CURRENT DEVELOPMENTS

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

Edited by J Craig Barker

I. INTERNATIONAL COURT OF JUSTICE: *JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY v ITALY)* JUDGMENT OF 3 FEBRUARY 2012

A. Introduction

The vexed question of State immunity and the extent and application thereof has once again found its way to the International Court of Justice (the Court) in the form of the *Case Concerning Jurisdictional Immunities of the State (Germany v Italy)*.[1] On this occasion, the precise question concerned the so-called 'territorial tort exception' to State immunity and involved an assessment of the immunity to be granted to Germany, by Italy, in relation to compensation claims brought in Italy by Italian claimants against German armed forces and the organs of the German Reich during the Second World War.[2]

B. Historical and Factual Background

The facts of the case were largely uncontested by both parties and arose out of the period during the Second World War after the surrender of Italy to the Allies in September 1943, and the subsequent declaration of war by Italy against Germany in October 1943. Between that date and the end of the war, German soldiers, who occupied much of Italy, perpetrated many atrocities against Italian citizens, including massacres and large-scale deportations. Of particular note for the purposes of the present case, several hundreds of thousands of Italian soldiers were taken prisoner and deported to Germany for use as forced labour.[3]

Subsequent to the end of the war, a number of legal instruments were created purporting to deal with questions of compensation due by Germany to Italy and to Italian nationals. These included the Peace Treaty of 10 February 1947 between Italy and the Allied Powers,[4] the Federal Compensation law Concerning Victims of National Socialist Persecution 1953,[5] two Agreements of 2 June 1961 between Germany and Italy concerning the 'Settlement of certain property-related, economic and financial

[1] *Case Concerning Jurisdictional Immunities of the State (Germany v Italy)* ICJ Judgment of 3 February 2012 (hereinafter the 'Judgment').

[2] The case was initiated by Germany on 23 December 2008. A counter-claim by Italy, alleging a failure by Germany to make reparations to Italian victims of gross violations of international humanitarian law, was declared inadmissible by the Court in its Order of 6 July 2010. On 13 January 2011, Greece applied to intervene in the case, but not as a party in terms of arts 62, 83 and 84 of the ICJ Statute. Neither Germany nor Italy objected and Greece's intervention in the proceedings was authorized by Order of 4 July 2011.

[3] Judgment para 21. [4] ibid para 22. [5] ibid para 23.

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questions' and 'Compensation for Italian nationals subjected to National Socialist measures of persecution'[6] and the German Federal Law of 2 August 2000 establishing a 'Remembrance, Responsibility and Future' Foundation.[7] These instruments formed the basis of a counter-claim submitted by Italy on 23 December 2009 relating to the question of reparation owed to Italian victims of grave breaches of humanitarian law committed by German forces during the Second World War. However, by its Order of 6 July 2010, the Court found that the waiver contained in Article 77, paragraph 4, of the Peace Treaty of 1947[8] ensured that the subsequent instruments were ancillary thereto and were not required in order to give effect to the obligations imposed on Germany to pay compensation to Italy and Italian nationals.[9] Specifically the instruments did not give rise to 'new situations' relating to the obligations on Germany to pay compensation to Italian nationals.[10] Accordingly, Italy's counter-claim was found to be inadmissible for reason of it being outside the jurisdiction of the Court.[11]

The domestic proceedings at issue in the present case arose from both Italy and Greece. In relation to the Italian proceedings, these began on 23 September 1998 with the institution of proceedings against Germany by Mr Luigi Ferrini, an Italian national who had been arrested and deported to Germany where he was forced to work in a munitions factory. The Italian courts at first instance, and on appeal, dismissed the case due to the jurisdictional immunity of Germany.[12] However, at the Italian Court of Cassation on 11 March 2004, it was held that the immunity of Germany did not apply as the act complained of constituted an international crime.[13] The case was returned to the original court which held, nevertheless, that the claim was time barred. This decision was, however, reversed by the Court of Appeal of Florence, and Germany was held liable to pay damages.[14] After the initial Court of Cassation decision in *Ferrini*, subsequent cases were brought by further claimants in Turin and Sciacca. These led to the filing of an interlocutory appeal by Germany before the Italian Court of Cassation requesting a declaration of lack of jurisdiction. By two orders of

[6] ibid paras 24 and 25.

[7] ibid para 26.

[8] According to art 77, the property of Italy and Italian nationals was no longer to be treated as enemy property (para 1); identifiable Italian property was to be eligible for restitution (para 2). However, according to para 4, Italy agreed that: 'Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include all debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.'

[9] *Case Concerning Jurisdictional Immunities of the State (Germany v Italy)* Order of 6 July 2010. *ICJ Rep* 2010, 310 (hereinafter Counter-Claim Order). See especially paras 27–31. See also the Joint Separate Opinion of Judges Keith and Greenwood, ibid 323, at paras 11–15.

