Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening): International Law Precludes World War II Victims from Seeking Justice

I. OVERVIEW

Following the atrocities of World War II, Germany entered into several agreements to make reparations to the victims of the German Reich; however, certain victims were excluded from recovery.[1] Germany established two lump settlement agreements with Italy to compensate for economic losses and persecution suffered as a result of the German occupation of the Italian Republic from 1943 to 1945.[2] More recently, Germany established the Remembrance, Responsibility and Future Foundation (Foundation) to directly compensate those who were "subjected to forced labour and other injustices" at the hands of German forces.[3] During Germany's occupation of Italy, victims included not only Italian civilians but also captured members of the Italian armed forces (Italian military internees), most of whom were denied prisoner-of-war status.[4] Even so, looking to a provision in the Foundation's enacting legislation that excludes prisoners of war from receiving compensation, German courts denied the Italian military internees compensation due to their de jure prisoner-of-war status.[5] On several occasions, victims brought claims before Italian courts arising from injury caused by the

1. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 143, ¶¶ 23-26 (Feb. 3).
2. *Id.* ¶¶ 21, 23-26. Germany also enacted the Federal Compensation Law Concerning Victims of National Socialist Persecution in 1953. *Id.* ¶ 23.
3. *Id.* ¶ 26 (internal quotation marks omitted).
4. *Id.* ¶ 21.
5. *Id.* ¶ 26.

German armed forces.[6] The Italian Court of Cassation asserted its jurisdiction over the claims, reasoning that jurisdictional immunity does not apply in circumstances in which the act complained of constitutes an international crime.[7]

Alleging that the Italian courts' exercise of jurisdiction was unlawful, the Federal Republic of Germany brought a complaint before the International Court of Justice (ICJ) pursuant to the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.[8] Italy's counterclaim regarding the question of reparations for grave violations of international humanitarian law was dismissed as inadmissible under the Rules of the Court in 2010.[9] As such, the ICJ considered solely the question of Germany's right to immunity.[10] The International Court of Justice *held* that the Italian courts breached their obligation to respect Germany's immunity under international law by adjudicating claims against Germany, declaring Greek court judgments to be enforceable in Italy, and taking measures of constraint against German property in Italy. *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, 2012 I.C.J. 143, ¶ 139 (Feb. 3).

II. BACKGROUND

A. The Doctrine of Immunity

The doctrine of immunity derives from the principle of sovereign equality among the states and is fundamental to the international legal order.[11] It can be traced to absolute monarchies and the historical roles of

---

6. *Id.* ¶¶ 27-29.

7. *Id.* The Italian Court of Cassation denied Germany's state immunity in a 1944 case involving the deportation and forced labor of an Italian citizen. *Id.* ¶¶ 27, 52. Addressing subsequent lawsuits regarding the activities of the German Reich, the Italian Court of Cassation again asserted jurisdiction, first holding against Germany in an interlocutory appeal and later affirming a lower court's decision that held Germany liable for damages. *Id.* ¶ 28. In another case, regarding a 1944 massacre by German forces in the Hellenic Republic, the Greek Court of First Instance granted a judgment against Germany, but the Minister for Justice of the Hellenic Republic never authorized its enforcement, driving the claimants to the Italian courts. *Id.* ¶¶ 30, 33. The Italian Court of Cassation subsequently confirmed the Court of Appeal of Florence's ruling granting the enforcement of the Greek court's judgment, the result of which was a legal charge against the Villa Vigoni, a German property in Italy. *Id.* ¶¶ 30, 33-35. In the noted case, the ICJ permitted Greece to intervene as a nonparty, recognizing the significance of this case to the judgments of Greek courts. *Id.* ¶¶ 10, 18.

8. *Id.* ¶ 1.

9. *Id.* ¶¶ 4-5.

10. *See id.* ¶ 50.

11. *See* U.N. Charter art. 2, para. 1.

foreign ambassadors and diplomats.[12] Today, the doctrine of jurisdictional immunity of states honors the sovereignty of each state by preventing one state from addressing or deciding a claim brought before its national courts against another state.[13] Immunity thus represents an exception to sovereign authority over the people and property within a state's territory.[14] The competing demands of jurisdiction and immunity have inspired fluctuations in the law in the twentieth century and, notably, in recent years.[15]

Although state immunity has long been recognized as a bar to jurisdiction over foreign states, state practice with respect to the doctrine has not reached total uniformity.[16] One way to alleviate this problem is to formally define the contours of state immunity.[17] The United Nations Convention for Jurisdictional Immunities of States and Their Property (U.N. Convention) is a multilateral instrument that aims to do just that.[18] Prior to its adoption in 2004, the law relating to state immunity was derived from the prevailing international customs.[19]

The ICJ is charged with resolving disputes of international law arising under international conventions, customary international law, or accepted general principles.[20] Customary international law develops from the combination of two elements: state practice and *opinio juris*.[21] State practice refers to the conduct of states, and *opinio juris* describes a state's belief that it is legally obligated to engage in a certain practice.[22] Together, these elements create legally binding customary international law.[23] In discerning what constitutes international custom, the ICJ looks to state practice that is representative and widespread.[24] With respect to disputes regarding state immunity, the ICJ is bound to uphold immunity in the absence of an applicable exception recognized by customary

---

12. Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 VAND. J. TRANSNAT'L L. 1163, 1169 (2011).

