Kokott, *supra* note 100, at 144.

[109] *Id.* at 144–145. *But see* Cremer, *supra* note 106, at 156 (seeing the subsidiarity principle as violated).

[110] *See, e.g.*, Dissenting Opinion of Judge Trindade and Dissenting Opinion of Judge Yusuf, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143 (Feb. 3).

[111] Counter-Memorial of Italy, Jurisdictional Immunities of the State (Ger. v. It.) 2009 I.C.J. 143 para. 4.117 (Dec. 22) ("immunity must be denied when, if granted, it would amount to an absolute denial of justice for the victims and to impunity for the State;" thus, Italy's argument does not explicitly depend on *jus cogens*). *See also* Doehring, *supra* note 101, at 60 (arguing that the question of whether immunity can be considered forfeited, does not depend only on the *jus cogens* character of the violated human rights, but is also a result of a balancing process between the legal interests).

[112] For Germany's position, see Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 93–97 (Feb. 3).

(3) Given the fundamental importance of state immunity in international law, the conflict of values should be flagrant and of an intolerable degree so as to depart from this basic rule of international law. Karl Doehring notes that forfeiture could be assumed only in extreme cases, in which the will to respect international law has been abandoned.[113] Even with an incomplete fulfillment of the duty to make reparation and unsatisfied but justified claims of the victims, it cannot be assumed that Germany has forfeited its right to immunity because it has acknowledged its guilt and tried to give redress.

XI. The Emergence of a Legal Consequence System for Jus Cogens *Norms?*

The ICJ holds that if immunity is accorded to states before national courts, this principle cannot be restricted by human rights guarantees, whether they have the status of *jus cogens* or of *erga omnes* because such a restriction of state immunity does not constitute a recognized legal consequence of *jus cogens*. This view reflects the current state of international law, since the legal consequences of *jus cogens* are undetermined. An immunity exception is conceivable only on the basis of a legal consequence system for *jus cogens* violations, including effects on the immunity principle as a possible sanction. This points to one of the fundamental questions of the decision: How to enforce *jus cog*ens and what are the legal consequences of a *jus cogens* violation?

Apart from treaty law, which in Article 53 of the Vienna Convention provides that treaties are void as a legal consequence if they conflict with peremptory norms, other legal consequences of peremptory international law are not recognized. As to an extension of their effects within the law of state responsibility, the draft of the ILC is revealing as it fits the principle of *jus cogens* into the law of state liability. The ICJ, in its judgment, as well as the draft of the ILC on state responsibility tends to regulate the legal consequences of *jus cogens* violations in terms of treaty law. It does not, nevertheless, draw from the peremptory norms of international law any right to individual procedural enforcement.[114]

The ILC draft provides for "a concentrated, repressive approach of the international community as a consequence of violating a jus cogens norm but it does not assume any effect"[115] on the procedural principle of immunity. In Article 19(f) of Part II, the violation of a *jus cogens* norm is declared to be a matter affecting all states, although the circle of materially entitled states has been extended, no procedural consequences are drawn. The measures in Article 40(f) are directed only at bringing an end to unlawful conduct and preventing the recognition or even the maintenance of an illegally created status. Neither a

[113] Doehring, *supra* note 101, at 55.

[114] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 93 (Feb. 3).

[115] KADELBACH, *supra* note 67, at 56.

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

restriction of immunity nor even a denial of it, in the form of a reprisal, or an individual right of action as a legal consequence is created. This is due to the danger of a "do-it-yourself" sanction through granting unilateral enforcement powers.[116]

Nevertheless, collective sanctioning powers are an innovation since its configuration is kept deliberately open, and the ILC explicitly indicates that the fundamental provisions of the Draft in respect of the legal consequences will not be an obstacle to the development of further rules allowing legal consequences for *jus cogens* violations.[117] The Draft therefore only specifies the objectives of secondary norms without creating new rules and can therefore be understood as a call to formulate regulations for imposing collective measures.

