CASE NOTE

INTERNATIONAL LAW AND THE INTERNATIONAL COURT OF JUSTICE'S DECISION IN *JURISDICTIONAL IMMUNITIES OF THE STATE*

CONTENTS

I INTRODUCTION

On 3 February 2012, the International Court of Justice ('ICJ' or 'Court') handed down its judgment in *Jurisdictional Immunities of the State*,[1] effectively ending a clear and persistent schism that had arisen between domestic courts on the question of state immunity for civil tort claims arising out of wartime atrocities.

On the one hand, some of the basic assumptions of international law had been challenged when courts in Greece and Italy held that the law of state immunity could not preclude a state from being sued before the civil courts of another state where the allegations concerned a serious breach of international human rights or humanitarian law or a breach of *jus cogens* norms. The rush of scholarly commentary following these decisions was voluminous and, in some instances, suggested that an exception to a state's immunity from civil suit in foreign courts was emerging in cases concerning breaches of *jus cogens* norms.

On the other hand, other jurisdictions had already rejected the argument that such an exception existed, at least in so far as their domestic legal systems would allow, although some courts also held that international law was similarly bereft of a *jus cogens* exception. In decisions criticised by some for their strict adherence to doctrine, these courts held that, unless an exception to the immunity of states had been prescribed in the governing legislation, it did not matter that the civil suit brought against the state concerned a peremptory norm of international law. This view of the issue also had scholarly support.

With the line in the sand having been drawn, the ICJ delivered its decision. This case note explains in detail the background, substance and ramifications of

[1] *(Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012).

this decision. It first explains the background to the decision, summarising the facts leading to the case and the contested doctrinal issues before the Court. The case note then reviews the proceedings before the Court and the Court's decision itself, before lastly commenting on the decision's key points of significance for international law.

II THE BACKGROUND

A *The Factual Background*

The origins of the dispute are of historical notoriety. In September 1943, during the Second World War, Italy surrendered to the Allied Forces and declared war on Germany. Having previously been allied with Germany, much of Italy was occupied by German forces. From October 1943, German forces committed atrocities against Italian nationals in Italy. These atrocities included the mass killing of civilians and the deportation of both civilians and members of the Italian armed forces for use as forced labour in German-occupied territories.[2]

Shortly after the end of the Second World War the *Treaty of Peace with Italy*[3] was concluded between Italy and the Allied Forces. A number of issues were covered in the *Treaty of Peace with Italy*, including war reparations, minorities' rights and territorial adjustments.[4] Importantly, art 77(4) provided that Italy waived 'on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945',[5] with the exception of a limited category of claims and without prejudice to certain other rights acquired by Italy as part of the settlement (such as restitution of identifiable property).[6]

Following the *Treaty of Peace with Italy*, Germany took several other steps to compensate those who suffered during the National Socialist period, two of which were specific to Italy and its nationals.[7] However, despite these actions, a large number of former Italian military internees were unable to claim any compensation and claims by them in German courts and the European Court of Human Rights ('ECtHR') were unsuccessful.[8]

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2 Ibid [21].

3 *Treaty of Peace with Italy*, signed 10 February 1947, 49 UNTS 3 (entered into force 15 September 1947).

4 Ibid arts 1–14, 19–20, 74.

5 Ibid art 77(4).

6 Ibid arts 77(2)–(4).

7 See *Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (BEG)* [Federal Law for the Compensation of the Victims of National Socialist Persecution] (Germany) 18 September 1953, BGB1 I, 1953, 1387; *Gesetz zur Errichtung einer Stiftung: 'Errinerung, Verantwortung und Zukunft'* [Law on the Creation of a Foundation: 'Remembrance, Responsibility and Future'] (Germany) 2 August 2000, BGB1 I, 2000, 1263. See also two treaties signed by Italy and Germany which, in arts 3 and 2 respectively, purported to be final settlements of any claims by Italy and Italian nationals against Germany and its nationals on this issue: *Treaty concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution*, Italy–Germany, signed 2 June 1961 (entered into force 31 July 1963); *Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions*, Italy–Germany, signed 2 June 1961 (entered into force 16 September 1963).

8 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [23]–[26].

This situation changed on 11 March 2004, when the Italian Court of Cassation held that a claim by Luigi Ferrini against Germany seeking damages for his wartime arrest, deportation and forced labour was within the jurisdiction of Italian courts.[9] The Italian Court of Cassation ruled that the assertion of state immunity by Germany was unfounded because such immunity does not apply where the conduct complained of constitutes an international crime.[10] Shortly after this ruling, two further cases were instituted by similarly placed claimants and, in interlocutory appeals by Germany on the issue of jurisdiction, the Italian Court of Cassation confirmed its ruling in *Ferrini v Germany* ('*Ferrini*').[11] Unsurprisingly, numerous similar claims followed and were pending at the time of the ICJ's judgment.[12]

However, the Italian Court of Cassation was not alone in determining that claims arising out of atrocities committed by German armed forces during the Second World War were justiciable. Even before the decision in *Ferrini*, the Greek Court of Cassation had upheld the rulings of lower courts awarding damages to individuals who had claimed against Germany for the loss of life and property of their relatives in a civilian massacre by German armed forces in the Greek town of Distomo.[13] Despite this ruling, the claimants in the case were unable to enforce the judgment in Greece,[14] a position which did not change upon the completion of proceedings in the ECtHR.[15] Having been thus frustrated in their enforcement attempts in Greece, the claimants looked elsewhere. After a refusal by German courts to enforce the Greek Court of Cassation judgment,[16]

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9 See generally *Ferrini v Germany*, Corte di cassazione [Italian Court of Cassation], No 5044/2004, 11 March 2004 reported in (2006) 128 *International Law Reports* 658 ('*Ferrini*')

10 Ibid. For a helpful summary and appraisal of the decision, see Andrea Bianchi, '*Ferrini v Federal Republic of Germany*' (2005) 99 *American Journal of International Law* 242.

11 *Germany v Giovanni Mantelli*, Corte di cassazione [Italian Court of Cassation], No 14201/2008, 6 May 2008 reported in (2009) 92 *Rivista di Diritto Internazionale* 618; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [28]. See also Carlo Focarelli, '*Federal Republic of Germany v Giovanni Mantelli and Others*' (2009) 103 *American Journal of International Law* 122.

