CHAPTER 11

JURISDICTIONAL IMMUNITIES OF THE STATE IN INTERNATIONAL LAW

PAUL GRAGL

I. The Concept of State Immunity: History, Functions, and Philosophy

Despite its elusive and protean nature, jurisdiction in international law constitutes, at its broadest, a *positive* concept, somehow relating to state sovereignty which, in turn, gives rise to the claim to exercise powers and to speak in the name of the law. In this vein, the relevant international legal rules on jurisdiction serve the crucial function of principally delimiting state regulatory authority to its own respective territory or citizens, thereby excluding other states from this very claim to power.[1] Conversely, the reverse side to jurisdiction is the *negative* concept of jurisdictional immunity which denies a state this very claim to fully exercise its powers over other states.[2] Jurisdiction and immunity thereby act like communicating vessels to the extent that any grant of immunity involves declining to exercise jurisdiction, whilst any denial of immunity results in the assertion of jurisdiction.[3]

The importance of state immunity is rooted in the fact that the international legal order lacks an effective and compulsory centralized enforcement mechanism, which is why domestic courts continue to play a pivotal role in implementing and enforcing international law.[4] The concept of state immunity, however, represents a considerable impediment to domestic judicial scrutiny over internationally wrongful acts and hence the accountability of states in national fora.[5] Under classical international law, States are the main actors and legal subjects in international relations, and since they are coeval with the birth of the international society,[6] they also enjoy—in the parlance of the

[1] See e.g. Cedric Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford: Oxford University Press, 2015), 5–6; Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction', in Shaun McVeigh (ed.), *Jurisprudence of Jurisdiction* (London: Routledge, 2007), 3; Alex Mills, 'Rethinking Jurisdiction in International Law', *British Yearbook of International Law* 84 (2014): 188, 188–92.

[2] In this regard, please note that this chapter only examines the immunity of states as international legal subjects; it does not concern itself with the immunities of heads of state and governments.

[3] Alexander Orakhelashvili, 'State Immunity from Jurisdiction between Law, Comity, and Ideology', in Alexander Orakhelashvili (ed.), *Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015), 151. He also notes, however, that this image is not entirely correct since the question of jurisdiction is antecedent to that of immunities, and that 'it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction'; see *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep. 19, para. 46.

[4] See the theoretical foundations of this *dédoublement fonctionnel* or '~~role splitting~~' in Georges Scelle, *Précis de droit des gens: Principes et systématique*, I: *Introduction, le milieu intersocial* (Paris: Sirey, 1932), 43.

[5] Paolo Gaeta, 'Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 229.

[6] Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds,), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 50.

state-centred sovereigntists Jean Bodin, Thomas Hobbes, and G. W. F. Hegel[7]—absolute sovereignty and immunity. States are equal and have no authority over each other, and thus, in order to enable them to carry out their public functions effectively and free from disruptions, they are principally immune from legal action before the courts of another state (along the maxim of *par in parem non habet imperium*).[8] Upon the arising of a dispute, a state may consequently plead its immunity under international law to prevent adjudication without its consent and thereby evade any judicial responsibility before foreign domestic courts.[9] Given this development of the law of state immunity through domestic judicial decisions and the absence of an international treaty of universal participation dealing with this matter, state immunity is usually considered to be a principle of *customary international law*.[10] In contrast to that, the two main codification projects on the law of state immunity remain mostly ineffective: whereas the 2004 UN Convention on Jurisdictional Immunities of States and their Property is not in force yet because it has, so far, not attracted the required number of ratifications,[11] the European Convention on State Immunity is in force, but only for eight states.[12]

It is nonetheless remarkable that due to the increasing interrelationship and interdependence between states and the rise of international human rights, absolute sovereign immunity gradually eroded into mere relative sovereign immunity,[13] according to which states certainly remain equal *inter se*, but are subject to international law.[14] Thus only the exercise of sovereign authority in the sense of 'political activities'[15] (i.e. foreign and military affairs, legislation, the exercise of police power, and the administration of justice)[16] is—as *acta iure imperii*—exempt from the jurisdiction of foreign domestic courts. Pure commercial activities, however, in which states act as ordinary legal

[7] See e.g. Ernest K. Bankas, *The State Immunity Controversy in International Law* (Berlin: Springer, 2010), 1–12.

[8] See in particular the arguments voiced in the United States Supreme Court case, *The Schooner Exchange v McFaddon*, 11 US 116 (1812).

[9] Hazel Fox, 'State Immunity and the International Crime of Torture', *European Human Rights Law Review* [2006]: 142, 144. See therefore the decision of the Supreme Court of the Netherlands in *The Netherlands v Nuhanovic*, Decision No. 12/03324, 6 September 2013, in which a court of the Netherlands held the Netherlands responsible for the wrongful conduct of its peacekeeping troops. Thus no *foreign* state was directly involved.

[10] Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012), 35.

[11] Adopted by UN General Assembly Resolution 59/38, A/RES/59/38, 2 December 2004; see Art. 30(1) of the Convention, requiring thirty instruments of ratification, acceptance, approval, or accession; at the time of writing, only twenty-~~one~~ such instruments had been deposited.

[12] ETS No. 074; entry into force on 11 June 1976.

[13] Leaving aside the issue that the idea of relative sovereignty involves a *contradictio in adiecto*: the original sense of sovereignty is that of supreme power, but if power is limited by law, it cannot be supreme. Thus, to use the term 'relative' in this context is to distort 'sovereignty's' proper and original sense, and therefore the concept of sovereignty should be best abandoned altogether; see Hans Kelsen, 'Théorie du droit international public', *Recueil des cours* 84 (1953-III): 1, 83–5; Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr-Siebeck, 1920), 2, 7–8, 85–101.

[14] See e.g. Jasper Finke, 'Sovereign Immunity: Rule, Comity, or Something Else?', *European Journal of International Law* 21 (2011): 853, 858–61.

[15] *Hoffmann v Dralle*, Austrian Supreme Court, 1 Ob 171/50, 10 May 1950.

[16] BVerfGE 16, 27—*Iranische Botschaft*, German Federal Constitutional Court; 30 April 1963, para. 162.

persons, are—as *acta iure gestionis*—not immune from foreign domestic jurisdiction.[17] Nevertheless it needs to be mentioned that this exception to immunity only concerns immunity from *adjudication*, whilst immunity from actual *enforcement* remains largely absolute, and coercive measures to a state and its property continue to remain subject to the respective state's consent.[18]

The intricate law of state immunity continues to puzzle jurists, mainly because its stated rationales are sometimes legal, and sometimes political or ideological.[19] In accordance with the overall rationale of this Handbook, this chapter is intended to give a critical overview of this topic, and to hopefully inspire further research. Therefore, it will examine the main and most pressing legal issues concerning jurisdictional immunities of the state in international law[20] and clarify and critically discuss these puzzles for the reader. To this end, it will first illustrate the most recent international decision on the scope of state immunity—namely, the *Jurisdictional Immunities* case of the International Court of Justice (ICJ) (Section II), and subsequently assess the most prevalent problems in this context: first, whether state immunity should be upheld as a rule of procedural law or whether it should give way to substantive questions in terms of human rights violations and *ius cogens* norms (Section III); and lastly, which problems emerge from immunity cases for the relationship between international and national law. By way of a crude oversimplification, one could argue that the entire debate on state immunity boils down to the questions of whether immunity is merely relative or absolute, and whether the state needs to subordinate itself to the international legal order for the sake of global peace or whether it retains an untouchable core of sovereignty to assert itself as the actual centre of power on the international level.[21]

II. The *Jurisdictional Immunities* Case

II.1. Recent Developments in International Jurisprudence

As briefly mentioned earlier, the law of state immunity has undergone enormous changes in both doctrine and practice during the last decades, seeing a gradual relaxation from absolute to relative immunity. It is, however, symptomatic of this subject

[17] See in general the overview in Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd edn (Oxford: Oxford University Press, 2013), 399–411.