13. HAZEL FOX, THE LAW OF STATE IMMUNITY 5 (2d ed. 2008).

14. *See* Stephens, *supra* note 12, at 1169.

15. *See id.* at 1169-70.

16. *See id.*

17. *See* FOX, *supra* note 13, at 2-3.

18. *Id.* at 3, 175.

19. *Id.* at 3.

20. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

21. Jo Lynn Slama, Note, Opinio Juris *in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 605 (1990).

22. *Id.*

23. *Id.*

24. *See, e.g.*, North Sea Continental Shelf (Ger. v. Den. & Neth.), 1969 I.C.J. 3, ¶ 37 (Feb. 20).

international law.[25] The party challenging state immunity has the burden of proving the existence of such an exception.[26]

B. Developments in Immunity

The modern doctrine of immunity incorporates some well-established changes and may reflect some emerging changes as it continues to evolve.[27] One longstanding change revolves around distinguishing between private law activities (*acta jure gestionis*) and sovereign acts (*acta jure imperii*).[28] While state immunity does not apply to claims arising out of the former, it does apply to those arising out of the latter.[29] Budding changes in the doctrine of immunity may be evidenced by recent trends in national and international law.[30] Some argue that the evolution of the immunity doctrine indicates its great flexibility as well as the international community's ability to adjust immunity norms to respond to modern developments in the law.[31] However, this flexibility and the variety of approaches to immunity compromise the clarity with which one can discern state practice.[32] Further adding to the fog, decisions by national courts to uphold or deny a state's immunity may be heavily swayed by considerations of foreign relations.[33]

The doctrine of immunity has shifted notably in the area of tort law, blurring the line of immunity between public and private acts.[34] The U.N. Convention includes an exception to state immunity for some torts, which provides for compensation for noncontractual personal injuries and property loss and is not restricted to private law.[35] The tort exception for personal injuries and damage to property is also set out in the European Convention on State Immunity (European Convention), which the International Law Commission (ILC) and the *Institut de Droit International* cite with approval.[36] In addition, many countries have enacted legislation limiting state immunity in cases of personal injury

---

25. *See infra* note 85 and accompanying text.
26. *See infra* note 85 and accompanying text.
27. *See* FOX, *supra* note 13, at 2-3; Stephens, *supra* note 12, at 1170.
28. Sévrine Knuchel, *State Immunity and the Promise of* Jus Cogens, 9 NW. U. J. INT'L HUM. RTS. 149, 151 (2011); *see* Stephens, *supra* note 12, at 1169-70.
29. Knuchel, *supra* note 28, at 151; Stephens, *supra* note 12, at 1169-70.
30. *See* Knuchel, *supra* note 28, at 150-51.
31. *See* Stephens, *supra* note 12, at 1170.
32. *See* Knuchel, *supra* note 28, at 150-51.
33. *Id.* at 151.
34. *See* FOX, *supra* note 13, at 569.
35. *Id.*
36. *See id.* at 583.

and damage to property from torts occurring within their territory; these include the United States, Great Britain, Canada, South Africa, Argentina, Australia, and Singapore.[37] These provisions include language suggesting that the tort exception may not apply to torts of a state's armed forces.[38]

Courts have varied in their application of the tort exception to *jure imperii* acts of armed forces.[39] The European Court of Human Rights (ECtHR) recognized the common practice of not applying the tort exception to public acts in a judgment issued in 2001.[40] The next year, the Supreme Court of Canada opined that *jure imperii* acts are included in the tort exception, noting that their exclusion "would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts."[41]

Legislation in the United States has particularly blurred the line between immunity for public versus private acts.[42] The Foreign Sovereign Immunities Act (FSIA) now includes a provision that denies state sponsors of terrorism immunity in cases where a U.S. citizen brings a claim against a sovereign whose conduct includes torture, hostage taking, or other named activities.[43]

C. Immunity in the Face of Human Rights Concerns

Whether state immunity remains intact despite human rights abuses remains a controversial question, especially where the violations contravene peremptory, or *jus cogens*, norms.[44] The Vienna Convention of the Law of Treaties defines *jus cogens* as internationally recognized norms from which no derogation is permitted and which can be modified only "by a subsequent norm of general international law having the same

---

37. AMNESTY INT'L, GERMANY V. ITALY: THE RIGHT TO DENY STATE IMMUNITY WHEN VICTIMS HAVE NO OTHER RECOURSE ¶ 7 (2011); *see, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2006); State Immunity Act, 1978, c. 33 (U.K.); Foreign States Immunities Act 87 of 1981 (S. Afr.).