In accordance with the ILC Draft, the ICJ also prefers cooperation of states to unilateral measures in the case of severe violations of peremptory norms. Although the court acknowledged that every state has an interest in the observance of the norms and the termination of any infringement of them, it does not go beyond that to recognize any enforcement powers.[118] Nor does the UN Immunity Convention make provision for any effects of *jus cogens* on state immunity. By contrast, the Naples Report of the *Institut de droit International* goes a step further by calling on states to deny immunity in cases of international crimes[119] and by developing an exception to immunity for civil actions by individuals before national courts outside of the offending state as a proposal for future legal developments.[120] In 2012, the ILA adopted a report taking into account the ICJ decision in the case of *Germany v. Italy*, which also includes the procedural aspects concerning the right of victims of armed conflicts to reparation for harm suffered.[121] This document provides general principles that in the opinion of the ILA should be considered in the establishment of arbitration or commissions and in procedures for processing

[116] Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, para. 54, U.N. Doc. A/56/10 (2001); GAOR, 56th Sess., Supp. 10 (2001). See also SAARSCHMIDT, *supra* note 2, at 32–33 for the idea of denying immunity as a countermeasure.

[117] Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, para. 2, U.N. Doc. A/56/10 (2001); GAOR, 56th Sess., Supp. 10 (2001).

[118] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, paras. 137, 157, 159, 160 (July 9).

[119] Institut de Droit International, *supra* note 53, at 227–31.

[120] *Id.* at 101 ("A State may not enjoy immunity from the civil jurisdiction of the national courts of another State for violations of the fundamental rights of the person as defined in the present Resolution wherever committed unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international convention or customary international law.").

[121] Int'l Law Ass'n, Sofia Conference 2012: Reparation for Victims of Armed Conflict (Procedural Issues) 17, *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1018.

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reparation claims of victims of armed conflicts.[122] First and foremost, war victims should be entitled to have access to an effective mechanism to receive reparation for harm suffered.[123]

Overall, one cannot conclude that the legal consequences of *jus cogens* are a closed category; in this regard, and given the current state of international law, the ICJ decision seems to be soundly based. An effect of *jus cogens* on immunity, which would lead to an exception to immunity or a forfeiture of immunity, is not (yet) identifiable. As there is no direct conflict between the procedural principle of state immunity and legal norms having the special quality of *jus cogens* as laid down in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, possible legal consequences of such conflict cannot be applied. As long as the legal consequences arising from the special character of *jus cogens* are not worked out, such selective conclusions would lead to legal uncertainty. Also, the suggestion that in the event of the violation of a *jus cogens* norm all conflicting principles and dispositive norms of international law will be displaced would be contrary not only to current legal practice, but would also be quite problematic from the standpoint of legal theory[124] and, for states, would not be acceptable because of all its negative consequences and uncertain implications.[125] A system of legal consequences for *jus cogens* violations that is consistent with the other principles of international law cannot currently be drawn up on the basis of case law or legal literature.

In the law of state liability there is, however, a discernible development that amounts to formulation for the norms of *jus cogens* of legal consequences similar to those of treaty law.[126] There is also another important development that can be seen in the formulation of collective dispute settlement procedures. These trends are not yet reflected in a legally coherent system; and there is, moreover, no basis for enhancing the procedural rights of third parties.

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[122] *Id.* at 6–7.

[123] *Id.* at 2–3, 6–8.

[124] See YANG XIAODONG, STATE IMMUNITY IN INTERNATIONAL LAW 132–198 (2012), for a theoretical legal justification that denies the voidability of dispositive law without there being explicit regulation of the legal consequences, that can be applied in the case of violating jus cogens rules.

[125] Memorial of the Federal Republic of Germany, Jurisdictional Immunities of the State (Ger. v. It.) 2009 I.C.J. 143, para. 114 (June 12).

[126] KADELBACH, *supra* note 67, at 335–339.