[18] *Ibid*., 23–4 and 479–534. See also *Jurisdictional Immunities (Germany v Italy; Greece Intervening)* [2012] ICJ Rep. 99, para. 113.

[19] Orakhelashvili (n. 3), 155.

[20] For further and more detailed analyses, to date the most comprehensive commentaries concerning state immunity can be found in Fox and Webb (n. ~~16~~); Yang (n. ~~9~~); and Bankas (n. 7).

[21] See Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), 8; Jochen von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law', *Goettingen Journal of International Law* 4 (2012): 659, 664–6.

area that whereas domestic jurisprudence in this respect is abundant,[22] decisions by international courts and tribunals are rather scarce. This finding allows for two closely connected interpretations which might explain this scarcity: first, domestic courts are aware that in granting immunity to foreign states they are applying a principle of international law;[23] and second, by doing so, they not only comply with international norms, but can also ensure good international relations through reciprocity as well as comity.[24] We should nevertheless not disregard the fact that this domestic judicial practice has long been a major component of the development of the international law of state immunity.[25]

Yet the focus of this contribution is not on domestic practice, but international jurisprudence. As the first example, it took quite some time before the European Court of Human Rights (ECtHR) was faced for the first time with a normative conflict between state immunity as a denial of access to courts and Article 6(1) of the European Convention on Human Rights (ECHR), granting exactly this very right to individuals. In the majority of cases, however, the Court held that denying access to a court because of the law of state immunity could not be considered a human rights violation.[26] Given the status of state immunity as a general practice of states, '[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state immunity'.[27] In labour disputes concerning the dismissal of local employees from foreign embassies, conversely, the Court dismissed the principle of state immunity and found violations of Article 6(1) ECHR.[28]

Similarly, no issue regarding state immunity had come before the ICJ until 2012. Before that, the first three cases submitted to the Court only related to the immunity of individuals acting on behalf of the state, and not to the immunity of the state itself, namely the question whether an incumbent Minister for Foreign Affairs enjoys immunity from criminal jurisdiction before a foreign court;[29] whether a witness summons addressed to a head of state violates international law;[30] and whether the

[22] It is impossible to provide an overview of domestic cases here, but for a comprehensive list see e.g. Fox and Webb (n. ~~16~~ 2), xxi–xxxviii; and Yang (n. ~~9~~ 2), xxxii–clii. It is interesting to note that whilst the legal basis for immunity in common law jurisdictions is mostly rooted in domestic legislation and case law (see e.g. the UK State Immunity Act 1978 and the US Foreign Sovereign Immunities Act 1976), civil law jurisdictions largely rely on international law itself; see generally Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999), 111–14.

[23] Yang (n. ~~9~~ 2), 34–5.

[24] See *Al-Adsani v The United Kingdom*, App. No. 35763/97, ECtHR, 21 November 2001, para. 54.

[25] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), 10.

[26] See in particular *McElhinney v Ireland*, App. No. 31253/96, ECtHR, 21 November 2001; *Fogarty v The United Kingdom*, App. No. 37112/97, ECtHR, 21 November 2001; *Grosz v France*, App. No. 14717/06, ECtHR, 16 June 2009.

[27] *Al-Adsani v The United Kingdom* (n. 24), para. 55.

[28] See in particular *Cudak v Lithuania*, App. No. 15869/02, ECtHR, 23 March 2010; *Sabeh El Leil v France*, App. No. 34869/05, ECtHR, 29 June 2011; *Wallishauser v Austria*, App. No. 156/04, ECtHR, 17 July 2012.

[29] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (n. 3).

[30] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep. 177.

extent to which a delay in a treaty obligation to exercise universal jurisdiction over a former head of state accused of torture constitutes a breach of international law.[31] Those cases certainly involved issues of *derived* immunity, but not the law of state immunity per se. Therefore, the first and so far only 'pure' state immunity case examined and decided by the ICJ remains the *Jurisdictional Immunities* case from 2012, which will be discussed in the subsequent section.

II.2. Germany v Italy: State Immunity before the ICJ

II.2.a. *Factual Background*

The facts of the case concern the many atrocities perpetrated by German forces during World War Two against the Italian population, including massacres of civilians and the deportation of large numbers of civilians and members of the Italian armed forces for use as forced labour.[32] Furthermore, the facts also involve the Distomo massacre which took place in 1944 in Greece and resulted in the deaths of hundreds of civilians.[33] Following the war, Germany fully acknowledged its responsibility for the crimes committed by the Nazi regime and arranged for a number of legal instruments to be created purporting to deal with questions of compensation, such as the Peace Treaty of 1947, the Federal Compensation Law of 1953, two agreements of 1961 relating to the 'settlement of certain property-related, economic and financial questions' and 'compensation for Italian nationals subjected to National Socialist measures of persecution, and the German Federal Law of 2000 establishing a 'Remembrance, Responsibility and Future Foundation'.[34] The problem with these various compensation regimes was that certain groups of victims were excluded from benefiting from them due to very strict eligibility criteria[35] and that these regimes awarded money to the Italian state rather than the individual victims.[36]

Consequently, the victims turned to their respective national courts for redress. In Italy, Luigi Ferrini, a civilian who had been deported and forced to work for the Nazi regime, instigated proceedings against Germany in 1998. The Italian Court of Cassation eventually ruled in 2004 that the Italian courts had jurisdiction to hear and decide a case against Germany, since the law of state immunity does not apply to international crimes and violations of *ius cogens* norms.[37] Following further cases, the Court of Cassation confirmed in its *Mantelli* judgment in 2008 that the Italian courts indeed had jurisdiction over these claims brought against Germany.[38] In Greece, relatives of the victims of

[31] *Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep. 422.

[32] *Jurisdictional Immunities* (n. 18), para. 21.

[33] *Ibid*., para. 30. [34] *Ibid*., paras. 22–6, and 52.

[35] See also *Associazione Nazionale Reduci and 275 Others v Germany*, App. No. 45563/04, ECtHR, 4 September 2007, which the ECtHR declared inadmissible because there is no obligation on states 'to provide redress for wrongs or damage caused prior to their ratification of the Convention'.

[36] Sangeeta Shah, 'Jurisdictional Immunities of the State: Germany v Italy', *Human Rights Law Review* 12 (2012): 555, 557.

[37] *Ferrini v Federal Republic of Germany*, Decision No. 5044/2004, 11 March 2004.