38. *See, e.g.*, State Immunity Act, 1978, c. 33, § 16(2).

39. *See* Roger O'Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT'L L. 999, 1011 & n.39 (2011) (listing various statutes, conventions, and cases from different jurisdictions).

40. Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105, 1138 (2011).

41. Schreiber v. Fed. Republic of Germany, [2002] 3 S.C.R. 269, paras. 36-37 (Can.).

42. *See* 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (2006).

43. 28 U.S.C. § 1605A (2006 & Supp. V 2012).

44. *See* Joseph G. Bergen, Note, Princz v. the Federal Republic of Germany*: Why the Courts Should Find That Violating Jus Cogen Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT'L L. 169, 171-73, 199 (1999).

character."[45] There is no settled or exhaustive list of *jus cogens* norms.[46] However, the Charter of the International Military Tribunal, which established the post-World War II tribunal responsible for the prosecution of major war criminals, lists war crimes and crimes against humanity (including murder, poor treatment of prisoners of war, extermination, and enslavement) as acts falling under its jurisdiction, and these crimes are now widely recognized as *jus cogens*.[47]

The interaction between state immunity and *jus cogens* violations has uncertain results.[48] Those adopting a "normative hierarchy" approach assert that *jus cogens* obligations supersede state immunity wherever the two conflict.[49] The ECtHR addressed this in *Al-Adsani v. United Kingdom*, where its 9-8 decision found no established acceptance in international law supporting the denial of state immunity for cases involving torture.[50] In *Al-Adsani*, the applicant brought his case to the ECtHR alleging that his suit against Kuwait for torture was improperly dismissed by English courts.[51] The ECtHR rejected the view that the violation of the peremptory norm prohibiting torture allowed the denial of state immunity.[52] In a joint dissenting opinion, six judges adopted the normative hierarchy argument, asserting that *jus cogens* rules do override conflicting rules of international law.[53] Nonetheless, in a later ECtHR case, the Court's holding that no immunity exception existed for human rights violations was consistent with that of *Al-Adsani*.[54]

Many human rights advocates and legal scholars view the grant of state immunity for claims arising out of serious human rights violations as "artificial, unjust, and archaic."[55] In 2000's *Prefecture of Voiotia v. Federal Republic of Germany*, the Supreme Court of Greece broke from this trend and denied Germany's immunity, holding that the tort

---

45. FOX, *supra* note 13, at 150-51.

46. Bergen, *supra* note 44, at 171-72, 199.

47. Charter of the International Military Tribunal art. 6(b)-(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279; Knuchel, *supra* note 28, at 157.

48. *See* Knuchel, *supra* note 28, at 159.

49. *Id.* Other authorities point out that the hierarchy is only invoked where there is a conflict between laws, and they assert that the rules of state immunity are procedural and therefore can never conflict with *jus cogens* norms, which are substantive. *Id.* at 160.

50. 2001-XI Eur. Ct. H.R. 79, ¶¶ 66, 67.

51. *Id.* ¶ 3.

52. *Id.* ¶ 66.

53. *Id.* ¶¶ 2-3 (Rozakis & Caflisch, JJ., dissenting, joined by Wildhaber, Costa, Cabral Barreto & Vajić, JJ.); *see also* Stephens, *supra* note 12, at 1174.

54. Stephens, *supra* note 12, at 1174 & n.55 (citing Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415, 429).

55. Knuchel, *supra* note 28, at 149 (internal quotation marks omitted).

exception applied under customary international law.[56] The civil claim in that case arose from a massacre by German armed forces during Germany's occupation of Greece during World War II.[57] The majority held that the acts were not *jure imperii* on the grounds that the massacre was not in the course of armed conflict or resistance activity and was unnecessary to maintain the military occupation of the area.[58]

In 2002, the Greek Special Highest Court addressed a claim arising from the conduct of German armed forces, and by a 6-5 margin, held that Germany was entitled to immunity.[59] The court found that under customary international law no exception to jurisdictional immunity existed for certain acts of a state.[60] The five judges in the minority believed that such an exception did exist.[61] Since that decision, courts in Canada, England, and France have upheld state immunity for actions against foreign states arising out of serious human rights violations.[62] Likewise, the U.N. Convention does not include an exception to state immunity for serious human rights abuses.[63]