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

D. Objections to the Decision of the ICJ

I. Basic Assumptions of the ICJ

The ICJ concluded that the action of Italian courts in exercising jurisdiction over claims for the compensation of Italian citizens against Germany and in denying Germany state immunity constitutes a breach of current international law. Since Germany has jurisdictional immunity, it also enjoys immunity from enforcement, so that the constraint measures taken by Italian courts against Villa Vigoni constituted another breach of the state immunity of Germany and were, therefore, contrary to international law.[127] The Italian legislature drew the consequences and decided on 21 December 2012 to ratify the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004.[128]

With its decision, that follows the "classic" line of authority in the field of State immunity, the ICJ followed the case law of other national and international courts and confirmed its own jurisprudence, which followed its judgment in the case of *Belgium v. Congo*,[129] and emphasized the limits to judicial enforcement of international law initiated by individual states. Even in cases of serious international law violations, whether war crimes or crimes against humanity, immunity is maintained.

The Court stressed that the procedural character of state immunity is not subject to any balancing process that takes into account the cumulative effect of Italy's arguments. This rejection of Italy's "justice argument" led partially to the conclusion in the public perception of the ruling that courts are responsible for the law and not for justice. In fact, the ICJ left this task to diplomacy.[130]

Behind the position of the ICJ there also lay political considerations. In particular there was concern that a different finding might bring about legal difficulties in international

[127] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 119–120, 139 (Feb. 3) (holding that treatment of the measures of constraint taken against Villa Vigoni and enforcement of the decision of the Greek court in the Distomo case are no longer relevant for the evaluation of state immunity under this Article because the immunity from enforcement goes further than jurisdictional immunity). *See* SAARSCHMIDT, *supra* note 2, at 35–39, for more details about the immunity from enforcement and the significance of the case Ger. v. It.

[128] *Convention on Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION ch. 3.13 http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en (last visited Aug. 4, 2013).

[129] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

[130] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 99, 104 (Feb. 3) ("It considers however that the claims . . . which formed the basis for the Italian proceedings could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.").

cooperation and revive historical events that could potentially jeopardize interstate relations as well as endanger fundamental principles of international law. In the worst-case scenario, lead to abuse of the concept of *jus cogens*. Since international law as an interstate order is based on the recognition of the equal sovereignty of all states, and because state immunity should help to guarantee peaceful coexistence, reparations are usually agreed and implemented at the interstate level through peace treaties and global agreements. These peace treaties and global agreements form the basis for a return to a lasting peace system because of their comprehensive approach.[131] Regarding the evaluation of the judgment, some assume therefore that it guarantees continuing legal stability because it confirmed state immunity as an order factor of international law.[132]

Others regret, however, that the ICJ placed state immunity above the protection of human rights and see in the "traditional" decision a retrograde step that sets back transnational human rights protection for several years.[133] Fischer-Lescano even fears an increasing fragmentation of international law, as other courts may counter the ICJ decision from a human rights-oriented perspective and as a result weaken not only the concept of state immunity, but also the ICJ.[134] Particularly in light of the impact of this ruling on the further development of international law, many critics would have preferred a step towards a more value-influenced international law order. But the ICJ not only rejected such an approach, but also left unanswered many of the questions raised by the case of *Germany v. Italy*.

II. Lack of Appreciation of Developments in International Law by the ICJ

The decision of the ICJ undoubtedly reflects the current state of international law. The central criterion of the decision is the determination of customary international law; the ICJ relies in particular on the majority decisions of national courts and rejects dissenting opinions on the basis of their incompatibility with the practice of states. It is to be expected that current customary international law is the criterion that the ICJ will apply to determine questions about the development of exceptions to state immunity. Their view of the relationship between immunity and *jus cogens* is, however, rigid or rather formalistic and avoids the problem that the enforcement of *jus cogens* is prevented substantially because of the procedural obstacle of immunity. The ICJ rejected the idea that immunity constitutes an exception to the right to an effective legal protection and as such—even as a procedural

[131] Memorial of the Federal Republic of Germany, Jurisdictional Immunities of the State (Ger. v. It.) 2009 I.C.J. 143, para. 112 (June 12).

