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Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (2012)

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I. INTRODUCTION

THE 2012 JUDGMENT of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* is not groundbreaking in substance and not yet advanced in age, yet there are good reasons to consider it a 'landmark'. In testing the old international legal rule of state immunity before foreign courts against contemporary calls for reform, the Court affirmed that the rule still stands as an important tenet of international law, applying also in respect of acts which constitute grave international crimes. As the judgment illuminates not only the international law of state immunity, but also the ICJ's judicial approach and methodology more broadly, its impact is bound to reach well beyond the specific contours of the case. The present commentary seeks to explain this, detailing the origins of the dispute brought before the Court as well as the legal proceedings that ensued and their outcome.

II. THE LEAD-UP TO THE ICJ CASE

The wounds of the past were still festering in southern Greece in 1995, when relatives of the victims of a massacre committed during the Second World War by Nazi armed forces in the Greek village of Distomo brought a claim of indemnity against the German state before the local court of Leivadia. More than 215 civilians were murdered by the Waffen-SS in just a few hours of 10 June 1944, a reprisal for the actions of Greek resistance fighters that was deeply engrained in Greek national consciousness. Germany did not take part in the Greek proceedings, having notified the Greek Ministry of Foreign Affairs that the suit infringed upon its sovereign right under international law to jurisdictional immunity before foreign courts. But the Greek court held in 1997 that a state loses its right to invoke sovereign immunity where its acts amount to a breach of peremptory norms of international

law (*jus cogens*), and ordered Germany to pay the successors in title of the victims approximately €28 million in damages.[1] Germany's appeal against that judgment was dismissed in May 2000 by the Hellenic Supreme Court (*Areios Pagos*), which held that organs of the Third Reich had abused sovereign power by committing 'hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action'.[2] Being in violation of *jus cogens*, such crimes could not be considered as sovereign acts to which the privilege of immunity ought to be accorded.[3]

It was not long before Italian courts followed suit, embracing such an exception to state immunity in civil claims for damages brought against Germany by Italian nationals who had also suffered at the hand of the Nazis. Among such claimants was Mr Luigi Ferrini, a native of Tuscany who was deported to Germany in August 1944 to work as a forced labourer in the armaments industry following Italy's surrender to the Allies and declaration of war on Germany. Ferrini filed a lawsuit against Germany in 1998 in the Court of First Instance of Arezzo, which dismissed his claims on grounds of Germany's jurisdictional immunity under customary international law. The Court of Appeal in Florence agreed, but the decision was reversed in March 2004 by the Italian Court of Cassation (*Corte Suprema di Cassazione*), which held that immunity could be overridden when the act complained of amounted to an international crime.[4] Even if no definite and explicit customary rule to that effect was yet in existence, the Court reasoned, since international human rights 'are at the top of the international legal order' and prevail over other rules of international law, they must have priority over any rule of sovereign immunity, which should not allow a state to escape its responsibility for gross violations of fundamental human rights.[5] Two Orders issued by the Court of Cassation in May 2008, in other cases involving Italian civilians or members of the Italian armed forces who were denied prisoner-of-war status and were deported to Germany for use as forced labour, confirmed that Italian courts had jurisdiction over such claims brought against

[1] *Prefecture of Voiotia v Federal Republic of Germany*, Case No 137/1997, Court of First Instance of Leivadia, 30 October 1997 (ordering Germany to pay 9,448,105,000 in Drachmas). See also the case note by I Bantekas (1998) 92 *AJIL* 765. A similar ruling was delivered by the Court of First Instance in Tripoli (Greece) in Case No 59/1998; on the other hand, Germany's immunity was recognised by the Court of First Instance of Larissa in entertaining comparable claims (Case No 93/1998, NOMIKO BHMA 1098 (1998)).

[2] *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000 (4 May 2000), 129 ILR 513.

[3] ibid, 519–21; see also the case note by M Gavouneli and I Bantekas, (2001) 95 *AJIL* 198–204. A forceful dissenting opinion by five judges argued that no such customary restriction of sovereign immunity was (at least as of yet) in existence.

[4] *Ferrini v Federal Republic of Germany*, Decision No 5044/2004 (2004), (2004) 87 *Rivista di diritto internazionale* 539, 128 ILR 658. See also M Iovane, 'The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights', (2004) 14 *Italian Yearbook of International Law* 165–93; and the case note by A Bianchi, (2005) 99 *AJIL* 242–48. The Court referred Ferrini's case back to the Court of First Instance of Arezzo, which dismissed it again as time-barred; this judgment was reversed by the Court of Appeal of Florence, which in 2011 ordered Germany to pay Mr Ferrini damages and legal costs.

[5] ibid, [9]. The Court did not explicitly employ the term '*jus cogens*', but did refer to 'norms from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms … [being of] the highest status'.

Germany.[6] The *Ferrini* reasoning was again reaffirmed when the Court of Cassation rejected Germany's argument of lack of jurisdiction in an appeal against an order by the Military Court of La Spezia (upheld by the Military Court of Appeals in Rome) that Germany pay compensation for the massacres of Italian civilians committed by occupying or retreating German armed forces in Civitella (Val di Chiana), Cornia, and San Pancrazio.[7]

The decisions of the Italian courts paved the way for dozens of additional claims by Italian citizens against Germany, including through class actions. They did not go unnoticed by the Greek claimants in the *Distomo* case, who now turned to the Italian judiciary after their attempts to execute the 1997 judgment of the Leivadia court were rejected by the Greek Minister of Justice (whose consent to carry out a judgment against a foreign state in Greece is required under Greek law) as well as by the European Court of Human Rights and German Federal Supreme Court (*Bundesgerichtshof*), each of which considered that Germany's entitlement to state immunity in that case had been breached.[8] In decisions rendered in 2005 and 2006 the Florence Court of Appeal declared the *Distomo* judgment of the Leivadia court enforceable in Italy, leading the Greek claimants to inscribe in 2007 a mortgage on Villa Vigoni, a property of the German state located near Lake Como and dedicated to fostering cooperation between Germany and Italy in the fields of scientific research, higher education and culture. Germany's appeals against the decisions of the Florence Court of Appeal were again rejected by the Court of Cassation, which in May 2008 extended its *Ferrini* reasoning to immunity from enforcement measures.[9]

The German Government was not alone in its surprise and dismay in the face of these Italian judgments. Italy's Government, too, seems to have been taken aback by the willingness of its courts openly to disregard a basic rule of international law. The Italian Executive agreed with Germany that it was entitled to state immunity under international law, no doubt aware that, given its past, Italy too could be exposed to massive claims if the view of its courts on state immunity were to prevail. But all efforts by senior state attorneys to persuade the judicial branch to give effect to Italy's obligation to accord immunity to Germany under customary international law (applicable directly within the Italian legal order by virtue of the Italian Constitution)[10] were in vain. Extensive negotiations between the two Governments

[6] Orders of 29 May 2008 issued in the *Giovanni Mantelli and Others* case (Order No 14201, *Foro italiano*, Vol 134 (2009) I, 1568) and the *Liberato Maietta* case (Order No 14209, (2008) 91 *Rivista di diritto internazionale* 896), rejecting Germany's interlocutory appeal requesting a declaration of lack of jurisdiction.

[7] The *Max Josef Milde* case: see (2009) 92 *Rivista di diritto internazionale* 618.

[8] See *Kalogerpoulou and others v Greece and Germany*, Application No 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, 417; *Greek Citizens v Federal Republic of Germany*, Case No III ZR 245/98, Judgment of 26 June 2003, (2003) 42 ILM 1030.

[9] Order No 14199 of 29 May 2008; Judgment No 11163 of 20 May 2011.

