Jurisdictional Immunities of the State and *Exequatur* of Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in *Germany v. Italy*

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1 Introduction

The Federal Republic of Germany (hereinafter: Germany) instituted, in December 2008, proceedings against the Italian Republic (hereinafter: Italy) before the ICJ requesting the Court to adjudge and declare that Italy has failed to respect the jurisdictional immunity that Germany enjoys under international law, in three different ways: (1) by allowing, before the Italian courts, several civil claims against Germany seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during World War II against Italian nationals in Italy and elsewhere in Europe; (2) by taking measures of constraint against a German State property (Villa Vigoni) used for government non-commercial purposes; and (3) by declaring enforceable in Italy certain Greek judgments against Germany awarding compensation for civil damages to the successors of Greek nationals who had been victims of a massacre in the Greek village of Distomo committed by German units during their withdrawal in 1944. On 3 February 2012 the ICJ issued a judgment totally in favor of Germany, having rejected all the Italian arguments in favor of the existence of an exception to State sovereign immunity in civil cases based on the most serious violations of rules of international law of a peremptory character (war crimes and crimes against humanity) for which no alternative means of redress is available.[1]

Despite the truly public international law nature of the claim submitted to the ICJ (jurisdictional immunity and immunity from enforcement), originating in

[1] ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment (3 February 2012).

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N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, DOI: 10.1007/978-90-6704-894-1_57,
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"violations of obligations under international law" allegedly committed by Italy through its judicial practice, the subject matter of the dispute also involved a typical "private international law" issue, namely the process of enforcing a foreign judgment (the claim against Italy regarding the recognition and enforcement of the decisions of Greek courts upholding civil claims against Germany). The ICJ decided (by a majority of 14 to 1) that the Italian courts had violated Germany's immunity from jurisdiction in upholding a "request for *exequatur*" of judgments rendered by these foreign courts. Thus, the enforcement of foreign judgments is expressly recognized by the World Court as another topic at the crossroads of public and private international law convergence and their relationship, which challenges the sharp distinction between the law applicable to the rights and obligations of States with respect to other subjects of international law and individuals (public international law) and issues of jurisdiction, applicable law, and the recognition and enforcement of judgments before national courts (private international law),[2] whose other point of interest also derives from its location at the intersection of the fundamental procedure/substance distinction drawn by the ICJ.[3] This paper will focus precisely on Germany's third submission and the crucial pronouncements of the Court on the question of the purpose of *exequatur* proceedings and their relation with the jurisdictional immunity of States: the ICJ's judgment might in fact have consequences also on the private international law level; particularly, it could have a potential "chilling effect"[4] on the fundamental role of PIL's rules in preventing or remedying a denial of justice which affects procedural as well as substantive fundamental human rights, as well as on its role, maybe not so fundamental, but still very important, in supporting the evolving nature of customary international law.[5]

2 Historical and Factual Background of the ICJ's Decision in Relation to Proceedings Involving Greek Nationals

The historical and factual background of the case are well known. In the last decade, Germany has faced a growing numbers of disputes before Italian and Greek courts. Various claimants, who suffered injury during World War II, have instituted proceedings seeking financial compensation for that harm; Germany, in its Application to the ICJ,[6] distinguished three main groups: (1) claimants (civilians) who were

[2] Mills 2009.

[3] Kerameus 1997, p. 198.

[4] Webb 2012. On the role played by the ICJ in the development of private international law, see De Dycker 2010; Tams and Tzanakopoulos 2010.

[5] See for a conclusion on these aspects that which is considered in Section 4.

[6] ICJ: Jurisdictional Immunities of the State (Germany v. Italy), Application Instituting Proceedings (23 December 2008).

arrested on Italian soil and sent to Germany to be used as forced labor; (2) members of the Italian armed forces who, after the events of September 1943 (when, after the fall of Mussolini, Italy joined the Allied Powers and declared war on Germany), were taken prisoner by German forces, deported to German territory and German-occupied territories to be used as forced labor, and soon thereafter "factually" deprived by the Nazi authorities of their status as prisoners of war; (3) victims of massacres perpetrated by German forces during the last months of World War II during the German occupation of Italian territory. Cases involving Greek nationals have been considered by Germany in its Application as a "fourth group of disputes" to be mentioned separately as these disputes were raised from the attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a similar massacre committed by German military units during their withdrawal in 1944 (*Distomo* case).[7] Actually, this distinction only makes sense with respect to Germany's third submission against Italy, in which it complained that its jurisdictional immunity had also been violated by the Italian court's decision to declare enforceable in Italy, the Greek judgments against Germany in proceedings arising out of the Distomo massacre. In the country of origin of these judgments (the Hellenic Republic, hereinafter: Greece), the said proceedings found the same cause of action (infringements of human rights and international humanitarian law during belligerent occupation) invoked by the Italian victims of massacres committed by the German forces on the forum soil. The Distomo massacre was in fact one of the worst crimes, involving many civilians, committed by German armed forces in Greece in June 1944, during its occupation.[8]

In 1995, over 250 plaintiffs brought an action for a declaratory judgment before the Greek Court of First Instance of Livadia, claiming compensation for loss of life and property due to acts perpetrated by the German occupation forces in Greece. Two years later (in 1997) the Court of First Instance, by means of a "default" judgment against Germany, held this State liable and ordered it to pay compensation to the relatives of the victims (approximately $ 30 million).[9] Against this judgment, Germany instituted proceedings before the Supreme Court of Greece (*Areios Pagos*) claiming immunity from the jurisdiction of Greek courts. On 4 May 2000 the Supreme Court confirmed the judgment, stating (by seven votes to four) that the Greek courts were competent to exercise jurisdiction over the case.[10] After the Greek Supreme Court's pronouncement, the judgment of the Court of First Instance became

[7] Ibidem, para 10.

[8] Finke 2010, p. 855, n. 8, which refers, for a description of the massacre, to Mazower 1995, pp. 213–215.

[9] Court of First Instance of Levadia: Prefecture of Voiotia v. Federal Republic of Germany, Case no. 137/1997 (30 October 1997). An English translation of the judgment is reproduced in 1997 Revue hellénique de droit international 50: 599 (with note by Gavouneli). See also Bantekas 1998, p. 765.

[10] Areios Pagos (Supreme Court of Greece): Prefecture of Voiotia v. Federal Republic of Germany, Judgment no. 11/2000 (4 May 2000). International Law Reports 129: 513; for a comment see Gavouneli and Bantekas 2001.

final, but the efforts to enforce it in Greece failed because the Minister of Justice denied his approval, which was necessary, according to Article 923 of the Greek Code of Civil Procedure, to start enforcement proceedings against a foreign State. The applicants then sought to enforce the judgments of the Greek courts in Italy, as the Italian courts, after the landmark judgment of the Italian Court of Cassation of 11 March 2004, in the *Ferrini* case,[11] have reputedly disregarded the jurisdictional immunity of Germany.[12] The Court of Appeal of Florence held, in May 2005, that the Greek order contained in the judgment of the Supreme Court of Greece imposing an obligation on Germany to reimburse legal expenses for the judicial proceedings before that Court was enforceable in Italy.[13] In a decision, dated 7 February 2007, the same Court rejected the objections raised by Germany against its decision of May 2005,[14] and the Italian Court of Cassation confirmed, in a judgment dated 6 March 2008, the Court of Appeal of Florence's ruling.[15] Concerning the question of reparation to be paid to Greek claimants by Germany, the same Court of Appeal of Florence declared, by a decision dated 13 June 2006, that the 1997 judgment of the Court of First Instance of Livadia was equally enforceable in Italy and rejected, in a judgment dated 21 October 2008, the objections by Germany against the 2006 judgment. Again, the Italian Court of Cassation confirmed, by a judgment dated 12 January 2011, the ruling of the Court of Appeal.[16]

In 2011, Greece filed an Application at the Court's Registry for permission to intervene in the case,[17] and it was authorized by an order of the Court of July 2011 to intervene in the case "as a non-party", in so far as its intervention was limited to the decisions of the Greek courts which were declared, by the Italian courts, to be enforceable in Italy.[18]

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[11] Corte di cassazione (Italy) Sezioni unite civili: Ferrini v. Federal Republic of Germany, Judgment no. 5044/2004. 2004 Rivista di diritto internazionale 87: 539 (in Italian) and International Law Reports 128: 658 (in English). See Bianchi 2005; Gattini 2005; Focarelli 2005; De Sena and De Vittor 2005; Gianelli 2004; Baratta 2004; Iovane 2004; Ronzitti 2004; Ronzitti 2002.

[12] Jurisdictional Immunities, supra n. 1, paras 27–29.

[13] Ibidem, para 33.

[14] Corte d'Appello di Firenze (Court of Appeal of Florence): Judgment (22 March 2007). 2008 Il foro italiano 133: 1308.

[15] Corte di cassazione (Italy), Sezioni unite civili: Federal Republic of Germany v. Prefecture of Voiotia, Judgment no. 14199 (29 May 2008). 2009 Rivista di diritto internazionale 91: 594. With a note by Bordoni 2009.

[16] Corte di cassazione (Italy), Sezione I civile: Repubblica Federale di Germania v. Prefecture of Voiotia, Judgment no. 11163 (12–20 May 2011). www.europeanrights.eu. Accessed 15 June 2015. International Law Reports 150 (in English, forthcoming).

[17] Tzanakopoulos 2011.

[18] Jurisdictional Immunities, supra n. 1, para 10. For different conclusions on the point of Greece's legal interest relating to the enforcement of its judicial decisions abroad, see ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Additional Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece (26 May 2011), paras 5–6; and Order (4 July 2011), Separate Opinion of Judge Cançado Trindade and Declaration of Judge *ad Hoc* Gaja.

3 The Arguments of the Court on the Private International Law Issue of Jurisdictional Immunity in *Exequatur* Proceedings

In its third submission, Germany contended that its jurisdictional immunity had also been violated by the Italian decisions to enforce in the Italian *forum* the Greek judgments against Germany in proceedings arising out of the above-mentioned *Distomo* massacre, for the same reasons as those invoked by Germany in relation to the Italian proceeding instituted in Italy and concerning war crimes committed in Italy between 1943 and 1945. All these civil claims, according to Germany, would have to be dismissed by Italy as the Italian courts were obliged to accord Germany jurisdictional immunity in respect of acts *jure imperii* performed by the Authorities of the Third Reich. Similarly, the decisions of the Greek court had also themselves been rendered in violation of its jurisdictional immunity.

Before assessing the Court's decision on Germany's contention that its jurisdictional immunity had also been violated by the Italian decisions, it is worth remembering that *exequatur* is a concept which is specific to private international law and which refers to a specific procedure by which a national court authorizes the enforcement of a foreign judgment in its country.[19] The enforcement of a foreign judgment consists of securing compliance therewith, if necessary by means of coercion as allowed by the law, including the intervention of the forces of law and order (it could take, for instance, the form of an attachment of the debtor's assets). In principle, enforceability is confined to the State of the court which gave the judgment; to be enforceable abroad, the judgment must be declared enforceable (by the *exequatur* procedure) or be registered (like in the UK and in Ireland). The enforcement of a foreign judgment nevertheless requires a preliminary step: there can be no enforcement without recognition; recognition has the fundamental function of rendering the foreign judgment *res judicata* in the forum, conferring on it the authority and effectiveness accorded in the State in which it was given. Only after recognition, is the judgment a valid title for execution. It is obviously possible for the creditor to have a foreign judgment only recognized, in order to prevent proceedings being pursued before a domestic court of the forum, without any prospect of enforcement/execution.

The distinction between mere recognition and enforcement in the strict sense of the term in relation to State immunity has been the object of divergence between French courts confronted with an application to recognize an award rendered under the auspices of the ICSID: Articles 53 and 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; ICSID Convention)[20] require each Contracting State to recognize

[19] See, European Judicial Network in Civil and Commercial Matter, *Glossary*. http://ec.europa.eu/civiljustice/glossary/. Accessed on 15 June 2012.