[132] *See* Reinhard Müller, *Rechtsfrieden*, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), Feb. 3, 2012, http://www.faz.net/aktuell/politik/staat-und-recht/entscheidung-in-den-haag-rechtsfrieden-11636702.html.

[133] *See* Andreas Fischer-Lescano, *Opfer ohne Schutz*, FRANKFURTER RUNDSCHAU, Feb. 15, 2012, http://www.fr-online.de/meinung/gastbeitrag-opfer-ohne-schutz,1472602,11642126.html.

[134] *Id.*

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

principle—can be subject to a balancing test.[135] Moreover, the ICJ does not deal adequately with the consequences of the classification of a legal rule as a peremptory norm in international law.

Also, the question of the relationship between immunity and state responsibility remains unanswered. In particular, judges Keith and Yusuf expressed in their dissenting opinions the view that the ICJ does not take into account the growing significance of these aspects. Through an overall survey, taking in different lines of argumentation, it seems that this clear separation on which the ICJ based its decision is at least questionable. The is, firstly, the third Pinochet judgment dealing with the supposed exception to immunity in the case of the criminal prosecution of former heads of state. Secondly, one has to take a closer look at the findings of the ECtHR in the cases *Al-Adsani* and *McElhinney*, which show at least a tendency to put the restriction of state immunity as a matter for consideration in the future, especially the dissenting opinions of the decisions of the ECtHR which find that there is a conflict between state immunity and the content of *jus cogens*. Finally, some voices in legal literature hold that *jus cogens* due to its peremptory nature has a procedural as well as a substantive character and assume therefore a conflict of norms.[136] Even the Naples report of the *Institut de droit International* concludes that there is a need that the two principles should be balanced against each other.[137]

Finally, the question of the duty to make reparation as well as the position of the individual and his individual subjective rights, especially the right to an individual compensation claim, remain open. Given the individual protective nature of international humanitarian law and the trend in recent decades, that grant an individual increasingly enforceable rights and strongly emphasize the responsibility of the state, the ICJ should have taken into account the concepts and norms which have been under discussion in light of these developments in order to explain their interpretation and emphasize their openness to further development.[138] Indeed, the dissenting opinions[139] have laid emphasis precisely on this transformation of international law and bring the hope that there will be ways to

[135] *Cf.* Bornkamm, *supra* note 2, at 781–82. *See Al-Adsani*, ECHR App. No. 35763/97 paras. 55–67; *Kalogeropoulou,* ECHR App. No. 59021/00; and Grosz v. France, ECHR App. No. 14717/06 (June 16, 2009), http://hudoc.echr.coe.int/, for the deviating jurisprudence of the EctHR.

[136] *See* Bartsch & Eberling, *supra* note 93, at 486–88; Orakhelashvili, *supra* note 89, at 963–70; YANG, *supra* note 125, at 131.

[137] Institut de Droit International, *supra* note 53, at 99 (showing Principle III of the Draft resolution, *de lege lata*: "A balance is to be achieved in resolving conflict arising from the application of the above principles relating to the protection of human rights and the jurisdictional immunities of States and persons acting on their behalf.").

[138] *See also* Bornkamm *supra* note 2, at 778–782, for criticisms.

[139] *See, e.g.*, Dissenting Opinion of Judge Yusuf, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 46–50, 58 (Feb. 3); Separate Opinion of Judge Keith, 2012 I.C.J. 143; Separate Opinion of Judge Koroma, 2012 I.C.J. 143, paras. 9–10; Dissenting Opinion of Judge *ad hoc* Gaja, 2012 I.C.J. 143, para. 1.

achieve a better balance with immunity in the future. But the ICJ—unlike the ECtHR before it—completely bypassed such tendencies in its remarks. Therefore, one may criticize the ICJ for not having given sufficient weight to the current developments in international law or relevant codification proposals.