12 When Germany made its application to the ICJ it stated that 'roughly 250 claimants have introduced civil actions against Germany': 'Application Instituting Proceedings', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 23 December 2008, [12]. Sciso provides a comprehensive review of the Italian case law on this point: Elena Sciso, 'Italian Judges' Point of View on Foreign States' Immunity' (2011) 44 *Vanderbilt Journal of Transnational Law* 1201, 1202–12.

13 *Prefecture of Voiotia v Germany*, Areios Pagos [Greek Court of Cassation], No 11, 4 May 2000 reported in (2007) 129 *International Law Reports* 513. The Greek Court of Cassation's decision was taken by a 6:5 majority. Gavouneli and Bantekas provide a clear and helpful summary of the decision: Maria Gavouneli and Ilias Bantekas, '*Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000, May 4, 2000' (2001) 95 *American Journal of International Law* 198.

14 The claimants were unable to enforce the judgment because the Greek Minister for Justice refused to provide a necessary authorisation for the enforcement of a judgment against a foreign state: *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [30].

15 *Kalogeropoulou v Greece* [2002] X Eur Court HR 415, 428.

16 *Distomo Massacre Case*, Bundesgerichtshof [Federal Supreme Court of Germany], No III ZR 245/98, 26 June 2003 reported in (2007) 129 *International Law Reports* 556.

the claimants sought enforcement in Italy. The Italian Court of Cassation upheld the ruling of a lower Italian court that the judgment of the Greek Court of Cassation was enforceable in Italy.[17] Irrespective of a later decision of a specially-convened Greek court, which held in a different case with similar circumstances that international law afforded Germany immunity from suit,[18] the claimants in the earlier Greek Court of Cassation decision enforced their judgment in Italy by registering a legal charge over a property near Lake Como owned by Germany and used for non-commercial purposes (known as Villa Vigoni).[19] In response to these developments, Germany — having participated in various domestic court proceedings for a number of years — instituted proceedings against Italy in the ICJ.

B *The Contested Doctrinal Background*

In contrast to the well-established historical facts of the case, the status of the law that the Court would apply to those facts had been widely contested by courts and scholars. The key point of contest was whether principles of state immunity could, and should, operate to preclude a state from being sued in the courts of another state for alleged violations of *jus cogens* norms. Some courts and authors were of the view that the principles affording states immunity from such suits did not alter in their application because the alleged violation concerned a peremptory norm of international law.[20] The trump card for adherents to this position was that the procedural nature of immunity meant that it could not conflict with norms of a substantive nature and therefore a substantive (even *jus cogens*) norm could not limit immunity.[21] The impugned state was thus endowed with immunity from any enforcement action in another

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17 *Germany v Prefecture of Voiotia*, Corte di cassazione [Italian Court of Cassation], No 14199/2008, 29 May 2008 reported in (2009) 92 *Rivista di Diritto Internazionale* 594.

18 *Margellos v Germany*, Anotato Eidiko Dikastirio [Greek Special Supreme Court], No 6, 17 September 2002 reported in (2007) 129 *International Law Reports* 525 ('*Margellos*').

19 The charge registered over Villa Vigoni was suspended pending the decision of the Court: *Jurisdictional Immunities (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [35].

20 See, eg, Andreas Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens* — Some Critical Remarks' (1995) 16 *Michigan Journal of International Law* 433, 437–40; Thomas Giegerich, 'Do Damages Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff, 2006) 203; Lee Caplan, 'State Immunity, Human Rights and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97 *American Journal of International Law* 741, 771–6; Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2002) 524–5; Xiaodong Yang, '*Jus Cogens* and State Immunity' (2006) 3 *New Zealand Yearbook of International Law* 131; Emmanuel Voyiakis, 'Access to Court v State Immunity' (2003) 52 *International and Comparative Law Quarterly* 297, 303–7; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407, 414; Andrea Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) 3 *Journal of International Criminal Justice* 224, 235–41; Roger O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44 *Vanderbilt Journal of Transnational Law* 999, 1027–9.

21 See, eg, Yang, above n 20, 153–4; Akande, above n 20, 414; Fox, above n 20, 524–5.

state's courts (subject to limited abrogating situations, such as waiver).[22] Other courts and authors, however, rejected this approach. They argued that immunity did not exist for breaches of *jus cogens* norms or serious breaches of international human rights or humanitarian law.[23] Some authors specifically argued that *jus cogens* norms occupied a privileged place in international law's hierarchy of norms, so that lesser principles of immunity could not oust the forum state's adjudicatory jurisdiction relating to alleged breaches of such norms.[24] The distinction between procedural and substantive rules was either irrelevant when the substantive rule being enforced was *jus cogens* or the hierarchically superior nature of a *jus cogens* norm inherently 'presuppose[d] a procedural rule which guarantee[d] its judicial enforcement' irrespective of any conflicting procedural rule of immunity.[25]

While this contest of ideas can be traced back to scholarship in the late 1980s,[26] the issue gained prominence through the decision of the ECtHR in 2001 in *Al-Adsani v United Kingdom* ('*Al-Adsani*').[27] That case concerned attempts by Sulaiman Al-Adsani to sue Kuwait before English courts in respect of allegations that Kuwaiti governmental officials and relatives of the Emir of Kuwait had tortured him. After English courts dismissed his suit on the basis that Kuwait

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22 See, eg, *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79 ('*Al-Adsani*'); *Jones v Ministry of the Interior of Saudi Arabia* [2007] 1 AC 270, 283–6 [13]–[18] (Bingham LJ).

