JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY V ITALY: GREECE INTERVENING): A CASE NOTE

Daniel Scherr*

I. Introduction

In its judgment of 3 February 2012, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*,[1] the International Court of Justice (ICJ) affirmed state immunity as a core principle of international law, stemming from the sovereignty of states and, in doing so, confirmed traditional conceptions of international law. The ICJ upheld the customary international law obligation to respect state immunity in civil cases before foreign courts, even in cases involving the perpetration of gross violations of human rights and international humanitarian law. The ICJ rejected the developing notion that certain values of the international community, such as fundamental human rights norms and humanitarian law standards, reflect elementary considerations of humanity that might necessitate exceptions to the traditional sovereignty based system of international law and a removal of the cloak of sovereign state immunity.[2] In sum, the ICJ held that Italy's failure to recognise German immunity in respect of civil actions against Germany

* LLM. Researcher, German Institute for Human Rights.

1 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) (International Court of Justice, General List No 143, 3 February 2012) [*Jurisdictional Immunities of the State*].

2 Alexander Orakhelashvili "State Immunity and International Public Order" (2002) 45 GYIL 227 at 258-260; Alexander Orakhelashvili "State Immunity and Hierarchy of Norm: Why the House of Lords Got it Wrong" (2007) 18 (5) EJIL 955 at 963-966; Dapo Akande "International Law Immunities and the International Criminal Court" (2004) 98 AJIL 407 at 413-415; Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) EJIL 21 815 at 839-841; Annyssa Bellal "The 2009 Resolution of the Institute of International Law on Immunity and International Crimes: A Partial Codification of the Law?" (2011) 9 (1) J Int'l Crim Just 227 at 237-239; Claus Kress, "Reflections on the Iudicare Limb of the Grave Breaches Regime" (2009) 7 (4) J Int'l Crim Just 789 at 804-805; Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, Oxford, 2008) at 303-305; Paolo Gaeta "Official Capacity and Immunities" in Antonio Cassese (ed) *Rome Statute of the International Criminal Court: A Commentary* (Vol 1, Oxford University Press, Oxford, 2002) 975 at 982; Micaela Frulli "Immunities of Persons from Jurisdiction" in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) at 368; *Prosecutor v Blaškić* (Judgment) ICTY Appeals Chamber IT-94-1AR108bis, 29 October 1997, at [38] and [41]; *Prosecutor v Furundzija* (Trial Judgment) ICTY Trial Chamber IT-95-17/I-T, 10 December 1998, at [155]; *R v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet; R v Evans and the Commissioner of Police for the Metropolis and others ex parte Pinochet (No 3)* [2000] 1 AC 147 (HL), 24 March 1999, 38 ILM (1999) 581 [*Pinochet (No 3)*].

constituted a breach of international law.[3] In particular, the ICJ found that Italy breached its obligation to respect the immunity which Germany enjoys under international law, first, by allowing civil claims, secondly, taking enforcement measures and thirdly, declaring enforceable a decision of the Greek courts.[4] Consequently, the ICJ ordered Italy to ensure that the decisions and measures infringing the immunity of Germany should cease to have effect.[5] This note will discuss the decision in this case and will explore whether the ICJ's analysis of state immunity is reflective of the contemporary status of customary international law on state immunity.

II. The Facts

The dispute before the ICJ arose out of a series of Italian judicial decisions denying immunity to Germany for war crimes that took place towards the end of World War II.[6]

On the one hand, Italian courts had rejected pleas of state immunity in respect of civil actions brought by Italian citizens against Germany.[7] On the other hand, Italian courts had declared a Greek decision, which dealt with war crimes committed by German armed forces in occupied Greece, enforceable in Italy, and issued measures of constraint against German property in Italy.[8]

A. Ferrini

With respect to the first issue, a number of judgments by the national courts of Italy decided that the German state was liable to pay compensation in connection with the conduct of German armed forces on Italian soil, in violation of international law (including forced labour, mass killings and torture) during the German occupation of Italy during the final stages of World War II.[9]