As a result, there are concerns that the ICJ thereby has either set them back for many years or blocked them completely from achieving a balance between the procedural obstacle of immunity and the material requirements of *jus cogens*. For herein lies another key question, which the case raises. To push this aside with the argument that immunity is a procedural obstacle leads to a clear position, but it raises the question of whether the ruling has created final clarity or it has rather opened the door for much doubt. Judge Bennouna points in this direction in his Separate Opinion, as he wants to leave the door open in regard to achieving a balance between state immunity and state responsibility in the case of *jus cogens* violations.[140]

Against this background, it is also essential to ask about remedies available for victims of violations of international humanitarian law against the offending state when the state concerned does not fulfill its obligations under international law.

E. Approaches to a Political Solution

Unlike the human rights conventions—particularly the ICCPR, the ECHR, and the ACHR—international humanitarian law does not so far provide instruments with the purpose of giving individuals compensation for the violation of rules of international humanitarian law.[141] This lack of enforcement mechanisms and of the possibility to impose sanctions, contributes substantially to the fact that international humanitarian law is not applied comprehensively and effectively.

Therefore, there is a noticeable development in international law that tends increasingly to give the affected person the right to individual compensation for violations of international humanitarian law.[142] Since some international conventions provide for the victim's right to

[140] *See* Separate Opinion of Judge Bennouna, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 25 (Feb 3). *See also* PAUL CHRISTOPH BORNKAMM, RWANDA'S GACACA COURTS: BETWEEN RETRIBUTION AND REPARATION 120–125 (2012).

[141] European Convention on Human Rights arts. 34, 41 Sep. 3, 1954, 213 U.N.T.S. 222; American Convention on Human Rights art. 63(1), Nov. 22, 1969, 1144 U.N.T.S. 123; *see* Yasser Abdelrehim, *Das Recht des Individuums auf Wiedergutmachung*, HUMANITÄRES VÖLKERRECHT – INFORMATIONSSCRIFTEN (HUV-I) (2013, forthcoming).

[142] Yvonne Kintzel, *Das Recht der Opfer schwerer Menschenrechtsverletzungen und schwerer Verletzungen des internationalen humanitären Völkerrechts auf Wiedergutmachung*, 3 MENSCHENRECHTS MAGAZIN (MRM) 40 (2007); *see* Int'l Law Ass'n (ILA), Hague Conference 2010: Reparation for Victims of Armed Conflict (Substantive Issues) art. 6 cmt. 2 [hereinafter ILA Report 2010], *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1018, for an individual duty to make reparation.

compensation, a legal mechanism for this purpose seems to exist.[143] After the ICJ's judgment excluded—at least for the time being—the possibility of bringing individual (civil) claims before national courts by persons who are victims of violations of international humanitarian law, it will now be examined how these codification proposals could be supplemented.[144] The question that arises after the judgment of the ICJ is this: How can an individual's right to compensation be brought into balance with the principle of state immunity?[145]

Unilateral enforcement attempts do not often allow for an objective assessment and are especially dependent on political considerations. Moreover, according to the judgment of the ICJ, the immunity defense can be removed, as in the case of the ICC, but only through collective agreements in which states accept subjection to the jurisdiction of courts of other states. The subjugation of the states that have ratified the ICC Statute is based on a waiver of immunity in the face of neutral international justice, or alternatively on the non-applicability of the principle of sovereign immunity to submission to an international tribunal.[146] In international criminal law, the opportunity for individual reparations can be found in Article 75, paragraph 1 of the Rome Statute and individuals can apply to the Court for this purpose.[147]

The solution which, according to the current state of international law, is probably the most likely to succeed is creating treaty enforcement mechanisms at the universal level, which will allow for an objective assessment of the damage inflicted on the victim as a result of a breach of peremptory rules by states. This is also the conclusion of more recent analyses, such as those of Yasser Abdelrehim.[148] The establishment of an international organization or a Commission, which can be established for example by the UN Security Council or in some cases by means of peace agreements and is responsible for the quasi-judicial hearing

[143] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (considering individuals as the beneficiaries of reparations for violations and establishing comprehensive rights for victims, but exclusively covering—like the codification proposal of the ILA—material and not procedural matters).