[10] The *Procura Generale della Repubblica presso la Corte di Cassazione* made a submission to the Court of Cassation on 22 November 2007, advising that 'it is not at all easy to contend that in the international legal order conventional or customary rules have emerged pursuant to which the jurisdictional immunity yields if the civil responsibility of the state for the commission of international crimes is invoked', and concluding that the Court should determine that the Italian courts lacked jurisdiction in the case under consideration. The *Avvocatura Generale dello Stato* made an additional submission to the Court of Cassation, arguing that the Court's stance did not seem to be in line with the current position under international law.

in order to reach a diplomatic solution, with Germany urging the Italian authorities 'to see to it that the erroneous course followed by the Italian judiciary be halted',[11] proved futile as well. As more and more cases were building up against Germany, recourse to the ICJ must have seemed like the only option left.

III. THE ICJ PROCEEDINGS

It was presumably with great reluctance that Germany decided to institute proceedings in The Hague in late December 2008. Only when the damage that would be done by hundreds of further cases against it was deemed greater than the damage to its image caused by asserting state immunity in respect of Nazi atrocities, did Germany turn to the ICJ as 'the only remedy available to [it] in its quest to put a halt to the unlawful practice of the Italian courts, which infringes its sovereign rights'.[12] Although in form a unilateral application to the Court, it seems that the two Governments had both agreed to present their differences to the Court. Some five weeks before the lodging of Germany's Application, Italy stated in a Joint Declaration of the two Foreign Ministers that it

> respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of State immunity. Italy, like Germany, is a State party to the European Convention of 1957 for the Peaceful Settlement of Disputes and considers international law to be a guiding principle of its actions. Italy is thus of the view that the ICJ's ruling on State immunity will help to clarify this complex issue.[13]

Echoing the political sensitivity, Germany acknowledged expressly before the Court that its responsibility for the grave violations of international humanitarian law committed by the Third Reich was undisputed.[14] Its only objective was 'to obtain a finding from the Court that to declare claims based on those occurrences as falling within the domestic jurisdiction of Italian courts, constitutes a breach of international law'.[15] Jurisdictional immunity, it said, 'belongs to the core elements of the

[11] Application instituting proceedings, filed with the Registry on 23 December 2008 (hereafter: 'Application'), 4.

[12] ibid. Germany brought the case under the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, to which Italy was also a party and according to which (in Article 1) disputes among the states parties regarding questions of international law would be submitted to the ICJ.

[13] ibid, 20: Joint Declaration, Adopted on the Occasion of German-Italian Governmental Consultations, Trieste, 18 November 2008. In April 2010 the Italian Government, followed by the Italian Parliament in June of the same year, adopted legislative measures suspending until the end of 2011 the execution of all Italian judgments ruling against Germany pending the decision of the Court.

[14] Germany further clarified that it was not acting 'in the exercise of its right of diplomatic protection in favour of German nationals' but rather on its own behalf, since its own 'sovereign rights have been—and continue to be—directly infringed by the jurisprudence of the highest Italian courts that denies Germany its right of sovereign immunity' (Application (n 11) 12). It told the Court that 'We cannot undo history. If victims or descendants of victims feel that these mechanisms [for compensation and reparation, put in place after WWII] were not sufficient, we do regret this. However, the mechanisms for compensation and reparation are not the subject of the present dispute': CR 2011/17, 12 September 2011, 18–19, [12] (Wasum-Rainer).

[15] Application (n 11) 10.

relationship between sovereign States'; dismissing it as Italian judges had done was not only unlawful, but would 'have far-reaching repercussions in vast areas of international law'.[16]

More specifically, Germany argued that, under firmly established rules of customary international law, a state is immune from civil proceedings before the courts of another state in respect of the exercise of sovereign powers (acts *jure imperii*, as opposed to acts *jure gestionis* of a private-law nature). It sought to demonstrate that state practice leaves no room for doubt on the matter, highlighting that even the decision of the Greek Supreme Court (*Areios Pagos*), which set in motion the series of proceedings against it in Italian courts, had soon thereafter 'lost its underpinnings' when Greece's Special Supreme Court (*Anotato Eidiko Dikastirio*), charged by the Greek Constitution to settle controversies regarding the content of generally recognised rules of international law, held in 2002 that Germany was indeed entitled to immunity.[17] Employing the concept of *jus cogens* in deciding the procedural question of immunity was wrong, as 'the substantive primary rules and the applicable secondary rules must be carefully distinguished': the basis for state immunity was not to be found in the character of the legal norm which was allegedly violated, but in the character of the act as an act of state that cannot, as such, be subject to the jurisdiction of another state. Germany also claimed that the mortgage registered on Villa Vigoni violated the immunity from enforcement to which it was entitled under customary international law, and noted that the Italian Government had itself opposed the inscription of this judicial measure of constraint. While there could be no doubt as to the good intentions of the Italian Court of Cassation, said Germany, 'judges are not legitimated to place themselves at the forefront of processes of change' of the law.[18]

Germany further argued that the Italian rulings jeopardised the entire reparation system put in place after the Second World War, which was effected by a classic inter-state model under which it had already paid millions of dollars.[19] It recalled that Italy had agreed under the 1947 Peace Agreement with the victorious Allied Powers to renounce 'on its own behalf and on behalf of Italian nationals' all claims against Germany and German nationals, and that despite this express waiver the

[16] Memorial of the Federal Republic of Germany, 12 June 2009, 69.

[17] ibid, 41; see *Margellos v Federal Republic of Germany*, Special Supreme Court 6/2002, 129 ILR 526.

[18] Memorial (n 16), 55, 38. In the UK House of Lords, Lord Hoffmann had referred to a suggestion that the Italian court in *Ferrini* had 'given priority to the values embodied in the prohibition of torture over the values and policies of the rules of State immunity', and continued: 'if the case had been concerned with domestic law, [this] might have been regarded by some as "activist" but would have been well within the judicial function … But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states': *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, [63].

[19] See also R Hofmann, 'Compensation for Personal Damages Suffered during World War II' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford, OUP, 2013), <opil.ouplaw.com/home/EPIL>.

German Government was prepared in the 1960s, as a voluntary complement to this scheme, to provide reparation to Italian victims of Nazi persecution. Germany also insisted that persons injured were in any event able to bring their claims before German courts, and that such claims would be examined on the merits.[20] If the Italian courts were allowed to have their way, the consequences would be severe: all past and future inter-state peace settlements concluded after an armed conflict would be endangered, and new disputes and legal disorder would soon follow.

Italy, as respondent, found itself arguing in support of the position taken by its courts, even though it had acknowledged that that position was not in accordance with existing international law.[21] It claimed, in its defence, that its courts were 'faced with a clear dilemma: to condone a blatant denial of justice or to render justice to victims of heinous crimes'.[22] The real subject matter of the case, Italy added, was 'not just immunity … but also, and above all, the ongoing non-compliance by Germany with its obligations of reparation for the egregious violations of International Humanitarian Law … committed in the final years of the Second World War against Italian victims by the Third Reich'.[23] The origin of the dispute thus lay not in the recent series of Italian judicial decisions, but rather in the 'sad story of protracted denial of justice' by Germany.[24] Refusing to accord immunity to Germany in such circumstances was justified in law, Italy asserted, as 'immunity cannot mean impunity'.[25]

While conceding that every state is generally obliged to recognise the immunity of foreign states with respect to acts *jure imperii*, Italy argued that even for such acts, immunity cannot be regarded as absolute. Just as state practice (and consequently, customary international law) had progressively restricted the scope of the once absolute state immunity by differentiating between *acta jure imperii* and *acta jure gestionis*, it was now time to recognise a further exception concerning torts committed by one state on the territory of the forum state.[26] Even if such an exception was not yet a rule of customary international law, its existence ought clearly to be inferred from the contemporary position of international law, in particular the recognition of the existence of international rules having a *jus cogens* character; the formation of a body of rules criminalizing the conduct of individuals responsible for specified

[20] Germany also expressed willingness to continue making 'symbolic gestures' to commemorate the Italian victims (Application (n 11) 16).