These decisions came about as a consequence of the ground-breaking decision in *Ferrini v Federal Republic of Germany* by the Italian Court of Cassation in 2004.[10] The claimant, Ferrini, was an Italian national who had been arrested in 1944 and deported to Germany, where he was detained and

3 *Jurisdictional Immunities of the State*, above n 1, at [107].
4 At [139].
5 At [139].
6 *Ferrini v Federal Republic of Germany* (2006) 128 ILR 658; *Federal Republic of Germany v Giovanni Mantelli and others*, Italian Court of Cassation, Order No 14201, 29 May 2008; *Federal Republic of Germany v Liberato Maietta*, Italian Court of Cassation, Order No 14209, 29 May 2008.
7 *Jurisdictional Immunities of the State*, above n 1, at [27].
8 At [30].
9 At [27].
10 *Ferrini v Federal Republic of Germany*, above n 6, at 158-160; Andrea Gattini "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3 (1) J Int'l Crim Just 224; Andrea Bianchi "Ferrini v Federal Republic of Germany" (2005) 99 (1) AJIL 242; Massimo Iovane "The Ferrini Judgment of the Italian Supreme Court" (2004) 14 Italian Yearbook of International Law 172.

forced to work in a munitions factory until the end of the war.[11] The Court of Cassation rejected Germany's claim to immunity, deciding that Italian courts had jurisdiction over claims for compensation brought against Germany, because state immunity does not apply in circumstances where the alleged acts constitute crimes under international law.[12] As a consequence of this decision, Germany was denied immunity and held liable to pay compensation.[13]

In the wake of the *Ferrini* decision a number of other claimants brought similar proceedings against Germany in the Italian courts.[14] Upon an interlocutory appeal by Germany, the Italian Court of Cassation issued two orders,[15] which reiterated and refined the *Ferrini* reasoning, rejected Germany's invocation of state immunity and confirmed the Italian courts' jurisdiction over claims for compensation against the German state.[16]

B. Distomo

The second set of issues before the ICJ concerned Germany's complaint that the Italian courts had permitted the enforcement in Italy of the Greek *Distomo* judgment[17] and also taken enforcement actions against German property in Italy.[18]

Distomo is a village in Greece where, during the German occupation of Greece, a massacre by German SS forces occurred in which a large number of civilians were killed. The victims' legal successors then initiated proceedings against Germany in the Greek courts, claiming compensation for loss of life and property.[19] Ultimately the Greek Supreme Court dismissed Germany's plea of immunity and upheld the judgment of a Greek court of first instance, ordering Germany to pay €28 million in compensation to the Distomo victims.[20] However, the Greek Minister of Justice refused to permit the judgment to be enforced,[21] a decision that was confirmed by the Greek Supreme Court.[22] Therefore the judgment against Germany could not be executed in Greece.[23]

11 *Jurisdictional Immunities of the State*, above n 1, at [27].
12 At [27].
13 At [27].
14 *Federal Republic of Germany v Giovanni Mantelli and others*, above n 6; *Federal Republic of Germany v Liberato Maietta*, above n 6; *Max Josef Milde*, Italian Court of Cassation, Decision No 1072/2009, 21 October 2008.
15 *Federal Republic of Germany v Giovanni Mantelli and others*, above n 6; *Federal Republic of Germany v Liberato Maietta*, above n 6.
16 *Jurisdictional Immunities of the State*, above n 1, at [28].
17 *Prefecture of Voiotia v Federal Republic of Germany* (2005) 129 ILR 513.
18 *Jurisdictional Immunities of the State*, above n 1, at [30].
19 *Jurisdictional Immunities of the State*, above n 1, at [30].
20 *Prefecture of Voiotia v Federal Republic of Germany*, above n 17.
21 Andrea Gattini "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?" (2011) 24 Leiden Journal of International Law 173 at 176.
22 At 176.
23 *Jurisdictional Immunities of the State*, above n 1, at [30].