[144] *See* Int'l Law Ass'n, Res. 2/2010, 74th Conf., Aug. 15–20, 2010, art. 6 (considering that there is only a tendency allowing for legal remedies before national courts), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1018.

[145] S*ee also* ABDELREHIM, *supra* note 141, for this issue.

[146] APPELBAUM, *supra* note 85, at 77–78; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, para. 58 (Feb. 14).

[147] Rome Statute of the International Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 90; *see also* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24(3), May 25, 1993, for a similar provision; Statute of the International Criminal Tribunal for Rwanda, art. 23(3), Nov. 8, 1994 (relating, however, to the powers of the court and not establishing individual claim for damages).

[148] ABDELREHIM, *supra* note 141; *see also* APPELBAUM, *supra* note 85, at 293.

of claims for damages during and after an armed conflict, could be a good solution for this problem.[149] The experience of the last thirty years with *ad hoc* compensation commissions shows that they are able to treat a large number of applications in a short time and in an orderly fashion.[150] Since such institutions come into existence only *ad hoc,* and since their establishment often depends on political considerations, it is imperative to set up such mechanisms on a permanent institutional basis.

Following a suggestion of Kamminga, a Permanent International Claims Commission (PICC) that would be closely linked to the Permanent Court of Arbitration in The Hague (PCA) could be established as a forum to provide services for the peaceful resolution of compensation claims.[151] In this way, a flexible assessment of each conflict on a case-by-case basis would be possible and at the same time would ensure for the benefit of the victims a fair hearing with the goal of assessing compensation. The advantage of such litigation compared to an international organization is the greater chance of acceptance of its judicial configuration and the fact that the parties remain "masters of the process" by selecting the potential judges (except the neutral presiding judge), by choosing the rules of procedure, and by regulating consensually the basis of any ruling.[152]

Kamminga states in his proposal that such a commission, similar to the ICC according to Article 13 of the Rome Statute, could be established either on the basis of a joint request of the signatory states concerned or by following a Security Council resolution.[153] Moreover, as with individual applications under Article 34 of the ECHR, any natural person, non-governmental organization, or group of individuals who claim that any of their rights according to international humanitarian law have been violated by one of the High Contracting Parties and who have exhausted the legal remedies in the offending state would have the right to submit a complaint to the PICC. In addition to individual compensation, collective redress mechanisms should also be provided to collective legal entities as well as to groups of individuals.[154]

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[149] *See, e.g.,* Dissenting Opinion of Judge Trindade, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 253 (Feb. 3); Tomuschat, *supra* note 6, at 1132.

[150] Kintzel, *supra* note 142, at 45 (showing that the UNCC received almost 2.6 million claims for compensation totaling 352 billion U.S. dollars, and 1.54 million complaints were admitted until the work of the UNCC ended in June 2005).

[151] Menno T. Kamminga, *Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law*, 25 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 23 (2007), http://arno.unimaas.nl/show.cgi?fid=3610.

[152] *See* VERENA JÜTTE, DIE UNITED NATIONS COMPENSATION COMMISSION 58 (1999) (arguing that in the case of the UNCC, Iraq was not involved in the proceedings and was unable to comment on the lawsuits).

[153] Kamminga, *supra* note 151, at 5.

[154] *See* Friedrich Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92.879 Int'l Rev. of the Red Cross (Sep. 2010) for the need of collective redress, its definition, and possible configuration. *See* ILA Report 2010,

As with the ICC,[155] Member States of the PICC could determine the budget and provide the necessary resources. The United Nations might also contribute additional financial resources, especially for cases referred to the PICC by the Security Council.[156] However, a potential problem could be the financing of proceedings, particularly the payment of reparations in cases where the ICC has instituted the proceeding and the state held liable to pay compensation is not willing to cooperate, or if a state is not in a position to make reparations.