[21] According to Bothe, 'When Germany brought the case against Italy before the ICJ, the Italian government was in a somewhat awkward position: it had to defend the position of its courts despite that it had and probably still espoused a different view and had said so before its own courts … [nevertheless] the academic agents did a very good job in defending the positions of the Italian courts': M Bothe, 'Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of the State', in A Peters, E Lagrange, S Oeter and C Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Leiden, Brill Nijhoff, 2015) 99, 101.

[22] Counter-Memorial of Italy, 22 December 2009, 6.

[23] ibid, 13.

[24] Written response of Italy to the questions put by Judge Simma, Judge Cançado Trindade and Judge ad hoc Gaja at the end of the public sitting held on 16 September 2011 (23 September 2011).

[25] Counter-Memorial of Italy (n 22) 80.

[26] Italy remarked, in this context, that 'domestic courts have always had a major role in contributing to the evolution of the law of State immunity': ibid, 42.

international crimes; and the increasing acceptance of the existence of a right of access to courts by individuals. Germany was not entitled to immunity because the acts attributed to it involved the most grave violations of rules of international law of an intransgressible character, for which no alternative means of redress were available.

Italy argued, moreover, that it had never absolved Germany from liability for the egregious breaches of international humanitarian law committed against its nationals during the Second World War, and that it could not have done so in any case given that such liability rests on non-derogable principles of international law. The 1961 German–Italian agreements on reparation were a confirmation that Germany recognised it was under an obligation to offer compensation to Italian victims; yet a very large number of these remained uncovered and had never received appropriate reparation. Italy stressed that German judges had consistently held, on the merits of cases brought before them by such victims, that state responsibility did not apply to military conduct in armed conflict, and that responsibility for violations of international humanitarian law in any event did not give rise to individual reparation claims. A particular source of aggravation was the fact that the Italian soldiers interned by Germany during the War were not included in any existing reparation schemes, including the 'Remembrance, Responsibility and Future' Foundation set up by the German Government in 2000.[27] Italian victims were thus left with no choice but to come before the Italian courts; all other avenues had been exhausted to no avail.

Italy also submitted a counter-claim to the Court, arguing that Germany had violated an obligation under international law to make reparations to Italian nationals as victims of war crimes and crimes against humanity committed by the Third Reich. It asked that Germany be ordered to cease such wrongful conduct and offer appropriate and effective compensation to the victims. In its Order of 6 July 2010, however, the Court found the counter-claim inadmissible *ratione temporis*.[28]

The written pleadings were already concluded when, in January 2011, Greece applied for permission to intervene as a non-party, seeking to inform the Court of its legal rights and interests so that these would remain 'unfettered and unaffected'.[29]

[27] The German federal law of 2000 that established the Foundation generally excluded from the right to compensation those who had the status of prisoner of war (since, as the commentary to the draft legislation explained, it was thought that prisoners of war 'may, according to the rules of international law, be put to work by the detaining power'). German courts held that even if Italian internees were denied the status of prisoners of war by the German Reich, that could not effectively change their status as such and thus they were ineligible to receive any benefits under that law.

[28] See *Jurisdictional Immunities of the State (Germany v Italy), Counter-Claim, Order of 6 July 2010*, [2010] ICJ Rep 310. Judge ad hoc Gaja, appointed by Italy, voted with the majority to reject Italy's counter-claim, remarking only, in a brief Declaration appended to the Order (398), that in applying its Rules to decide whether Italy's counter-claim was admissible, 'an oral hearing would probably have helped the Court' to identify more precisely the relevant facts (as opposed to deciding the issue on the basis of the parties' written observations alone).

[29] Application for permission to intervene by the Government of the Hellenic Republic, filed in the Registry of the Court on 13 January 2011, 6. Greece made clear that 'its intention is to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic—Greek) tribunals and courts on occurrences during World War II and enforced (*exequatur*) by the Italian courts'.

Faced with Germany's longstanding rejection of the possibility of holding bilateral discussions on war reparations, Greece's interest in intervention may have been to have the ICJ officially recognise that the settlement of reparation claims should be the subject of further negotiations. Broader political considerations may have also motivated the Greek move, which was announced by Prime Minister Papandreou at a time of severe financial crisis and growing public outrage at Germany's unwavering stance towards Greece in the then-ongoing negotiations within the European Union on economic recovery measures. The ICJ's decision in July 2011 to permit Greece to intervene as a non-party 'in so far as this intervention is limited to the decisions of Greek courts'[30] was presented in Greece as a great victory, allowing the country's voice finally to be heard.[31]

IV. THE ICJ JUDGMENT

The ICJ handed down its judgment on 3 February 2012, finding for Germany on virtually all counts. The Court held (by 12 votes to three) that Italy had violated its obligation to respect the immunity which Germany enjoyed under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945. It further held (by 14 votes to one) that Italy had violated its obligation to respect the immunity from enforcement which Germany enjoyed under international law by taking measures of constraint against Villa Vigoni; and (also by 14 votes to one) that Italy had violated its obligation to respect the immunity which Germany enjoyed under international law by declaring enforceable in Italy decisions of the Greek courts based on violations of international humanitarian law committed in Greece by the German Reich.[32]

After setting out the historical and factual background, delimiting the subject matter of the dispute and confirming its jurisdiction, the Court turned to examine, first, whether the Italian courts acted in breach of international law by exercising jurisdiction over Germany in the proceedings brought by the Italian claimants. It began by deploring the acts of the German armed forces and other organs of the German Reich

[30] *Jurisdictional Immunities of the State (Germany v Italy), Application for Permission to Intervene, Order of 4 July 2011*, [2011] ICJ Rep 494. Judge ad hoc Gaja voted against the Greek Application, stating that the fact the Italy had held the Greek judgments to be enforceable in Italy did not amount to the required 'interest of a legal nature which may be affected by the decision in the case' (531–32). In his separate opinion, Judge Cançado Trindade hailed the Order as being 'of historical importance' and as showing 'that intervention in contemporary international litigation is alive and well: it has at last seen the light of the day. What we behold today, here at the Peace Palace, is a true *resurrectio* of intervention in present-day international litigation; its *resurgere* from its long sleep may come to satisfy the needs not only of the States concerned, but of the individuals concerned as well, and ultimately of the international community as a whole, in the conceptual universe of the new *jus gentium* of our times' (505, 530).

[31] Germany did not formally object to the Greek Application being granted (although it did argue that the Application did not meet the criteria set out in the Court's Statute for purposes of intervening); nor did Italy object. After receiving permission to intervene, Greece submitted a written statement (to which Germany and Italy responded in writing) and appeared at the oral hearing.