In addition to the *Distomo* case, the Greek Supreme Court referred another case involving claims for compensation for acts committed by German armed forces in Greece at the end of World War II to the Greek Special Supreme Court.[24] This specially convened tribunal possesses the judicial competence to decide whether a rule of international law belongs to the body of international customary rules. In this case, it decided that Germany was indeed entitled to state immunity in respect of the action brought against it.[25]

The Greek claimants subsequently instituted proceedings before the European Court of Human Rights[26] and the German courts[27] in order to enforce the original judgments.[28] These proceedings were ultimately unsuccessful.

The Greek claimants were eventually successful in their quest to enforce the *Distomo* decision in Italy following the landmark decision in *Ferrini*, handed down by the Italian Court of Cassation.[29] This led to an Italian court deciding that the *Distomo* judgment was enforceable in Italy,[30] which was subsequently confirmed by the Italian Court of Cassation.[31] Pursuant to this decision a mortgage was inscribed on the Villa Vigoni, a German state-owned centre for cultural exchange in Italy, in order to secure the victims' claims.[32] This legal charge was then suspended by executive decree, pending the decision of the ICJ in the case at hand.[33]

III. The Law

The judgments by the Italian courts were essentially based on variations of two principal arguments. First, the argument was advanced that there exists an exception to state immunity on the grounds that the conduct in question took place on the territory of the forum state. Second, it was argued that because of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress, immunity was no longer available to Germany.

A. Civil claims

The ICJ rejected all of the arguments proposed by Italy for allowing civil claims against Germany in Italian courts, holding that they were insufficient to justify the denial of immunity to Germany.[34]

24 At [36].
25 *Margellos v Federal Republic of Germany* (2005) 129 ILR 525.
26 *Kalogeropoulou and others v Greece and Germany* (Application No 59021/00) Section 1 ECHR, 12 December 2002 at 417.
27 *Greek Citizens v Federal Republic of Germany* (2005) 129 ILR 556; Gattini, above n 21, at 176.
28 *Jurisdictional Immunities of the State*, above n 1, at [32].
29 *Ferrini v Federal Republic of Germany* (2006) 128 ILR 658.
30 *Jurisdictional Immunities of the State*, above n 1, at [33].
31 *Repubblica Federale di Germania c Amministrazione Regionale della Vojotia*, Italian Court of Cassation, Order No 14199, 29 May 2008 (2009) 92 Rivista di Diritto Internazionale 594.
32 *Jurisdictional Immunities of the State*, above n 1, at [35].
33 Gattini, above n 21, at 177.
34 *Jurisdictional Immunities of the State*, above n 1, at [107].

1. The Tort Exception

The first argument put forward by Italy was that under customary international law, a state is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the acts in question were performed as public acts of the government (*acta jure imperii*).[35] This principle is commonly known as the so-called '(territorial) tort exception' to state immunity.[36]

In order to establish the customary character of the tort exception under international law, Italy alluded to the adoption of Article 11 of the European Convention on State Immunity of 1972[37] and Article 12 of the UN Convention on Jurisdictional Immunities of States of 2 December 2004.[38] Italy also referred to an analysis of relevant state practice, comparing ten statutes in national legal systems dealing explicitly with state immunity, nine of which had enacted provisions to the same effect as those in the two international conventions referred to above.[39]

The ICJ did not accept Italy's argument concerning the tort exception and concluded that in tort actions state immunity continues to cover official conduct (*acta jure imperii*) by organs of a state in the conduct of armed conflict, even if the alleged acts took place on the territory of the forum state.[40] To obtain this result, the ICJ conducted an in-depth examination of relevant practice as manifested through legislation and jurisprudence at the national as well as the international level.[41] In particular, the ICJ highlighted that none of the relevant national and international rules codifying the tort exception are intended to apply to the conduct of armed forces in the course of an armed conflict. Rather, the exception applies to commonplace insurable risks such as road traffic accidents.[42]

35 At [62].

36 Rachel Fox *The Law of State Immunity* (Oxford University Press, Oxford, 2008) at 569.

37 European Convention on State Immunity, CETS 74 (opened for signature 16 May 1972, entered into force 11 June 1976).

38 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc A/RES/59/38 (2004) (opened for signature 17 January 2005, not yet in force).