[20] Entered into force on 14 October 1966.

an ICSID award simply upon the production of a copy of the award. The ICSID Award in *SOABI v. Senegal*[21] had been granted an *exequatur* by the *Tribunal de grande instance* of Paris. Senegal appealed against it before the *Cour d'appel* of Paris which set aside the order of *exequatur* as being contrary to "international public policy" (*ordre public*): according to the Court of Appeals, the State of Senegal had not waived its right to invoke its immunity from enforcement in a Contracting State under Article 55 of the ICSID Convention, and the applicant/creditor had not demonstrated that enforcement would be carried out against commercial property, in such a way as not to conflict with Senegal's the immunity from execution.[22] This judgment was reversed by the *Cour de cassation*, with the reasoning that an *exequatur* did not constitute a measure of enforcement which, as such, could give rise to immunity from execution for the State concerned.[23] Thus, for the purpose of State immunity enjoyed by States, according to the French *Cour de cassation* a distinction is to be made between *exequatur* (the procedure on the basis of which judgments are recognized and also declared enforceable in the State addressed) and "enforcement" in the strict sense, i.e. effective enforcement measures against property belonging to it, situated in a foreign territory.[24]

This is the same distinction which was also made by the ICJ in relation to Germany's third submission against Italy: after having determined, in respect of Germany's second submission, that the Italian measures of constraint against Villa Vigoni (a German-Italian center for cultural encounters, located near Lake Como) constituted a violation by Italy of its obligations to respect Germany's immunity from enforcement,[25] the Court stated that Germany's third submission is an entirely separate and distinct issue from that set out in the preceding one. In being asked to decide whether the Italian judgments declaring the Greek decisions to be enforceable in Italy "themselves" constituted a violation of Germany's immunity, independent of any act of execution/enforcement, the Court was no longer concerned with immunity from enforcement. Notwithstanding the obvious link

[21] ICSID: Société Ouest Africaine des Bétons Industriels v. Senegal, ARB/82/1, Award (25 February 1988).

[22] Cour d'appel de Paris, 1ère Chambre: État du Sénégal v. Alain Seutin ès qualité de liquidateur amiable de la SOABI et autres, Judgment (5 December 1989). 1990 Journal du droit international 117: 141.

[23] Cour de cassation, 1ère Chambre Civile: Societé SOABI v. État du Sénégal, Judgment (11 June 1991). 1991 Journal du droit international 118: 1005.

[24] This distinction has also been endorsed by Italian doctrine commenting on the *Corte di cassazione*'s judgment which confirmed the *exequatur* to the Greek decision on the Distomo massacre: see Franzina 2008.

[25] First, Germany had not waived its immunity from enforcement as regards property belonging to it situated in Italy; secondly, the property which was the subject of the legal charge (*ipoteca gudiziale*) was being used for governmental purposes, hence within Germany's sovereign functions. It is worth noting that Italy did not seek to justify this specific measure of constraint; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled", see Jurisdictional Immunities, supra n. 1, para 110.

between the two aspects of the procedure, since the measures of constraint against Villa Vigoni "could only have been imposed on the basis of the judgment of the Florence Court of Appeal according *exequatur* in respect of the judgment of the Greek court in Livadia",[26] the Court declared that the two issues remain "clearly distinct". In its view, the *exequatur* proceedings by which foreign judgments are given *res judicata* effects and *force éxecutoire*, i.e., declared enforceable, address another form of immunity governed by a different set of rules, precisely "immunity from jurisdiction".

A possible explanation for the different approach taken by the French Court of Cassation concerning the relevance of immunity in *exequatur* proceedings is that all States parties to the ICSID Convention are under an obligation to recognize and enforce ICSID awards as if they were final judgments of local courts; therefore, the Contracting States which have consented to arbitration have thereby "agreed that the award may be granted *exequatur*"[27]: under the ICSID Convention, only "enforcement" has its limitation in State immunity, as Article 55, which preserves State immunity from execution, neither applies to immunity from jurisdiction, nor to proceedings for the recognition of an award.[28] In any case, the relationship between arbitration law and the law of State immunity poses particular and peculiar challenges,[29] extraneous to the traditional doctrine of State immunity: what was as at stake in Germany's third submission before the ICJ was precisely the scope and the extent of the customary international law governing the jurisdictional immunity of States (understood *strictu sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State).

While the issue of the jurisdictional immunity of foreign States immediately arises when a national court is asked to rule "on the merits" of a claim brought against a foreign State, difficulties arise when the same court is simply asked to recognize and enforce a decision already rendered by a foreign court against a

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[26] Ibidem, para 124.

[27] SOABI v. Sénégal, supra n. 23.

[28] UNCTAD, International Centre for the Settlement of Investment Disputes, 2.9. Binding Force and Enforcement (2003) p. 18.

[29] In its decision in *Creighton v. Qatar* (Cour de cassation, 1ère Chambre Civile: Societé Creighton Ltd v. Ministère des Finances de l'État du Qatar et Ministre des Affaires municipales et de l'agriculture de l'État du Qatar, Judgment (6 July 2000). 2000 Journal du droit international 127: 1054–1055 (note by Pingel-Lenuzza); 2001 Juris classeur périodique II, 10512, 764 (note by Kaplan and Cuniberti)), the French *Cour de cassation* held that: "The obligation entered into by the State by signing the arbitration agreement to carry out the award according to Article 24 of the International Chamber of Commerce Arbitration Rules [now Article 28.6 of the Rules in force as of 1 January 1998] implies a waiver of the State's immunity from execution". The principle that an arbitral award against a State that has given its consent to submit certain disputes to arbitration should not be rendered ineffective simply because the State benefits from immunity from execution (see Gaillard and Younan 2008, pp. 179–192), has been recently contradicted by a decision of the Hong Kong Court of Final Appeal, in which the Court held that no state may be sued in Hong Kong's courts unless the state waives its immunity, and that submitting to arbitration does not constitute a waiver (Democratic Republic of Congo v FG Hemisphere Associates LLC, Judgment (8 June 2011). International Law Reports 150 (forthcoming)).

third State "which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State".[30] By stating this, the ICJ referred to one condition (among a number of common conditions) under which, according to various national legal regimes, a foreign judgment is entitled to recognition and enforcement: what is required is that the court of origin must have had jurisdiction ("indirect jurisdiction"). Most national legal regimes assess whether the foreign court was entitled to assume jurisdiction not according to foreign law (as one State's rules of jurisdiction are not binding on other States), but with respect to their own rules of private international law. This is, for example, the case with the recognition and enforcement of foreign judgments in Italy, governed by Article 64 *et seq.* of the Private International Law Act (Law 218 of 31 May 1995), which replaced, when it came into force (on 31 December 1996), the provisions of the Italian Code of Civil Procedure. In order for a foreign judgment to be recognized, Article 64 (among seven conditions which must be satisfied) requires that "[t]he judge who issued the judgment must have had jurisdiction over the matter in accordance with the relevant Italian principles" (part a). The same is also true for the German–Greek Treaty on the Mutual Recognition and Execution of Court Judgments, Settlements, and Public Documents in Civil and Commercial Matters of 4 November 1961, as well as for the ZPO—the German Code of Civil Procedure dealing with the recognition of foreign judgments: both require for a Greek judgment to be recognized and enforced in Germany that the original (Greek) court had jurisdiction on the merits of the claim according to Germany's own jurisdiction rules.

Nevertheless, the ICJ immediately rejected the "private international law" reasoning argued by both Parties, according to which the solution to the question of jurisdictional immunity in relation to *exequatur* proceedings simply depends on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. It is worth remembering that, according to their private international law rules, the Italian and the German courts had arrived at opposite conclusions on the question whether the Greek courts, in the *Distomo* case, had themselves violated Germany's immunity; in 2003, the *Bundesgerichtshof* (BGH) declined to give effect to the Greek judgment in the *Distomo* case, on the ground that the Greek court did not have jurisdiction to hear the case. According to the principle of sovereign immunity recognized by customary international law, which is part of German law, the Federal Court affirmed that a State can claim immunity from another State's jurisdiction in respect of *acta jure imperii*. To the extent that the acts committed by German armed forces in Greece were undoubtedly the exercise of a sovereign power, albeit illegal (just as those committed on Italian soil, a point never contested by Germany), the BGH ruled that the Greek courts had no fundamental requirement of jurisdiction to hear the case. Accordingly, the Greek decision was not recognized by the German courts, being in contrast to the international public order

[30] Jurisdictional Immunities, supra n. 1, para 125.

exception due to the reason that it had been rendered in breach of Germany's entitlement to immunity.[31] The Italian courts, on the contrary, while recognizing that the actions carried out by Germany (on which the Italian and Greek claims were based) were undoubtedly an expression of its sovereign power, being conducted during war operations, contested that immunity from jurisdiction can be granted in the case of such conduct which constitutes (on the basis of customary international law) an international crime in that it violates universal values that transcend the interests of individual states. According to the Italian courts, respect for inviolable human rights has by now attained the *status* of a fundamental principle of the international legal system, and the emergence of this principle cannot but influence the scope of other principles that traditionally inform this legal system, particularly that of the "sovereign equality" of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction. Therefore, according to the Italian courts, the distinction between *acta jure imperii* and *acta jure gestionis* carries no weight in relation to claims for compensation deriving from cases concerning torts of particular seriousness, in the light of the priority importance that is now attributed to the protection of basic human rights over the interests of the State in securing recognition for its own immunity from foreign jurisdiction.[32]

In its counter memorial, Italy argued that the Italian judges did not commit an unlawful act since lifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims. Such a measure was adopted only after several attempts by the victims to institute proceedings in Germany and it was the only possible means to ensure respect for and the implementation of the imperative reparation regime established for serious violations of international humanitarian law.[33] Italy argued that the reasoning and the conclusion provided to the Italian victims applied *mutatis mutandis* to the proceedings relating to the enforcement in Italy of the Greek judgment concerning the *Distomo* massacre. Since the Greek judgment concerned a case which presented much of the same features which were present in the Italian cases, including the fact that Greek victims had tried to obtain reparation before the German courts and were repeatedly confronted with a denial of justice,[34] the

[31] BGH (Federal Court of Justice, Germany): Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany), Case no. III ZR 245/98. 2003 NJW: 3488–3489. International Law Reports 129: 556. See, Pittrof 2004.

[32] Ferrini, supra n. 11. For an account of the most recent Italian judicial practice concerning foreign State immunity, see Sciso 2011.

[33] ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Counter-Memorial of Italy (22 December 2009), para 6.39.

[34] In September 1995, the Greek plaintiffs had brought action for a declaratory judgment before the *Landgericht* (Regional Court) of Bonn, claiming Germany's liability to pay compensation for the massacre. The regional Court dismissed the action (Landgericht Bonn: case no. 1O 358/95, Judgment (23 June 1997); the plaintiffs therefore lodged an appeal before the OLG, the Higher

recognition that the Greek judgment in the *Distomo* case could be enforced in Italy does not amount to a violation of international law.

The reason why the Court refused to follow the Parties' private international law approach in order to determine whether the Florence Court of Appeal had violated Germany's jurisdictional immunity by declaring the Greek decision to be enforceable in Italy was simply because of the fact that taking the applicable rules of private international law into account would have obliged the ICJ to pronounce "itself" on the question of whether the Greek courts had themselves violated Germany's immunity. Something that the court could not do, since Greece did not have the *status* of a party to the proceedings in question.[35] Therefore, the Court decided to address the issue "from a significantly different viewpoint": as nothing prevents national courts from ascertaining (before granting *exequatur*) that the foreign judgment had been rendered in respect of the immunity of the respondent State, the Court affirmed that "Where a court is seized, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question". In granting or refusing *exequatur*, "the courts exercise a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment on the merits in the requested State", with the consequence that "the proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment".[36] It followed, for the ICJ, that a court seized of the application for *exequatur* of a foreign judgment against a third State *has* to ask itself whether, in the event that it had itself been seized of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State.[37]

On this relevant question, the ICJ decided that the Italian courts, if they had been seized of the merits of a case identical to that which was the subject of the Greek decisions, should have been obliged to grant immunity to Germany. Consequently, they could not have granted *exequatur* to the Greek decisions

(Footnote 34 continued)
Regional Court of Cologne, which upheld the lower court's decision. In the already mentioned judgment of 26 June 2003, the *Bundesgerchtshof* (the German Federal Supreme Court) again rejected the plaintiffs' application for revision. Against these German courts' decisions, the plaintiffs filed a constitutional complaint at the German Federal Constitutional Court and their allegations (violations of their right to have access to a court, their right to a hearing in accordance with the law, their general personality right, and their right to physical integrity, as protected by the German Basic Law) were again rejected as being inadmissible (Bundesverfassungsgericht (BVerfG): 2 BvR 1476/03, Judgment (15 February 2006), www.bundesverfassungsgericht.de/entscheidungen/rk20060215_ 2bvr147603.html. Accessed on 15 June 2012). See Rau 2007.

[35] Jurisdictional Immunities, supra n. 1, para 127.