23 See Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2008) 18 *European Journal of International Law* 955, 968–70; Adam Belsky, Mark Merva and Naomi Roht-Arriaza, 'Implied Waiver under the *FSIA*: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law' (1989) 77 *California Law Review* 365, 394; Andrea Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 *Austrian Journal of Public International Law* 195; Matthais Reinmann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v Federal Republic of Germany*' (1995) 16 *Michigan Journal of International Law* 403, 420–3; Magdalini Karagiannakis, 'State Immunity and Fundamental Human Rights' (1998) 11 *Leiden Journal of International Law* 9, 19–23; Katherine Reece Thomas and Joan Small, 'Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?' (2003) 50 *Netherlands International Law Review* 1; Kerstin Bartsch and 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' (2003) 4 *German Law Journal* 477, 486–8; Lorna McGregor, 'State Immunity and *Jus Cogens*' (2006) 55 *International and Comparative Law Quarterly* 437. Knuchel canvasses the various ways in which scholars have argued that state immunity is subject to such an exception: Sévrine Knuchel, 'State Immunity and the Promise of *Jus Cogens*' (2011) 9 *Northwestern Journal of International Human Rights* 149, 159–74.

24 See especially Orakhelashvili, above n 23, 964. Bartsch and Elberling argue that 'every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement': Bartsch and Elberling, above n 23, 486–8.

25 Bartsch and Elberling, above n 23, 486. Some authors also derive support for this proposition from obiter dicta in *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/1-T10, 10 December 1998) [155]–[157]: see, eg, Erika de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97, 97–8.

26 Belsky, Merva and Roht-Arriaza, above n 23. See also Christian Djeffal, 'Constitutional Paths Not Taken: *Germany vs Italy* before the ICJ' on *Verfassungsblog* (4 February 2012) <http://www.verfassungsblog.de>.

27 [2001] XI Eur Court HR 79.

benefited from state immunity,[28] Al-Adsani applied to the ECtHR, arguing that the United Kingdom had failed to protect his right not to be tortured and had denied him access to legal process. The ECtHR dismissed his claim, albeit with several judges accepting the so-called 'normative hierarchy theory'.[29] Thus, in a joint dissenting opinion, Judges Rozakis, Caflisch, Wildhaber, Costa, Barreto and Vajić held:

> acceptance ... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.[30]

By contrast, the majority held:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern ... any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[31]

The two opposing doctrinal views were thus clearly articulated. Some scholars supported the dissentients' endorsement of the normative hierarchy theory.[32] Others suggested it was an 'idealistic' approach which was irreconcilable with doctrine and thus inferior to the 'pragmatic' approach of the *Al-Adsani* majority.[33] More generally, discussion of state immunity in the context of *jus cogens* violations, and torture in particular, boomed.[34]

In the context of this post-*Al-Adsani* discussion, numerous courts around the world considered whether allegations of breaches of *jus cogens* norms, or allegations of serious violations of international human rights or humanitarian law, were justiciable in spite of competing assertions of state immunity. Courts in the UK,[35] Canada,[36] France,[37] Poland,[38] New Zealand[39] and Slovenia[40] ruled

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28 *Al-Adsani v Kuwait* [1995] 103 ILR 420 (Queen's Bench); *Al-Adsani v Kuwait* [1996] 107 ILR 536 (Court of Appeal).

29 See Caplan, above n 20, 742. For a summary of the decision, see Marius Emberland, 'International Decisions: *McElhinney v Ireland*; *Al-Adsani v United Kingdom*; *Fogarty v United Kingdom*' (2002) 96 *American Journal of International Law* 699.

30 *Al-Adsani* [2001] XI Eur Court HR 79, 112 [3].

31 Ibid 101 [61].

32 See, eg, Orakhelashvili, above n 23, 965–6. See also Bartsch and Elberling, above n 23.

33 See, eg, Christian Tams, 'Schwierigkeiten mit dem *Ius Cogens*' (2002) 40 *Archiv des Völkerrechts* 331, 331, cited in Bartsch and Elberling, above n 23, 491. The use of dichotomous language such as 'idealist'/'realist' is strongly criticised in Orakhelashvili, above n 23, 956.

34 See the extensive post-*Al-Adsani* scholarship, see sources cited at above n 20, n 23.

35 *Jones v Ministry of Interior of Saudi Arabia* [2007] 1 AC 270.

36 *Bouzari v Islamic Republic of Iran* (2004) 243 DLR (4th) 406 (Ontario Court of Appeal).

37 Cour de cassation [French Court of Cassation], 02-45961, 16 December 2003 reported in (2003) Bull civ n° 258, 206.

38 Ewa Dąbrowska, 'The Supreme Court Decision of 29 October 2010, Ref No IV CSK 465/09 in the Case brought by Winicjusz N against the Federal Republic of Germany and the Federal Chancellery for Payment' (2010) 30 *Polish Yearbook of International Law* 299. See Marcin Kałduński, 'State Immunity and War Crimes: The Polish Supreme Court on the *Natoniewski* Case' (2010) 30 *Polish Yearbook of International Law* 235.

39 *Fang v Jiang* [2007] NZAR 420.

40 *AA v Germany*, Ustavno Sodišče [Slovenian Constitutional Court], Up-13/99-24, 8 March 2001 reported in [2001] 28/1 *Official Gazette of the Republic of Slovenia* [21].

that the immunity to which a state is entitled is not withdrawn simply because the allegations concern a breach of a *jus cogens* norm or a serious violation of human rights law or the laws of war. International tribunals also endorsed this view, including the ECtHR explicitly in *Kalogeropoulou v Greece*[41] and the ICJ (less directly) in *Arrest Warrant of 11 April 2000*[42] and *Armed Activities on the Territory of the Congo*.[43] Only Italian courts, in the cases noted above, clearly held that state immunity could be trumped by *jus cogens* or by the gravity of the claims,[44] while the decision of the Greek Court of Cassation which supported the Italian position was diluted, as evidence of state practice, by the subsequent contrary decision of the specially-convened Greek court.[45]

Therefore, unlike scholarship on the issue, almost all judicial consideration fell in one direction. Whether state immunity was to be precluded in respect of alleged violations of *jus cogens* or international human rights or humanitarian law was, it seemed, contestable enough to prompt a significant volume of litigation on the issue but not contestable enough to induce courts to reject a state's assertion of immunity and exercise jurisdiction over the claim.