39 These countries were: Argentina, Australia, Canada, Israel, Japan, Singapore, South Africa, the United Kingdom and the United States of America, the exception being Pakistan.

40 *Jurisdictional Immunities of the State*, above n 1, at [77].

41 At [70]-[76]. The ICJ considered the immunity laws of: Argentina, Australia, Canada, Israel, Japan, Singapore, South Africa, the United Kingdom, the United States of America and Pakistan. The ICJ also dealt with national court decisions from Belgium, Brazil Egypt, France, Germany, Greece, Ireland, Italy, the Netherlands, Poland, Serbia, Slovenia, the United Kingdom as well as *Kalogeropoulou and others v Greece and Germany*, above n 26, at 417 – which had all upheld the entitlement to immunity in relation to the acts of armed forces.

42 *Jurisdictional Immunities of the State*, above n 1, at [67]; Norway and Sweden have even made declarations upon ratification of the European Convention on State Immunity to the effect that it is not intended to apply to military activities (C.N.280.2006.TREATIES-2 and UN doc. C.N.912.2009.TREATIES-1); Foreign Sovereign Immunities Act 1976 (USA) 28 USC, s 1605(a)(5); State Immunity Act 1978 (UK), s 5; Foreign States Immunities Act 1981 (South Africa), s 6; State Immunity Act 1985 (Canada), s 6; Foreign States Immunities Act 1985 (Australia), s 13; State Immunity Act 1985 (Singapore), s 7; Argentina Law No 24.488

2. The Normative Arguments

The ICJ also rejected Italy's second argument: that immunity could be denied on the basis of the particular character and quality of the alleged breaches forming the subject matter of the compensation claims before the Italian courts.[43]

(a) Gravity of Breaches

According to the first strand of this line of reasoning, Italy argued that customary international law has developed to the point that a state is not afforded immunity in respect of grave breaches of international law.[44] In this respect, the ICJ first examined relevant state practice and concluded that under current customary international law a state is not deprived of sovereign immunity in relation to serious infringements of international human rights law and/or humanitarian law.[45] In particular, the ICJ relied on the jurisprudence of national courts,[46] including Greek cases after the initial *Distomo* decision[47] (distinguishing the *Pinochet* decision as being concerned with individual criminal responsibility[48]); international conventions;[49] and judgments of the ECtHR.[50] The ICJ thus rebutted the notions that "the availability of immunity will be to some extent dependent upon the gravity of the unlawful act" and that international law limits immunity, when a state has committed grave violations of the law of armed conflict.[51]

(b) Jus Cogens

Secondly, Italy maintained that because the breaches in question constituted violations of *jus cogens* norms, the peremptory character of the norms in question demands that they be given precedence over conflicting international obligations since they are hierarchically superior in terms of a norm conflict.[52] The Italian argument thus essentially stated that *jus cogens* prohibitions must prevail over any other international rules and that since the rule which accords a state immunity from the jurisdiction of another state does not possess a similar *jus cogens* status, the rule of immunity is to be overridden.[53] The ICJ rebutted this and asserted that the rules on immunity

(Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, art 2 (e); Foreign State Immunity Law 2008 (Israel), s 5; and Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (Japan), art 10.