International law has recognized individual entitlement to several fundamental rights and remedies for violations thereof.[64] In 2010, the International Law Association (ILA) created its Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Draft).[65] Because several international bodies had already acknowledged a right to reparation for victims of armed conflict, or a need thereof, the ILA codified this right in article 6 of the Draft.[66] The ILA also approved of collective claims settlements, especially in cases of reparation to a large number of victims.[67]

A decision by the Italian Court of Cassation acknowledged these competing interests by holding that the interest of fundamental human

---

56. FOX, *supra* note 13, at 149, 583.
57. *See id.* at 149.
58. *Id.*
59. Kerstin Bartsch & Björn Elberling, Jus Cogens *vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the* Kalogeropoulou et al. v. Greece and Germany *Decision*, 4 GERMAN L.J. 477, 481 (2003)
60. *Id.* at 481-82.
61. *Id.* at 482.
62. Knuchel, *supra* note 28, at 155 & n.32.
63. FOX, *supra* note 13, at 140.
64. Knuchel, *supra* note 28, at 152.
65. INT'L LAW ASS'N, HAGUE CONFERENCE: REPARATION FOR VICTIMS OF ARMED CONFLICT, DRAFT DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON REPARATION FOR VICTIMS OF ARMED CONFLICT (2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1018 (follow the "Conference Report The Hague (2010)" hyperlink).
66. *See id.* art. 6.
67. *Id.* art. 6, cmt. 3(b).

rights takes precedence over state sovereignty.[68] In *Ferrini v. Federal Republic of Germany*, the Italian Court of Cassation rejected immunity as a bar to victims' claims against Germany.[69] In subsequent cases, the Italian Court of Cassation has affirmed this stance.[70] Additionally, Italian courts have held that Greek court judgments against Germany could be enforced in Italy and have therefore allowed constraint measures against German property in Italy.[71] These decisions addressed complainants whose access to courts was extremely limited and who may have had no alternative means of redress for claims against Germany.[72]

III. THE COURT'S DECISION

In the noted case, the ICJ relied upon its analysis of customary international law to find that Italy unlawfully encroached upon Germany's right to state immunity.[73] In its assessment of Italy's conduct, the ICJ first had to determine whether granting states immunity had been established as an international custom.[74] The ICJ rejected Italy's first claim that customary international law no longer entitles states to immunity for acts committed by its armed forces.[75] Looking at the decisions being handed down by the national judiciaries of several states, the ICJ determined that there was a general, widespread practice of granting immunity to states for torts committed during armed conflict, and this, combined with *opinio juris*, evidenced by the states' positions and acceptance of their national courts' jurisprudence on the matter, indicated that state immunity was still considered to be customary international law.[76] The ICJ also rejected Italy's second averment that the subject matter and circumstances of the claims justified denying state immunity.[77] First, the ICJ found no established custom of basing a state's right to immunity on the gravity of its violations.[78] Second, the ICJ held that a state's violation of a peremptory norm could not overrule state immunity.[79] Lastly, the ICJ rejected Italy's final claim that Germany

---

68. *See* FOX, *supra* note 13, at 149-50.
69. *Id.*
70. *See* Tomuschat, *supra* note 40, at 1115-16.
71. *Id.* at 1114-15.
72. *See* AMNESTY INT'L, *supra* note 37, ¶¶ 10, 27.
73. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 143, ¶ 139 (Feb. 3).
74. *See id.* ¶ 55.
75. *Id.* ¶¶ 62, 77-78.
76. *Id.* ¶¶ 72, 77-78.
77. *Id.* ¶¶ 80, 91, 97.
78. *Id.* ¶¶ 83-84.
79. *Id.* ¶ 97.

should be denied immunity on the grounds that there was no other recourse for the victims, asserting that a state's right to immunity was a separate issue from its obligation to compensate victims.[80]

The ICJ first laid out the applicable law and parameters for its analysis.[81] Because no treaty applied to both Germany and Italy, Germany's entitlement to immunity could be derived only from customary international law.[82] Thus, pursuant to the Statute of the ICJ (Statute), the Court endeavored to ascertain the existence of a general, widespread practice regarding state immunity and the scope and extent of that immunity.[83] Relying on the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the ICJ found that the applicable law was the law of state immunity as it existed at the time of the Italian proceedings, rather than the law that existed at the time of the acts of the German forces.[84] Because the ICJ found the acts of the German armed forces to be *acta jure imperii*, which are traditionally afforded immunity, Italy's burden was proving that modern customary international law would allow for an exception to state immunity under the circumstances of the noted case.[85]