It is important to note, however, that the consideration provided in several of these cases went beyond the issue considered in *Al-Adsani*. The facts before some domestic courts specifically involved assertions of immunity by a state in respect of acts allegedly committed by its armed forces in the territory of the forum state during an armed conflict against that state. These courts were required to decide whether state immunity was subject to a 'territorial tort' exception, whereby immunity must be denied because the allegations relate to tortious conduct of the defendant state in the territory of the forum state resulting in harm or loss to the claimant. The key controversy in these cases was whether this territorial tort exception applied when the allegations related to state conduct which was *acta jure imperii* and, in particular, conduct which was pursued during an armed conflict. Defendant states maintained that, if an armed conflict carve out from the territorial tort exception did apply, their immunity subsisted and the claims were not justiciable. Again, the judicial view tilted in one direction. French,[46] Slovenian,[47] Polish,[48] Israeli,[49] Belgian,[50] Serbian,[51]

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41 *Kalogeropoulou v Greece* [2002] X Eur Court HR 415, 428–9.

42 *(Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 24 [58], 32–4 [78].

43 *(Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 202–3 [64], 217 [125]. See also *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [95].

44 *Ferrini*, Corte di cassazione [Italian Court of Cassation], No 5044, 11 March 2004 reported in (2006) 128 *International Law Reports* 659; *Germania v Giovanni Mantelli*, Corte di cassazione [Italian Court of Cassation], No 14201/2008, 29 May 2008; *Germania v Amministrazione Regionale della Voiotia*, Corte di cassazione [Italian Court of Cassation], No 14199, 29 May 2008 reported in (2009) 92 *Rivista di Diritto Internazionale* 594.

45 *Margellos*, Anotato Eidiko Dikastirio [Greek Special Supreme Court], No 6, 17 September 2002 reported in (2007) 129 *International Law Reports* 525.

46 Cour de cassation [French Court of Cassation], 02-45961, 16 December 2003 reported in (2003) Bull civ n° 258, 206; Cour de cassation [French Court of Cassation], 04-47504, 3 January 2006. See also the ECtHR's decision concerning the latter case in *Grosz v France* (European Court of Human Rights, Chamber, Application No 14717/06, 16 June 2009) 4.

47 *AA v Germany*, Ustavno Sodišče [Slovenian Constitutional Court], Up-13/99-24, 8 March 2001 reported in [2001] 28/1 *Official Gazette of the Republic of Slovenia*.

Brazilian[52] and German[53] courts held that, in respect of claims arising out of a defendant state's conduct during an armed conflict in the forum state, the immunity subsisted.[54] Only the Italian court decisions, and the subsequently contradicted decision of the Greek Court of Cassation, stood as exceptions to this trend.

An important aspect of this trend was the 2004 *United Nations Convention on Jurisdictional Immunities of States and their Property* ('*JISP Convention*').[55] Article 12 of the *JISP Convention* contains a territorial tort exception to immunity. On its face, this provision does not carve out from the exception the actions of a state's armed forces. This ostensibly suggests that the *JISP Convention* ran contrary to the abovementioned decisions of the majority of domestic courts. However, the International Law Commission's commentary on art 12 states that the exception does not apply to 'situations involving armed conflicts',[56] and the practice of the Sixth Committee has confirmed that art 12 was drafted on the basis of this understanding.[57] Identical declarations made by Sweden and Norway when ratifying the *JISP Convention* also expressly confirm this understanding.[58]

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48 Dąbrowska, above n 38.

49 *Orith Zemach v Germany*, District Court of Tel Aviv-Jafo, No 2134/07, 31 December 2009.

50 *Botelberghe v Germany*, Court of First Instance of Ghent, 18 February 2000, cited in *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [68].

51 Cited in 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 12 June 2009, [127].

52 *Barreto v Germany*, Tribunal Regional Federal da 2nd Região [Regional Federal Court of Brazil of the 2nd Region], No 2006.5101016944-11, 9 July 2008. See Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions' (2011) 44 *Vanderbilt Journal of International Law* 1105, 1135–6.

53 *Distomo Massacre Case*, Bundesgerichtshof [Federal Supreme Court of Germany], No III ZR 245/98, 26 June 2003 reported in [2007] 129 *International Law Reports* 556. See Sabine Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad during the Second World War: Federal Court of Justice Hands down Decision in the *Distomo* Case' (2004) 5 *German Law Journal* 15.

54 The decisions of these courts and their references to one another are an example of what Damrosch calls '[i]nter-judicial dialogue' on the 'reasons either for maintaining traditional conceptions of state immunity or for adjusting preconceptions in light of evolving views': Lori Damrosch, 'Changing the International Law of Sovereign Immunity through National Decisions' (2011) 44 *Vanderbilt Journal of Transnational Law* 1185, 1197.

55 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, 65th plen mtg, Agenda Item 142, UN Doc A/RES/59/38 (16 December 2004) annex.

56 International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Third Session*, UN GAOR, 46th sess, Supp No 10, UN Doc A/46/10 (10 September 1991) 106.

57 *Summary Record of the 13th Meeting*, UN GAOR, 6th Comm, 59th sess, 13th mtg, Agenda Items 142, 149 and 160, UN Doc A/C.6/59/SR.13 (22 March 2005) 6 [36].

58 Cited in *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [69]:

> the *Convention* does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties.

It was into this flurry of jurisprudence and scholarship, and the resulting doctrinal contest, that the ICJ was required to proceed with its decision on the *Jurisdictional Immunities of the State* decision. With both the *jus cogens* issue and the territorial tort issue before it, the stage which had been set for the Court would allow it to play a leading role in the resolution of matters which had been a fecund and emotional source of international litigation throughout the previous decade.

III THE PROCEEDINGS BEFORE THE COURT

The proceedings before the Court comprised the main proceedings instituted by Germany in respect of Italy's alleged violations of its state immunity and two further incidental proceedings. It is convenient to address the latter first.