[38] *Mantelli and Others v Federal Republic of Germany*, Order No. 14201/2004, 29 May 2008.

the Distomo massacre filed for compensation against the German state before the Greek courts and succeeded in the last resort when the Hellenic Supreme Court upheld the judgments of the inferior courts.[39] Again, the decision was based on the argument that Germany had violated *ius cogens* norms and that by committing such acts, Germany had impliedly waived its immunity.[40] When the Greek claimants attempted to enforce this judgment, however, an order by the Minister of Justice, which is usually required in order to enforce judgments against foreign states in Greece, was refused.[41] For this reason, the claimants concurrently brought their claims before the ECtHR and the German courts, but both dismissed the cases as a result of Germany's entitlement to state immunity.[42] Lastly, the Greek claimants sought to have the decisions enforced by the Italian courts. Indeed, the Court of Appeal in Florence considered these decisions to be enforceable, which was subsequently also confirmed by the Italian Court of Cassation. As the target of enforcement, the Greek claimants registered a legal charge over Villa Vigoni, a property owned by the German state near Lake Como and the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy.[43]

Given the principle of state immunity, Germany could not accept these actions and instigated proceedings before the ICJ against Italy, requesting the Court to declare that: (i) by allowing civil claims to be brought against Germany, Italy had failed to respect the jurisdictional immunity which Germany enjoys under international law; (ii) Italy had also violated Germany's immunity by taking measures of constraint against Villa Vigoni; and (iii) it had further breached this immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany. In this vein, Germany asked the ICJ to declare that Italy's international responsibility was engaged and to order the respondent to take steps by way of reparation.[44]

II.2.b. *The Decision*

On 3 February 2012, the ICJ delivered its judgment, holding by a majority of twelve to three,[45] that Italy had in fact violated international law on all three aforementioned accounts. The jurisdiction of the Court itself was based on the European Convention for the Peaceful Settlement of Disputes,[46] to which Italy raised no objection.[47] Consequently

[39] *Prefecture of Voiotia v Federal Republic of Germany*, Case No. 11/2000, 4 May 2000.

[40] Shah (n. 36), 557–8.

[41] In accordance with s. 923 of the Greek Civil Procedure Code; see also Matthias Kloth, *Immunities and the Right to Access to Court under Article 6 of the European Convention on Human Rights* (Leiden: Brill, 2010), 95.

[42] *Kalogeropoulou and Others v Greece and Germany*, App. No. 59021/00, ECtHR, 12 December 2002; German Federal Supreme Court, *Distomo Massacre*, III ZR 245/98, BGHZ 155, 279, 26 June 2003.

[43] See *Jurisdictional Immunities* (n. 18), paras. 33–6 and 119. This charge was then, however, suspended pending the proceedings before the ICJ.

[44] *Ibid*., paras. 15–17, 37.

[45] Judges Cançado Trindade and Yusuf as well as Judge ad hoc Gaja appended dissenting opinions, Judges Bennouna, Keith, and Koroma separate opinions.

[46] See Art. 1 of the Convention, requiring all High Contracting Parties to submit to the judgment of the ICJ all international legal disputes; ETS No. 23, 29 April 1957.

[47] *Jurisdictional Immunities* (n. 18), paras. 27–51.

the ICJ affirmed that it had jurisdiction and noted, proceeding to the merits, that since there was no treaty on state immunity which would bind both parties, any entitlement to immunity could only be rooted in customary international law.[48] Following a brief examination of the existence and extent of state immunity through state practice, the Court acknowledged that whilst there was broad agreement between Germany and Italy about the *existence* of the law of state immunity, they differed as to its *scope*, and how the law was to be applied. More precisely, although both parties accepted that states enjoy full immunity for *acta iure imperii*, Italy argued that torts and the most serious human rights violations were not covered by these acts.[49] Let us now engage with these two issues and the question of enforcement.

II.2.B.I. TERRITORY AND TORTS

In support of its first argument, Italy put forward the so-called 'territorial tort principle', which essentially states that customary international law has developed to a point where a state can no longer rely on its immunity regarding acts occasioning death, personal injury, or damage to property on the territory of the forum state, even if the act in question was performed as an *actum iure imperii*.[50] In order to ascertain whether such a territorial tort exception to the customary rule of state immunity indeed applied to the activities of armed forces, the ICJ first concluded that neither the 1972 European Convention on State Immunity nor its UN equivalent from 2004 preclude immunity for acts committed by armed forces.[51] Next, the Court analysed the potential instances of state practice as mentioned by Italy, and concluded that neither the judgments of national courts on the relevant provisions of the two Conventions[52] and on state immunity for foreign armed forces itself,[53] nor the existing nine pieces of domestic legislation on state immunity[54] could provide evidence in support of a general territorial tort exception for the activities of foreign armed forces.[55] Italy's first argument was therefore rejected.

II.2.B.II. THE GRAVITY OF THE VIOLATIONS, *IUS COGENS* NORMS, AND THE QUESTION OF ALTERNATIVE REMEDIES

Italy's second argument was of a threefold nature and basically asserted that Germany could not rely on its immunity because (i) of the grave nature of the violations of

[48] *Ibid*., para. 54. [49] *Ibid*., paras. 55–61.

[50] For a discussion of this principle see e.g. Andrew Dickinson, '*Germany v. Italy* and the Territorial Tort Exception', *Journal of International Criminal Justice* 11 (2013): 147, 152; Paul Christoph Bornkamm, 'State Immunity against Claims Arising from War Crimes: The Judgment of the International Court of Justice in *Jurisdictional Immunities of the State*', *German Law Journal* 13 (2012): 773, 776–7, 779.

[51] *Jurisdictional Immunities* (n. 18), paras. 64–9. See in particular Art. 31 of the European Convention and the *travaux préparatoires* to Art. 12 of the UN Convention.

[52] I.e. in Belgium, Ireland, Slovenia, Greece, and Poland; see *Jurisdictional Immunities* (n. 18), para. 68.

[53] I.e. in Egypt, Belgium, Germany, the United States, the Netherlands, France, and the United Kingdom; see *ibid*., para. 72.

[54] Namely those of the United Kingdom, Singapore, Canada, Australia, Israel, South Africa, Argentina, Japan, and the United States; see ~~*ibid*.~~, para. 71.

[55] *Ibid*., paras. 70–8.

international law committed by Germany; (ii) the rules of international law thereby contravened were *ius cogens* norms; and (iii) the exercise of jurisdiction by the Italian courts was necessary as a last resort, since the claimants had been denied all other forms of redress.[56]

Concerning the first sub-argument, the Court commenced its examination by drawing attention to a logical inconsistency in Italy's argument, namely that expecting state immunity for *acta iure imperii* to be superseded by serious violations of international humanitarian law or human rights law would be to prejudge the merits of the claim in question.[57] Despite having demonstrated this logical error in reasoning, the ICJ then went on to assess the position of customary international law on this matter. In perhaps the most controversial part of its judgment, it quickly dismissed the argument,[58] as it found no such exception to state immunity in the jurisprudence of six different national jurisdictions.[59] The Court also explicitly distinguished the case at hand from the *Pinochet (No. 3)* decision of the House of Lords[60] as this other case not only involved the immunity of a former head of state in *criminal* proceedings, and not the immunity of the state itself in *civil* proceedings, but also because *Pinochet* directly depended on the 1984 UN Torture Convention, which was not applicable to *Germany v Italy*.[61]

Regarding the second sub-argument on the question of peremptory norms, it is certainly not surprising that the ICJ was also scathing of Italy's *ius cogens* argument.[62] It accepted that certain substantive rules of international humanitarian law could be considered as peremptory,[63] but it did not regard them as conflicting with state immunity. Although it was evident that all parties openly recognized the violations of the law of armed conflict as illegal, state immunity and *ius cogens* norms simply apply to different matters: the rules on immunity are *procedural* in nature, and since they only address the question of jurisdiction and not whether the conduct in question was lawful or not, they cannot violate the *substantive* rules of *ius cogens*.[64] Alternatively put, state immunity only affects how substantive rules are to be given effect, but it does not affect the substance of the duties of states itself.[65] Lastly, the ICJ also made clear that the same applies to the

[56] *Ibid*., para. 80. [57] *Ibid*., para. 82. See also Shah (n. 36), 565.