The ICJ found no exception from immunity under modern customary international law for the tortious conduct of foreign troops in the forum state.[86] While the ICJ acknowledged the presence of a "territorial tort" exception in the European Convention and in the U.N. Convention, it found that complementary language limited its application.[87] The language in the U.N. Convention provides some evidence that the territorial tort exception was not intended to apply to torts committed by a state's forces in armed conflict.[88] In addition, the ICJ examined the legislation of the ten states referred to it by the parties and found that nine provided exceptions to immunity for tortious conduct in the territory of the forum state.[89] The ICJ found that these nine states had either additional provisions indicating an exception for acts by foreign armed forces or simply never applied the legislation to those

80. *Id.* ¶¶ 98, 100-01, 103.
81. *See id.* ¶¶ 53, 55.
82. *Id.* ¶ 54. Although Germany was a party to the European Convention, Italy was not, and neither had signed the U.N. Convention, which was not yet in force anyway. *Id.*
83. *Id.* ¶ 55; Statute of the International Court of Justice, *supra* note 20, art. 38(1)(b).
84. *Jurisdictional Immunities of the State*, 2012 I.C.J. ¶ 58.
85. *See id.* ¶¶ 60-61.
86. *Id.* ¶ 79.
87. *Id.* ¶¶ 67-69.
88. *Id.* ¶ 69.
89. *Id.* ¶ 70. The nine countries are the United Kingdom, the United States, South Africa, Canada, Australia, Singapore, Argentina, Israel, and Japan. *Id.*

cases.[90] Examining judgments from seven countries, the ICJ found almost no cases that withdrew state immunity for tortious conduct on the territory of the forum state in cases of armed conflict.[91] The ICJ particularly noted judgments by the highest courts in France, Slovenia, and Poland that held that Germany was entitled to immunity with respect to the acts of German armed forces in their respective territories during World War II.[92] The only state that applied the exception was Greece, in its decision in *Prefecture of Voiotia*, but the ICJ noted the Greek government's decision not to permit enforcement of that judgment.[93] Furthermore, the ICJ held that the Greek Special Supreme Court's more recent decision in *Margellos v. Federal Republic of Germany*, which held that Germany was entitled to immunity, reflects its repudiation of the territorial tort exception in cases of armed conflict.[94]

The ICJ held that a state's immunity was not based on the gravity of its alleged conduct under modern customary international law.[95] Pointing to *Margellos*, the ICJ noted that the most current Greek law does not reflect this practice.[96] The ICJ also referenced the judgments of national courts in six other countries that supported its finding against the existence of an exception to immunity for cases of serious violations of humanitarian law or crimes against humanity.[97] The ICJ acknowledged the relevance of the United States' FSIA, which creates an exception for state immunity for specified acts, such as torture and extrajudicial killings, by certain states.[98] However, the ICJ found that this legislation did not affect the status of customary international law.[99] The ICJ noted that neither the European Convention, the U.N. Convention, nor the draft Inter-American Convention on Jurisdictional Immunity of State included limitation provisions based on the gravity of an act or the peremptory nature of the rule breached.[100] Finally, the ICJ pointed to two judgments in which the ECtHR found that customary international law did not

90. *Id.* ¶¶ 70-71.
91. *See id.* ¶¶ 73-76. The seven countries are France, Slovenia, Poland, Belgium, Serbia, Brazil, and Germany. *Id.*
92. *Id.* ¶¶ 73-74.
93. *Id.* ¶¶ 30, 76.
94. *Id.* ¶ 76.
95. *Id.* ¶¶ 83-84, 91.
96. *Id.* ¶ 83.
97. *Id.* ¶ 85. The six countries are Canada, France, Slovenia, New Zealand, Poland, and the United Kingdom. *Id.*
98. *Id.* ¶ 88.
99. *See id.* ¶¶ 88, 91.
100. *Id.* ¶ 89.

support denying state immunity in civil suits for crimes against humanity.[101]

Addressing Italy's normative hierarchy argument, the ICJ held that a state's violation of a peremptory norm has no impact on its entitlement to immunity.[102] The ICJ found that while the rules governing *jus cogens* are substantive, the rules of state immunity are procedural.[103] As such, the ICJ stated that although a state does have a duty to make reparations for wrongdoing, the law of state immunity concerns only the means by which such a duty is to be affected.[104] Additionally, the ICJ found that several national courts rejected the argument that *jus cogens* displaces the law of state immunity.[105]