[36] Ibidem, para 128.

[37] Ibidem, para 130.

without thereby violating Germany's jurisdictional immunity.[38] In reaching such a decision, the Court confined itself to considering, in general terms, that the fact that Germany might have waived its immunity before the courts hearing the case on the merits, does not bar the respondent's immunity in *exequatur* proceedings instituted in another State.[39]

3.1 Evaluation of the Court's Reasoning: Its Correctness and Weakness in the Light of the Preliminary Unconvincing Solution Given in Respect to the Violation of Germany's Jurisdictional Immunity in Proceedings Brought Before the Italian Courts by Italian Claimants

The ICJ's reasoning is correct in several respects, except (in our opinion) for the conclusion reached, according to which the conduct of the Italian courts is to be qualified as being inconsistent with the doctrine of sovereign immunity under current international law.

Regarding the ICJ's arguments, it is certainly true that *exequatur* proceedings, according to which a court declares a pecuniary award rendered against a third State to be enforceable in the forum, are an "exercise of jurisdictional power". The legal procedure by which foreign judgments are given *res judicata* effects and declared enforceable (thus given effects corresponding to those of a judgment on the merits rendered in the requested State) entails an act which is exactly an *exercise of jurisdiction* on the part of the requested State. The foreign judgment in itself, in the absence of treaty commitments which provide for its automatic recognition and enforcement abroad, does not have any authority and effectiveness outside the country of origin. When there are certain legal provisions, like the Italian and German laws mentioned above, which make the recognition and enforcement of a foreign judgment dependent on various conditions being fulfilled, the insertion of the foreign judgment into the domestic legal order of the requested State, as well as its "efficacy", depends on a judicial decision (*exequatur*) that has "constitutive" effect. Without this jurisdictional act, the foreign judgment cannot extend its effects in the country of reception. In sum, the foreign judgment can be considered a valid title for execution only insofar as its efficacy has been declared by a court of the State in which the party seeks authorization for enforcement. Article 67 of the Italian law on private international law subjects the enforceability in the forum of any foreign judgment to a special procedure, which is necessary in order to ascertain that there are no grounds for the refusal of recognition as

[38] Ibidem, para 131.

[39] Ibidem, para 132.

referred to in the same Italian law. This special procedure (declaration of enforceability) is undeniably an act of State.[40]

Second, irrespective of the fact that a declaration of enforceability is to be distinguished from actual enforcement, the ICJ was correct in asserting that *exequatur* proceedings must be regarded as being "directed against" the State which was the subject of the foreign judgment: such proceedings, in fact, are a preliminary step leading to actual execution against the assets of the foreign State. According to the United Nations Convention on Jurisdictional Immunity of States and Their Properties (New York, 2 December 2004),[41] proceedings before a court of a State shall be considered to have been instituted against another State (not named as a party to the proceedings) when such a proceeding in effect "seeks to affect the property, rights, interests or activities of that other State" (Article 6.2). Therefore, Germany was entitled to object to the decision of the Florence Court of Appeal granting *exequatur* to the Greek decision.

In support of the conclusion that a court seized of an application for *exequatur* of a foreign judgment must itself deal with the question of immunity from jurisdiction for the respondent State, the ICJ cited two judgments: one by the Supreme Court of Canada in *Kuwait Airways Corp. v. Iraq,* and a second judgment by the United Kingdom Supreme Court in *NML Capital Limited v. Republic of Argentina*. The first case arose out of Kuwait Airways Corp's action for damages against Iraqi Airways for the appropriation of its aircraft, equipment, and parts during the 1990 invasion of Kuwait. An English court awarded $ 84 million in damages against Iraq, as it held that Iraq could not rely upon its State immunity because of its involvement in the defence related to its commercial interests. KAC applied for the recognition of that judgment in the Quebec Superior Court, and Iraq, relying on its immunity, moved for the dismissal of the application for recognition on the ground that the impugned acts were sovereign acts and that the Quebec court could not simply recognize the foreign court's finding that State immunity did not apply. According to Iraq, the Quebec court had to decide this issue on its own. Although the Canadian conflict of laws rules establish that the enforcing court shall not review the merits of a foreign decision, the Supreme Court of Canada agreed with Iraq's defence, stating that it did not matter that the issue of state immunity had already been decided, and that this issue (as well as the State immunity exception) must be considered within the framework of the law currently applicable in Canada, including public international law. In any case, Iraq's victory was illusory as, ultimately, the Supreme Court of Canada agreed with the British court that Iraq could not rely upon its state immunity.[42]

[40] Morelli 1954, p. 278 ff. and p. 286 ff.

[41] Not yet in force.

[42] Supreme Court (Canada): Kuwait Airways Corp. v. Iraq, Judgment (21 October 2010). 2010 Supreme Court Reports 2: 571.

The case decided by the United Kingdom Supreme Court related to the legal consequences of the Argentinian debt crisis in 2001–2003, and the efforts of worldwide investors to recoup as much as possible of their investments in this country. In 1994, the Republic of Argentina issued a series of sovereign bonds, containing a clause dealing with jurisdiction and immunity in relation to claims against the bonds and subject to New York law. NML Capital Ltd bought a number of these bonds and, in 2003, declared "events of default" based on the subsequent failures by Argentina to pay interest. Refusing to accept the Argentinian offer to restructure its external debt, NML brought a claim in New York seeking payment of the principal amount of the bonds that had become due ($ 284 million). In 2006, the US District Court of the Southern District of New York entered judgment against Argentina in favor of NML for the sum claimed. NML then sought to enforce this judgment against assets held by Argentina in the UK. Argentina applied to have this order set aside, arguing that, as a sovereign State, it was immune from suit under section 1 of the State Immunity Act 1978, which grants general immunity to States unless specific exceptions apply. The Court of Appeal upheld this argument in February 2010. NML subsequently appealed against this judgment before the Supreme Court.

The question before the United Kingdom Supreme Court was whether such an investor could enforce its judgment against assets belonging to the Argentinian State in the United Kingdom, notwithstanding the Argentinian allegation of immunity. In unanimously allowing NML Capital's appeal, the Supreme Court held that it was entitled to do so. In order to determine whether, under English law, Argentina enjoyed State immunity in relation to the recognition and enforcement of the New York judgment, the Court stated that this

> "question ought to be answered in the light of the restrictive doctrine of State immunity under international law. There is no principle of international law under which State A is immune from proceedings brought in State B in order to enforce a judgment given against it by the courts of State C, where State A did not enjoy immunity in respect of the proceedings that gave rise to that judgment. Under international law the question of whether Argentina enjoys immunity in these proceedings depends upon whether Argentina's liability arises out of *acta jure imperii* or *acta jure gestionis*. This involves consideration of the nature of the underlying transaction that gave rise to the New York judgment. The fact that NML is seeking to enforce that judgment in this jurisdiction by means of an action on the judgment does not bear on the question of immunity."

In answering the question whether the foreign creditor, seeking to enforce the New York judgment in the UK, would have been precluded by English law from suing the foreign State, had it chosen to sue it in the United Kingdom, Lords Phillips and Clarke found that the claim would have been upheld by the State Immunity Act 1978, Section 3.1.a. Lords Mance, Collins and Walker, while disagreeing on this point, nevertheless all agreed that Argentina would have been prevented from claiming State immunity in respect of these proceedings by reason of the provisions of Section 31 of the Civil Jurisdiction and Judgments Act of 1982—which gave effect to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; hereinafter Brussels

Convention)[43]—and by Argentina's submission and waiver of immunity concerning the bonds. Lord Phillips neatly summarized the effect of Section 3.1:

> State immunity cannot be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognized in this jurisdiction, the State against whom the judgment was given was not entitled to immunity in respect of the claim.[44]

Both judgments mentioned by the ICJ support its conclusion that a court seized of an application for *exequatur* of a foreign judgment against a third State has to ask itself whether the respondent State enjoys immunity from jurisdictions, having regard to the "nature of the case in which that judgment was given". The reasoning of the World Court is well constructed and logical. Equally logical and coherent is its conclusion that the Italian courts had violated Germany's jurisdictional immunity by declaring the decisions of the Greek courts on the *Distomo* massacre to be enforceable, for the reason that, according to the ICJ, the Italian courts would have been obliged to grant immunity to that State if they had been seized of the merits of cases identical to those which were the subject of the Greek decisions.

The *weakness* of such a conclusion lies in the fact that its "correctness" depends on the appropriateness of the solutions given by the Court to a number of public international law issues. The ICJ's assertion that the decisions of the Italian courts, granting *exequatur* to the foreign Greek decisions, had violated Germany's jurisdictional immunity is in fact exactly the *same* as that set out by the Court in Section III of the judgment in respect of Germany's first submission. In order to determine whether the Italian courts had breached Italy's obligation to accord jurisdictional immunity to Germany by exercising jurisdiction over Germany with regard to the claims brought before them by various Italian claimants, the ICJ considered each of the Italian arguments separately and rejected all of them individually as well as the idea, suggested by Italy, that they could have worked in conjunction.[45] With regard to the "territorial tort exception", and contrary to what was asserted by the Italian and Greek courts (according to which contemporary customary international law has developed an exception to the principle of State immunity in respect of acts occasioning death, personal injuries, or damage to property in the territory of the *forum* State, even if the acts in question were carried out *jure imperii*),[46] the Court concluded that no territorial exception applied in the cases in question. According to the Court, customary international law continues to require "that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of

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[43] Entered into force on 1st January 1973.

[44] Supreme Court (United Kingdom): NML Capital Limited (Appellant) v. Republic of Argentina (Respondent), 2011 UKSC 31, on appeal from 2010 EWCA Civ 41.

[45] Jurisdictional Immunities, supra n. 1, para 106.

[46] Areios Pagos (Supreme Court, Greece), Full Court: Prefecture of Voiotia v. Federal Republic of Germany, Judgments nos 36/2002 and 37/2002 (28 June 2002), reported under "Facts" of the ECtHR: Kalogeropoulou and Others v. Greece and Germany, 59021/00, Decision (12 December 2002). For a comment on this point see Reinish 2006, p. 816. Serranó 2012, p. 628.

State in the course of conducting an armed conflict".[47] In respect of the Italian argument concerning the subject matter and specific circumstances of the claims in the Italian courts, the Court rejected the argument that the denial of immunity was justified by the *gravity* of the violations and of the unlawful acts (war crimes and crimes against humanity) and that customary international law has developed to a point that a State is not entitled to immunity in cases of violations of the peremptory rules of international law (*jus cogens*). The ICJ concluded that under customary international law (as it currently stands) "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict". Again, on the relationship between *jus cogens* and the rule of State immunity, the Court rejected the Italian argument that under international law a *jus cogens* rule should override not only "directly" inconsistent obligations under international law, but also obligations under international law that would reduce its *effectiveness* (i.e., jurisdictional State immunity for claims arising out of its breach). The Court excluded the existence of a *conflict* between rules of *jus cogens* and the rule of international customary law which requires jurisdictional immunity to be given, stating that the two sets of rules address different matters, one relating to *substance* and one relating to *procedure*. As the rules on State immunity are "procedural in character", and confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State, the Court asserted that the rules which determine the scope and extent of the jurisdictional immunity of States do not derogate from "substantive rules" which posses *jus cogens* status.[48] Finally, the ICJ also rejected the Italian "last resort" argument, according to which the Italian courts were justified in denying Germany its immunity, because all attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed; the same was also true for the Greek victims.[49] The Court refused this Italian contention by stating that it could find no basis in State practice "that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternatives of securing redress".[50] In conclusion, the Court held that the decision of the Italian courts to deny immunity to Germany with regard to proceedings brought by the Italian claimants in the Italian courts cannot be justified on the basis of customary international law, and therefore constituted a breach of the obligation owed by Italy to Germany. Accordingly, the Italian courts could not grant *exequatur* to the Greek decision rendered against Germany "without thereby violating Germany's jurisdictional immunity".[51]

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[47] Jurisdictional Immunities, supra n. 1, para 78.

[48] Ibidem, para 95.

[49] Distomo Massacre Case, supra n. 31.

[50] Jurisdictional Immunities, supra n. 1, para 101. According to Zgonec-Rozej 2012, the ICJ departed on this issue from its previous reasoning in the *Arrest Warrant* case, where "the availability of venues argument was referred to in support of the Court's determination".

[51] Jurisdictional Immunities, supra n. 1, para 131.