[58] J. Craig Barker, 'International Court of Justice: Jurisdictional Immunities of the State (*Germany v. Italy*) Judgment of 3 February 2012', *International and Comparative Law Quarterly* 62 (2013): 741, 747.

[59] *Jurisdictional Immunities* (n. 18), para. 85, namely in Canada, France, Slovenia, New Zealand, Poland, and the United Kingdom.

[60] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No. 3)* (1999) 2 All ER 97.

[61] *Jurisdictional Immunities* (n. 18), para. 87. [62] Barker (n. 58), 748.

[63] E.g. the rules that prohibit 'the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour'; see *Jurisdictional Immunities* (n. 18), para. 93. See also Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*', *European Journal of International Law* 19 (2008): 491, 502, 505.

[64] *Jurisdictional Immunities* (n. 18), paras. 92–7. See also Alexander Orakhelashvili, 'Case Note: Jurisdictional Immunities of the State (*Germany v. Italy; Greece Intervening*)', *American Journal of International Law* 106 (2012): 609, 611–12; and *Jones v Saudi Arabia* [2006] UKHL 26, paras. 24, 44.

[65] Shah (n. 36), 567.

duty to make reparation that 'exists independently of those rules which concern the means by which it is affected'.[66]

With respect to the third and last sub-argument and Italy's plea, that redress for the victims was only possible by disregarding Germany's state immunity, the Court did indeed reproach the applicant for denying compensation to certain groups of victims, emphasizing that its immunity did not affect its responsibility to make reparation.[67] But even though 'immunity does not equate impunity',[68] the ICJ could not determine any international legal norm which made the enjoyment of immunity dependent on the existence of 'effective alternative means of securing redress'.[69] It is of course beyond doubt that the decision on German immunity has the effect of precluding redress for some victims, but it is also clear that this issue could be resolved by way of further negotiations between the two states concerned.[70]

To conclude, the Court stated that even the cumulative effect of the nature of Italy's claims contained in these three sub-arguments would not lend 'support to the proposition that the concurrent presence of two, or even all three, of these elements would justify the refusal by a national court to accord to a respondent state the immunity to which it would otherwise be entitled'.[71] Consequently, Italy's second argument was rejected as well.

II.2.B.III. THE VILLA VIGONI AND THE ENFORCEMENT OF GREEK DECISIONS

Given Italy's position not to object to a Court order to bring the measure regarding the legal charge over the Villa Vigoni,[72] the ICJ also dealt rather quickly with this issue. Following the observation that state immunity from enforcement concerning their property situated on foreign territory goes further than mere jurisdictional state immunity before foreign courts, Italy's breach of international law was easily determined, especially due to the use of the Villa Vigoni for entirely non-commercial government purposes (i.e. *acta iure imperii*).[73] Similarly, it was not difficult for the Court to determine that the 'Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity', especially given that the decision to enforce was itself the exercise of a jurisdictional power by the Italian courts to a decision on the merits of the case.[74] Hence Italy's third argument was also rejected.

[66] *Jurisdictional Immunities* (n. 18), para. 94. [67] *Ibid*., para. 99.

[68] See Amrita Mukherjee, 'Rethinking Justice: Individual Criminal Responsibility, Immunity and Torture', in Charles Sampford, Spencer Zifcak, and Derya Aydin Okur (eds.), *Rethinking International Law and Justice* (London: Routledge, 2015), 121–2; Lorna McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', *European Journal of International Law* 18 (2007): 903, 907, 913.

[69] *Jurisdictional Immunities* (n. 18), para. 101.

[70] *Ibid*., para. 104. [71] *Ibid*., para. 106. [72] *Ibid*., para. 38.

[73] *Ibid*., paras. 113–20. See also the strict wording of Art. 19 of the 2004 UN Convention.

[74] *Jurisdictional Immunities* (n. 18), paras. 127–8, 131. See also Barker (n. 58), 749.

II.3. The Judgment within the Broader Legal Framework: A Defence

Before the judgment will be analysed from a more critical perspective in Section III of this chapter, it will first be placed and examined within the broader framework of the international legal order and how it fits within this framework. In other words, the following paragraphs represent a modest and doctrinal defence of the ICJ's decision in the context of classic international law. It is generally held that the judgment consolidates the hitherto ~~classic~~ mainline view on state immunity within a consensual positivist structure. From a purely doctrinal perspective, the judgment is based on a very detailed ~~scientific~~ analysis and is absolutely correct, confirming that state immunity constitutes an established *rule* rather than the *exception* to the rule that a state has jurisdiction over all acts committed on its territory.[75] Moreover the strong majority decision of twelve to three[76] also demonstrates that the conflict between *ius cogens* norms and state immunity needs to be seen as definitely settled for an indeterminate period of time. This will of course impede the long-term development of pertinent customary international law, but the decision nonetheless provides for legal certainty, and this is exactly where its significance rests.[77]

In particular Christian Tomuschat who also acted as counsel for Germany in the proceedings,[78] presents various plausible and convincing arguments in support of the actual outcome of the dispute. To begin with, his answer to this judgment's decisive question—namely whether exceptions to the strict law of state immunity have in fact developed *qua* customary law[79]—is in the negative. The position of the Italian and Greek courts in cases such as *Ferrini* and *Voiotia* was flawed from the outset, since customary law can be compared to a slow-moving convoy, which does not proceed by abrupt leaps.[80] The potential existence of 'instant' custom is of course an interesting notion,[81] but ultimately untenable in this case for two reasons. On the one hand, from a legal-theoretical point of view, the very concept of 'instant custom' boils down to a *contradictio*

[75] Orakhelashvili (n. 64), 612; Barker (n. 58), 750.

[76] See n. 45. See also narrow majority of nine to eight in *Al-Adsani v The United Kingdom* (n. 24). which was also acknowledged by the ICJ in *Jurisdictional Immunities* (n. 18), para. 90.

[77] Matthias Kloth and Manuel Brunner, 'Staatenimmunität im Zivilprozess bei gravierenden Menschenrechtsverletzungen', *Archiv des Völkerrechts* 50 (2012): 218, 238, 241.

[78] See *Jurisdictional Immunities* (n. 18), para. 13.

[79] Barker (n. 58), 750.

[80] Christian Tomuschat, 'The Case of *Germany v. Italy* before the ICJ', in Anne Peters *et al.* (eds.), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill, 2015), 88.