The ICJ found Italy's "last resort" argument that denying immunity was the only means by which certain victims would secure compensation to be irrelevant.[106] The ICJ reasoned that the issue of state immunity had no relation to a state's international responsibility or obligation to make reparations.[107] Despite the victims' having been left without compensation, the ICJ found that, under customary international law, entitlement of a state did not depend upon the existence of alternative means of securing redress.[108] The ICJ also noted that a last resort exception would be "exceptionally difficult in practice."[109] The ICJ stated that such an exception would threaten the reliability of state immunity since immunity would then hinge on states reaching successful settlements.[110] The ICJ also acknowledged the difficulty of gauging when a successful settlement was so unlikely that immunity should be denied and the inappropriateness of having national courts investigate settlement details or the distribution of funds from lump sum settlements.[111]

The ICJ held that Italy violated its obligation to respect Germany's immunity by taking measures of constraint against German property in Italy.[112] Under the U.N. Convention, for a foreign state to take any measure of constraint against property of another state, one of three

---

101. *Id.* ¶ 90.
102. *Id.* ¶¶ 92, 97.
103. *Id.* ¶ 93.
104. *Id.* ¶ 94.
105. *Id.* ¶ 96.
106. *Id.* ¶¶ 98, 100.
107. *Id.* ¶ 100.
108. *Id.* ¶ 101. The ICJ expressed "surprise—and regret" that Germany denied compensation due to the victims' prisoner-of-war status, which the German Reich did not honor. *Id.* ¶ 99.
109. *Id.* ¶ 102.
110. *Id.*
111. *Id.*
112. *Id.* ¶ 120.

requirements must be met: the property must be in use for nongovernmental and commercial purposes, the state must expressly consent to the measure of constraint, or the state must have allocated the property to satisfy a judicial claim.[113] The ICJ found none of these conditions to be satisfied, noting particularly that the property in question was being used for governmental purposes.[114]

The ICJ held that Italy encroached upon Germany's immunity by declaring enforceable in Italy decisions of Greek courts based on Germany's violations of international humanitarian law committed in Greece.[115] The ICJ found that in cases of an application for *exequatur* of a foreign judgment, the state seized of the application must determine the third state's right to immunity.[116] Given Italy's obligation to uphold Germany's immunity, as determined by the ICJ, discussed *supra*, it was unlawful for the Italian courts to declare enforceable in Italy decisions that Greek courts rendered against Germany.[117]

In three separate opinions, Judges Kenneth Keith and Abdul G. Koroma concurred with the majority in full, and Judge Mohamed Bennouna concurred with the majority conclusion but disagreed with the approach and reasoning.[118] Judge Keith's opinion focused on the principle of sovereign equality of states declared in the Charter of the United Nations and on the unwavering retention of state immunity as a long-established practice.[119] Judge Koroma emphasized the ICJ's limited role of applying the existing law of state immunity regardless of what changes it may undergo in the future.[120] Judge Koroma also acknowledged the indispensable relationship between sovereign immunity and the *acta jure imperii* of a state.[121] Judge Bennouna found that state immunity does not exonerate a state of its responsibility, but rather defers its adjudication to other diplomatic or judicial bodies.[122] He continued to state that immunity could only be denied if the state that

---

113. *Id.* ¶ 118.
114. *Id.* ¶ 119.
115. *See id.* ¶¶ 121, 133.
116. *Id.* ¶ 130. A request for *exequatur* is made to render a foreign court's judgment against a third state enforceable on the territory of the state of the court receiving such request. *Id.* ¶ 125.
117. *Id.* ¶ 131.
118. *Id.* ¶ 1 (separate opinion of Judge Koroma); *id.* ¶ 20 (separate opinion of Judge Keith); *id.* ¶ 1 (separate opinion of Judge Bennouna).
119. *Id.* ¶¶ 2, 4 (separate opinion of Judge Keith).
120. *See id.* ¶ 10 (separate opinion of Judge Koroma).
121. *See id.* ¶ 4.
122. *See id.* ¶ 8 (separate opinion of Judge Bennouna).

allegedly committed the unlawful acts also rejected any engagement of its international responsibility.[123]

As one of three dissenters, Judge Abdulqawi A. Yusuf suggested a limited exception to state immunity where the victims lack effective means of obtaining redress.[124] Judge Yusuf first noted that a state's obligation under international law to pay compensation and make reparations for violations of humanitarian law is well-established by international conventions.[125] He critiqued the majority decision for allowing immunity to shield a state from its obligation to make reparations despite domestic courts being the only means of redress available to victims.[126] Noting that customary international law is "fragmentary and unsettled," Judge Yusuf also critiqued the majority's reliance on some evidence of custom amid examples of differing, general practices among states.[127] Judge Yusuf, asserting that courts should take into account the relative value of state immunity and the reparation of victims, suggested that the weight given to state immunity be shifted to reflect the growing importance of human rights in international law.[128] Lastly, Judge Yusuf found that the decisions from the Italian and Greek courts that carved out new exceptions to immunity should be recognized as part of a newly developing custom.[129]