43 *Jurisdictional Immunities of the State*, above n 1, at [80].
44 At [83].
45 At [91].
46 At [85].
47 At [83]; *Margellos v Federal Republic of Germany*, above n 25, at 525.
48 *Jurisdictional Immunities of the State*, above n 1, at [87]; *Pinochet No 3*, above n 2, at 581: Lord Browne-Wilkinson at 582; Lord Hope at 609; Lord Saville at 641.
49 *Jurisdictional Immunities of the State*, above n 1, at [89].
50 At [90]; *Al-Adsani v United Kingdom* (2001-X1) 101 ECHR at [61]; and *Kalogeropoulou and others v Greece and Germany*, above n 26, at 417.
51 *Jurisdictional Immunities of the State*, above n 1, at [82].
52 *Jurisdictional Immunities of the State*, above n 1, at [93].
53 At [92].

operate on an entirely different level from the material violations in question, so that the former cannot be trumped by the latter.[54] According to the ICJ, immunity is a procedural and not a material defence. Therefore immunity bars a state from exercising its jurisdiction, but does not affect the illegality of certain conduct in a substantive sense. The ICJ went on to establish that under current international law, there exists no procedural ancillary rule to *jus cogens* norms demanding the revocation of state immunity.[55] By contrast, the practice of states as illustrated by the decisions of the courts of France, Canada, Greece, New Zealand, Poland, Slovenia and the United Kingdom upholds state immunity in cases where violations of peremptory norms were alleged, so that Italy stands alone against the overwhelming state practice with its attempt to create a *jus cogens* exemption to immunity.[56] This conclusion is also supported by the judgments of international tribunals on the subject matter.[57] Thus the ICJ concluded that the customary international rule of sovereign state immunity applies even to *jus cogens* violations.[58]

(c) The Principle of Effective Compensation

Thirdly, as a supplementary argument, Italy proposed that the actions of its courts were justified owing to the fact that all other attempts to obtain compensation for the various groups of victims involved in the proceedings had failed.[59] The ICJ rejected this line of argument too.[60] According to the ICJ's analysis, there exists no evidentiary basis in the relevant practice of states to link the entitlement of a state to immunity to the existence of an effective alternative means of securing redress.[61]

(d) The Combined Effect

Finally, as a last resort, Italy argued that even if it were held that all of the above approaches in isolation do not lead to a rejection of state immunity, the combination of the arguments viewed together must result in the denial of sovereign immunity.[62] That is to say, because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress, the Italian courts allegedly justified the refusal to accord immunity to Germany.[63] The ICJ, however, refused to view the three strands of Italy's second argument in combination and refused to grant them a cumulative persuasive power greater than each individual argument.[64]

54 At [93].
55 At [96].
56 At [96].
57 *Al-Adsani v United Kingdom*, above n 50, at 171; *Kalogeropoulou and others v Greece and Germany*, above n 26, at 417; *Arrest Warrant of 14 February 2002 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at [58] and [78].
58 *Jurisdictional Immunities of the State*, above n 1, at [97].
59 At [98].
60 At [98]-[103].
61 At [102].
62 At [105].
63 At [105].
64 At [105]-[108].

B. Measures of Constraint

The ICJ then turned to the issue of the measures of constraint taken against German property in Italy.[65] In this regard, the ICJ asserted that as a necessary condition under contemporary customary international law, enforcement measures against property belonging to a foreign state can only be undertaken if the property in question is used for non-commercial purposes.[66] Since that was not the case concerning the property in question, the ICJ concluded that the measures of constraint on the German owned Villa Vigoni constituted a violation of Germany's immunity.[67]