[81] Roberto Ago, 'Science juridique et droit international', *Recueil des cours* 90 (1956-II): 849, 932 *et seq.*; Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' *Indian Journal of International Law* 5 (1965): 23, 35–50.

in adiecto.[82] Like the United States' claim to the continental shelf,[83] initiatives for the development of new custom are certainly necessary, but they do not create new law overnight; and like streets that are built upon well-trodden paths, customary international law is dependent on such processes in which other nations intervene by either following suit, by rejecting the innovation, or by reserving their response until a later point in time.[84] On the other hand, from a practical perspective, even if one concedes to the existence of instant custom, the threshold for its acceptance would be even higher than for 'regular' customary law, as it would require very strong evidence that states unanimously regarded the new practice as legally binding.[85] In other words, the emergence of instant custom is only possible if a universal consensus among states on the existence of a certain rule can be identified—for instance, by way of unanimous adoption of a UN resolution.[86] But this is definitely not the case in an area as sensitive as jurisdictional immunities of the State, and hence both *opinio iuris* and *consuetudo* remain necessary for the formation of customary law. The Italian and the Greek courts, however, evidently ignored this practice element, which prevented them from recognizing that there is no practice that—if it had existed—would have allowed them to ignore the law of state immunity.[87] And since there was no practice, there could not be any *opinio iuris* either. Lastly, seeing that the decisions of the lower Greek courts had effectively been overturned by a later judgment of the Greek Special Supreme Court,[88] it was the Italian Court of Cassation which fought a lone war against the law of state immunity.[89] Through this avenue, no new customary international law—let alone instant customary law—can develop.

Second, it is doctrinally absolutely correct that *ius cogens* does not have the effect of superseding the procedural immunity of states from the domestic jurisdiction of foreign states.[90] *Ius cogens* norms are substantive in nature and therefore regulate positive state conduct. They aim at averting the evil consequences which specific acts or activities

[82] See e.g. Michael Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* 47 (1975): 1, 31; Jonathan I. Charney, 'International Agreements and the Development of International Law', *Washington Law Review* 61 (1986): 971, 990–6; Godefridus J. H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983), 86.

[83] See e.g. Offical Documents, 'United States: Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf', *American Journal of International Law—Supplement* 40 (1946): 45–6.

[84] Bruno Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (Munich: Fink, 1970), 55; Tomuschat (n. 80), 88–9.

[85] Martin Dixon, *International Law*, 7th edn (Oxford: Oxford University Press, 2013), 36.

[86] Bin Cheng, 'On the Nature and Sources of International Law', in Bin Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens & Sons, 1982), 222–9; Cheng (n. 81), 35–40; Niels Petersen, 'Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation', *American University International Law Review* 23 (2008): 275, 281.

[87] *Jurisdictional Immunities* (n. 18), paras. 72–5.

[88] *Margellos and Others v Federal Republic of Germany*, Case No. 6/2002, 17 September 2002.

[89] Tomuschat (n. 80), 89.

[90] Barker (n. 58), 751.

would entail, but they do not specify what particular consequences are to be drawn in case such rules have been violated.[91] In other words, peremptory norms are norms from which no derogation is permitted according to Article 53 of the Vienna Convention on the Law of Treaties (VCLT), but the application of a procedural rule in itself does not amount to a derogation from substantive rules of *ius cogens*. The plea of state immunity is made before the merits of the case are being heard, and thus, as a procedural rule, it may hinder the enforcement of the peremptory norm in question, but it does not derogate from its content.[92] As an analogy, Stefan Talmon mentions the example of a 17-year-old person who committed the crime of genocide. Yet not even the commission of this worst-of-all crimes can call into question the procedural bar to the International Criminal Court's jurisdiction over persons under the age of 18.[93]

Third, we should consider the consequences of the law of state immunity giving way to other rules of international law, however crucial they may be in substance. In terms of legal policy, individualizing the settlement of war damages by permitting individual actions to be brought could lead to a total judicial impasse, wherein thousands or even more of individual claims would require adjudication. Furthermore, one should not underestimate the empirical complexities involved in such cases, especially when it comes to the securing of evidence decades after the actual crime has been committed, notwithstanding any statutes of limitation.[94] Yet once permitted and without any precisely defined eligibility and standing criteria, it could only be a matter of time until such individual claims could transform into an *actio popularis* to enforce *erga omnes* obligations, thereby granting standing to virtually everybody and bringing the judicial system to a complete standstill.[95] The question ~~there~~ is whether national courts really are the right institutions to adjudicate upon these cases. Seeing that international law is a legal order characterized by the principle of reciprocity, the danger of reopening World War Two at the judicial level would be tantamount to legal bursting of a dam. As a consequence, undermining the law of state immunity would not really contribute to the settlement of disputes and the preservation of peace by diplomatic means. And at the end of the day, we should not be oblivious to the fact that state immunity remains a necessary precondition for international relations. If a state were to be in constant worry of being subjected to a foreign judiciary without its consent, then no state would ever allow its organs, companies, or financial assets to leave its own territory.[96]

[91] Tomuschat (n. 80), 89–90; Fox and Webb (n. ~~16~~), 18–21.

[92] Stefan Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished', *Leiden Journal of International Law* 25 (2012): 979, 986.

[93] *Ibid*., 989. See also Art. 26 of the Rome Statute of the International Criminal Court.

[94] Tomuschat (n. 80), 94–5, 97 fn. 32.

[95] See the discussion in e.g. Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 518–27; Gleider I. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"', *British Yearbook of International Law* 83 (2013): 13, 35–6, 47–8; Bankas (n. 7), 299.

[96] Kloth and Brunner (n. 77), 242; Tomuschat (n. 80), 97.

Finally, we should also be aware of the fact that Germany has already been held accountable for the crimes of the Nazi regime and that is, regardless of the outcome of the ICJ decision, still obligated to pay reparations for these crimes and to negotiate further on this issue.[97] Judicial proceedings can of course be incentives for such negotiations, as the case of *Princz v Germany* demonstrates: even though the US courts accepted Germany's plea of immunity regarding a claim brought by a former concentration camp prisoner,[98] Germany subsequently concluded a compensation agreement with the United States to indemnify the original applicant and other victims of Nazi cruelties.[99] To conclude, it is also important to emphasize that individuals may attempt to bring their case before the courts of their *own* state—a course of action which is ~~of course~~ not subject to the law of state immunity. Uncertainties nonetheless also remain in this scenario, in particular due to different legal bases and judicial practices which might eventually also preclude victims from gaining compensation via this avenue.[100]

III. The Immunity Controversy: From State-Centrism to Individualism?

After contextualizing the decision of the ICJ within the broader framework of international law *de lege lata*, it is now time to engage critically with its shortcomings *de lege ferenda* and to enquire whether the argument that the plea for immunity is a purely procedural principle is indeed a good one. Maybe there are also convincing arguments to the contrary and beyond the Court's meticulous stock-taking of the law as it is, corroborating the view that violations of human rights and *ius cogens* norms should not be exempted anymore from litigation on the grounds of state immunity. Particularly the extremely comprehensive dissenting opinion of Judge Cançado Trindade, comprising 111 pages (compared to the 57 pages of the judgment itself),[101] presents a coherent, considerate, and value-centred critique of the decision itself as well as of certain developments in international law. The subsequent points of criticism will—in analogy to the defence above—engage with the two core problems of the matter, namely the foreclosure of any developments of new customary law and whether substantive norms should prevail over the procedural law of state immunity. In a nutshell, the arguments

[97] Barker (n. 58), 751; Tomuschat (n. 80), 95–6.

[98] *Princz v Federal Republic of Germany*, 26 F 3d 1166 (Court of Appeals for the District of Columbia Circuits, 1 July 1994).