[32] *Jurisdictional Immunities of the State, (Germany v Italy: Greece intervening), Judgment* [2012] ICJ Rep 99, 154–55, [139].

against Italian men and women in 1943–45, asserting that 'there can be no doubt that this conduct was a serious violation of the international law of armed conflict' applicable at that time.[33] The Court then clarified that the sole question before it was 'whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity'.[34]

Observing that any entitlement to immunity as between Germany and Italy could (in the absence of an applicable treaty) be derived only from customary international law, the Court then sought to determine, in accordance with Article 38(1)(b) of its Statute, whether a general rule of 'international custom, as evidence of a general practice accepted as law' conferring immunity on states exists, and if so, what its precise contours were. In the analysis that followed the Court noted, based on the actual practice of states, that 'whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity'.[35] It added that 'the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which … is one of the fundamental principles of the international legal order'.[36] But another fundamental principle, the Court observed, was also at play: 'This principle [of sovereign equality] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it'.[37]

Before moving on to define the scope and extent of the rule of State immunity, the Court recalled that the law of immunity is essentially procedural in nature, and is 'thus entirely distinct from the substantive law which determines whether [a particular] conduct is lawful or unlawful'. It noted, moreover, that the case before it concerned *acta jure imperii*, for which both parties agreed that states are generally entitled to immunity. The question, then, was whether an exception existed as regards acts committed on the territory of the forum state by organs of a state in the course of an armed conflict,[38] and to this the Court replied in the negative. Surveying extensive state practice, it rejected Italy's argument that customary international law had evolved to a point where such an exception to sovereign immunity exists. '[C]ustomary international law', the Court held, 'continues to require that

[33] ibid, 121, [52]. As the Court made clear, the unlawfulness of such conduct was not contested by Germany.
[34] ibid, 122, [53].
[35] ibid, 123, [56].
[36] ibid, 123, [57].
[37] ibid, 123–24, [57].
[38] The Court did not find it necessary to address the wider question of whether a territorial tort exception exists as a general rule, preferring to focus on the context of the claims before it (ibid, 127–28, [65]).

a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of the State in the course of conducting an armed conflict'.[39]

The Court next addressed, in turn, each of the three strands of Italy's second argument, according to which the denial of immunity was justified on account of the particular nature of the German acts and the circumstances in which the claims before the Italian courts were made. None were found, of themselves, to justify the action of the Italian courts. Customary international law, as demonstrated by a substantial number of instances of state practice and other evidence, was not found to treat a state's entitlement to immunity as dependent upon the gravity of the violations of international humanitarian law.[40] Even if the rules violated by Germany were *jus cogens*, the Court continued, the rules of state immunity were procedural in nature and could thus neither bear upon nor conflict with the substantive nature of the conduct at issue. The Court referred in this context to domestic court decisions that rejected the argument that *jus cogens* may have the effect of displacing the law of state immunity (and noted that no national legislation has accepted it), once again isolating the practice of the Italian courts as the single (and misbegotten) outlier. Finally, the Court could not find in customary international law that the entitlement of a state to immunity is dependent upon the existence of effective alternative means of securing redress, rejecting the 'last resort' strand of Italy's argument. Even if viewed together, the Court added, the three strands of Italy's argument could not justify the denial of immunity: state practice was not found to lend support to such an approach, and the recognition of state immunity was in any event to be determined as a procedural matter at the outset of legal proceedings, and not on the basis of a balancing exercise of the various specific circumstances at hand.[41]

Making clear, again, that its ruling on immunity 'can have no effect on whatever responsibility Germany may have' for the atrocities committed,[42] the Court thus found that the action of Italian courts constituted a breach of the international obligation owed by Italy to Germany. Stressing that it was not unaware that the state of the law may preclude judicial redress for the Italian nationals concerned, it noted that it was a matter of surprise and regret that Germany decided to deny compensation to the Italian military internees, and that compensating them and others whose claims

[39] ibid, 135, [78].

[40] ibid, 135–44, [80]–[104]. The Court also noted that 'the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim' (136, [82]).

[41] ibid, 144–45, [105]–[106].

[42] ibid, 145, [107].

have not been settled 'could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue'.[43]

Turning next to the mortgage registered in Italy against Villa Vigoni,[44] the Court observed, first, that immunity from enforcement and immunity from jurisdiction are governed by different sets of rules that ought to be applied separately.[45] The legality under international law of the measure of constraint could thus be assessed without considering the legality under international law of the Greek court decisions themselves or the Italian decisions declaring them enforceable. The Court then confirmed that, in accordance with well-established state practice, customary international law did not permit imposing any measure of constraint against property belonging to a foreign state without its consent if the asset was used in pursuit of governmental non-commercial purposes. Since Villa Vigoni was used for purposes falling within Germany's sovereign functions, the registration of a legal charge on it was in violation of the immunity owed to Germany.

Finally, the Court addressed the decisions by Italian courts that declared enforceable in Italy the decisions of Greek courts upholding civil claims against Germany. In such cases where a court is seised of an application for the execution of a foreign judgment rendered against a third state, the Court explained, that court must ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent state. It followed that since the Italian courts would have been obliged, under customary international law, to grant immunity to Germany if they had been seised of the merits of a case identical to that which was the subject of the decisions of the Greek courts, they could not grant *exequatur* without violating Germany's jurisdictional immunity.[46]

Italy having lost on all these counts, the Court found that it 'must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect'.[47] On the other hand, the Court declined Germany's request that it order Italy to take any and all steps to ensure that in the future Italian courts do not entertain similar legal actions against Germany. The Court explained that 'as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat the act or conduct in the future,

[43] ibid, 144, [104] and 143, [99].

[44] Although Italy suspended this measure of constraint after the ICJ proceedings had begun, did not seek to justify it before the Court, and indicated its lack of objection to any decision ordering it to ensure that it is cancelled, the Court considered that a dispute on the matter did formally still exist and thus proceeded to rule on it.

[45] The Court clarified that 'Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question' (*Jurisdictional Immunities of the State, Judgment,* (n 32) 146, [113]).

[46] ibid, 149–52, [121]–[133].

[47] ibid, 155, [139].

since its good faith must be presumed'; there was 'no reason to believe' that special conditions existed which would have justified such an order either.[48] Hardly anyone, including Mr. Ferrini, who passed away only weeks after the judgment, could have anticipated what would then happen.

V. DEVELOPMENTS AFTER THE ICJ JUDGMENT

Germany was careful not to trumpet a great victory following the ICJ judgment. Its Foreign Minister, Guido Westerwelle, remarked that the clarification of the state of the law by the Court 'was not only in the interest of Germany but also in the interest of the international community. It is good and it serves all to have legal certainty now'.[49] No doubt there was relief in Germany that the ruling, which was widely considered to be legally sound, would stem the flow of cases against it. At the same time, some in Germany (as elsewhere) may have felt that the judgment was unsatisfactory in moral terms.

While there was naturally some regret at the judgment in Greece, there was also a feeling that it might encourage bilateral talks on compensation. The Italian Government did not seem too disappointed either; indeed, it was reported that it was 'secretly pleased' with the judgment.[50] Be that as it may, it acted swiftly to abide by it. In what has been described as a 'model of compliance',[51] Italian courts soon aligned themselves with the ICJ, including the Court of Cassation that *en banc* reversed its own position and declared in 2013 that the doctrines put forward by it in the *Ferrini* case 'have remained isolated and have not been upheld by the international community, of which the International Court of Justice is the highest manifestation. Therefore, the principle [of an exception to jurisdictional immunity in the case of war crimes, and related responsibilities of the German State] can no

[48] ibid, 154, [138].

[49] L Watson, 'Germany is safe from being sued by victims of WWII Nazi atrocities after world's highest court throws out claim from Italian held as a slave in 1944', *The Daily Mail* (4 February 2012) <www.dailymail.co.uk/news/article-2096306/Germany-safe-sued-victims-WWII-Nazi-atrocities-ruling-worlds-highest-court.html>. According to the report, 'Westerwelle stressed that Germany's decision to go to court was not aimed at diminishing the country's responsibility for Nazi war crimes: "The (German) federal government has always recognised their pain," he said'.

[50] H-J Schlamp, 'War Crimes Ruling: Human Rights Take a Back Seat to Sovereignty', *Der Spiegel* (3 February 2012) <www.spiegel.de/international/world/war-crimes-ruling-human-rights-take-a-back-seat-to-sovereignty-a-813226.html>. See also M Krajewski and C Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 *Max Planck Yearbook of United Nations Law* 3, 4. Italy's Agent before the Court, Ambassador and State Counsellor Paolo Pucci di Benisichi, reportedly said that the result helped clarify the limits of states' legal immunity, adding that 'We are not disappointed … Of course, I would have preferred a judgment that was closer to our line of defence': Associated Press, 'Court confirms German immunity from claims by Nazi victims', *The Guardian* (3 February 2012), <www.theguardian.com/world/2012/feb/03/german-immunity-nazi-victims-claims>. On 25 November 2014, less than two years after the judgment in *Germany v Italy*, Italy for the first time made a declaration recognising as compulsory the jurisdiction of the ICJ under Article 36(2) of the ICJ Statute.