The assessment of whether the ICJ's decision is "right" from the point of view of the current state of public international law is obviously something that cannot be discussed in this paper.[52] For our purpose, it is sufficient to observe that much of the ICJ's reasoning has been authoritatively criticized by leading public law scholars, who are also judges at the same court. This not to say that the remaining Judges of the World Court are not "leading" scholars in public international law; it is simply that, in our opinion, the authoritative critics of this judgment are very impressive and deserve attention: the correctness of the World Court's judgment cannot only be founded on assuring the certainty of the law[53]; it should also be evaluated in the light of the fundamental principle that immunity from jurisdiction should only be granted when this is consonant "with justice and with the equitable protection of the Parties".[54]

In his *separate* opinion, Judge Bennouna, while agreeing with the operative part of the ICJ's judgment, nevertheless stated that he could not support the *logic* of its reasoning: the Judge started by noting that when the question of jurisdictional immunity arises in connection with international crimes, it raises "fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure".[55] According to Judge Bennouna, the Court of Justice should have followed a different approach in order to strike "an equal balance between State sovereignties and the considerations of justice and equity operating within such sovereignties"[56]; the Court could not have rejected the Italian "last resort" argument (as it did in para 103 of its judgment) "on the pretext of the absence of supporting State practice or jurisprudence", rather it should have applied and interpreted the international law on State immunity taking into account the complementary nature of the law governing State responsibility.[57] Judge Bennouna reproached the Court of Justice for having confined its primordial function (serving international justice) within "a narrow, formalistic approach, which considers immunity alone, *strictu sensu*, without concern for the victims of international crimes seeking justice",[58] and for having relied upon a "mechanical" conception of the judicial task by imposing on national judges the rules on immunity "as a preliminary issue, without considering the specific circumstances of each case".[59] Lastly, he regretted that the Court's reasoning "was not founded on the characteristics of contemporary international law, where immunity, as one element of the mechanism for the allocation of jurisdiction, could not be justified if it

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[52] For a recent critical comment concerning the judgment, see Trapp and Mills 2012; Zgnonec-Rozej 2012.

[53] Bianchi 2012.

[54] Higgins 1982, p. 271.

[55] Jurisdictional Immunities, supra n. 1, Separate Opinion of Judge Bennouna, para 9.

[56] Ibidem, para 18.

[57] Ibidem, para 27.

[58] Ibidem, para 28.

[59] Ibidem, para 29.

would ultimately pose an obstacle to the requirements of the justice owed to victims".[60] Such reproaches concerning the ICJ's judgment are so grave as to even question the consistency of Judge Bennouna's adhesion to its operative part.

Judge *Ad Hoc* Gaja, in his *dissenting* opinion, argued (extensively and convincingly) against the ICJ's conclusion that the decision of the Italian courts to deny immunity to Germany could not be justified on the basis of the territorial tort principle.[61]

Judge Cançado Trindade, in his *dissenting* opinion concerning all of the ICJ's findings, discussed at length the international legal doctrine and the growing opinion sustaining the removal of immunity in cases of international crimes, for which reparations are sought by the victims, and concluded that "it is nowadays generally acknowledged that criminal State policies and the ensuing perpetration of State atrocities cannot at all be covered up by the shield of State immunity"[62]; he further argued that to admit the removal of State immunity within the realm of trade relations, or in respect of local personal torts, and at the same time to insist on shielding States with immunity in cases of international crimes, "amounts to a juridical absurdity".[63] Finally, Judge Cançado Trindade argued for the inadmissibility of the Inter-State waiver of the rights of individual victims of grave violations of international law.[64]

The lack of an adequate analysis of the "core issue" of the dispute before the ICJ, i.e., the obligation to make reparations for violations of international humanitarian law, intimately linked to the denial of State immunity, was lengthily discussed by Judge Yusuf in his *dissenting* opinion; Judge Yusuf also disagreed with the reasoning and conclusions of the majority of the Court on the scope and extent of State immunity in international law and the derogations that may be made from it, as well as with the approach adopted by the Court toward the role of national courts in the identification and evolution of international customary norms, particularly in the area of State immunity from jurisdiction for *acta jure imperii* in violation of human rights and humanitarian law. According to Judge Yusuf, the scope of State immunity is "as full of holes as Swiss cheese", and in the light of considerable divergence in the practice of States and in the judicial decisions of their courts, the reasoning followed by the Court—which characterized some of the exceptions to immunity as part to the customary international law, despite the persistence of conflicting domestic judicial decisions on their application, while interpreting other exceptions (similarly based on divergent court decisions), as supporting the non-existence of customary norms—"may give the impression of cherry-picking, particularly where the numbers of cases invoked is rather limited on both sides of the equation".[65]

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[60] Ibidem, para 31.

[61] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Gaja.

[62] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Cançado Trindade, para 52.

[63] Ibidem, para 239.

[64] Ibidem, paras 69–72.

[65] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Yusuf, para 23.

In conclusion, many arguments run against this very conservative judgment and the restrictive interpretation given by the Court of Justice to the continuously evolving doctrine of State immunity. As Amnesty International has convincingly argued in its position paper, the restriction to sovereign immunity advocated by the Italian courts (in relation to claims brought before them by victims of international humanitarian law and crimes against humanity who have been unable to bring their claim for reparation in other fora) should have been considered by the ICJ to be "consistent with established State practice"; this is because this restriction "is narrowly defined, manageable, and routed in established principles of international law" and does not "interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations".[66]

3.2 *The External Private International Law Context of the ICJ's Judgment: The European Court of Justice's* Lechouritou *Judgment*

The logical consequence of the ICJ's decision that the Florence Court of Appeal's enforcement of the Greek judgments was in itself incompatible with international law is that the Italian court should have refused it. According to general international law, States are under no obligation to recognize and/or enforce foreign judgments; therefore, a refusal to enforce a foreign judgment entails, in principle, no international responsibility.[67] A problem of conflicting international obligations may nevertheless arise if the State in question (and therefore its national courts) is subject to a treaty commitment to recognize and enforce foreign judgments.

Unsurprisingly, this problem was raised in 2005 by a Greek court, the Patras Court of Appeal, by referring a preliminary ruling to the European Court of Justice (ECJ) in relation to the interpretation of Article 1 of the Brussels Convention, and further amendments. The reference was made in relation to proceedings between Greek nationals resident in Greece and the Federal Republic of Germany, concerning compensation for the financial loss, and non-material damages which the plaintiffs (the descendents of the victims of a massacre carried out by German soldiers on 13 December 1943 in the village of Kalavrita) had suffered as a result of the acts perpetrated by the German armed forces at the time of the occupation of Greece during the World War II.[68] In 1995, these victims (Ms Lechouritou and others) brought an action based on the Brussels Convention (in particular under its Article 5.3–4) in the Kalavrita Court of First Instance, claiming compensation

[66] Amnesty International (2011): Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse, p. 6 ff.

[67] Michaels 2009, p. 9.

[68] ECJ: Eirini Lechouritou and Others v. Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, Judgment (15 February 2007).

from Germany. In 1998, this court, before which Germany did not enter an appearance, dismissed the claim on the grounds that the Greek courts lacked jurisdiction because the defendant (the Federal Republic of Germany) enjoyed the privilege of immunity in accordance with Article 3.2 of the Greek Code of Civil Procedure. The defendants then appealed in 1999 to the Patras Court of Appeal, which decided (2 years later) to stay the proceedings to await a ruling which was pending at the *Anotato Eidiko Dikastirio* (Special Supreme Court of Greece) in a parallel case concerning the interpretation of international rules on the immunity of sovereign States from legal proceedings. More specifically, that case concerned other claims brought against Germany by Greek nationals before the Greek courts: it is referred to as the *Margellos* case, involving civil claims for compensation for acts committed by the German armed forces in the village of Lidoriki in 1944. The Greek Superior Special Court, seized of the matter according to the Greek Constitution (Article 100.1.f), was requested to decide whether generally recognized rules of international law covered atrocities committed by German troops in the territories under occupation. By six votes to five, the Special Supreme Court decided that Germany was entitled to immunity without any restrictions or exceptions before any Greek civil court for torts committed on Greek territory by its armed forces during World War II.[69] The Special Supreme Court, after an evaluation of the *Al-Adsani* judgment by the European Court of Human Rights (ECtHR),[70] and the *Arrest Warrant* judgment by the ICJ,[71] concluded that—contrary to what was asserted by the lower courts—a customary international law rule (excluding certain acts from the law of State immunity) does not (yet) exist, thus indirectly overruling the *Areios Pagos* in parallel proceedings granting immunity to Germany (in the *Distomo* case).[72]

After this ruling, the Patras Court of Appeal (*Efetio Patron*) decided to stay its proceedings and to refer two questions to the ECJ for a preliminary ruling, by reason of the connection between the claims brought by the appellants and the Community legislation; in short, the Greek Court asked the ECJ whether the Brussels Convention applies to actions for compensation brought by individuals against a Contracting State in respect of loss and damages caused by occupying forces during an armed conflict; second, whether it is compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very

[69] Anotato Eidiko Dikastirio (Special Supreme Court, Greece): Margellos and Others v. Federal Republic of Germany, Case no. 6/2002, Judgment (17 September 2002). International Law Reports 129: 526.

[70] ECtHR: Al-Adsani v. United Kingdom [GC], 35763/97, Judgment (21 November 2001).

[71] ICJ: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment (14 February 2002), para 58.

[72] Margellos, supra n. 69, para 14.a–e. See Bartsch and Elberling 2003, pp. 481 ff.

application of the Convention is neutralized in respect of acts and omissions by the defendant's armed forces which occurred before the Convention entered into force.[73]

As to the first question (the applicability of the Brussels Convention), the ECJ (following the opinion of Advocate General Ruiz-Jarabo Colomer, and its settled case law on the concept of "civil matters"), ruled that

> (…) "civil matters" within the meaning of [Art. 1 Brussels Convention] does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.[74]

According to the Court, the legal action for compensation brought by the plaintiffs in the main proceedings against Germany (derived from operations conducted by armed forces during the Second World War) are to be considered "one of the characteristic emanations of State sovereignty in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy".[75] Being *acta jure imperii*, the ECJ concluded that they do not fall within the scope *ratione materiae* of the Brussels Convention. The Court also held that its conclusion could not be affected by the plaintiffs' line of argument set out in the main proceedings, according to which, first, the action brought before the Greek courts against Germany was to be regarded as being of a "civil nature" (covered by Articles 5.3 and 5.4 of the Brussels Convention), and second that acts carried out *jure imperii* "do not include illegal or wrongful actions". In respect of the first objection, the Court ruled that the civil nature of the proceedings is irrelevant in respect of a legal action which arises from an act that does not fall within the scope *ratione materiae* of the Brussels Convention. The Court, and the Advocate General, linked their argumentation to the "cause of action" (the massacre perpetrated by German armed forces) and not to the "subject-matter of the action", i.e., the purpose of the action, stating that the fact that the public authority acted in the exercise of its powers, is sufficient for the exclusion of the claim, based thereon, from the scope of the Convention.[76] Had the Court based its judgment not on the legal relationship between the parties (one of which was exercising public powers) but upon the second criterion (the subject matter of the proceedings), it would have reached the opposite result.[77]

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[73] See ECJ: Eirini Lechouritou and Others v. Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, Op. of Adv. Gen. Ruiz-Jarabo Colomer (8 November 2006), paras 12–16.

[74] Lechouritou, supra n. 68, para 46.

[75] Lechouritou, supra n. 68, para 37.

[76] For an analysis of the Court's criteria on which the exclusion has been based, see Gärtner 2007, pp. 420 ff.; Feraci 2007, pp. 660 ff.

[77] For the position that the *Lechouritou* decision represents a change from prior ECJ jurisprudence, in the sense that the Court accepted as sufficient (in order to exclude this dispute from the scope of the Convention) just one of the two mentioned aspects (the nature of the relation between the parties), see Requejo 2007, p. 208.