A *Incidental Proceedings*

The first incidental proceeding was the filing by Italy of a counterclaim seeking to espouse the claims of certain nationals against Germany arising from the latter's wartime actions.[59] Germany objected that these claims fell outside the Court's jurisdiction *ratione temporis* because they occurred before the entry into force of the treaty on which its jurisdiction was based.[60] The Court rejected the counterclaim, holding that jurisdiction *ratione temporis* is to be determined upon the facts which were the 'source of the dispute' and are its 'real cause'.[61] Here, those facts predated the entry into force of the treaty containing the compromissory clause and nothing in Germany's subsequent conduct altered that conclusion.[62]

The second incidental proceeding arose when Greece sought permission to intervene in the proceedings, albeit solely in relation to 'the aspects of the procedure relating to judgments rendered by its own (domestic — Greek) tribunals and courts on occurrences during the Second World War and enforced (*exequatur*) by the Italian courts'.[63] The Court consulted Germany and Italy, and while neither 'formally objected' to the intervention,[64] Germany identified several aspects in which Greece's application might not comply with the criteria for intervention in art 62 of the *Statute of the International Court of Justice* and r

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59 'Counter-Memorial of Italy', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 22 December 2009, [7.1]–[7.14].

60 'Preliminary Objections of the Federal Republic of Germany regarding Italy's Counter-Claim', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 10 March 2010, [13]–[19]; *European Convention for the Peaceful Settlement of Disputes*, opened for signature 29 April 1957, 320 UNTS 243 (entered into force 30 April 1958).

61 'Counter-Claim Order', *Jurisdictional Immunities of the State (Germany v Italy; Intervening)*, International Court of Justice, General List No 143, 6 July 2010, [23].

62 Including the signature of the treaties discussed at above n 7.

63 'Application for Permission to Intervene by the Government of the Hellenic Republic', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 13 January 2011, 6.

64 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Order on Application by the Hellenic Republic for Permission to Intervene)* (International Court of Justice, General List No 143, 4 July 2011) [5].

81 of the *Rules of Court*.[65] Ultimately, however, the Court allowed Greece to intervene, albeit only on the limited basis stipulated in its application.[66]

B *The Pleadings of the Parties in the Main Proceedings*

Alongside the conduct of these incidental proceedings, Germany and Italy advanced their pleadings in the main proceedings before the Court. Germany argued that, while the conduct of its armed forces during the Second World War was unlawful, the 'liability of a national community for the tortious actions orchestrated by its leaders cannot be unlimited' and that 'authorizing individual claims' in the present context would have 'incalculable financial dimensions'.[67] More specifically, Germany maintained that Italy, through its courts, had 'repeatedly disregarded the jurisdictional immunity of Germany as a sovereign state'[68] by: allowing civil claims based on Germany's violations of international humanitarian law in the Second World War to be brought before Italian courts; taking measures of constraint against Villa Vigoni; and declaring the judgment of the Greek Court of Cassation enforceable.[69]

In response, Italy argued that the proceedings before Italian courts did not breach international law because: customary international law no longer granted states immunity for acts (be they *jure gestionis* or *jure imperii*) causing death, personal injury or damage to property on the territory of the forum state (the 'territorial tort' exception);[70] and the gravity of the breach of international human rights and humanitarian law, the breach of *jus cogens* norms and the absence of any other avenue of redress meant that Germany was not entitled to immunity.[71] Italy further maintained that these considerations meant that its courts' decisions to enforce the judgment of the Greek Court of Cassation did not breach international law.[72] Italy acknowledged, however, that vis-a-vis the measures of constraint, it had 'no objection to ... the Court obliging Italy to ensure that the mortgage on Villa Vigoni ... is cancelled'.[73]

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65 International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 81; 'Application by Greece for Permission to Intervene: Germany's Response', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 23 March 2011.

66 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Order on Application by the Hellenic Republic for Permission to Intervene)* (International Court of Justice, General List No 143, 4 July 2011) [32].

67 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 12 June 2009, [59], [75].

68 'Application Instituting Proceedings', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 23 December 2008, 4.

69 Ibid [14]; 'Memorial of the Federal Republic of Germany', *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, International Court of Justice, General List No 143, 12 June 2009, [132].

70 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [62].

71 Ibid [80].

72 Ibid [123].

73 Ibid [110].

C *The Decision of the Court*

Thus seized of the dispute, the Court rendered its decision on the main proceedings. In relation to the alleged violation of Germany's immunity before Italian courts, the ICJ dealt first with the territorial tort issue. The Court carefully identified the international conventions and national legislation which contain exceptions to state immunity based on the territorial tort principle, and reviewed the decisions of national and international courts which have considered its application.[74] When dealing with the territorial tort exception in the *JISP Convention*, the Court was careful to note the 'understanding' that the exception did not apply to the acts of armed forces during an armed conflict on the territory of the forum state.[75] Article 12 of the *JISP Convention* therefore could 'not be taken as affording any support' to a contrary contention.[76] Despite its wide-ranging survey of the territorial tort exception in international and domestic law, the Court was ultimately concerned only with the application of a particular carve out to the exception, namely, one according to which the state would continue to enjoy immunity where the territorial tort was committed by its armed forces during an armed conflict. For the purposes of this narrow enquiry, the most pertinent state practice concerned whether a state was entitled to immunity for the conduct of its armed forces in the course of armed conflict in the territory of the forum state.[77] The Court determined that state practice and *opinio juris* evidenced that

> customary international law continues to require that 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 State in the course of conducting an armed conflict.[78]

Having decided that the armed conflict carve out thus applied, the Court did not have to rule generally on the scope of the territorial tort exception in customary international law.[79]

Continuing its analysis of Germany's immunity before Italian courts, the Court addressed Italy's three-pronged argument regarding the gravity of the allegations, the *jus cogens* issue and the lack of any alternative means of redress. The Court carefully noted the decisions of the many domestic and international courts that had rejected the proposition that allegations of breaches of human rights law or the law of war subvert the immunity of a defendant state.[80] It also noted the absence of such provisions in relevant multilateral treaties, including the *JISP Convention*[81] and the *European Convention on State Immunity*.[82] In light of this practice, and contrary to the decisions of Italian courts and the Greek

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74 Ibid [66]–[76]. These cases are identified above at Part II(B).

75 Ibid [69].

76 Ibid. Further, the negotiation of art 12 was contentious, which in itself militates against any finding that its content reflects customary international law: Damrosch, above n 54, 1190.

77 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [73].