[51] G Nesi, 'The Quest for a 'Full' Execution of the ICJ Judgment in *Germany v Italy*', (2013) 11 *Journal of International Criminal Justice* 185, 187.

longer be applied'.[52] The Italian Parliament approved 'with unusual promptness' the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property,[53] and Italy acceded to it in May 2013. The legislature also enacted, in January 2013, a law mandating Italian judges to declare *ex officio* (at any stage of legal proceedings before them) a lack of jurisdiction for war crimes committed by the Third Reich, and providing a ground to invalidate final judgments that conflict with the ICJ judgment.[54]

Then came a bolt out of the blue. On 22 October 2014, the Italian Constitutional Court held that this primary legislation, together with a provision in a 1957 Law incorporating into the Italian legal order the UN Charter obligation to comply with decisions of the International Court of Justice (ICJ), was unconstitutional.[55] To implement the ICJ's 2012 judgment, asserted 13 judges at the *Palazzo della Consulta* notwithstanding the arguments of the Italian Government, would be incompatible with the supreme principle of judicial protection of fundamental human rights guaranteed by the Italian Constitution. In cases such as the present one, they added, 'it is up to the national judge, and in particular to this Court, to exercise the constitutional review, in order to preserve the inviolability of fundamental principles of the domestic legal order, or at least to minimize their sacrifice'.[56]

The Constitutional Court emphasised that it was not seeking to review the ICJ's judgment: 'It has to be recognized that, at the international law level, the interpretation by the ICJ of the customary law of immunity of States from the civil jurisdiction of other States for acts considered *jure imperii* is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court'.[57] Another matter, however, was resolving 'the envisaged conflict' between the customary rule (which was incorporated into the Italian constitutional order by a provision stipulating that the Italian legal system conforms to the generally recognised principles of international law) and other

[52] Judgments Nos 32139/2012 (9 August 2012) and 4248/2013 (21 February 2013).

[53] See E Lamarque, 'Some WH Questions about the Italian Constitutional Court's Judgment on the Rights of the Victims of the Nazi Crimes' (2014) 6 *Italian Journal of Public Law* 197, 203.

[54] Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order).

[55] Judgment No 238/2014 (case referred to the Constitutional Court by the Tribunal of Florence, which raised the question of constitutionality of the aforementioned legislation when seised with additional cases seeking to obtain compensation from Germany for damages suffered during World War II but requested by Germany to apply the judgment of the ICJ of 3 February 2012). The Court did clarify that the unconstitutionality of the latter provision was made 'exclusively to the extent that it obliges Italian courts to comply with the Judgment of the ICJ of 3 February 2012', stressing that in any other case 'it is certainly clear that the undertaking of the Italian State to respect all of the international obligations imposed by the accession to the United Nations Charter, including the duty to comply with the judgments of the ICJ, remains unchanged' [5]. The Court did not touch upon questions relating to immunity from enforcement, dealing solely with immunity from jurisdiction.

[56] ibid, [3.1]. The President of the Constitutional Court, who also acted as Judge Rapporteur for the case, was Giuseppe Tesauro, and the judgment came very near the end of his short, three-month term as President (30 July–9 November 2014).

[57] But the Court did note that its President, as Judge Rapporteur for the case, had opined that it was doubtful whether 'the immunity of States (European Union States in particular) still allows, by effect of international customs existing prior to the entry into force of the Constitution and of the Charter of

constitutional principles, 'to the extent that their conflict cannot be resolved by means of interpretation'.[58]

In seeking to resolve this 'conflict', the Constitutional Court stressed that the commission of atrocities by the German Reich on Italian soil was uncontested, and that the ICJ had itself acknowledged that upholding Germany's immunity implies for those claiming reparations an unqualified denial of access to judicial remedy. It reiterated that the constitutional principle of absolute guarantee of judicial protection is 'a supreme principle of the Italian constitutional order', and asserted that the incorporation of a rule of international law into the Italian legal system must be precluded in so far as it conflicts with inviolable principles and rights enshrined in the constitution.[59] While foreign states enjoy immunity in Italian courts for their 'typical exercise of governmental powers', the wide scope of the customary rule of state immunity as defined by the ICJ 'entails the absolute sacrifice of the right to judicial protection', which in the Italian legal order no overriding public interest was found to justify. The Court concluded that in Italian courts jurisdictional immunity may thus not shield states from accountability for war crimes and crimes against humanity that 'as such are excluded from the lawful exercise of governmental powers'.[60]

The Constitutional Court recalled that it was by virtue of national jurisprudence, mainly by Italian judges, that international law had progressively evolved since the early twentieth century to recognise that state immunity was not absolute so far as acts *jure gestionis* were concerned. While it acknowledged that its judgment related to the Italian legal system alone, the Court went on to say that, as state practice, the judgment 'may also contribute to a desirable—and desired by many—evolution of international law itself'.[61]

Fundamental Rights of the European Union, for the indiscriminate denial of judicial protection of fundamental rights violated by war crimes and crimes against humanity'. For President Tesauro, immunity could not entail that individuals affected by such atrocities are also denied the possibility of judicial examination and remedy: 'Italian courts cannot leave the protection of individuals to the dynamics of the relationship between the political organs of the States involved, since these organs have not been able to come up with a solution for decades' [1.2]. See also C Tomuschat, 'The National Constitution Trumps International Law' (2014) 2 *Italian Journal of Public Law* 187, 188 ('The [Constitutional Court] confines itself to applying Italian domestic law … However, it indirectly criticizes the ICJ for not rising to the level of human rights protection which, according to its view, is required within the famous group of '*nations civilisées*' in accordance with Article 38(1)(c) ICJ Statute').

[58] Judgment (n 55) [3.1].

[59] See also A Peters, 'Let Not Triepel Triumph—How To Make the Best Out of Sentenza No 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL: Talk!* (22 December 2014) <www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i> ('The Italian *controlimiti*-approach to European or international court decisions is by no means an outlier. Quite to the contrary, the *Sentenza* No 238 is just one more building block in the wall of "protection" built up by domestic courts against "intrusion" of international law, relying on the precepts of their national constitution. Ironically, this front of resistance (which now deploys effects "against" Germany) had been spearheaded by the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG)').

[60] Judgment (n 55) [3.4].

[61] ibid, [3.3]. The Constitutional Court claimed that its own case-law had led the Court of Justice of the European Union to change its jurisprudence on judicial protection; and that the latter had itself annulled, for being incompatible with fundamental human rights, the European Community regulation seeking to implement UN Security Council resolutions (the *Kadi* and *Al Barakaat* cases): see [3.4].

One of Germany's Agents before the ICJ has written that the Italian judgment came 'as a shock to the international community' and set the Constitutional Court 'on a course with unforeseeable consequences'.[62] Others have criticised the judgment not only for its outcome of 'a shattering schism between internal and international law',[63] but also for the quality of its reasoning: 'More than the outcome, it is the poor reasoning behind it that is striking', argued an Italian jurist who represented Italy before the ICJ.[64] Still others (though mainly not international lawyers) could not hide their satisfaction. 'Europe is beginning to listen to America', hailed one American commentator, drawing a comparison between the Italian Court's defiance of the ICJ and the United States Supreme Court decision in *Medellín v Texas* (2008).[65] But Italy's international legal obligation to implement the ICJ judgment remains unaltered, as national law cannot be invoked to evade international obligations.[66] While Rome and Berlin continue to discuss potential legal

[62] Tomuschat, 'National Constitution' (n 57) 187.