As to the second objection, raised by the plaintiffs and the Polish Government, that the concept of acts *jure imperii* does not include wrongful acts, and that serious violations of human rights, such as the massacre carried out on Greek soil, cannot be regarded as *acta jure imperii*, but rather as *acta jure gestionis*, therefore falling within the scope of the Brussels Convention, the Court objected that

> the question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for the main proceedings are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation.[78]

Thus, as contended by the Advocate General, the wrongfulness of the acts does not affect their classification but rather their consequences. The Advocate General also rejected another objection raised by the Polish Government, according to which public authority must be exercised within the territorial boundaries of a State, with the consequence that operations carried out by armed forces of a State outside its territory may not be regarded as *acta jure imperii*.[79]

It is interesting to note that in 2007 the ECJ arrived (on the basis of a pure international civil procedure/private international law perspective) at the same conclusions reached in 2012 by the ICJ in the Jurisdictional Immunities case on corresponding issues raised in relation to the scope and extent of State immunity. This is true in particular concerning the classification of the acts, on which the proceedings in the various courts had their origin, as *acta jure imperii*, notwithstanding their unlawfulness (which was never contested). The ICJ ruled that the distinction between those *acta* and *acta jure gestionis* (concerning the non-sovereign activities of a State) has to be applied "before" that jurisdiction can be exercised, whereas the legality or illegality of the acts is something that can be determined only in the exercise of that jurisdiction.[80] Analogously, the ECJ ruled that the issue of whether the Brussels Convention applies to the main proceedings based on acts carried out in the exercise of public powers "logically constitutes a prior question", rendering "immaterial" the reference made by the plaintiffs to the substantive rules of the Brussels Convention.[81] Second, the ECJ argued that if the unlawfulness of the acts should be considered to affect their classification, this would raise preliminary questions of "substance" even before the scope of the Brussels Convention can be determined with certainty; something that would run against the objective of that Convention. Furthermore, the Advocate General objected that the suggested approach would also lead to difficulties with regard to liability, because if the acts concerned were to be characterized as *jure gestionis* "it would only be possible to attribute liability to the persons who actually caused the damages rather than to the

[78] Lechouritou, supra n. 68, para 43.

[79] Lechouritou, Op. of Adv. Gen. Ruiz-Jarabo Colomer, supra n. 73, paras 67–69.

[80] Jurisdictional Immunities, supra n. 1, para 60.

[81] Lechouritou, supra n. 68, para 42.

authorities to which they belong".[82] In the main proceedings, the claims were nevertheless brought against Germany and not against the individual soldiers concerned. In view of the reply given to the first preliminary question, the ECJ found that there was no need to answer the Patras Court of Appeal's second question on the compatibility of the privilege of States' jurisdictional immunity from legal proceedings with the system of the Brussels Convention. Should the Court have decided to answer the question, surely it would have followed the opinion of its Advocate General who had anticipated (many years earlier) the procedural/substantive distinction used by the ICJ in its recent judgment. While recognizing that, in respect of the concept of State immunity from legal proceedings, there is "evidence of a tendency to lift State immunity in respect of *acta jure imperii* in cases where human rights are breached", the Advocate General suggested to the Court that it should consider "that State immunity is created as a procedural bar which prevents the courts of one State from giving judgments on the liability of another"; the issue of State immunity must therefore be addressed "before" considering the Brussels Convention. In any case, as stated by the AG, the issue whether States can assert jurisdictional immunity in disputes involving civil claims based on violations of international humanitarian law, as in the present case brought before the ECJ, and its implication with regard to human rights, "is not within the powers of the Court of Justice".[83]

Against this ECJ judgment, Ms Lechouritou and others brought an application before the ECtHR against Germany, the 26 other Member States of the European Union and the European Union itself; according to the plaintiffs the refusal of the ECJ to declare the Brussels Convention to be applicable to their civil compensation claims infringed their rights under Articles 6 and 13 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR),[84] as well as Article 1 of Protocol no. 1 thereto.[85] On 3 April 2012, the Court declared the application inadmissible against the European Union due to its incompatibility ratione personae with the ECHR (Article 35.3. a), as the EU had not yet acceded to the said Convention. The Court stated, therefore, that its task consisted only of judging whether the 27 Member States of the EU "peuvent être tenus responsables de l'arrêt de la Court de Justice", immediately after rejecting this contention. The Court observed that

> la Cour de Justice, compétente pour interpréter la Convention de Bruxelles en vertu du protocole du 3 juin 1971 (…) a amplement motivé son arrêt et a exposé de manière circonstanciée pourquoi l'action des requérants devant les juridiction grecques ne tombait

[82] Lechouritou, Op. of Adv. Gen. Ruiz-Jarabo Colomer, supra n. 73, para 65.

[83] Ibidem, para 78; on the distinction between jurisdictional immunities of States and the issue of the applicability of the Brussels Convention/Brussels I regulation system, see: Leandro 2007, pp. 766 ff.

[84] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[85] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952), entered into force on 18 May 1954.

> pas sous le coup de cette convention. Rien ne permet de dire que l'interprétation des dispositions de la Convention de Bruxelles par la Cour de Justice était entachée de considérations arbitraires un manifestement déraisonnables, ce qui pourrait amener la Cour à constater une violation de la Convention.[86]

The Court, therefore, concluded that "ce grief est manifestement mal fondé et doit être rejeté en application de l'article 35 §§ 3(a) et 4 de la Convention."[87]

3.3 The Problematic Role of Secondary European Legislation (in the Field of Judicial Cooperation in Civil Matters) on Human Rights Claims Against a State

Another point of relevant interest in the *Lechouritou* judgment is the explicit reference made by the ECJ to European secondary legislation enacted in the field of judicial cooperation in civil matters in order to promote, at the European level, the mutual recognition of judicial judgments in civil and commercial matters, including the abolition of the *exequatur* procedure. This reference was made by the Court in the penultimate paragraph of its judgment in order to substantiate its reasoning that acts perpetrated by a public authority are excluded from the scope of the Brussels Convention. The Court specifically referred to Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[88] and to Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.[89] Both provide, in their Article 2.1, that they apply to civil and commercial matters with the *exclusion* of "(…) the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*)" without drawing "a distinction in that regard according to whether or not the acts or omissions are lawful".[90] These references had been approved in the doctrine as they reflect "the goal of the Court to enhance a coherent system of Community measures", by dealing with the Brussels Convention as being part of Community/European law, despite its treaty nature.[91] It is worth remembering, in this respect, that the material scope (civil and commercial matters) of Regulation (EC) No. 805/2004 is the same as that of Regulation (EC) No. 44/2001 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgments in civil and

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[86] ECtHR: Lechouritou and Others v. Germany and 26 other States Members of the European Union, 37937/07, Decision (3 April 2012), available only in French.

[87] Ibidem.

[88] Regulation (EC) no 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims.

[89] Regulation (EC) no 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

[90] Lechoritou, supra n 68, para 45.

[91] Gärtner 2007, pp. 440 ff.

commercial matters (Brussels I), which (in turn) is identical to that of the Brussels Convention, that it replaced on 1 March 2002.

In our opinion, the affirmed "consistency" between the Brussels Convention and the subsequent European Regulations (enacted by the EU legislator, following the conferral upon it—by the Treaty of Amsterdam[92]—of the competence to legislate in the area of private international law instead of the Member States) is a "forcing" interpretation, in the sense that the decision to amend the scope *ratione materiae* of these Regulations, the successors of the Brussels Convention, has come much later and found its rationale in purely "political" reasons which have nothing to do with the classification of a matter as "civil or commercial" in the sense of Article 1 of the Brussels Convention. Among the multitude of European legislative acts enacted by the European legislator in the field of judicial cooperation in civil matters, Regulation (EC) No. 805/2004 represents the necessary step which is required by the European Council (in its Tampere conclusions) to facilitate access to enforcement in a Member State other than that in which the judgment has been given; the idea is that enforcement should be accelerated and simplified by dispensing with any intermediate measures to be taken prior to enforcement in the Member State in which enforcement is sought. The Regulation in question is exactly designated to enable creditors who have obtained an enforceable judgment in respect of a pecuniary claim, which has not been contested by the debtor, to have it enforced directly in another Member State. Its aim is the elimination of any intermediate measures that are currently necessary for enforcement in various Member States (the *exequatur* procedure). Thus, a judgment that has been certified as a European Enforcement Order by the court of origin must be dealt with, for enforcement purposes, as if it had been delivered in the Member State in which enforcement is sought. The aforementioned provision in Regulation (EC) No. 805/2004, which excludes *acta jure imperii* from its scope of application, (and consequently from Article 1 of the Brussels Convention/Brussels I Regulation, as the ECJ stated in the *Lechouritou* judgment), was not present in the initial Commission Proposal for the Regulation on the European enforcement order.[93] It appeared for the first time in the European Council Common Position (CE) of 6 February 2004.[94] In its Communication to the European Parliament, on 9 February 2004, the Commission explained this amendment to Article 2 by simply stating that it has been introduced "to clarify that the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*) does not constitute a civil and commercial matter and does therefore

[92] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997), entered into force on 1 May 1999.

[93] See Proposal for a Council Regulation creating a European enforcement order for uncontested claims (COM(2002)159 final—2002/0090(CNS)) OJ C 203E (27 August 2002).

[94] Common Position (EC) no. 19/2004 of 6 February 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a regulation of the European Parliament and of the Council creating a European enforcement order for uncontested claims, OJ C 079 E (30 March 2004), p. 59.

not fall within the scope of this Regulation".[95] This new formulation has subsequently been repeated in several other Regulations, like the already mentioned Regulation (EC) No. 1896/2006 creating a European Order for payment procedures, as well as in Regulation (EC) No. 864/2004 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[96] This amendment has always been justified as merely "narrative" and for clarification purposes.[97] The Council of the European Union, finally, took the opportunity to recast Regulation (EC) No. 44/2001, in order to introduce, formally, the same amendment in the text of its Article 1.1 of the recent July 2012 "recast proposal of the Brussels I Regulation".[98]

Far from being simply "narrative", or "innocent", as the European legislators pretend, this amendment to the Brussels Convention/Brussels I Regulation's scope *ratione materiae*, introduced during the drafting of the Regulation on the enforcement order, is the result of a specific request advanced by the German delegation during the legislative work in the European Council, exactly in order to clarify that "titles on the liability of the Federal Republic of Germany for war crimes committed during World War II should not be certified as a European Enforcement Order".[99] In order to understand the rationale of this request it is necessary to return to the situation described in the second section of this study: precisely to the Greek judgment in *Prefecture of Voiotia v. Federal Republic of Germany,* in which the Court of First Instance of Livadia (by means of a "default" judgment against Germany) held this State liable to pay compensation amounting

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[95] COM(2004)90 final, Brussels (9 February 2004), 2202/0090 (COD), 8, 3.3.2.

[96] Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II).

[97] Regarding the "Rome II" Regulation, the Common Position of the Council no. 22/2006 (25 September 2006), (OJ C 289E/68, 28 November 2006) states that "In comparison with the original Commission proposal, the scope of the instrument has been clarified and further elaborated. Civil and commercial matters do not cover liability of the State for acts or omissions in the exercise of State authority (*acta jure imperii*)". The adopted Regulation clarifies in recital (7) that "The material scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I') and the Rome Convention on the law applicable to contractual obligations"; Recital (9) states that "Claims arising out of '*acta jure imperii*' should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation".

[98] The text has been proposed with a view to adoption as a "compromise package" of the draft general approach set out by the Council (Justice and Home Affairs) at the meeting on 7 and 8 June 2012. See, Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)—First reading- General approach, 10609/12, ADD 1, JUSTCIV 209 CODEC 1495, (1 June 2012).

[99] Council of the European Union, Note from German delegation: Proposal for a Council Regulation creating a European enforcement order for uncontested claims, 11813/03, JUSTCIV 122. CODEC 151; Council of the European Union. Note from German delegation Brussels, 10660/03, JUSTCIV 92. CODEC 856. See also, Kropholler 2005, para 2; Rauscher, Pabst 2006, para 5; Gärtner V 2007, p. 439 (note 104).

to approximately $ 30 million to the relatives of the Greek victims (*Distomo* case).[100] Following the Hellenic Supreme Court's confirmation of the Greek Court of First Instance's decision, this judgment became final. In 2003, pending the drafting of the European Enforcement Order Regulation, the Greek claimants brought proceedings against Germany before the German courts in order to enforce the judgment rendered by the Greek court of Livadia in Germany. We have already recalled that in 2003 the *Bundesgerichtshof* declined to give effect to the Greek judgment in the *Distomo* case, on the ground that the Greek court did not have jurisdiction to hear the case and that this judgment was contrary to the public order exception having been given in breach of Germany's entitlement to immunity.[101] Had Regulation (EC) No. 805/04 been in force in its initial version, without the additional exclusion of *acta jure imperii* from its scope *ratione materiae*, the BGH would been unable to deny *exequatur* to the Greek decision. As already mentioned, Germany did not appear before the Greek court; under the Regulation this would lead to an "uncontested" claim, allowing the claimants to apply for, and obtain, a European enforcement order in Greece, to be directly enforced in another Member State. The elimination of any intermediate measure (the *exequatur* procedure) in order to enforce this judgment abroad would have precluded the German courts from exercising any form of control over the foreign judgment, even in relation to the public order exception. Therefore, the best solution for Germany in order to avoid this result was to prevent the applicability ab initio of the Community/European instruments to the recognition and enforcement of foreign decisions ordering a State to pay compensation to the victims of crimes against humanity and war crimes.[102] Germany, therefore, succeeded in obtaining "political" support among EU Member States (the Council) in order to exclude civil claims for damages resulting from serious violations of human rights and humanitarian law from the substantive scope of application of this and other successor Community/European instruments.