The contractual principles of such a Claims Commission should allow the individual an effective and speedy redress. The ILA's proposal should provide in express terms that there will be no immunity for defendant states, as in the case of Article 27 of the Rome Statute. Such an implementation of the proposals submitted by the ILA for the modernization and harmonization of the Geneva Conventions and their Additional Protocols as well as the Convention Respecting the Laws and Customs of War on Land—coordinated with recent developments in international humanitarian law—would not run contrary to the recent decision of the ICJ because the question of whether the individual enjoys a right to compensation according to international law would be resolved in favor of a pragmatic, more attractive and less tedious solution for the victims. The result would be an interpretation of Article 3 of The Hague Convention and Article 91 of the First Additional Protocol to the Geneva Conventions that would enable them to establish rights not only for states but also for individuals. The position of the individual as a subject of international law would be strengthened thereby.

The question that arises, however, is whether such solution is consistent with Article 12 of the UN Immunity Convention. According to the opinion of the ICJ, Article 12 of the UN Immunity Convention covers not only *acta jure gestionis,* but also *acta jure imperii*. Even on the basis of customary international law, the ICJ excluded an exception to immunity in respect of acts of armed forces.[157] In this regard, the ICJ could refer to relevant declarations of Sweden and Norway. However, the declarations of only two States does not mean

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supra note 142 (allowing for collective reparations); G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (taking collectives as potential victims into account).

[155] *See* Rome Statute of the International Criminal Court, arts. 113–118, July 17, 1998, 2187 U.N.T.S. 90, for financing the ICC; *see also* Maarten Halff & David Tolbert, *Funds of the Court and of the Assembly of States Parties: Article 115*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1221, 1221–28 (Otto Triffterer ed., 2008).

[156] *See* Halff & Tolbert, *supra* note 155, para. 18 (demonstrating that the UN can contribute the funding as in the case of the ICC; on the one hand, the UN may initiate investigations through the mechanism provided in Article 13(b) of the ICC Statute and consequently costs will arise, on the other hand, the UN will work for the benefit of the entire community).

[157] Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, paras. 72–78 (Feb. 3).

https://doi.org/10.1017/S2071832200002510 Published online by Cambridge University Press

necessarily that all other states accept their interpretation of Article 12 of the Convention.[158] Moreover, both States have declared that this interpretation of the Convention is without prejudice to any future international development in the protection of human rights.[159]

A different position regarding the scope of Article 12 of the UN Immunity Convention has been expressed by Switzerland. According to its legal opinion, Article 12 does not apply to the question of pecuniary compensation for serious human rights violations that are alleged to be attributable to a state and are committed outside the state of the forum.[160] From these different positions it can be concluded that the UN Immunity Convention does not prejudice developments in international law in this regard. It can also be maintained that the Convention is not applicable at all to proceedings before an international court or tribunal, since the doctrine *par in parem non habet imperium* relates only to the impleading of a foreign sovereign in proceedings before a domestic court of another sovereign state.

Conditions for making reparations would thus be the performance of a sovereign act (*actum jure imperii*) attributable to a state that caused injury and was itself a violation of international humanitarian law.[161] The ILA's draft provides not only for a compensation for any breach of international humanitarian law, but also calls for pragmatic solutions in dealing with war damages consistent with the rules of international humanitarian law.[162]

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[158] Dissenting Opinion of Judge *ad hoc* Gaja, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, para. 6 (Feb. 3).

[159] See *Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 129, for the Declarations of Sweden and Norway on the UN Convention.

[160] But see *Die Bundesversammlung der Schweizerischen Eidgenossenschaft, in* BUNDESBESCHLUSS ÜBER DIE GENEHMIGUNG UND DIE UMSETZUNG DES UNO-ÜBEREINKOMMENS ÜBER DIE IMMUNITÄT DER STAATEN UND IHRES VERMÖGENS VON DER GERICHTSBARKEIT art. 1(3) (Dec. 11, 2009), http://www.droit-bilingue.ch/ff/lecteur.php?page1=8805&source=d&cible=f&an=2009&page2=8026, for the decision of Switzerland concerning the approval and the implementation of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

[161] *See* MICHAEL TRAßL, DIE WIEDERGUTMACHUNG VON MENSCHENRECHTSVERLETZUNGEN IM VÖLKERRECHT 73–74 (1994) (arguing the duty to make reparation requires in international law the existence of a causal link between a breach of an international obligation and the injury).