[63] R Kolb, 'The Relationship Between the International and Municipal Legal Order: Reflections on the Decision No 238/2014 of the Italian Constitutional Court' (2014) 2 *Questions of International Law* 5, 6.

[64] P Palchetti, 'Judgment 238/2014 of the Italian Constitutional Court: In search of a way out' (2014) 2 *Questions of International Law* 44 (adding that 'Given the complexity of the case, one would have expected the Court to engage in a thorough assessment of the weight to be given to the competing interests at stake in the light of the concrete circumstances of the case. By balancing such interests, the Court could have helped to shed some light on the leeway afforded by the Constitution to the political organs in order to find a way out of this situation'). See also A Tanzi, 'Un Difficile Dialogo tra Corte Internazionale di Giustizia e Corte Constituzionale' (2015) 70 *La Communità Internazionale* 13–36 (arguing that the Court did not strike an appropriate balance between the right to judicial redress and compliance with international law, which was also required under the Italian Constitution); Lamarque, 'Some WH Questions' (n 53) 200 ('Such a black and white solution is unworthy of the elegant balances that the Italian constitutional case law usually produces').

[65] E Kontorovich, 'Italy adopts Supreme Court's view of ICJ authority', *The Washington Post*, 28 October 2014 (In *Medellín v Texas*, it was held that neither the ICJ's *Avena* judgment nor President George W Bush's Memorandum committing US domestic courts to give effect to it constituted directly enforceable law in the United States.) Somewhat prophetically, in 2010 (then) ICJ President Owada said that 'the Court had recently been faced with some increasingly complex questions concerning specific details of compliance … when the Court rendered a judgment which must be implemented in the domestic legal order of a State, it might happen, depending on the legal system in force in that State, that the latter encountered difficulties in implementing the judgment. In the *Avena* case, the Government of the United States of America had in fact tried to implement the judgment of the Court at both federal and state level, but that had not been possible because of both the federal system in the United States and its constitutional system, in which the doctrine of "self-executing" treaties had prevented the executive branch from implementing the decisions of the Court at state level … That type of question could arise in other States; the problem was how to harmonize the international legal order and the domestic legal order' (UN Doc A/CN.4/SR.3062: Provisional summary record of the International Law Commission's 3062nd meeting, 9 July 2010, 6). Also noteworthy is that in response, the German member of the Commission remarked that 'Germany also had a federal system, but fortunately a chamber of the German Constitutional Court had interpreted the Constitution as requiring that judgments of the Court were to be duly implemented by the domestic courts. He was concerned that the United States approach might become the model and had cited the above example to show that there were other ways of dealing with the Court's judgments' (11). More recently, Russia's Constitutional Court has ruled in 2016 that it was 'impossible to implement' the final judgment of the European Court of Human Rights delivered on 4 July 2013 in the case of *Anchugov and Gladkov v Russia*: see N Chaeva, 'The Russian Constitutional Court and its Actual Control over the ECtHR Judgment in Anchugov and Gladkov', *EJIL: Talk!* (26 April 2016) <www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko>.

[66] See *Vienna Convention on the Law of Treaties*, Article 27; International Law Commission's *Articles on State Responsibility*, Article 3 and Article 32. In the 2015 provisional measures hearing in the *"Enrica Lexie" Incident (Italy v India)* case, India referred to the Italian Constitutional Court's judgment and raised doubts as to Italy's capability of fulfilling its international obligations (see ITLOS/PV.15/C/24/2,

avenues for defusing the Constitutional Court's ruling, legal proceedings have resumed against Germany in Italian courts,[67] which on a number of occasions again ordered Germany to pay reparations. It remains unlikely, however, that claimants would be able to force Germany to pay.[68] And Germany has informed the Italian Government that if necessary, it stands ready to bring another case against Italy in The Hague.[69]

VI. *JURISDICTIONAL IMMUNITIES OF THE STATE* AS A LANDMARK CASE

While the benefit of hindsight is still limited, it seems clear that *Jurisdictional Immunities of the State* has given rise to issues that go to the heart of, and challenge, the role of international law in today's world. Although the response to the ICJ's judgment by the Italian Constitutional Court and its aftermath shake the very foundations of international law, it is to be hoped that these are temporary setbacks that will in due course fade into the background; they are not what makes the case a

40–42; ITLOS/PV.15/C/24/4, 13; ITLOS/PV.15/C/24/4, 15-16; ITLOS/PV.15/C/24/3, 19). Judge ad hoc Francioni stated in response that '… any reference to the recent decision of the Italian Constitutional Court is misplaced and ill-conceived. This is so because that decision concerned a case of undisputed war crimes and crimes against humanity committed during the Second World War which could not be more far removed from the present case, which concerns a conflict of jurisdiction over a maritime incident. Further, the judgment of the Italian Constitutional Court shows exactly the opposite of what India has tried to infer from it. Contrary to India's regrettable and repeated assertion that Italy's promise is tainted by an alleged disposition to shun compliance with international judgments, the case shows that Italy not only promptly complied with a decision of the International Court of Justice (*Jurisdictional Immunities of the State, Judgment* (n 32) ICJ Rep 99), but went as far as to adopt ad hoc legislative measure in order to ensure effective implementation of such decision in its internal legal order. Further, even after the Constitutional Court's decision affirming the inalienable right of access to justice for victims of international crimes, legislative measures have been adopted in order to ensure that no enforcement measures are taken with regard to foreign states' assets in violation of the decision of the ICJ in *Jurisdictional Immunities of the State* (see Law, fn 162, 10 November 2014, Art 19-*bis*), which was not mentioned by counsel for India, either intentionally or for lack of adequate information. Italy's trust in international adjudication and its commitment to fully comply with international decisions is further confirmed by its filing on 25 November 2014 of a declaration of acceptance of the compulsory jurisdiction of the ICJ under Art 36, paragraph 2, of the Court's Statute': '*Enrica Lexie*' *Incident (Italy v India), Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, 182, declaration of Judge ad hoc Francioni, 221–22, [10], [15].

[67] It is understood that Germany has been transmitting to the Italian courts a *Note Verbale* addressed by the German Embassy in Rome to the Italian Foreign Ministry setting out its position and asserting its rights notwithstanding the judgment of the Italian Constitutional Court, and warning that a resumption or continuation of cases based on breaches of international humanitarian law by the German Reich would once again violate the state immunity of Germany. The lawyer for the Italian Government (*Avvocato dello Stato*) appears to urge the courts to uphold international law as decided by the ICJ. For more on the aftermath of the Constitutional Court's judgment in the Italian legal system see K Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice—The Italian Constitutional Court—Italian Tribunals and the Question of Immunity' (2016) 76 *ZaöRV* 193–202; G Boggero, 'The Legal Implications of *Sentenza* No 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?' (2016) 76 *ZaöRV* 203–24.

[68] On the paradoxical possibility that the 'most logical inference to be drawn would be for the Italian State to pay financial compensation to all those who feel that they have a legitimate claim against Germany' see Tomuschat, (n 57) 194.

[69] Other possible options available to Germany include recourse to the Security Council under Article 94(2) of the UN Charter (though this route is improbable).

landmark. Rather, it is as a key decision on the law of state immunity, and the light it sheds on international law more broadly, for which the judgment's significance 'reaches beyond predictions on the future for state immunity to the structure, subjects and systems of international law as a whole'.[70] Space does not permit a detailed analysis of all the reasons for this, but four points seem worth highlighting.