[99] Germany–United States Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution of 19 September 1995.

[100] See e.g. Philipp Stammler, *Der Anspruch von Kriegsopfern auf Schadensersatz* (Berlin: Duncker & Humblot, 2009), 159 *et seq.*; Kloth and Brunner (n. 77), 242–3.

[101] *Jurisdictional Immunities (Germany v Italy; Greece Intervening)* [2012] ICJ Rep. 99, 179–290 (Judge Cançado Trindade, diss. op.).

presented below address the limits of the Court's traditional voluntarist approach[102] and argue in favour of establishing a proper hierarchy of norms in which *ius cogens* rules should reign supreme.

III.1. International Law as a System of Values: Formation Interrupted

At the outset, it needs to be highlighted that the role of domestic courts as agents of development and norm-creation in international law is not to be underestimated, because 'customary international law on the subject of State immunities has grown principally and essentially out of the judicial practice of States on the matter'.[103] Especially through their status as subsidiary means for the determination of the law in the sense of Article 38(1)(d) of the ICJ Statute, national court decisions play an immensely crucial role in ascertaining state practice and what the current status of the law is.[104] It is therefore undisputed that domestic courts are *ipso facto* agents of the development of international law.[105]

Nonetheless, the role of national courts in the process of formation and determination of international law is not uncontroversial.[106] The ICJ's judgment in the *Jurisdictional Immunities* case reveals a profound structural problem of customary international law, namely the fact that state practice can only change if national courts start to decide in contrast to the existing practice. Thereby new customary rules can develop and become valid law. Yet the principal issue is that during this transitionary period from rebellion to consolidation, these national courts encroach upon valid international law.[107] As a result, international law is virtually condemned to the paradoxical 'habit of pulling itself up by its own boot-straps'.[108] Yet what the ICJ has effectively done with its judgment is to have interrupted any development of customary international law in this area for the foreseeable future.[109] The decisions of the Italian courts are therefore not capable of changing the existing or bringing about customary international law, or in Lord Bingham's words in *Jones v Saudi Arabia*: 'one swallow does not make a rule of international law'.[110]

[102] See also Carlos Espósito, 'Of Plumbers and Social Architects: Elements and Problems of the Judgment of the International Court of Justice in Jurisdictional Immunities of States', *Journal of International Dispute Settlement* 4 (2013): 439, 450–2.

[103] Preliminary Report by Mr Sompong Sucharitkul, Special Rapporteur, on the topic of jurisdictional immunities of States and their property, UN Doc. A/CN.4/323 (1979), para. 23.

[104] Fox and Webb (n. ~~16~~ 1), 175; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 208.

[105] Rosanne van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules', *Leiden Journal of International Law* 26 (2013): 559, 564.

[106] *Ibid*. [107] Kloth and Brunner (n. 77), 238–9.

[108] Geoffrey Robertson QC, *Crimes against Humanity*, rev. edn (London: Penguin, 2006), 470.

[109] Shah (n. 36), 571; *Jurisdictional Immunities (Germany v Italy; Greece Intervening)* [2012] ICJ Rep. 99, para. 24 (Judge Yusuf, diss. op.).

[110] *Jones v Saudi Arabia* (n. 64), para. 22.

But what is highly commendable about the decisions of the Italian courts is that they sought, through ~~the adoption~~ an exception to immunity in cases of breaches of *ius cogens*, to uphold fundamental values of the international community. They did this in order to consider a development which they interpreted as a continuous change in the principle of state immunity and to implement the effective enforcement of human rights and the prosecution of war crimes and crimes against humanity. In this manner, the foundations of peaceful coexistence between nations could have been strengthened and international law as a system of values would have been consolidated.[111] As various ECtHR judges also argued in the joint dissenting opinion in *Al-Adsani*, it is common knowledge that states have, through their own initiative and in many instances, waived their rights immunity, which clearly demonstrates that the rules on state immunity do not enjoy a privileged or higher status. Consequently, these rules should not supersede the basic values of the international community.[112]

Interestingly, it has been stated that the ICJ's judgment and its analysis of customary law on the day of the judgement had an effect which can be compared to a specific aspect of Heisenberg's uncertainty principle: in the same way as it is impossible to measure the position of an object without disturbing its momentum,[113] the Court tried to 'measure' the status of customary law at a given time and, by concluding that there was not sufficient evidence for a new customary rule limiting state immunity, it also influenced the development of such a new rule—that is, effectively preventing such development by giving additional weight to the existing rule.[114] As a final verdict, we should of course acknowledge that, seeing the development of the law of state immunity over centuries by national courts, the ICJ is quite a latecomer to the international law of jurisdictional immunities,[115] and thus new developments in this area cannot entirely be ruled out. And having said that, it is also legitimate to criticize the Court for not being more flexible and for not having used language which could have indicated that these rules are still in a state of flux.[116] This would have allowed for a less stringent approach and potential changes even in the near future.

[111] Hermann-Josef Blanke and Lara Falkenberg, 'Is There State Immunity in Cases of War Crimes Committed in the Forum State? On the Decision of the International Court of Justice of 3 February 2012 in Jurisdictional Immunities of the State (*Germany v. Italy; Greece Intervening*)', *German Law Journal* 14 (2013): 1817, 1831.

[112] *Al-Adsani v The United Kingdom*, Application no. 35763/97, ECtHR, 21 November 2001; joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić, para. 2.

[113] Paul Busch, Teiko Heinonen, and Pekka Lahti, 'Heisenberg's Uncertainty Principle', *Physics Reports* 452 (2007): 155, 155.

[114] Markus Krajewski and Christopher Singer, 'Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights', *Max Planck Yearbook of United Nations Law* 16 (2012): 1, 28–9.

[115] Roger O'Keefe, 'Jurisdictional Immunities', in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013), 146–7.

[116] Krajewski and Singer (n. 114), 31.

III.2. Hierarchy of Norms and *Ius Cogens*

The second crucial point of the ICJ's judgment is its 'deconstruction' of *ius cogens*, as Judge Trindade berated the Court in his dissenting opinion. In a nutshell, he criticized the Court for its encouragement of the 'stagnation' of peremptory norms whenever claims of state immunity are at stake, based on a distorted state-centric outlook, and thus for disregarding the human person and the individual's right of access to justice as an evolving *ius cogens* norm.[117] Hence, in short, the overall argument is that breaches of such norms should, at the end of the day, bring about the removal of claims of state immunity.[118] Seeing that the law of state immunity is only instrumental, it is quite tempting to suggest that the Court should not have followed its 'ethics of responsibility' (*Verantwortungsethik*), dedicated to the need for international cooperation within a broader legal framework, but an 'ethics of conviction' (*Gesinnungsethik*),[119] meaning that the ICJ should have given justice to the victims of serious human rights violations regardless of the potentially ensuing chaos in international relations.[120]

In legal terms, this entails that, in contrast to the Court's findings, state immunity should not be seen as a mere rule of procedural law which cannot conflict with substantive *ius cogens* norms, but as just another international rule which stands for a certain content and value (i.e. 'the State as the paramount subject of international law') which can certainly come into conflict with other contents and values (e.g. the protection of individual human rights). And if this truly is the case, then state immunity, as ~~the~~ conflicting rule of purely dispositive legal character,[121] would not produce any legal effects in the light of a hierarchically superior peremptory norm.[122] Therefore Italy assumed both the existence of a normative conflict and a hierarchy of norms in international law by which the conflict is to be resolved by application of the *lex superior* rule. Yet the question remains whether this really is the case. Seeing that the second part of this assumption—namely the existence of a hierarchy between *ius cogens* norms and dispositive rules in international law—is more or less accepted,[123] we should look into the question as to how state immunity can be substantiated and integrated in this hierarchy.