78 Ibid [78].

79 See ibid [65].

80 Ibid [83]–[85], [90]. These cases are identified above at Part II(B).

81 Ibid [89].

82 Opened for signature 16 May 1972, 1495 UNTS 182 (entered into force 11 June 1976).

Court of Cassation, the Court concluded that 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict'.[83] Regarding Italy's argument that the justiciability of *jus cogens* violations could not be precluded by principles of state immunity, the Court again surveyed domestic and international jurisprudence and found no support, outside the Italian and Greek cases, for Italy's proposition.[84] The Court held that 'rules of State immunity are procedural in character', which in their application do not conflict with — and thus are not normatively subordinate to — substantive rules prohibiting violations of *jus cogens* norms.[85] Thus, 'even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law of State immunity was not affected'.[86] Finally, the Court rejected Italy's 'last resort' argument, concluding that there was 'no basis' on which 'international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress'.[87] On the basis of these findings, and even after considering the accumulation of Italy's arguments,[88] the Court held that the Italian courts' denial of jurisdictional immunities to Germany 'constitutes a breach of the obligations owed by the Italian State to Germany'.[89]

Moving next to the measures of constraint taken against Villa Vigoni, the Court, without hesitation, found in favour of Germany. After noting that Italy did not oppose a ruling against it on the issue,[90] the Court observed that the measure of constraint was pursued against property used for purposes which were 'entirely non-commercial, and … falling within Germany's sovereign functions'.[91] This finding was enough to demonstrate that the measure of constraint breached the immunity which attaches to state property used for governmental and non-commercial purposes and was therefore unlawful.[92] The Court therefore concluded that 'the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany'.[93]

The final issue was whether Italy had breached international law through its courts' declarations that judgments of Greek courts adverse to Germany were enforceable in Italy. The Court emphasised that its focus was on whether Italian courts, in granting exequatur, acted in conformity with the law of state immunity

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[83] Ibid [91]. An additional point the Court made, at [82], was that if

> 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.

[84] Ibid [95]–[96].
[85] Ibid [93].
[86] Ibid [97].
[87] Ibid [101].
[88] Ibid [106].
[89] Ibid [107].
[90] Ibid [110].
[91] Ibid [119].
[92] Ibid [118].
[93] Ibid [120].

and not on any alleged breach of international law by Greece.[94] The Court held that the obligation on a court conducting exequatur proceedings was to enquire whether, if it had been seized of the original merits of the dispute, it would have been obliged to recognise the immunity of the defendant state.[95] Given that the Court had already found that Italy breached international law by not recognising Germany's immunity before its courts, it unsurprisingly held that Italian courts would have been obliged to grant immunity to Germany if they had been seized of the merits of the case before the Greek courts. Accordingly, the Court concluded that Italian courts 'could not grant exequatur without thereby violating Germany's jurisdictional immunity'.[96] The Court therefore allowed the key elements of Germany's claim and rejected all of Italy's marquee defences.[97]

IV INTERNATIONAL LAW AND THE DECISION OF THE COURT

Numerous aspects of the Court's judgment have attracted scholarly attention.[98] The focus of this case note, however, is on the two features which

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94 Ibid [127]–[128].

95 Ibid [130].

96 Ibid [131].

97 Only Judge Cançado Trindade dissented in respect of all of the Court's findings. His dissenting opinion is long and comprehensive, although the driving impetus for his dissent was to

> contribut[e] to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of cases of the kind on the basis of fundamental considerations of humanity, whenever grave breaches of human rights and of international humanitarian law lie at their factual origins, as in the *cas d'espèce*.

Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Dissenting Opinion of Judge Cançado Trindade) (International Court of Justice, General List No 143, 3 February 2012) [2].

98 Scholars have discussed, for instance:

- The decidedly 'positivist' approach employed by the Court, especially when establishing the content of customary international law by reference to state practice, and the counterpoint in the methodology of Judge Cançado Trindade's dissenting opinion: Burkhard Hess, 'State Immunity, Violation of Human Rights and the Individual's Right for Reparations — A Comment on the ICJ's Judgment of February 2, 2012 (*Germany v Italy; Greece Intervening*)' on *Conflict of Laws* (21 February 2012) <http://conflictoflaws.net/2012/hess-on-italy-v-germany/>.
- The Court's 'clumsy sidestepping' of the *Monetary Gold* issue raised by Greece's interest, beyond intervener, in the proceedings: Kimberly N Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany v Italy*' (2012) 1 *Cambridge Journal of International and Comparative Law* 153, 154.
- The question of whether Italy could have argued that its domestic courts' decisions constituted lawful countermeasures: at 163–8.
- The potential consequences for states' exercise of extraterritorial jurisdiction and the immunity of foreign officials from suit, particularly in the United States: Paul Stephan, 'ICJ Decision in *Jurisdictional Immunities of the State (Germany v Italy)*' on *Lawfare* (5 February 2012) <http://www.lawfareblog.com/2012/02/paul-stephan-on-icj-decision-in-jurisdictional-immunities-of-the-state-germany-v-italy-2/>. For a contrasting view, see Chimène Keitner, '*Germany v Italy*: A View from the United States' on *EJIL: Talk!* (15 February 2012) <http://www.ejiltalk.org/germany-v-italy-a-view-from-the-united-states/>.

were central to the Court's decision and had produced the significant contest of doctrine reviewed earlier in this note. These two issues are: the scope of the armed conflict carve out from the territorial tort exception to the immunity of states from suits before foreign domestic courts; and whether state immunity subsists for violations of *jus cogens* norms or other serious violations of international human rights and humanitarian law.