It is, therefore, difficult to support the ECJ's view that the exclusion of the *acta jure imperii* from the scope of the Brussels Convention is justified by its *intrinsic* nature, being that this Convention's (and its successor European Regulations') instruments are simply aimed at enhancing the internal market by facilitating the mutual recognition and enforcement of judgments in civil and commercial matters. The argument that the Brussels Convention/Brussels I Regulation are not "the right instruments" to govern compensation claims arising from "public" matters, like those arising from serious human rights violations,[103] has nothing to do with the *intrinsic* nature of "civil matters" for the purpose of the application of the

[100] Prefecture of Voiotia v. Germany (30 October 1997), supra n. 9.

[101] Distomo Massacre Case, supra n 31.

[102] Requejo 2007.

[103] In favour of the application of the Brussels Convention/Brussels Regulation (and the Lugano Convention) system to the so-called human rights claims, to be heard by the Europaen courts on the basis of the competence criterion set out in Article 5.4, see Kessedjian 2005, p. 158 ff.

European international jurisdiction rules and the following (correlated) benefit of the free circulation of related judgments within the European area of "freedom and justice". This conclusion simply derives from a *political* decision (solicited and obtained by Germany) to exclude governmental liability for serious violations of human rights from the scope of European secondary legislation in order to avoid that the victims' right of compensation could be freely enforced throughout the European area of justice by means of Community/European Regulations.

4 The Negative Impact of the ICJ's Decision on the Role of the National/International Public Order Exception; Critical Assessment of the Formalistic "Procedure/Substance" Distinction with Regard to Criminal and Civil Proceedings

Several consequences at the private international level could be drawn from the ICJ and ECJ judgments commented upon above. According to the latter, the decision on international jurisdiction for civil claims directed at compensation for damages resulting from the exercise of acts of government (amounting to crimes against humanity and/or war crimes) is remitted to the national private international law rules of the Member States. As these legal actions are not covered by the term "civil matters" within the meaning of Article 1 of the Brussels Convention/Brussels I Regulation, the national decisions on these civil claims would not benefit from the free recognition and enforcement system set out at the European level. Any State may reject their recognition and enforcement on the basis of the grounds for refusal available under national law, including the contrary public policy in the State addressed and the court of origin's lack of jurisdiction.

The door left open by the ECJ to the victims of serious violations of human rights and humanitarian law to bring actions for compensation before the national courts has, nevertheless, been closed by the ICJ's 2012 ruling, according to which—under the current state of development of customary international law—a State enjoys jurisdictional immunity from legal proceedings in the domestic courts of another State with respect to its *acta jure imperii*, even if these acts amount to international crimes. The Court stated that municipal judges have to decide on the question of immunity at the very outset of the proceedings, before any consideration of the merits of the case, and that immunity cannot be made *dependent* upon the ground of the gravity of the acts alleged, nor upon the outcome of a "balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed".[104] In sum, according to the ICJ, no exception to sovereign immunity exists for "human rights" civil cases.

[104] Jurisdictional Immunities, supra n. 1, para 105.

By rejecting the Italian "substantive normative hierarchy argument" as a possible justification for the Italian courts' denial of immunity to Germany, the ICJ's ruling also condemned the private international law reasoning concerning the "public order exception" followed by the Italian judges who declared the Greek judgment against Germany to be enforceable in Italy. The Italian judges found the Greek decision and the principles informing the national public order to be "perfectly in tune": the solution given by the *Areios Pagos* to the jurisdictional immunity invoked by Germany was "in sync", not only with the development of immunity law at the international level, but also with the absolute primacy that international *jus cogens* rules enjoyed in the Italian legal order. Rules such as the non-derogable norms protecting prisoners of war and those related to crimes against humanity, simply "assumed" by ICJ to be rules of *jus cogens*,[105] have been considered by the Italian judges as an integral part of a "new international/European public order notion", whose function consists precisely of protecting fundamental values of the international community. Fundamental values which correspond, furthermore, to Constitutional provisions imposed on the Italian judges by their national system (Article 10.1 and Article 11 of the Italian Constitution). In reaching this conclusion, the Italian Court of Cassation relied upon the same principle established in its 2004 *Ferrini* decision: that international immunity law has to be interpreted and applied by national judges *consistently* with the fundamental values shared by the international community and embodied in the national public policy exception.[106]

The function and role of the general public policy exception consists, exactly, of ensuring the coherence and the harmony of the internal legal system, in the light not only of the "domestic" values and public interests of the forum State, but also of international principles and values, specifically those established in "imperative" or "mandatory" rules of international law.[107] The Italian judges therefore correctly identified (at the time of the proceedings in question) the principles and fundamental values of the forum State. Second, due to the fact that international *jus cogens* rules enter into the national legal system in accordance with an "inherent logic of a normative hierarchy of norms", the Italian court drew at that time the *logical* consequence of their existence and status (hierarchically higher than any other rule of international law) in the proceedings brought before them: they decided that these rules must prevail over the non-peremptory rule of State

[105] Ibidem, para 94.

[106] Ferrini, supra n. 11. The "substantive" inconsistency found by the Italian court in the internal legal system, in that case as well as in all the others brought before it, concerned competing international values and principles: on the one hand, the paramount values of human rights and human dignity endorsed by *jus cogens* norms and by constitutional principles and, on the other, the recognition of the immunity of States which bars the exercise of jurisdiction in civil claims against the State whose armed forces have committed grave breaches of obligations arising under peremptory norms of general international law. See Jurisdictional Immunities, Counter-Memorial of Italy, supra n. 33, para 4.67.

[107] Sperduti 1954.; Barile 1980; Benvenuti 1977; Lattanzi 1974; Verhoeven 1994; Boschiero 2011, p. 139 ff., p. 154 ff.

immunity, when immunity is invoked by the responsible State in order to avoid its responsibility and to deny to individuals any forms of reparation and compensation. They reached the same conclusion when faced with an application for *exequatur* of a foreign judgment against a third State: in order to reaffirm the principle that a State cannot invoke hierarchically lower rules (those on State immunity) to avoid the consequences of the illegality of its actions, the Italian judges used the public policy exception in a "positive" way; not as a barrier for precluding the recognition and enforcement of the foreign judgment in the forum State, but exactly for the opposite reason: as a means to reaffirm—at the national and international level—the *effectiveness* of these norms, which reflect principles which are widely accepted as fundamental in all the legal systems throughout the world, whose respect for, and compliance with, the national judges are under a *duty* (*obligation*) to guarantee. By declaring the enforceability of the Greek judgment in the forum, the Italian judges also used private international law to comply with the double international obligation imposed on States (and judges) by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (Article 41.2): not to recognize as lawful a situation which has arisen under serious violations of a peremptory norm of general international law and not to render assistance or aid in maintaining such a situation.

As already recalled, the ICJ rejected the argument that the non-peremptory rule of the jurisdictional immunity of a State should be lifted if not doing so would hinder the enforcement of *jus cogens* rules, even in the *absence* of a direct conflict between the two sets of rules; the Court also stated that extending jurisdictional immunity to a State in breach of international obligations arising under *jus cogens* rules does not amount to recognizing such situations as being lawful or to render assistance and aid in maintaining it.[108] The ICJ's ruling, according to which any interpretation of the international legal system which is *consistent* with the hierarchy of norms is inadmissible with regard to the immunity of the State, will from now on prevent national courts from guaranteeing the supremacy of fundamental human rights and human dignity in their forum, either *directly* by affirming their jurisdiction in proceedings arising out of compensation against third States in respect of *acta jure imperii* (notwithstanding their unlawful nature), or *indirectly* via the operation of the public policy exception mechanism (whatever its use, positive or negative). As to the public policy exception, while it cannot be inferred from the ICJ's judgment that the fundamental values enshrined in international *jus cogens* rules should no longer be considered part of the national/international public policy notion of each State, the ICJ's judgment will nevertheless have a substantive *freezing* effect on its operation in the future. The Court's distinction between questions of substance and procedure, and its finding that the substantive nature of *jus cogens* rules has no impact on the procedural question of State immunity, implies an international obligation for States (and their judiciary) to guarantee jurisdictional immunity to the foreign State whenever they are faced with

[108] Jurisdictional Immunities, supra n. 1, paras 93 and 95. See Costelloe 2012.

a problem of State immunity for *acta jure imperii*, even if committed in violation of international *jus cogens* rules. Municipal judges will always be prevented from hearing these cases brought before them as to their merits, with the consequence that the forum's public policy exception could never come into question. This compression of the public policy exception at the private international law level is not at all to be welcomed, as this is the notion that had *most* contributed to linking the private and public international law reasoning and to develop (at the level of the national legal system) the principles enshrined in international law, with specific regard to human rights international provisions and obligations.

Besides that, the ICJ's strict and formalist argument concerning the procedure/substance distinction between State immunity rules (procedural) and *jus cogens* (substantive) is not at all convincing. In domestic legal systems this distinction, as correctly recalled in the doctrine, has long been criticized by recognizing that procedural rules "may go to the heart of substantive justice", in facilitating or denying a remedy to the claimants.[109] At the international level, the "artificial" distinction between substantive and procedural law had already been condemned, with convincing arguments, in relation to criminal proceedings for serious violations of international peremptory norms, namely the prohibition of torture. In the *Pinochet* case, for example, the House of Lords had concluded (in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984))[110] that the "substantive" prohibition of torture (a *jus cogens* rule) has the overriding force to deprive the rules of sovereign immunity of their legal effects, thus entailing clear "procedural" consequences for the doctrine of State immunity.[111] In its 2012 decision the ICJ did not consider the *Pinochet* judgment to be "relevant", as it concerned the immunity of a former Head of State from criminal prosecution in another State and not the immunity of the State itself, and also because the rationale of this judgment was based on the specific languages of the Torture convention. While it is true that a number a States do not consider the Torture convention to establish universal *civil* jurisdiction, contrary to the opposite opinion expressed by the Committee against torture,[112] the mere idea of *universal jurisdiction* in criminal and/or civil proceedings suggests, as correctly underlined in the doctrine, that "the substance of certain norms has procedural implications" and that the two issues could not be considered "unconnected as a matter of principle".[113] The ICJ's conclusion in its

[109] Trapp and Mills 2012, p. 160.

[110] Entry into force on 26 June 1987.

[111] House of Lords: *Ex parte* Pinochet Ugarte (No. 3) (2000) 1 AC 147, pp. 203 ff. (Lord Browne-Wilkinson). For further comments on the criticized distinction see Muir Watt 2012, p. 546; Talmon 2012.

[112] UN Committee against torture, Conclusions and Recommendations, 34th Session (2–20 May 2005), UN Doc. CAT/C/CR/34/CAN (7 July 2005), paras 4(g), 5(f).

[113] Trapp and Mills 2012, p. 161.

Germany v. Italy judgment, that there is no "inherent" link between rules of *jus cogens* and rules on State immunity, simply ignores the interplay that *ought* to exist between these hierarchically higher norms and any other rule which does not have the same status (like the rules on State immunity) by "preconceiving" (for the purpose of its reasoning) the scope of the former rules as "substantive".