To begin with, one could argue similarly to Italy that acts like torture, enslavement, rape, unlawful killing, genocide, war crimes, and crimes against humanity are too grave to ever fall within the sovereign authority of a state, and that they should therefore be

[117] *Jurisdictional Immunities* (Judge Trindade, diss. op.) (n. ~~99~~), paras. 161–299.

[118] *Ibid*., para. 129.

[119] For this distinction see Max Weber, *Politik als Beruf* (Berlin: Duncker & Humblot, 1919), 56 *et seq*.

[120] Robert Uerpmann-Wittzack, 'Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges', in Anne Peters *et al.* (eds.), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill, 2015), 240–1.

[121] See *Al-Adsani v The United Kingdom*, joint dissenting opinion (n. ~~106~~), para. 2; Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory', *American Journal of International Law* 97 (2003): 741, 741–2.

[122] Gennady M. Danilenko, 'International *Jus Cogens*: Issues of Law-Making', *European Journal of International Law* 2 (1991): 42, 42.

[123] See Art. 53 VCLT.

exceptions to the principle of state immunity.[124] *Ius cogens* norms evolve from the common values of all nations and aim at absolutely prohibiting a given conduct considered to be an utmost evil.[125] Consequently, these norms are founded on a deeper moral consensus than mere *ius dispositivum*, and strict adherence to a consensual approach would run counter to the very essence of peremptory norms.[126] The formulation of Article 53 VCLT makes the emergence of peremptory norms from a quasi-constitutional source[127] very likely, and if this is indeed the case, the very nature of *ius cogens* norms must be explained by extra-positivist factors, such as morality and humanity, and their link to transcendent community interest.[128]

Yet, despite these noble aspirations, traditionalists will nonetheless insist that this remains a conflict of two levels—procedural versus substantive law—and that even deontic logic demonstrates that there is no conflict at all.[129] But this fact does not preclude the possibility that there is no conflict between a procedural *ius cogens* norm and an ordinary procedural rule. Admittedly, the ICJ remarked in the *Armed Activities* case that presently no peremptory norm exists which would require a state to consent to the jurisdiction of the Court,[130] thereby leaving open the possibility of such peremptory procedural rules to emerge in the future.[131] However, perhaps the *ius cogens* prohibition of torture has generated an ancillary procedural rule of peremptory character which requires states to assume civil jurisdiction over other states in cases of alleged torture.[132] Consequently there seems to be room for the development of procedural *ius cogens* rules which could prevail over ordinary procedural rules, such as the right of individuals to access to a court.[133] But, after all, it remains highly doubtful whether this right truly is of peremptory nature,[134] and even if it were, such a right would not automatically entitle individuals to obtain a judicial remedy and therefore would not automatically overrule existing procedural rules of immunity.[135]

[124] Orakhelashvili (n. ~~93~~), 323.

[125] Christian Tomuschat, 'Obligations Arising for States without or against their Will', *Recueil des Cours* 241 (1993-IV): 195, 307.

[126] Van Hoof (n. 82), 161–2; David F. Klein, 'A Theory of the Application of the Customary International Law of Human Rights by Domestic Courts', *Yale Journal of International Law* 13 (1988): 332, 353; Peter Malanczuk, 'First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility', 8 June 2000.

[127] Mark W. Janis, 'The Nature of *Jus Cogens*', *Connecticut Journal of International Law* 3 (1988): 359, 363.

[128] Orakhelashvili (n. ~~93~~), 111.

[129] François Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (*Germany v. Italy; Greece Intervening*)', *Leiden Journal of International Law* 25 (2012): 1003, 1008–12.

[130] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility [2006] ICJ Rep. 6, para. 69.

[131] Talmon (n. ~~99~~), 987.

[132] *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270, paras. 45 *et seq*. (Lord Hoffmann).

[133] See e.g. the discussion by Orakhelashvili (n. 3), 173–7.

[134] See e.g. Case T-315/01, *Kadi v Commission* [2005] ECR II-3649, wherein the existence of such a potential *ius cogens* norm was considered, but not determined beyond all reasonable doubt.

[135] Talmon (n. ~~99~~), 987.

III.3. Concluding Remarks

In the light of these two critical arguments, one should remember that '[i]t is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight . . . that it is an exception to the normal doctrine of jurisdiction'. And such an exception should only be granted 'when it is in consonant with justice and with the equitable protection of the parties. It is not to be granted "as of right".'[136] Hence the Court could have trodden more lightly and engaged in a more considerate weighing of principles,[137] given that the ICJ has already followed a more progressive interpretation of international human rights in previous cases.[138] Without doubt, this particular area of the law is developing fast, as the example of the US Justice against Sponsors of Terrorism Act of 2016 shows, effectively narrowing the scope of state immunity in order to allow for civil claims against foreign states for injuries, death, or damages from acts of international terrorism.[139] In political terms, this act was specifically enacted to allow victims of the 9/11 terrorist attacks to bring claims against Saudi Arabia, which has long been suspected of directly or indirectly funding these attacks. Maybe it is time for a considerable change to the law of state immunity as it currently stands.

For instance, domestic courts could—in the future—follow a list of elements and carefully weigh each against the others in a three-step procedure: (1) if it has been determined internationally that an egregious breach of fundamental human rights or *ius cogens* norms has occurred, and this breach is attributable to the state pleading immunity, then lifting state immunity may be more justified; (2) if there is a state entitled to claim the consequences of the breach on behalf of the victims, then the dispute can be settled at the international level and lifting immunity is less justified; vice versa, lifting immunity and exercising domestic jurisdiction is more justified if there is no state which can act on behalf of the victims; and (3) before lifting immunity, domestic courts should take into consideration the existence of a system of remedies at the disposal of the applicants in the legal order of the allegedly responsible state, since adjudicating the claim in that legal order does not violate state immunity and is therefore less disruptive of the existing rules.[140] This means that, eventually and if all three criteria are fulfilled, a state may forfeit its immunity in the face of gross human rights violations, but only as the last remedy and if all other means of enforcement have failed.[141]

[136] Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', *Netherlands International Law Review* 29 (1982): 265, 271.

[137] Kloth and Brunner (n. 77), 240.

[138] Such as *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136 *et seq*.

[139] s. 2040, Justice against Sponsors of Terrorism Act (JASTA), 28 September 2016.

[140] 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* (Oxford: Oxford University Press, 2011), 839–41.

[141] Juliane Kokott, 'Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen', in Ulrich Beyerlein *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung* (Berlin: Springer, 1995), 136–7.

IV. State Immunity and the Relationship between International and National Law

The immediate consequence of this criticism of the ICJ's decision could be seen in Italy itself: in October 2014 the Italian Constitutional Court declared that the primary legislation[142] implementing the ICJ judgment of 2012 was unconstitutional for two reasons. First, it held that the customary international rule on state immunity as determined by the ICJ cannot prevail over the supreme constitutional principle of judicial protection of fundamental human rights. And second, Article 94(1) of the UN Charter must be interpreted to the effect that it imposes on Italy an obligation to comply with ICJ decisions only insofar as it does not require a violation of the Constitution.[143] This decision raises various international law questions, particularly those with regard to the relationship between international and national law.