Turning to the first issue, the Court's ratio decidendi on the territorial tort exception has been described as 'narrow'.[99] It stands only for the proposition that *acta jure imperii* do not fall within the territorial tort exception to immunity where they involve the conduct of the defendant state's armed forces in the course of an armed conflict on the territory of the forum state, where they were evidently present without the forum state's consent.[100] This narrowness is commendable. More than the general desideratum of a court deciding only the question before it, the Court's precision leaves open the question of whether other *acta jure imperii* might fall within the exception. This is shrewd, as a matter of case-load management, as it allows the Court to determine the issue when it is more centrally presented in a later case. It also makes sense in principle. After all, no domestic legislation contains a territorial tort exception which distinguishes wholesale between *acta jure imperii* and *acta jure gestionis*[101] and at least one domestic court has explicitly held that the exception is not inherently limited to *acta jure gestionis*.[102] Thus, given that state practice does not exclude the possibility that some *acta jure imperii* could fall within the territorial tort exception,[103] the Court correctly confined its ruling to that category of actions which clearly fell outside the exception. It would have been precipitous for the Court to rule generally on the issue. The category of *acta jure imperii* covers a diversity of state conduct, some of which may not, in the practice of states, be so clearly carved out of the territorial tort exception. Had the Court ruled generally that *acta jure imperii* did not fall within the exception, it would have enshrined immunity not only for territorial torts committed by a state's armed forces but also for state conduct which was vastly different though still tortious, such as the provision of educational material to troops stationed in a

- The potential consequences for the argument that a state which breaches *jus cogens* norms impliedly waives immunity in respect of such conduct: Michele Potestà, 'State Immunity and *Jus Cogens* Violations: The *Alien Tort Statute* against the Backdrop of the Latest Developments in the "Law of Nations"' (2010) 28 *Berkeley Journal of International Law* 571, 577–9.
- Whether a rejection of *jus cogens* exceptions to state immunity may have a 'chilling' effect on domestic courts' willingness to refuse the immunity for grave violations of human rights: O'Keefe, above n 20, 1033; Damrosch, above n 54, 1200.

99 Trapp and Mills, above n 98, 156. See Keitner, above n 98.

100 On the importance of consent, albeit in the context of foreign official immunity, see *Khurts Bat v Investigating Judge of the German Federal Court* [2012] 3 WLR 180, [97]–[98] (Moses LJ).

101 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [64].

102 *Schreiber v Canada* [2002] 3 SCR 269, [33]–[36].

103 Note, however, Garnett's discussion of the controversy of the scope of the exception in relation to *acta jure imperii*: Richard Garnett, 'The Defence of State Immunity for Acts of Torture' (1997) 18 *Australian Year Book of International Law* 97, 116–21.

foreign state that turned out to be libellous.[104] While the Court may in the future consider the latter scenario and apply the principle articulated in this case, a ruling of such generality in this instance would have been unnecessary on the facts of this case, unsupported by state practice and risked a distortion of doctrine.

It has been argued that 'it is not entirely clear that the evidence relied on by the Court provides sufficient foundation for its conclusions' on the armed conflict carve out from the territorial tort exception.[105] The basis for this criticism is that the national legislation reviewed by the Court indicates that certain states require status of forces agreements to be in place with the defendant state before the conduct of the defendant state's forces would fall outside the exception.[106] In the author's view, such a criticism is weak. The Court's reliance on the state practice evidenced in those pieces of national legislation was minimal: it reads chiefly as an acknowledgment that several states have legislated for this exception to state immunity, rather than as an attempt to elicit from that legislation the content of the specific customary international law rule at issue. As the Court stated, the 'most pertinent State practice' in the present case is found in those domestic court decisions which had, unlike the national legislation surveyed, specifically considered the scope of the armed conflict carve out from the territorial tort exception.[107] These specific instances of practice, taken as a whole, evidence that states regard the conduct of armed forces in the forum state during an armed conflict as being *acta jure imperii*, which do not fall within the territorial tort exception.

Turning to the second central aspect of the Court's decision, this author agrees with the Court's implicit rejection of the normative hierarchy theory.[108] The elision of the difference between the procedural nature of state immunity principles and the substantive nature of *jus cogens* prohibitions is something which scholars and, to a far lesser extent, courts have tried to achieve through various arguments. For some, the importance of compliance by states with *jus cogens* norms is itself sufficient to require that this substantive rule inherently encompass a procedural rule which guarantees its judicial enforcement.[109] For others, the elision rests on the acknowledgment that procedural rules can go to the heart of substantive justice[110] and that the 'distinction between substantive and procedural law is artificial and illusory'.[111] For still others, the situation is simpler: there is a straight conflict between the rules of state immunity and the

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104 See *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1577 (Lord Hope).

105 Trapp and Mills, above n 98, 156.

106 Ibid 157.

107 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [73].

108 Although not directly related to the Court's reasoning and decision in *Jurisdictional Immunities of the State*, a number of issues that scholarship had previously linked to the success or failure of the existence of *jus cogens* exceptions to state immunity may be broadly affected by the decision. Thus scholars query whether the immunity of foreign officials from suit, particularly in litigation before US courts, may be affected by the Court's decision: see, eg, Stephan, above n 98; Keitner, above n 98.

109 Bartsch and Elberling, above n 23, 486; Orakhelashvili, above n 23, 968.

110 Trapp and Mills, above n 98, 160.

111 Charles Frederic Chamberlayne, *A Treatise on the Modern Law of Evidence* (Sweet & Maxwell, 1911) vol 1, 217.

rules of *jus cogens*, with the result that 'the procedural bar of State immunity is automatically lifted, because those rules … conflict with a hierarchically higher rule'.[112]

None of these objections are sufficient to erode the difference between the procedural nature of immunity and the substantive nature of *jus cogens* prohibitions. No reasonable international lawyer would maintain that connections between procedural and substantive rules do not exist. To the contrary, they are abundant. Failure to abide by procedural requirements in compromissory clauses or in 'consent to arbitrate' clauses can deny a claimant access to an international tribunal. The notion of universal jurisdiction implies a connection between the substance of certain norms and the procedural availability of all domestic courts for their enforcement. As the Court itself has noted,[113] principles of immunity can leave substantive wrongs done by states unaddressed.[114] However, while these connections between procedure and substance exist in international law, as in all law, a connection does not imply a conflict. Procedural rules may affect the *effectiveness* of substantive rules, but they do not affect their *content*. This remains the case for substantive rules of either a primary or secondary character — the effectiveness of rules governing the allocation of responsibility are equally affected by procedural matters as the rules prohibiting the original wrongful conduct. That is why the Court was able to state so bluntly that procedural rules 'do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'.[115] In other words, the application of rules of state immunity does not prejudge whether a breach of a substantive norm has occurred.[116] To maintain the reverse is to conflate two sets of principles which, although related in the outcome they can produce, determine entirely different questions of law.