C. Declaration of Enforceability

With respect to the impact on Germany's immunity of Italian court decisions declaring Greek compensation awards for the Distomo massacre enforceable in Italy, the ICJ held that these also amounted to breaches of Italy's obligation to respect Germany's jurisdictional immunity.[68] The ICJ phrased the issue in terms of whether or not the Italian courts, by their declaration of enforceability, violated Germany's immunity in their own right. The legality of the original Greek order was thus irrelevant to the case at hand.[69] In order to assess the validity under international law of the Italian courts' execution of foreign decisions holding Germany accountable to pay compensation, the ICJ examined whether those foreign courts should have accorded immunity to Germany.[70] In light of this approach, the ICJ concluded that the declaration of enforceability violated Germany's sovereign immunity. This was because the Italian courts would have been obliged to afford Germany immunity if they had been concerned with the substantive side of the case for the very same reasons elaborated in respect of the civil claims allowed by Italian courts.[71]

IV. Commentary

It is the author's contention that the ICJ decision impeccably delineates the customary international rules on sovereign state immunity in foreign civil courts as they stand today. However, the ICJ decision needs to be read narrowly and cannot be extended beyond civil cases against the state, so that its rationale does not apply to the individual immunity of representatives of the state.

65 At [109]-[120].
66 At [118].
67 At [119].
68 At [133].
69 At [132].
70 At [130].
71 At [131].

At its heart, the ICJ decision is based upon a strict application of the traditional doctrine of sovereign equality of states, which the ICJ perceived as "one of the fundamental principles of the international legal order."[72] Although balancing this doctrine against the principally permitted exercise of sovereign jurisdiction,[73] the ICJ set forth the dominance of immunity by noting that "exceptions to the immunity of the State represent a departure from the principle of sovereign equality."[74]

The ICJ thus established sovereign state immunity as a prohibitive rule, which prevents the assertion of jurisdiction in line with the principle of the *Lotus* case that international law permits the exercise of jurisdiction only in so far as no express prohibition is in place.[75]

In reaching its conclusion that state immunity is an international obligation from which no exceptions are permitted, the ICJ principally relied upon customary international law. This might be seen as a failure to progressively develop the law in this area.[76] However, in its decision making, the ICJ is bound to apply the sources of law as set out in Article 38(1) of the ICJ Statute. Since specific treaties on the subject matter were not in force between the parties and applicable general principles of law are not apparent, the ICJ was essentially left with no other choice but to resort to an analysis of international customary law with the assistance of judicial decisions and the teachings of scholars as a subsidiary means of interpretation.

The examination of the international customary rules governing the rules on state immunity conducted by the ICJ was meticulous and cannot be faulted from a legal perspective. The ICJ engaged in the analysis of national laws dealing with immunities from across the world[77] and discussed a considerable number of relevant decisions by national courts.[78] These illustrated a widespread and consistent state practice of customary law to the effect that state immunity cannot be revoked even in cases of gross human rights and humanitarian law violations. The author is not aware of any contradictory national court decisions where a state was held liable to pay compensation in front of foreign courts, with the exception, of course, of the Italian court decisions at the heart of the dispute. This analysis of the contemporary standards of the customary law on state immunity is also supported by the jurisprudence of international tribunals, which was taken into account as a subsidiary source of international law.

72 At [57].
73 *SS Lotus (France v Turkey) Judgment No 9* (1927) PCIJ, (series A) No 10 at 18.
74 *Jurisdictional Immunities of the State*, above n 1, at 57.
75 *SS Lotus*, above n 73.
76 Benjamin Wittes "Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v Italy)" (5 February 2012) Lawfare <www.lawfareblog.com>.
77 *Jurisdictional Immunities of the State*, above n 1, at [67].
78 At [85] and [96].

While the ICJ therefore not only in substance but also in its methodology followed a conservative but correct approach and focused almost exclusively on the establishment of the law as it stands (*de lege lata*), it is accurate in its representation of the current customary international law on state immunity.