Judge ad hoc Giorgio Gaja primarily took issue with the majority's opinion that the tort exception does not apply to the conduct of a state's armed forces in the forum state's territory.[130] Judge ad hoc Gaja found that the language in the legislation from the nine states examined by the majority did not restrict the exception in cases of torts arising out of a state's *acta jure imperii*, such as those of armed forces.[131] In addition, he suggested that the application of the tort exception should rely in part on the nature of the obligation that the state has allegedly breached.[132] He opined that the tort exception should especially apply where a state violates a peremptory norm.[133]

Dissenting from the majority opinion in its entirety, Judge Cançado Trindade asserted, inter alia, that the analysis of a broader range of law

123. *Id.* ¶¶ 15-16.
124. *Id.* ¶¶ 20, 58 (Yusuf, J., dissenting).
125. *Id.* ¶¶ 13-14.
126. *Id.* ¶ 20.
127. *Id.* ¶¶ 23-24.
128. *Id.* ¶¶ 35, 42, 52.
129. *Id.* ¶¶ 44, 46.
130. *Id.* ¶ 1 (Gaja, J., ad hoc, dissenting).
131. *Id.* ¶¶ 4-5.
132. *Id.* ¶ 10.
133. *Id.* ¶ 11.

was appropriate to determine customary international law and that human rights concerns should take precedence over other claims.[134] In his analysis, he noted the works of three legal jurists who endorsed an approach to immunity that focused "on the human person."[135] He also presented the ILA comment on article 6 that recognition of an individual's right to reparation is the dominant view under international humanitarian law, and that this view was appearing in state practice.[136]

Judge Trindade also argued that the majority should have been primarily concerned with preventing perpetrators of grave crimes from avoiding legal consequences of their illegal acts by invoking immunities.[137] He agreed with the normative hierarchy theory that the violation of a *jus cogens* norm requires any jurisdictional bar to be lifted.[138] Asserting the unfairness of the majority's conclusion, he stated that it permits a "double injustice" in that the German Reich's denial of the Italian military internees' prisoner-of-war status bolstered Germany's subsequent denial of reparation to the victims.[139]

In addition, Judge Trindade asserted that the acts of the German armed forces cannot be categorized as *jure imperii* given their unlawfulness and violation of human rights.[140] He criticized the majority's dissociation of the issue of immunity from the reparation claims, arguing that immunity cannot be considered in a void but must be informed by the facts of the underlying case.[141] He also found the majority's fragmented view of procedural law and substantive law unpersuasive, emphasizing that the ultimate role of legal procedure is the realization of justice.[142]

IV. ANALYSIS

The decision in the noted case provides a snapshot of the status of the doctrine of state immunity at a critical stage in its evolution. The doctrine has undergone dramatic changes over time and continues to evolve in the twenty-first century.[143] To many, the decision in the noted

134. *Id.* ¶¶ 1, 32, 52, 132, 183 (Trindade, J., dissenting).
135. *Id.* ¶¶ 32-40.
136. *Id.* ¶ 51.
137. *Id.* ¶ 183.
138. *See id.* ¶ 132.
139. *Id.* ¶¶ 264, 267.
140. *Id.* ¶ 290.
141. *Id.* ¶ 15.
142. *Id.* ¶ 295.
143. *See* Stephens, *supra* note 12, at 1169-70; Knuchel, *supra* note 28, at 151.

case represents great injustice to victims of the German Reich.[144] However, as unappealing as its outcome may be, the ICJ's decision reflects the only feasible legal conclusion. The ICJ faithfully carried out its duty under its Statute to apply "international conventions . . . international custom [and] the general principles of law recognized by civilized nations."[145] Judge Trindade's assertion that the ICJ should have looked at a broader source of law is misguided, because the teachings of publicists is merely a "subsidiary means for the determination of rules of law" under the Statute.[146]

The noted case demonstrates great tension between the strict application of existing law and the desire to ensure an equitable resolution of a dispute. Although the ICJ applied only existing law, the Court's decision may have been informed by equitable considerations, albeit discretely.[147] The ICJ's acknowledgment of the German-Italian lump settlement agreements and tacit affirmation of the acceptability of their use in the aftermath of conflict are particularly noteworthy.[148] Thus, whether the ICJ would uphold the immunity of a state that committed grave human rights abuses in the absence of a lump settlement agreement is uncertain. If the decision declined to take the settlements into account, its reasoning implicates the potential for a further-reaching double injustice than the one asserted by Judge Trindade.[149] Although the decision in the noted case does not resolve this open question, it illustrates the potential dangers of the ICJ's rigid parameters of analysis and application of the law.