In doing so, the Court artificially separated the imperative precepts of *jus cogens* from their possible implementation and effectiveness, thus attributing to the *jus cogens* rules very limited legal effects. Furthermore, the ICJ did not provide any convincing explanation with regard to the distinction to be made between criminal and civil proceedings, thus relying on the same unconvincing and unexplained conclusions reached by a very strict majority of judges (nine votes to eight) in the well-known case of *Al-Aldsani v. United Kingdom* decided by the ECtHR.[114] This Court (the Grand Chamber), while accepting the prohibition of torture as a norm of *jus cogens* in international law, nevertheless found itself unable "to discern [..] any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the court of another State where acts of torture are alleged". The same unfortunate principle was reiterated by the European Court in the following year, in *Kalogeropoulus and others v. Greece and Germany*[115]; in rejecting an application relating to the refusal of the Greek Government and the German courts to enforce the *Distomo* judgment, the Court said that it was not established "that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity". In their joint dissenting opinion to the *Al-Aldsani* judgment, judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barrate, and Vajic objected to the main reasoning of the majority of the Court—that the standards applicable in civil cases differ from those applying in criminal matters when a conflict arises between a peremptory rule—as it was given "in the absence of authority"; they also found it to be defective on two other grounds: first, because the English courts, which dismissed the merits of a claim brought by the applicant against the State of Kuwait for an allegation of torture, never resorted to such a distinction in so far as the legal force of the rule on State immunity or the applicability of the 1978 Act to the claim; they simply denied the *jus cogens* status of the rule prohibiting torture. Second, because this distinction "is not consonant with the very essence of the operation of the *jus cogens* rules". The dissenting judges went directly to the heart of the matter considered by the Court, stating that "it is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as peremptory norm and its interaction with a hierarchically lower rule". The dissenting judges therefore

[114] Al-Adsani, supra n. 70.

[115] Kalogeropoulou, supra n. 46.

concluded that the distinction between "the criminal or civil nature of the domestic proceedings is immaterial", as what really matters is the violation of a *jus cogens* rule.[116] Similarly, Judge Loucaides correctly pointed out, in his dissenting opinion, that the "rationale" behind the principle of international law that those responsible for violations of jus cogens rules must be accountable "is not based only on the objective of criminal law. It is equally valid in relation to any legal liability whatsoever". A conclusion which must be considered to be valid not only in relation to the functional immunity of State officials but also in respect of the immunity of the State itself. The ICJ, in its 2012 judgment, never explained the different rationale behind the distinction between criminal and civil proceedings, nor did it take the opportunity to explain why developments in the criminal context should be ignored in the context of civil proceedings, taking into due consideration that both form part of State immunity and serve the same purpose: "to hold those responsible for crimes under international law accountable and to give the victims access to justice and reparation".[117]

At the private international law level, the link between substance and procedure is enshrined in the *forum necessitatis* "autonomous" ground of jurisdiction, currently available in 10 Member States of the European Union when an appropriate forum abroad is lacking for the plaintiff. As is correctly underlined in an important Study commissioned by the European Commission on the issue of national rules of jurisdiction for cases where the current European law does not provide uniform grounds of jurisdiction in civil and commercial matters, like actions against defendants domiciled in third States (the so-called "residual jurisdiction"),[118] this jurisdiction "of necessity" is traditionally considered to be based on, or even imposed by, the right to a fair trial under Article 6.1 of the ECHR. In some countries (like France), this ground of jurisdiction is also referred to as the general principle of public international law which prohibits the "denial of justice", as it would ensure effective access to justice when there is no other forum available. Even if not presented in this form, it must be emphasized that the proceedings in the Italian courts, setting aside Germany's immunity, had been mainly justified by the necessity to avoid an otherwise inescapable "denial of justice". Italy contended that the Italian courts were justified in asserting jurisdiction against Germany, because all other attempts to secure compensation for the various groups of victims involved in the Italian and Greek proceedings had failed, and had the Italian judges decided to accord Germany the immunity to which it would otherwise have been entitled, no other avenues would have been available to the victims; with the consequence that a denial of justice would have been endorsed by

[116] Al-Adsani, supra n. 70, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para 4.

[117] Zgonec-Rozej 2012, p. 3.

[118] Study on Residual Jurisdiction, General Report, 3rd Version, 6 July 2007, prepared by Nuyts and al., p. 64 ff.

the Italian judiciary. The so-called "last resort" argument advanced by Italy entailed, therefore, two fundamental aspects, both substantially ignored by the (too abstract and formalist) ICJ judgment: first, the public and private international law right of the victims to have access, as a measure of last resort, to a court (particularly to the courts of the State when serious violations of *jus cogens* rules have been committed, which in the case in question were also the courts of their nationality) when all other avenues have been explored and all prospects of obtaining reparation in other ways have already been exhausted; second, the substantive and inherent link between the procedure and substance of this asserted forum "of necessity": denying the victims' "procedural" right of access to the courts (by according jurisdictional immunity to the responsible State—a rule also of a procedural character), would have meant a denial of their "substantive" right to compensation. The ICJ has not been unaware that, at least, an entire category of Italian victims had been denied compensation on the ground that they have been excluded by Germany from the status of prisoner of war that they were entitled to, and therefore denied access to the Inter-State compensation scheme (para 99). While considering this as a "matter of surprise and regret", the Court nevertheless refused to assess the impact of this failure to make reparations, as well as the absence of alternative means of redress, on the "legality" of the Italian decisions in this specific circumstance. It confined itself to recognizing that "immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned", and that these claims "could be the subject of further negotiations involving the two States concerned, with a view to resolving the issue".[119] It is worth remembering, in this respect, that the Italian effort to have an ICJ decision on the question of reparation owed to the Italian victims has been unsuccessful, as the court dismissed the counterclaim in which Italy asked the Court to adjudicate and declare Germany responsible for its ongoing failure to comply with its reparation obligation toward the Italian war crimes victims, on the ground that it did not fall within its jurisdiction, and was therefore inadmissible under Article 80.1 of the Rules of the Court. The Court thought that it was also unnecessary to rule on whether, as Italy contended, international law confers upon the individual victim of a violation of the law of armed conflict "a directly enforceable right to claim compensation".[120] The only rule of the ICJ on the right of reparation, and the corresponding duty to make reparation, is that there is not a *jus cogens* rule under international law "requiring the payment of full compensation to each and every individual victim".[121]

[119] Jurisdictional Immunities, supra n. 1, para 104.

[120] Ibidem, para 108.

[121] Ibidem, para 94.

5 The Consequences for the Fundamental Individual Right to Have Access to Justice and the Right to an Effective Remedy

What are the consequences of the ICJ's decision for the fundamental (private as well as public international law) individual's right to have access to justice? As correctly recognized by Judge Cançado Trindade in his dissenting opinion, the two Parties understood this human right in fundamentally different ways[122]: Germany construed this right very narrowly and argued its limitation with regard to accessing the judicial system of the forum State without discrimination and with full procedural rights. Germany further distinguished the right to have access to justice (and its complementary component, namely the right to an effective remedy) from the question whether the plaintiff has a genuine, substantive, and legal claim. Consequently, it argued that the right to have access to justice had been respected in relation to both the Italian and Greek victims, who had full access to judicial remedies under German law; the decisions of the German courts which rejected reparations were not a *denial of justice* but simply the recognition that these victims did not have the rights which they claimed. For its part, Italy argued that the right of access to justice "is conceived in all systems of human rights of protection as a necessary complement of the rights substantively granted", and that not surprisingly it had been qualified by the Inter-American Court of Human Rights, in the case *Goiburú* "as a peremptory norm of international law in a case in which the substantive rights violated were also granted by *jus cogens*".[123] The same conclusion on the peremptory status of this norm has been reached by Judge Antonio Cassese, the President of the Special Tribunal for Lebanon, in an Order assigning matters to a pre-trial Judge, issued on 15 April 2010, after a lengthy and learned assessment of the status of this right in international customary law (including in international tribunal judgments and in domestic legal systems).[124]

Unlike the Inter-American Court of Human Rights, the ECtHR has refused, starting from its unfortunate *Al-Adsani* judgment, to bring the right of access to justice within the domain of *jus cogens*, and has rather approached this fundamental right from the side of its permissible or implicit "limitations". Not only can this right be temporarily suspended but, in addition, it can be restricted when restrictions are imperatively justified by the need, among other things, to respect personal or functional immunities accorded to the person or to the State against whom or which a

[122] Jurisdictional Immunities, supra n. 1. Dissenting Opinion of Judge Cançado Trindade, paras 73–79.

[123] Jurisdictional Immunities, Counter-Memorial of Italy, supra n. 33, para 4.94, citing IACtHR: Goiburú et al. v. Paraguay, Judgment (22 September 2006).

[124] STL: In the Matter of El Sayed, CH/PRES/2010/01, Order Assigning Matter to Pre-Trial Judge (15 April 2010), para 29.

claim is lodged. It was on this premise that this Court decided, on 12 December 2002, to reject the claims of 257 applicants against Germany and Greece who claimed that the refusal to enforce the *Areios Pagos* decision on the *Distomo* massacre constituted an undue infringement of their right to have access to justice, as laid down in Article 6 (1) of the ECHR and their right to property as established by Article 1 of the Additional Protocol to the Convention. The Court found the applicants' claim to be manifestly ill founded, as the restriction of their right to have access to justice was justified in so far as it pursued the legitimate aim "of complying with international law to promote comity and good relations between States". Regarding the "proportionality" of the restriction, the Court interpreted Article 6 in the light of the relevant norms of the international law on State immunity; referring to its own *Al-Adsani* judgment, the Court concluded that the restrictions on access generally accepted by the community of nations as part of the doctrine of State immunity could not be regarded as "disproportionate". It dismissed the claim based on Article 1 of Protocol no. 1 on the same reasoning.[125] On 31 May 2011, the Court, by means of a "décision sur la recevabilité", dismissed the claim of the Greek plaintiffs (*Sfountouris et autre)* that the German courts' refusal to pay compensation to the victims of the *Distomo* massacre[126] constituted an infringement of their rights as established by a combination of Article 1 of Protocol no. 1 and Article 14 of the ECHR. The Court, after having analyzed the various German decisions, concluded that

> compte tenu de tous les éléments devant elle, (…)l'on ne saurait soutenir que l'application et l'interprétation du droit international et interne auxquelles ont procédé les juridictions allemandes aient été entachées de considérations déraisonnables ou arbitraires.[127]

The Court reasoned that "ne peuvent prétendre avoir une espérance légitime de se voir accorder une indemnisation pour le préjudice subi et que les faits litigieux ne tombent dès lors pas sous l'empire du Protocole no 1. Partant, l'article 14 de la Convention ne trouve pas non plus à s'appliquer."[128]

It is not our task to take a position on the question of whether or not the right to justice has already been elevated to the level of *jus cogens*, and also not on the correctness of the doctrinal affirmation that a *procedural jus cogens* rule is necessarily contained in a *material jus cogens* rule; in other words, that every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement.[129] Nevertheless, it seems difficult to construct the right to have access to justice as a peremptory rule of customary international law, from which the international community, States and other international legal subjects may not

[125] Kalogeropoulo, supra n. 46.

[126] Distomo Massacre Case, supra n. 31.

[127] ECtHR: Sfountouris and Others v. Germany, 24120/06, Decision (31 May 2011).

[128] Ibidem.

[129] Bartsch and Elberling 2003, p. 486 ff.

derogate, where it is widely recognized that this right is not "absolute", as repeatedly held by the ECtHR; many derogations are allowed by the norm itself.[130] In any case, it is worth remembering that all the restrictions allowed for these fundamental rights are not only limited in number, but also subject to stringent requirements: among other things (they must be reasonable and not disproportionate), the restrictions on its scope could not be applied so as to reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It is not therefore necessary to characterize this rule as belonging to *jus cogens* in order to draw the logical consequence deriving from the ICJ's decision to refuse to exercise the necessary and inherent (in its judicial task) balancing of possible conflicting rights and legal interests brought before it: the ICJ's conclusion that national courts, when faced with a problem of State immunity for *acta jure imperii*, even if committed in violation of international *jus cogens* obligations, must be prevented from hearing the case, implies a real *denial* of the very essence of the right to have access to justice. The right to go before an independent and impartial judge and to have one's claims duly considered by such a judge has nothing to do (of course) with the complementary right to an effective remedy; the existence of the fundamental right of access to justice does not automatically entitle individuals to obtain a "substantive" judicial remedy.[131] The national courts, like the German courts did in respect of the Italian and Greek plaintiffs, could obviously conclude, after considering the merits of the cases brought before them, that the claimants did not have "genuine" substantive rights to make a claim. In order to reject the Italian argument that the right of access to justice entails an obligation to satisfy the complaining party, being directly linked to Germany's ongoing failure to comply with its reparation obligations, the ICJ came to the worst possible conclusion (according to public and private international law): it simply denied all the victims of war crimes and crimes against humanity their fundamental "preliminary" right to have access to a court, and therefore to justice. The Court denied them the very right to resort to the courts, a constituent element of the well-known public and private international law right to a *fair trial*. One may legitimately wonder whether such a form of "blanked" immunity applied by the ICJ, as well as by the ECtHR, in order to block completely any judicial determination of civil rights, without balancing the competing interests and the nature of the specific claims, amount to a real *violation* (being a *disproportionate* limitation) of the right enshrined in Articles 6.1 and 13 of the ECHR,[132] in Article 25 of the American Convention on Human Rights (San Jose, 22 November 1969),[133] and in Article 7.1 of the African Charter on Human and Peoples' Rights (Banjul, 26 June 1981),[134] as well as in Article 6 of the Treaty of

[130] ECtHR: Stegarescu and Bahrin v. Portugal, 46194/06, Judgment (6 April 2010), para 46.