First, *Jurisdictional Immunities of the State* is, and is likely to remain for some time, the leading international case on the law on state immunity, which 'Until recently … relied virtually exclusively upon domestic case law and latterly legislation'.[71] In affirming that sovereign immunity continues to occupy an important place in international law the judgment holds unequivocally that state immunity is not, as some have suggested, merely a matter of comity. It furthermore clarifies the nature of state immunity as being essentially procedural, and provides coherent guidance as to its consideration and application. The ruling also settles for now the debate, intense but largely confined to academic commentators, as to whether states are entitled to jurisdictional immunity under international law in cases involving allegations of serious human rights violations (or international crimes),[72] providing an authoritative and orthodox statement of the *lex lata*.[73] It is noteworthy, however, that the Court narrowly circumscribed the issue before it, avoiding a decision on whether there is a 'territorial tort exception' to state immunity applicable to *acta jure imperii* other than those committed during an armed conflict, and expressly distinguishing the separate question of the immunity of state officials from foreign criminal jurisdiction.[74]

[70] L McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v Italy?' (2013) 11 *Journal of International Criminal Justice* 125, 145. See also B Nussberger and V Otto, '*Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford, OUP, 2016) opil.ouplaw.com/home/EPIL.

[71] MN Shaw, *International Law*, 4th edn (Cambridge, CUP, 2015) 507. See also J Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford, OUP, 2012) 488 ('the law developed primarily through domestic case law and limited treaty practice, supplemented more recently by comprehensive legislation in certain states'). Other international courts have touched on issues of state immunity, both before and after 2012, including the ITLOS (in *ARA Libertad*) and ECtHR (in *Al Adsani*, *Jones*). But it is the ICJ in *Jurisdictional Immunities* that has confirmed basic elements of the international law on state immunity.

[72] See also A Bianchi, 'On Certainty', *EJIL: Talk!* (16 February 2012), available online at www.ejiltalk.org/on-certainty: 'At last we have certainty. After almost twenty years of heated debate … we now know. States cannot be sued for serious human rights violations before the municipal courts of another state'; C Espósito, 'Of Plumbers and Social Architects: Elements and Problems of the Judgment of the International Court of Justice in Jurisdictional Immunities of the State', (2013) 4 *Journal of International Dispute Settlement* 439, 455 ('Perhaps the greatest achievement of the Court's judgment in Jurisdictional Immunities of the State is its lack of ambiguity').

[73] Other courts confronted with the issue have followed the ICJ's lead. In *Jones and others v The United Kingdom*, the European Court of Human Rights stated that '*Germany v Italy* … must be considered by this Court as authoritative as regards the content of customary international law' (Applications Nos 34356/06 and 40528/06, Judgment of 14 January 2014, [198]). The Dutch Supreme Court took a similar approach in *Mothers of Serbenica Association et al v The Netherlands and the United Nations* (10/04437, Judgment of 13 April 2012), [4.3.10]–[4.3.14]; as did the Quebec Court of Appeal (*Hashemi v Iran* (2012) QCCA 1449, 154 ILR 351, 159 ILR 299) in a judgment that was upheld by the Supreme Court of Canada.

[74] *Jurisdictional Immunities of the State, Judgment* (n 32) 128, 139, [65], [91]. The Court also found it unnecessary to consider the general regime of immunity from enforcement under customary international law (147–148, [115]–[118]).

Second, the judgment is instructive for what it says about *jus cogens*. In particular, the ruling further clarifies the nature of *jus cogens* as a category of substantive law and illustrates its position in relation to rules of international law that are procedural in character (such as the rules of state immunity). Relying on its previous jurisprudence in the *Armed Activities* and *Arrest Warrant* cases, the Court declined to recognise a possible conflict between these two sets of rules, explaining that:

> A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[75]

While the concept of *jus cogens* appears by now to be beyond dispute, such authoritative pronouncements on its essence and consequences remain highly valuable.

Third, *Jurisdictional Immunities of the State* resonates as a landmark not only for the points of law it spells out, but also for the judicial reasoning by which these points are developed and adopted. Most notably, in the tradition of the *Nuclear Weapons* and *Barcelona Traction* cases,[76] the Court showed unwillingness to accept a claim which, however morally appealing, did not accord with the law in force. Grappling yet again with the strain between traditional concepts of a state-centrist legal system and the contemporary pull of individual (human) rights,[77] the Court saw its role as being to decide the case before it on the basis of the existing law rather than as a campaigner or legislator.

[75] ibid, 141, [95]. It has been argued that this approach 'supports a very limited scope of peremptory norms' that was instrumental to corroborating the result that the Court was aiming to achieve (C Espósito, 'Jus Cogens and Jurisdictional Immunities of the State at the International Court of Justice: "A Conflict Does Exist"' (2011) 21 *Italian Yearbook of International Law* 161, 162–63); see also the dissenting opinion of Judge Cançado Trindade at 282–86). But see S Talmon, '*Jus Cogens* after *Germany v Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 *LJIL* 979, 1002 ('The criticism of the 'substantive–procedural' distinction in international law as too formalistic and technical may be answered by noting that law, by its very nature, is formalistic and technical. These traits contribute to clarity, certainty, and predictability—also 'values' not to be discarded lightly'); C Tomuschat, 'The Case of Germany v Italy before the ICJ', in A Peters, E Lagrange, S Oeter and C Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Leiden, Brill Nijhoff, 2015) 87, 91 ('The concept of *ius cogens* is not a magic wand that would transform all traditional rules into a new ethereal substance, immune from any controversy, as soon as touched by it').

[76] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Rep 226; *Barcelona Traction, Light and Power Company, Limited, Judgment* [1970] ICJ Rep 3.

[77] See also V Gowland-Debbas, 'The ICJ and the Challenges of Human Rights Law' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation* (Cambridge, CUP, 2015) 133–35; SD Murphy, 'What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence', (2013) 4 *Journal of International Dispute Settlement* 539, 552 ('International law has increasingly become attuned to the rights of persons as against the power or States and international organizations, but the traditional processes of international law pose difficult and sometimes insurmountable hurdles to persons in effectively vindicating those rights'); J Klabbers, 'The Curious Condition of Custom', (2002) 8 *International Legal Theory* 29, 34 ('With respect to prescriptions of moral relevance (think in particular of human rights), the traditional concept of custom has lost plausibility').

Several writers have, predictably enough, expressed deep disappointment with what they have labelled as a conservative judgment, 'a kind of Westphalian atavism where the ICJ placed the values of sovereignty over those of humanity'.[78] To them, 'the Court missed a double opportunity: to contribute to the development of international law by interpreting the rule on sovereign immunity in harmony with international human rights law and its dynamics, and to finally serve justice for the victims of war crimes'.[79] By so doing, it is argued, the Court had 'neglected fundamental requirements of the legitimacy of the international legal order'.[80] But such writers concede, even if reluctantly, that the judgment did in fact reflect existing international law, and that for the Court to find in Italy's favour 'would have meant a certain amount of creativity'.[81]

The Court, whose function 'is to decide in accordance with international law such disputes as are submitted to it',[82] thus in this case fulfilled its function. Had it decided otherwise, against the law, it would have been acting outside its mandate. Moreover, to disregard the jurisdictional immunities of the state, as some have suggested it should have done, would have had serious repercussions on international relations and cast doubt on international law as a whole. In pronouncing in favour of immunity the Court was therefore not a guardian of the status quo,[83] but rather of the international legal system that it serves.

Also unconvincing is the criticism that the Court has set international law back many years by interrupting the development of a rule of more limited sovereign

[78] R Howse, responding to an *Opinio Juris* blog entry: <http://opiniojuris.org/2014/11/19/guest-post-tearing-sovereign-immunitys-fence-italian-constitutional-court-international-court-justice-german-war-crimes>. The late Professor Benedetto Conforti, who had long opposed the orthodox position, and whose views may well have influenced the Constitutional Court and its President Tesauro, was a virulent critic: 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity', (2011) 21 *Italian Yearbook of International Law* 135, 136, 137 ('There is no sign of progress in this judgment … The lack of willingness to provide elements for future exceptions to this immunity from jurisdiction of foreign States lends the judgment an air of strong conservativism'); O Bakircioglu, 'Germany v Italy: The Triumph of Sovereign Immunity over Human Rights Law', (2012) 1 *International Human Rights Law Review* 93–109.