Furthermore, the noted case highlights the shortcomings of the application of customary international law to state immunity issues. The evolution of customary international law necessarily relies on a state's divergence from the norm, as a pioneer of change.[150] With regard to state immunity, any deviation is likely to result in litigation and condemnation, as in the noted case. Although the decision does not directly address the status of these deviations, a logical interpretation might be that they are

---

144. *See Jurisdictional Immunities of the State*, 2012 I.C.J. ¶¶ 267, 304, 307 (Trindade, J., dissenting); AMNESTY INT'L, *supra* note 37, ¶¶ 11-13.

145. Statute of the International Court of Justice, *supra* note 20, art. 38.

146. *Id.* art. 38(d); *Jurisdictional Immunities of the State*, 2012 I.C.J. ¶ 32 (Trindade, J., dissenting).

147. *See Jurisdictional Immunities of the State*, 2012 I.C.J. ¶¶ 24, 102, 104 (majority opinion).

148. *See id.* ¶ 102. Also, in addressing the victims' right to reparation claims, the ICJ instructs that concerns about their compensation should be resolved through further negotiations with Germany. *Id.* ¶ 104.

149. *See id.* ¶ 267 (Trindade, J., dissenting).

150. *See* FOX, *supra* note 13, at 20-21.

incompatible with international law. This interpretation, however, denies the nature of the doctrine of immunity and may truncate its continuing evolution.

Perhaps it is this paradox that led Amnesty International to argue that finding an exception in the noted case would be consistent with international law.[151] Although such a standard would allow the ICJ more flexibility to uphold newly emerging practices, the Court's obligation is to apply the law as it exists.[152] The outcome of this case may inspire future revision of the ICJ's role in the face of complex and ever-changing international law doctrines. Until the implementation of such a change, the ICJ's proverbial hands are tied by its Statute's provisions.

Upholding Germany's immunity was also the only possible outcome due to the burden of proof in state immunity cases. The evidentiary standard for discerning international custom looks for representative and widespread state practice.[153] The exceptions asserted by Italy, however, had little or no support in state practice.[154] Similarly, the ICJ found that although Italy's national judgments offered support for an exception to immunity for grave violations of international law, Italy has also exhibited uncertainty about the evolving state of the law of immunity.[155] Finally, the ICJ found no support whatsoever for a last resort exception.[156] Under the applicable analysis, there is no doubt that Italy failed to carry its burden of proof, leaving the ICJ with insufficient evidence for finding of a rule of customary international law in Italy's favor. A different outcome would have contravened the high threshold for the denial of state immunity.

V. CONCLUSION

The decision in the noted case is the only feasible legal conclusion to which the ICJ could have come without straying from its duty.[157] Although an exception from immunity is appealing given the circumstances surrounding the noted case, customary international law simply does not recognize one. The case also highlights how high the standard is for meeting the burden of proof in state immunity cases. Confronted with little to no evidence of applicable exceptions to

151. *See* AMNESTY INT'L, *supra* note 37, ¶¶ 11, 13, 43.
152. Statute of the International Court of Justice, *supra* note 20, art. 38.
153. *See id.*; Slama, *supra* note 21, at 605.
154. *See Jurisdictional Immunities of the State*, 2012 I.C.J. ¶ 101 (majority opinion).
155. *See id.* ¶ 86.
156. *Id.* ¶ 101.
157. Statute of the International Court of Justice, *supra* note 20, art. 38.

immunity under customary international law, and governed by the doctrine of immunity as it existed in 2004, the ICJ's decision is legally correct.

On the other hand, the noted case does illuminate problems that may affect future cases regarding state immunity. One concern is that the ICJ's duty to strictly apply existing law may not allow for the equitable resolution of disputes. It remains uncertain where the outer boundaries of this duty lie and in what circumstances the ICJ might take into account equitable considerations or growing international expectations. The noted case also highlights concerns about the effect that the application of customary international law may have on the evolution of the doctrine of immunity. It is possible that, in light of these concerns, the ICJ may address future cases regarding state immunity with a different approach. However, the analysis and decision in the noted case make it clear that this is speculation, if not mere hope. Here, the ICJ not only declines to provide a glimpse of any changes in its approach, but also leaves little room for such hope.

Nicole Celia Katz*

 J.D. candidate 2014, Tulane University Law School; B.A. 2006, with Distinction, University of Wisconsin—Madison. Nicole extends a hearty thanks to Professor Günther Handl for his insightful comments regarding this piece and to her immensely supportive family.