In the author's eyes, this also holds true with regard to the law as it should be (*de lege ferenda*) because valid political rationales for the way the law of state immunity stands today are in place and were referenced by the ICJ in its decision.[79] In particular, it was pointed out that states have good reasons for their established practice of conveying individual compensation claims via payment of reparations or the use of lump sum settlements. These global restitution agreements give closure to complex sets of circumstances arising from armed conflicts. In particular, they take into account political dimensions and enable the affected state to direct compensation to where it is most needed by society as a whole in post war situations, and avoid the protracted exercise of evaluating claims by individuals. If individual compensation claims could subsequently be brought against the responsible state in front of foreign courts, the practice of concluding global restitution agreements between states would be futile.[80] The lack of such settlements would result in disordered relations between the states involved and dispute resolution in front of foreign national courts would be prone to allegations of "victor's justice".[81]

In the author's opinion, the ICJ was also correct when it addressed Italy's argument that to recognise an immunity to a *jus cogens* norm would be to illegitimately defeat that norm. In response, the ICJ observed that Italy's *jus cogens* argument was premised on the existence of a conflict between *jus cogens* rules prohibiting certain conduct in armed conflict and the granting of immunity to Germany.[82] The ICJ held, however, that no conflict between *jus cogens* rules and the rules on state immunity exists because the two sets of rules coexist on different legal planes without interfering with one another.[83] Immunity is a procedural plea and not an exemption from the material law.[84] This is evident from the fact that a state can waive its immunity with the consequence that the case will proceed and the law will be applied as usual.

79 *Jurisdictional Immunities of the State*, above n 1, at [94].

80 For example Italy had renounced any claims against Germany in the Treaty of Peace with Italy 126 UNTS 1950 (signed 10 February 1947), Article 77: "Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all intergovernmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war."

81 Gattini, above n 21, at 185.

82 *Jurisdictional Immunities of the State*, above n 1, at [92].

83 At [93].

84 Rachel Fox, above n 36, at 33.

The underlying legal responsibility however remains unaffected by the plea of immunity.[85] Thus immunity merely presents a procedural bar that precludes proceedings in front of foreign courts.

Since immunities are procedural in nature, they cannot be affected by a substantive provision. After all state immunity does not permit violations of substantive humanitarian law and human rights provisions but merely runs counter to the judicial assertion of claims for violations of *jus cogens* rules.[86] Therefore only a procedural ancillary rule, to the effect that the violation of a substantive *jus cogens* rule inevitably implies a corollary right to compensation or at least access to justice of equal *jus cogens* status, could be in conflict with the law of state immunity. Such a rule has however not come into existence under customary international law and is unlikely to do so in the near future.[87]

The ICJ therefore affirms that state immunity remains a pillar of the traditional sovereignty based international legal system. No progressive developments are foreseeable in the near future such as would allow a claimant to bring civil claims against a state in front of foreign courts. However, it is important to remember that the ICJ decision does not have an impact on the situation of immunities under customary international law in general, but deals only with the issue of sovereign state immunity. The rationale of the ICJ decision applies only to civil proceedings against states, so that exceptions to immunities in criminal proceedings against individuals remain conceivable under contemporary international law.[88] Therefore some leverage remains for taking progressive steps towards a shedding of the cloak of immunities in the criminal law context. First, the ICJ itself explicitly refrained from extending its reasoning to the question of immunity in cases of individual criminal responsibility.[89] Secondly, the regime of state immunity serves an object and purpose which is distinct from that of individual immunities. While the former is closely linked to the sovereign equality of states as a founding principle of the international legal order[90] and the doctrine that one sovereign power cannot exercise jurisdiction over another sovereign power

85 *Arrest Warrant*, above n 57, at [60].

86 *Jurisdictional Immunities of the State*, above n 1, at [93]; Gattini, above n 21, at 179; *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26 at [45].

87 *Jurisdictional Immunities of the State*, above n 1, at [96]; *Al-Adsani v United Kingdom*, above n 50, at 171; *Kalogeropoulou and others v Greece and Germany*, above n 26, at 417; *Arrest Warrant*, above n 57, at [58] and [78].