[131] El Sayed, supra n. 124, para 36.

[132] Al-Adsani, supra n. 70, Dissenting opinion of Judge Loucaides.

[133] Entered into force on 18 July 1978.

[134] Entered into force on 21 October 1986.

the European Union (Maastricht, 7 February 1992; hereinafter TUE).[135] As Ms Rosalyn Higgins had observed

> it is severing immunity which is the exception to jurisdiction and not jurisdiction which is the exception to the basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires – that is to say, when it is *consonant with justice and with the equitable protection of the parties*. It is not granted 'as of right'.[136]

6 Conclusion

The ICJ's rejection of all the private international law reasoning followed by the various national courts confronted with the issue of the jurisdictional immunity of a third State which is allegedly responsible for *acta jure imperii* in violation of international jus cogens rules had been dictated by the legal impossibility of pronouncing itself on the question of whether the Greek courts had (themselves) violated Germany's immunity in the *Distomo* case. The ICJ's reasoning that the *exequatur* proceeding is an "exercise of jurisdictional power" is certainly correct, but the weakness of the Court's final pronouncement lies in the unconvincing and selective arguments that it used in order to determine that the Italian courts had breached Italy's obligation to accord jurisdictional immunity to Germany in respect of the various claims brought before them by Italian claimants. Furthermore, the ICJ approached the fundamental right to justice not with the due attention to its essence, but focusing (like the ECtHR) on its "implicit" limitations. At the end of the day, the combined effect of the various decisions (rendered by the ICJ, ECtHR, and ECJ) closed any door to the victims of international crimes, not only in respect of the complementary right to an effective remedy for grave breaches of human rights and of humanitarian law, but also (and foremost) with regard to the very universally "recognised" fundamental principle of the "right to a court". The consequence is a judicial codification of an undoubted *denial* of the procedural right *to have access to justice*.[137] By imposing the "preliminary" nature of State immunity from jurisdiction, and totally ignoring the rationale under the Italian "last resort" argument, the ICJ's decision will (from now on) preclude national courts from assessing the merits of the claims, the context in which these claims have been made, and also the balancing of the different factors underlying each case, irrespective of any forum "of necessity" due to the absence of any alternative forum available to the plaintiffs. Furthermore, the Court's conclusion

[135] Entered into force on 1 November 1993, as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009.

[136] Higgins 1982, p. 271 (emphasis added).

[137] See Francioni 2008, p. 13 ff.

that immunity could not have any bearing on questions of substance, due to its fundamental formalist substance/procedure distinction, simply (and skilfully) avoided the core issue of the case: whether questions of substance should/could have any bearing on procedural hierarchically lower rules of State immunity. The ICJ's decision also failed to explain why there should be any different rationale in relation at to the inherent link of substance and procedure between criminal and civil proceedings.

Another negative side of the ICJ's decision is its potential deterrent effect on the evolving State practice (discretionally) determining when third States may bar civil claims on the assertion of State immunity rules, taking into due consideration the need for "justice" in the light of the application of the general principles underlying human rights and humanitarian law. The ICJ's 2012 judgement could have a "chilling" effect on national courts, preventing them from moving the international law of State immunity toward a more responsive direction to contemporary international law that demands a growing recognition of the rights of individuals *vis-à-vis* States.[138] One might, for example, seek to draw lessons from the ICJ's judgment, beyond the context of war crimes claims, and declare that the "State sponsors of terrorism" exception in the United States (US) Foreign Sovereign Immunities Act, which allows suits to proceed against "designated" States for certain *acta jure imperii*, is inconsistent with customary international law "as it presently stands".[139] Furthermore, notwithstanding the fact that the ICJ's decision concerned sovereign immunity, and not the right of a sovereign to entertain civil claims for misconduct by "aliens" on foreign territories (with the consequence that the principle of universal jurisdiction was not at issue), the ICJ's decision also could have an impact on this issue. Some (sad) examples can already be deduced from State practice and European legislation. The adverse effect of the ICJ's judgment could be measured, for example, in the US human rights litigation in the US courts: it is easy to measure the strength of the ICJ's *implicit* idea that any extraterritorial exercise of "prescriptive jurisdiction" (like the one practised by the US courts according to the Alien Tort statute) would also violate international law as it currently stands, as a general prohibition of extraterritorial jurisdiction equally rests on the fundamental principles of sovereign equality.[140] This position has already being strongly argued by an *amici curiae* brief filed at the US Supreme Court in the pending *Kiobel v. Royal Dutch Petroleum* case, in which the Supreme Court has been confronted with the question of the liability of corporations under the federal common law that derives from the Alien Tort Statute in a dispute involving "unlawful" conduct in Nigeria by a Nigerian subsidiary of an Anglo-Dutch family of companies. What is interesting to note is that the US Government initially supported, before the Unites States Supreme Court, the plaintiffs' claim that there is no international law limitation on the availability of civil remedies for

[138] Webb 2012.

[139] Keitner 2012.

[140] Stephan 2012. Jurisdictional Immunities, supra n. 1, Separate Opinion of Judge Keith.

human rights violations arising in the territories of foreign sovereigns; the US Government urged a reversal of the Second Circuit judgment arguing that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law". After the petitioners' supplemental brief, the US Government changed its stance in June 2012 (hence after the ICJ's February 2012 judgement). In its supplemental *amicus brief*, the US Government stated that the Court should not "fashion a federal common-law cause of action" on the facts of this case, where "Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing [crimes] in Nigeria." It further argued that US Courts should apply *forum non conveniens* and exhaustion doctrines at the very beginning of Alien Tort cases, in order to limit the filing of ATS cases in the US, where there is a slight nexus with the forum.[141]

On the European side, another probable negative consequence of the ICJ's judgment may be recalled: in June 2012, the Council of the European Union adopted a "general approach" with regard to the proposed *recast* of the Brussels I Regulation, its provisions and key recitals, and adopted as "a compromise package" a new draft of this Regulation,[142] completely different from the European Commission's 2011 Proposal.[143] According to the new text, all the provisions for disputes involving third State defendants, suggested by the European Commission, have been deleted together with the new proposed European uniform rule of *forum necessitatis*. This European "political" decision has therefore annulled any hope to have, within the European space of justice and freedom, the operation of the Brussels I Regulation in the broader international order, providing grounds for the jurisdiction of the courts of Member States in *disputes involving third-state defendants*. The most significant innovation of the Commission's proposal consisted precisely in having a new European head of jurisdiction (the *forum necessitatis* rule) able to ensure that the corporate social responsibility of firms with their headquarters or seat in the territory of a Member State may be held accountable for human rights violations by their subsidiaries in third—usually developing—countries, where they are not held to the same European high standards of human rights.[144] After the ICJ's decision, the Council of the European Union has (better)

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[141] Supplemental Brief for the United States as *Amicus Curiae* in partial support of affirmance, No. 10-1941, http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf (accessed on 15 June 2012). The U.S. doctrine has read between the lines of this new *writ of certiorari*, explaining that "SG's office and perhaps the Executive Branch generally saw the writing on the wall based on the Court's oral argument and rebriefing order that ATS litigation was going to be shut down based on extraterritoriality—a position the Bush Administration had previously argued. Not wanting to go that far, the SG's office tried to give the Court comfort that cases with no U.S. nexus would not be filed here and other doctrines like forum non conveniens and exhaustion would keep those cases out of U.S. courts." See, Childress 2012.

[142] EU Council, Proposal for a Regulation. General approach, supra n. 98.

[143] On the Commission's 2011 Proposal, see Boschiero 2012, pp. 253–302.

[144] Muir Watt H., The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters *(Recast),* European Parliament- Directorate-General for Internal Policies 2011, 15.

decided not to extend the application of the Regulation to third-State defendants/situations, thus avoiding any potential accusation of the *extraterritoriality* of European secondary legislation, and consequently also renouncing a specific jurisdictional ground for denouncing, before the European courts, foreign corporations allegedly responsible for serious human rights violations committed abroad.

Another closed door to the victims' enjoyment of their rights came again from the European side: in 2011 the Tribunale ordinario di Brescia (Italy) submitted a reference for a preliminary ruling to the highest court in the European Union, the ECJ, in the course of proceedings between a number of Italian nationals and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning their application for compensation in respect of the harm which they suffered by reason of their deportation, or the deportation of the persons to whom they are the legal successors, during the Second World War. The request for preliminary ruling concerned the issue of the objection of immunity in relation to European Union law, namely the Treaty of Lisbon and the 2000 Charter on Fundamental Rights of the European Union (the Charter).[145] The Italian Tribunal asked the ECJ to pronounce itself on the compatibility of Germany's alleged "civil" State immunity before the Italian courts with Art. 6 (TUE) and Articles 17, 47, 52 of the Charter. It further requested the European Court to pronounce itself on the compatibility of Germany's alleged "civil" State immunity decisions to exclude some European citizens (the victims of war crimes) from the benefits of reparations with the TUE's rules and the European general principle of "*non conceditur contra venire factum proprio*". Finally, the Italian Tribunal asked the ECJ to rule on the compatibility of Germany's jurisdictional immunity with Articles 4.3 and 21 TUE: according to the referring court, the rule on State immunity could exclude the summoned party's civil liability as established by the common European principles common to the law of the Member States (Art. 340 TFUE) for violations of public international law in respect of citizens of another Member State.

By an Order of 12 July 2012, the Third Chamber of the Court rejected this reference for a preliminary ruling by stating that "It is clear that the Court of Justice of the European Union has no jurisdiction to take cognisance of the request for a preliminary ruling submitted by the Tribunale ordinario di Brescia (Italy).[146]

The Court recalled that, pursuant to Article 267 TFEU, it can interpret European Union law only within the limits of the powers conferred on it, and that consequently it has no jurisdiction to give a ruling on the interpretation of provisions of international law which bind Member States outside the framework of European Union law. According to the Court of Justice, it has no jurisdiction *ratione materiæ* to rule not only on the interpretation of the general principle of international law relating to State immunity and on the interpretation of the Agreement on German

[145] ECJ: Gennaro Currà and Others v. Bundesrepublik Deutschland, C 466/11, Order (12 July 2012).

[146] ECJ: Gennaro Currà and Others v. Bundesrepublik Deutschland, C-303/5, Order (6 October 2012).

External Debts, to which the European Union is not a party. Even if, admittedly, the European Court of Justice must apply international law (and may be required to interpret certain rules falling within the scope of that law), this could happen (the Court recalls) solely within the context of the competence which has been conferred on the European Union by the Member States. According to the Court, the subject-matter of the case in the main proceedings is excluded from the scope of European Union law, as well as, therefore, the interpretation and application of the principle of international law on the State immunity. In addition the Court declared that it has no jurisdiction *ratione temporis* due to the fact that the dispute in the main proceedings concerned an application for compensation brought by citizens of a Member State against another Member State in respect of events which took place during the Second World War, and thus before the European Communities were established. The Court noted in this respect that the International Court of Justice declared that it had jurisdiction and delivered a judgment on the merits of the case on 3 February 2012 (Germany v. Italy).

By stating that it's impossible to determine whether the law and the conduct of two Member States are in compliance with the provisions of the EU and FEU Treaties and of the Charter provisions when the compatibility concerns an act or an event predating their entry into force, and by stating that the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it, the ECJ rendered a "perfect" judgment from a pure legalist point. Undoubtedly, since the situation in the main proceedings does not come within the scope of European Union law, it is logic for the Court to conclude, therefore, that it does not have jurisdiction and that the provisions of the Charter relied upon cannot, in themselves, form the basis for any new power.

Coming to the substance of the judgement, the European Court of Justice missed a real opportunity to better balance the necessity of granting immunity with the "right to have access to the courts" and the right to an effective remedy in the context of contemporary international law and European public and private international law, which undoubtedly demands that human rights must be taken more seriously, specifically with regard to respect for "due process" solemnly proclaimed in Article 47 of the EU Charter and guaranteed by the European public order exception [147].

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[147] Salerno 2011; Fawcett 2007.

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