[79] S Negri, 'Sovereign Immunity v Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning *Jurisdictional Immunities of the State* (*Germany v Italy*)' (2014) 16 *International Community Law Review* 123 (adding that 'the International Court of Justice deliberately chose to abdicate its recognised role as authoritative law-maker, restraining itself to a strict computation, and maybe short-sighted interpretation, of the data provided by State practice, regardless of the new trends and dynamics of international law … in marking the triumph of judicial self-restraint over judicial activism, the judgment no doubt represents a missed opportunity to re-interpret the scope of the immunity rule in harmony with the evolution of human right law' (137)).

[80] Bothe, 'Remedies' (n 21) 100. Human rights organisations, too, admonished the judgment as a disappointment; Amnesty International, for example, described it as an 'astonishing ruling … a big step backwards in [the protection of] human rights' (<www.amnesty.org/en/latest/news/2012/02/un-court-ruling-nazi-war-crime-victims-deplorable>).

[81] ibid 111 (explaining that 'The Court would have contributed to the development of the law by promoting a norm which may still be *in statu nascendi*').

[82] Statute of the International Court of Justice, Art 38.

[83] KN Trapp and A Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany* v *Italy*' (2012) 1 *CJICL* 153, 168; Krajewski and Singer, 'Should Judges be Front-Runners?' (n 50) 34; Bakircioglu, 'Germany v Italy' (n 78) 108.

immunity.[84] To begin with, the Court took care to note that it was applying customary international law 'as it presently stands'.[85] More importantly, the judgment afforded states a specific opportunity to react and, if they so considered, to express an opinion that the law of sovereign immunity as applied by the Court was or should be different: if they had done so, that might well have led to a change in the law.[86] But states, who remain the principal source of legitimacy in the international legal system, seem to concur with the Court's view of the law. Again, then, the criticism seems misdirected. As a former President of the Court has remarked, 'Activists have the wrong target in their sights. They should bring pressure to bear on States, rather than berate the Court for conservatism'.[87]

Finally, the Court's analysis in determining the existence and scope of the customary rule at issue provides an instructive example of how such a task is to be carried out by those called upon to advise on or apply customary international law. In addition to reiterating the need to establish the existence of 'a settled practice' together with acceptance as law (*opinio juris*),[88] the judgment illustrates how in each case the underlying principles of international law that may be applicable to the matter ought to be taken into account; how the evidence is to be adjusted to the situation, with certain forms of practice and evidence *opinio juris* possibly being of particular significance; and how all available practice of a state must be assessed 'as a whole'.[89] The extensive review of relevant materials, also acknowledged by Judge Ad hoc

[84] See, for example, Bothe (n 21) 113; Krajewski and Singer (n 50) 10, 30.

[85] *Jurisdictional Immunities of the State, Judgment* (n 32) 139, [91]. See also Judge Koroma's separate opinion: 'Given that the Court's task is to apply the existing law, nothing in the Court's Judgment today prevents the continued evolution of the law on State immunity … The Court's Judgment applies the law as it exists today' (159).

[86] See also G Gaja, (2012) 364 *Recueil des Cours* 44 ('much as the Court's vies on the existence and content of principles and rules of general international law are highly regarded by all States, there is an ultimate test of acceptability of these views which may affect their impact in practice'). But see D Bethlehem, 'The Secret Life of International Law' (2012) 1 *CJICL* 23, 31–33 (on the difficulty for states in reacting to legal pronouncements not directly opposable to them).

[87] R Higgins, 'Equality of States and Immunity from Suit: A Complex Relationship' (2012) 43 *NYIL* 129, 146. See also S Rosenne, *The Law and Practice of the International Court of Justice 1920–2005*, vol I, 4th edn (The Hague, Martinus Nijhoff, 2006) 3 ('The Court's status as a principal organ of the United Nations, itself above all a political organization, emphasizes that the judicial settlement of international disputes is a function performed within the general framework of the political organization of the international society'); Gowlland-Debbas, 'The ICJ' (n 77) 144 ('The ICJ, an institution established at a time when bilateral and subjective relations between States based on the golden rule in *Lotus* prevailed, cannot always respond to expectations when faced with human rights cases. The requirement of a jurisdictional link and the fact that its decisions bind only the parties and its advisory opinions are just that, sits uneasily alongside the development of an international public policy in which subjective interests must give way to collective values and interests'). One of Germany's agents before the Court remarked that 'Careful analysis of the empirical background should precede any attempt at reforming the law as it stands. It is not helpful for international law to postulate rules which under the test of empirical practice prove to be purely utopian, without any real chance of becoming operative. Human rights law should be real law and not only a playground for activists where enormous resources are being squandered uselessly': Tomuschat 'The Case of Germany v Italy' (n 75) 98.

[88] *Jurisdictional Immunities of the State, Judgment* (n 32) 122, [55].

[89] ibid, 123–24, [55], [57]; 134, [76].

Gaja in his dissenting opinion,[90] not only served to show that the Italian practice did not gain support among other states; it also counsels more broadly on how treaty texts may be utilised in seeking to identify customary rules, and how domestic court decisions may be examined both as state practice and as subsidiary means for determining the law.[91] At a time when the International Law Commission has taken up the topic 'Identification of customary international law' to assist practitioners and others in such a task,[92] the judgment is a further important contribution by the Court to those seeking guidance on the matter. Whether or not the substance of the law on state immunity will eventually change, this methodological direction will surely have a lasting impact.

[90] ibid, 309, [1] ('The Court's argument is well built and includes a wide survey of relevant State practice'). Some have argued that the evidence relied on by the Court does not clearly provide sufficient foundation for its conclusions: see Judge Yusuf's dissenting opinion 291, 297–98 ('Would it not have been more appropriate to recognize, in light of conflicting judicial decisions and other practices of States, that customary international law in this area remains fragmentary and unsettled?'); Trapp and Mills, 'Smooth Runs the Water' (n 83) 156 (concluding that 'The most that can be said here is that state practice is mixed—and that the Court's selectivity in its examination of that state practice is potentially misleading', 158); Conforti, 'A Missed Opportunity' (n 78) 138–40; R Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in *Jurisdictional Immunities of the State*' (2011) 21 *Italian Yearbook of International Law* 143, 144 ('It is the specific use or omission by the ICJ of certain significant manifestations of practice that lends itself to criticism and justified perceptions of biased, policy-driven conservatism. Most importantly, it weakens the persuasive force of the Court's findings'); Negri, 'Sovereign Immunity v Redress for War Crimes' (n 79) 132.

[91] ibid, 127–30, [64]–[69]; 131–35, [72]–[77]; 137–38, [85]–[87]; 138–39, [89]; 141–42, [96]. See also C Greenwood, 'Unity and Diversity in International Law' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation* (Cambridge, CUP, 2015) 50–51 ('Although the Court did not expressly make this point, it is clear that it examined the decisions of national courts for two distinct reasons. Those decisions were, of course, part of the State practice on which the customary international law of State immunity was based. As such, they were important for the Court's analysis irrespective of the quality of the reasoning on which they were based. Yet the Court also considered that reasoning in order to see what guidance it gave, in the same way as it examined the reasoning of the European Court of Human Rights in the judgments which that Court had given regarding State immunity. While the reasoning in some of those judgments was very brief, in others … there was a detailed examination of the issues on which the Court placed a degree of reliance'); I Wuerth, 'International Law in Domestic Courts and the Jurisdictional Immunity of the State Case' (2012) 13 *Melbourne Journal of International Law* 819.

[92] See UN Doc A/71/10: *Report of the International Law Commission, Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, 75–115, containing the Commission's 16 draft conclusions, with commentaries, adopted on first reading in 2016; a second reading is expected in 2018.