88 By contrast, it would be illogical to differentiate between civil actions against the state and civil actions against individuals that represent the state. This is because the state can only act through its organs or agents and as a logical consequence of individual liability arising for certain claims on the level of civil compensation claims, state responsibility would automatically be incurred as a corollary. In the opinion of the present author, the reasons for upholding state immunity in the face of gross human rights and humanitarian law violations therefore need to be extended to civil compensation claims against individual government officials covered by immunities as well.

89 *Jurisdictional Immunities of the State*, above n 1, at [91].

90 At [57].

(*par in parem non habet imperium*),[91] the latter are a reflex of the former and are afforded to enable the effective functioning of international relations between states.[92] Therefore state immunity is a necessary precondition for individual immunities. Exceptions to state immunity would automatically impact individual immunities, but the opposite is not true, so that exceptions to individual immunities do not bear upon the status of state immunity. In other words, while state immunity is essential to the very fabric of international law, the immunity of individuals serves a primarily practical purpose and can more readily be modified.

Moreover, the present author considers that it is entirely logical to differentiate between the immunity of the state itself on the one hand and the immunity of its individual functionaries on the other hand.[93] This is because civil claims can arise against both the individual as well as the state, but criminal claims can only be brought against an individual.[94] A state cannot be held criminally responsible as a matter of law in front of foreign criminal courts because in terms of state responsibility, there is no corollary to individual criminal responsibility for international crimes. By contrast, a state is necessarily implicated in compensation claims in front of civil courts whether these are brought directly against it or its agents. Thus a state can be held liable under civil law but is by design removed from criminal accountability. Therefore, civil actions are more intrusive into the original sphere of state sovereignty than criminal proceedings. Conversely, the criminal prosecution of individuals covered by immunities does not interfere with state sovereignty to the same degree as the revocation of immunity with regard to civil claims. Since criminal proceedings against individuals enjoying immunity can be distinguished from civil actions against a sovereign state or its acting organs, it cannot be logically concluded that what is true for state immunity equally applies to individual immunities.[95]

Thus, an exclusion of individual immunity in criminal proceedings concerning grave human rights and humanitarian law violations remains conceivable even though, following the ICJ's decision in *Jurisdictional Immunities of the State*, no exception to state immunity in civil cases is permitted under customary international law. The reliance by the ICJ on

91 *Al-Adsani v United Kingdom*, above n 50, at [54]: "sovereign immunity is a concept of international law, developed out of the principle par in *parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State."

92 *Arrest Warrant*, above n 57, at [53].

93 Rosanne van Alebeek *The immunity of states and their officials in international criminal law and international human rights law* (Oxford University Press, Oxford, 2008) at 253.

94 Chanaka Wickremasinghe "Immunities enjoyed by officials of states and international organizations" in Malcolm D Evans *International Law* (3rd ed, Oxford University Press, Oxford, 2010) at 403; *Pinochet*, above n 2, at 581: Lord Hutton at 627.

95 *Jurisdictional Immunities of the State*, above n 1, at [95] - this reference by the ICJ only dealt with the *jus cogens* argument and does not insinuate that state immunity and individual immunity are governed by the same set of rules, as is evident from: *Jurisdictional Immunities of the State*, above n 1, at [91]; *Al-Adsani v United Kingdom*, above n 50, at [61]; for the opposing view see: *Prosecutor v Furundzija*, above n 2, at [155].

national jurisprudence for the ascertainment of state practice is a hopeful indicator that a similar line of reasoning can be employed in the future with regard to the issue of exceptions to individual immunities *ratione materiae*, where the pertinent judicial practice is more diverse and at least partially supports denying immunity in cases of grave human rights or humanitarian law violations.[96]

96 *Pinochet*, above n 2, at 581: Lord Hutton at 627; Lord Millet at 643; Lord Phillips at 652; *Prosecutor v Blaškić*, above n 2, at [38] and [41]; *Prosecutor v Furundzija*, above n 2, at [155].