[162] *See* ILA Report 2010, art. 4 cmt. 3; *but see* Protocol Additional to the Geneva Conventions of Aug. 12 1949 (Protocol I), June 8, 1977, art. 91; Hague Peace Conference, Oct. 17, 1907, art. 3 (demonstrating classic international humanitarian law leaves the normal acts of war taking place within the Convention limits without sanctions and penalizes only the violation of the Convention rules through imposing the duty to make reparation). *See also* G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) para. 15 (making the performance of compensation conditional on the gravity of the violation).

Furthermore, the question of the degree of the obligation for the plaintiff to produce proof needs clarification. Modeled after the Eritrea-Ethiopia Claims Commission, the burden of proving the absence of a causal link between the conduct in question and the damage suffered would be transferred to the state against which the claim is raised if the claimant has given clear and persuasive evidence of the violation of international humanitarian law.[163]

The Claims Commission should act specifically towards conflicts where global agreements were not reached, the recipient state was unwilling or unable to distribute the funds appropriately, or if victim groups were excluded without apparent reason from reparation.[164]

In order not to rely solely on the good will of the signatory countries which accept the decisions of the Commission, it should be possible to draw up mechanisms for execution of decisions, particularly the compulsory execution against state property—at least where this was not in use for sovereign purposes. It is likely, however, that such items would not be accessible for compulsory execution either for the Claims Commission or for the Permanent Court of Arbitration. Therefore, it has been argued that even the national courts of the home state could come into question as a last resort for victims of violations of international humanitarian law when a state refuses to recognize its responsibility for serious violations of international humanitarian law (*jus cogens*).[165] Although the conformity of such an exceptional jurisdiction to be given to the courts of the forum state with the ICJ decision is questionable.

This proposal, which amounts to the establishment of a permanent international claims commission, shows how to assert the rights of victims of violations of international humanitarian law consistently with the decision of the ICJ of 3 February 2013. Such a solution not only responds to some of the questions left open by the Judgment, but also reflects the requirements of justice. Yet, the proposal hinges on the question of the resources available to the offending states; states that have recently gone through armed conflicts are not normally in a financial position to pay compensation to entitled victims of the conflict. Thus, the will and generosity of the international community is needed to

[163] *But see* Eritrea-Ethiopia Claims Comm'n, Decision No. 4: Evidence, Aug. 2001, para. 3, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1151. *See* Markus Benzing, *The Law of Evidence Before International Courts and Arbitral Tribunals in Inter-State Disputes*, 215 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 739, 753 (2010), for the procedural means of a reduction or a reversal of the burden of proof in international law.

[164] *See* ILA Report 2010, *supra* note 143 (not offering suggestions on how to deal with cases in which the offending state has already paid reparations under a global agreement and obtained a discharge for any future claims).

[165] *See* ABDELREHIM, *supra* note 141.

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create a fund for the compensation of damages in such situations. It is hoped that efforts, aimed at strengthening and enforcing the rights of victims, will increase in the light of the ICJ judgment and will trigger further codification efforts. Looking at the developments of international law since the Second World War, especially in view of the position of the individual, the chances in this regard are greater than the ICJ decision might suggest at first glance.

Such efforts could be guided by the words of the British Judge Lord Denning, who cited in his judgment declaring the existence in English law of an exception to state immunity in the case of *acta jure gestionis*: "Whenever a change is made, someone sometimes has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood."[166]

[166] *Trendtex Trading Corp. v. Central Bank of Nigeria* (1977) 1 Q.B. 529, 556; Dissenting Opinion of Judge Yusuf, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 143, 46 (Feb. 3).

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