The most obvious problem in this respect is that the Constitutional Court considered supreme constitutional principles to prevail over international law, despite international law having the same rank as the Italian Constitution itself.[144] The Court nonetheless dismissed any potential conflict between national and international law, as it practically balanced two concurrent international norms with each other—the law of state immunity and human rights as 'consubstantial norms' which exist both as national and international norms[145]—thus resembling the approach of the Court of Justice of the EU in *Kadi*.[146] Furthermore, the Court's decision is very similar to the *Medellín* judgment of the United States Supreme Court,[147] since it rejected the doctrine of absolute supremacy of international law over domestic law.[148] However, this very supremacy is a necessary fundamental principle of international law,[149] because permitting national courts to evade the application of international law on the basis of domestic law ultimately

[142] Law 5/2013 obliging Italian judges to deny their jurisdiction in order to implement the ICJ's judgment from 2012 and Law 848/1957 obliging Italian judges to comply with ICJ judgments in general.

[143] Decision no. 238/2014, 22 October 2014, confirmed by Order no. 30/2015, 3 March 2015.

[144] The incorporation of international law into Italian law is governed by Arts. 10, 80, and 87 of the Constitution.

[145] See Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', *Loyola of Los Angeles International and Comparative Law Review* 43 (2011): 133, 178.

[146] Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

[147] *Medellín v Texas*, 552 US 491, 128 S. Ct 1346 (2008).

[148] Massimo Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court', *Modern Law Review* 78 (2015): 1029, 1036.

[149] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep. 12, para. 57; Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Recueil des cours* 92 (1957): 5, 85.

threatens to undermine the effectiveness of international law.[150] On its merits, the judgment of the Italian Constitutional Court is to be welcomed in the same way as *Kadi* but, seen in a context, it displays a profoundly dualist understanding of the law which puts the other Italian courts in a veritable dilemma: should they either uphold German immunity in order to not engage the international responsibility of Italy or should they exercise civil jurisdiction against Germany in order to comply with the ruling of the Italian Constitutional Court?[151]

To conclude, this chapter will address both the positive and negative aspects of the monist and dualist approaches. A monist stance, on the one hand, would uphold the supremacy of international law, effectively making contravening domestic law internationally illegal. Thus principally, the ICJ judgment in *Jurisdictional Immunities* can be seen as a progressive step towards a cosmopolitan international legal order wherein a more effective enforcement of international law is made possible by what Antonio Cassese called the 'invalidation' effect[152] on domestic law incompatible with international law. In the long run, decisions of this kind will have a stabilizing impact on the international legal order and conclusively clarify what the law is. The most pertinent problems of a monist approach under the supremacy of international law are, however, the advancement of traditional state-centred sovereignty at the expense of individual human rights and the fight against impunity; the hindering of the progressive development of international law, particularly its human rights dimension; and the stifling effect on an otherwise dynamic judicial practice of reconciling the traditional law of state immunity with the need to modernize a system of international law still dependent on the principle of state sovereignty.[153]

A dualist view, on the other hand, in favour of the supremacy of national law and as exemplified by the Italian Constitutional Court, reinforces the trend towards a stronger respect of human rights and the individual in international law. Eventually, this could have the beneficial effect of promoting a more coherent human rights culture in international law. In doctrinal terms, this would also mean that constitutional law would supersede international law only in order to protect core constitutional values and insofar these values have not been met by international norms, along the lines of the *Solange*

[150] André Nollkaemper, 'The Rapprochement between the Supremacy of International Law at International and National Levels', in Helene Ruiz Fabri *et al.* (eds.), *Select Proceedings of the European Society of International Law: Volume 2 of 2008* (Oxford: Hart, 2010), 242.

[151] Giovanni Boggero, 'The Legal Implications of Sentenza No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 76 (2016): 203, 205.

[152] Antonio Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 191–2.

[153] Francesco Francioni, 'From Utopia to Disenchantment: The Ill Fate of "Moderate Monism" in the ICJ Judgment on *The Jurisdictional Immunities of the State*', *European Journal of International Law* 23 (2012): 1125, 1128–9.

jurisprudence of the German *Bundesverfassungsgericht*.[154] The central issue with this viewpoint remains, nevertheless, the potential undermining of the international legal system and the detrimental consequences on the overall effectiveness of international norms. One could certainly argue that even in this scenario, the coherence of the international legal order remains intact because Italy can be held responsible for wrongful international conduct but, substantially, this does not change the paradoxical situation that the Italian courts try to bring about new customary international law through currently unlawful practice.

V. Conclusion

In the same way as this Handbook in its entirety intends to show that jurisdiction is a multivalent concept, sitting at the intersections of political and legal theory, technical doctrine, and sovereignty studies,[155] this chapter has aimed at demonstrating what complex matters jurisdictional immunities of the state are. And although the law of state immunity has—to a certain extent—been consolidated by the ICJ's judgment of 2012, it remains subject to fierce legal and political criticism. As Alexander Orakhelashvili states, it may be one thing to contend that in certain situations the grant of immunity to a foreign state before domestic courts is politically and ideologically desirable; but it is another thing to argue that the same grant of state immunity is required or allowed by domestic or international law. In this vein, there can be legal outcomes which may or may not be compatible with the ideological or political agenda of certain interest groups.[156] Alternatively put, besides the long-standing dispute concerning the relationship between national and international law in terms of monism and dualism, this debate also involves the ancient dichotomy of strict legal positivism versus a more normative and value-laden view of the law. *De lege lata*, the ICJ's decision was entirely correct and in accordance with the law but, *de lege ferenda*, it becomes evident that there is a tremendous need to catch up with the dynamic development of the international legal system.[157] Even though it seems that the Court's answer in the negative appears to have foreclosed any development of the customary law of state immunity in this area for the foreseeable future, we should look to treaty law to effect change[158]—for example,

[154] See BVerfGE 37, 271—*Solange I*, Judgment of 29 May 1974; BVerfGE 73, 339—*Solange II*, 22 October 1986. See also in general Fulvio Maria Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 75 (2015): 503–29.

[155] Asha Kaushal, 'The Politics of Jurisdiction', *Modern Law Review* 78 (2015): 759, 791.

[156] Orakhelashvili (n. 3), 155.

[157] Giovanni Boggero, 'Without (State) Immunity, No (Individual) Responsibility', *Goettingen Journal of International Law* 2 (2013): 375, 397.

[158] Shah (n. 36), 571–3.

by adopting a human rights protocol to the UN Convention on State Immunity.[159] Decisions like this therefore raise the key question of how international law can balance community and individual interests, by limiting state jurisdiction through exceptions to immunity, for instance, in order to fight impunity. Such steps can be taken in the form of treaties, such as the Rome Statute of the International Criminal Court, which complements state jurisdiction[160] and aims at ensuring that international crimes do not go unpunished. For at the end of the day, immunity should never be tantamount to impunity.

[159] See e.g. Christopher Keith Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol', *International and Comparative Law Quarterly* 55 (2006): 411–26.

[160] Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', *European Journal of International Law* 21 (2010): 387, 414, 416.