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112 *Al-Adsani* [2001] XI Eur Court HR 79, 112 [3]. O'Keefe summarises and rejects a final stream of argument which holds that in the same way 'the absolute doctrine of state immunity gave way via an incremental and contested process to the restrictive doctrine, so too over time will an exception be carved out for "human rights" cases': O'Keefe, above n 20, 1029.

113 In *Arrest Warrant of 11 April*, Judges Higgins, Buergenthal and Kooijmans in their separate opinion stated that '[i]n view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint': *Arrest Warrant of 11 April (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 87 [79]. In *Jurisdictional Immunities of the State* the Court stated: it 'is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned': *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [104].

114 O'Keefe, above n 20, 1027–8; Enzo Cannizzaro and Beatrice I Bonafé, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011) 825, 838.

115 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) [93].

116 As Lord Hoffmann memorably explained in *Jones v Ministry of the Interior of Saudi Arabia* [2007] 1 AC 270, 293 [44]:

> the *jus cogens* is the prohibition of torture. But the United Kingdom, in according State immunity to [Saudi Arabia], is not proposing to torture anyone. Nor is [Saudi Arabia], in claiming immunity, justifying the use of torture. It is objecting *in limine* to the jurisdiction of the English court to decide whether it used torture or not.

The acknowledgement that procedural rules may affect the effectiveness, but not the content, of substantive rules is therefore central to explaining why the elision of the two types of rules sought by many authors is inaccurate. However, at least one author attacks this point head on, arguing that a 'normative conflict' arises wherever 'one rule impedes the operation of another' and that a *jus cogens* norm 'must be enabled to operate as a norm; that is, to produce legal consequences among which accountability [of states for breaches of the norm] occupies the principal place'.[117] This is, in effect, an argument that immunity rules must make way for substantive *jus cogens* rules because any impairment of the enforcement of the latter renders it without effect or 'legal consequence'. This argument thus directly confronts the effectiveness/content issue and highlights what it would regard as the fundamental flaw in the Court's decision. However, the difficulties attending this argument are numerous. Even putting aside intertemporal issues about whether *jus cogens* existed, let alone had normative supremacy at the time of the Second World War,[118] and even assuming that *jus cogens* have an independent 'normative' existence outside the law of treaties,[119] the chief difficulty is the uncertainty of the legal basis on which such an expansive understanding of *jus cogens* is constructed. While it can be helpful to think in normative terms or in the language of conflicts of norms, ultimately the standards which apply to and decide disputes must be clearly based on a source of international law. Norms — even norms of *jus cogens* status — are, by themselves, empty of meaning unless their content can be defined by reference to a treaty provision, state practice and *opinio juris* or general principles of law recognised by states.[120] None of these sources of international law presently produce a rule stipulating that *jus cogens* norms in customary international law must be allowed 'to operate' and generate 'legal consequences' in spite of, for example, any countervailing procedural rules of state immunity in customary international law. This is not surprising. The history of the *jus cogens* concept is one of limitation and circumscription.[121] As Ian Brownlie famously stated, it is a 'vehicle [which] does not often leave the garage'.[122] Understood as such, expanding the concept in the way described above would be a monumental legal development, the justification for which would need to be unambiguously evidenced in the usual sources of international law. It is this evidence which, regardless of all the discussion of possible normative hierarchies in international law, does not exist. In its absence, therefore, the Court was entirely correct to maintain its distinction between procedural and substantive rules of international law and to dismiss Italy's argument that the nature of the rule breached by Germany stripped it of its jurisdictional immunities before Italian courts.

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117 Orakhelashvili, above n 23, 957, 968.

118 Zimmermann, above n 20, 437.

119 Ibid 437–8.

120 Cf Georges Abi-Saab, 'The Third World and the Future of the International Legal Order' (1973) 29 *Revue Egyptienne de droit international* 27, 53.

121 See generally Andreas Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297.

122 Ian Brownlie, 'Discussion' in Antonio Cassese and Joseph H H Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988) 110.

V CONCLUSION

Ultimately, one suspects that behind claims that state immunity cannot exist for breaches of *jus cogens* norms or serious breaches of international human rights and humanitarian law lies a very human impatience to bring about reform of the international legal system which better protects and promotes human rights. At stake in *Jurisdictional Immunities of the State* was the reparation which is morally due to those who suffered greatly at the hands of state machinery during the Second World War. However, sympathetic as one must feel for these individuals, showing that they have suffered compensable loss is a different task to showing that states are procedurally unable to assert immunity from civil suits before foreign courts.

There are no short cuts. If the procedural bars of state immunity recognised by customary international law serve to preclude individuals from obtaining reparation for substantive wrongs done to them, the solution is not to pursue sophistic attempts to justify the unprincipled elision of procedure and substance. Rather, the solution is what it always has been. States must, whether *proprio motu* or at the behest of aggrieved nationals, alter their practices in a way that brings about the desired change in international law. The reality is, however, that such an alteration of conduct has not yet occurred and is not imminent. It is for this reason that the Chairman of the International Law Commission's Working Group on jurisdictional immunities reported to the Sixth Committee that the issue of 'the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms … did not seem to be ripe enough' for codification in the *JISP Convention*,[123] before he later elaborated that any attempt to force the issue would not overcome the lack of a 'clearly established pattern by States in this regard' and would instead 'jeopardise' the *JISP Convention* as a whole.[124] The message is clear. Whether it be by enacting relevant domestic legislation, ratifying treaties dealing with the issue or using waivers more regularly, states' conduct will be determinative of any such diminution of immunity. That, quite evidently, is also the message both heeded and reiterated by the ICJ in its decision in *Jurisdictional Immunities of the State*.

LUCAS BASTIN*

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123 Gerhard Hafner, *Convention on Jurisdictional Immunities of States and Their Property: Report of the Chairman of the Working Group*, UN GAOR, 6th Comm, 54th sess, Agenda Item 152, UN Doc A/C.6/54/L.12 (12 November 1999) 7 [46]–[47].

124 Gerhard Hafner, 'State Immunity and the New UN *Convention*' (Speech delivered at the Chatham House Conference, London, 5 October 2005) <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf>.

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