[10] The importance of the development of 'new situations' arose from the fact that the Court's jurisdiction in relation to the Italian counter-claim was based on art 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 which provided for the jurisdiction of the Court in relation to matters of public international law but which was limited in terms of art 27(a) of the Convention to 'disputes relating to facts or situations prior to the entry into force of [the] Convention'. The Convention entered into force as between Germany and Italy on 18 April 1961.

[11] Counter-Claim Order paras 32–33.

[12] Judgment para 27.

[13] *Ferrini v Federal Republic of Germany*, Decision No 5044/2004 (Rivista di diritto internazionale, vol 87, 2004, 539; International Law Reports (ILR), vol 128, 658).

[14] Judgment para 27.

29 May 2008, 'the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany'.[15]

The proceedings in Greece related to a massacre of civilians that took place on 10 June 1944 in the Greek village of Distomo, which was at the time under German occupation. Relatives of the victims brought proceedings against Germany in 1995, which resulted in a default first instance judgment against Germany on 25 September 1997.[16] This decision was upheld by the Hellenic Supreme Court on 4 May 2000.[17] However, an order by the Minister of Justice that was required in order to enforce a judgment against a foreign State in Greece was refused.[18] The victims brought proceedings against both Germany and Greece at the European Court of Human Rights, but this case was held inadmissible as a result of the rule of State immunity.[19] At the same time, proceedings were brought before the German courts in order to enforce the original decision of the Greek Court of First Instance and the decision of the Hellenic Supreme Court. On 26 June 2003, the German Federal Supreme Court refused to recognize the decisions on the grounds that they had been given in breach of Germany's entitlement to State immunity.[20] The claimants then sought to have the decisions enforced in Italy and, having already decided on the matter of expenses to be paid by Germany, on 13 June 2006, the Court of Appeal of Florence held that the decision of the Greek Court of First Instance was enforceable in Italy.[21] This decision was confirmed by the Italian Court of Cassation on 21 October 2008.[22] By way of enforcement proceedings on 7 June 2007, the Greek claimants had registered a legal charge over Villa Vigoni, a property owned by the German State near Lake Como.[23] That legal charge was suspended in 2010 and 2011 pending the decision of the Court in the present case.[24]

Pursuant to these findings by domestic courts within Italy, Germany asked the Court to declare, first, that by allowing civil claims to be brought against it, Italy had failed to respect the jurisdictional immunity that Germany enjoyed under international law; second, that the measures of constraint against Villa Vigoni constituted further violations of Germany's jurisdictional immunity; and, finally, that by declaring Greek judgments enforceable in Italy, a further breach of Germany's jurisdictional immunity, all resulting in Italy's international responsibility for which reparation were sought.[25]

C. The Decision

In relation to the first submission, the Court acknowledged that the illegality of the various acts committed by German forces during the requisite period was not contested.

[15] *Giovanni Mantelli and others* (Italian Court of Cassation, Order No 14201 (Mantelli) *Foro italiano*, vol 134, 2009, I, 1568), and *Liberato Maietta* (Order No 14209 (Maietta) *revisita di dritto internazionale*, vol 91, 2008, 86). See Judgment para 28. [16] ibid para 30.

[17] *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000 (ILR vol 129, 513).

[18] Judgment para 30.

[19] *Kalogeropoulou and others v Greece and Germany*, App No 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, 417; ILR vol 129, 537.

[20] *Greek Citizens v Federal Republic of Germany*. Case No III ZR 245/98, *Neue Juristische Wochenschrift* (NJW), 2003, 3488; ILR vol 129, 556.

[21] *Foro italiano*, vol 133, 2008, I, 1308.

[22] *Rivista di diritto internazionale*, vol 92, 2009, 594. [23] Judgment para 35.

[24] Decree-Law No 63 of 28 April 2010, Law No 98 of 23 June 2010 and Decree-Law No, 216 of 29 December 2011. See Judgment para 36. [25] Judgment paras 15, 16, 17 and 37.

Rather, the role of the Court was to consider 'whether in respect of claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity'.[26] In doing so it excluded the application of the European Convention on State Immunity 1972, to which Italy was not a party, and the United Nations Convention on the Jurisdictional Immunities of States and their Property adopted on 2 December 2004, which had not yet entered into force and which neither Germany nor Italy had signed.[27] Accordingly, the Court found it necessary to rely on customary international law.

The Court's analysis of the existence and extent of State immunity in the present case was surprisingly short. It identified State practice in the judgments of national courts (excluding, of course, the courts of Italy in the present circumstances), national legislation, claims to immunity and statements made by States to the International Law Commission (ILC) in the context of the adoption of the 2004 Convention. The relevant *opinio juris* could be identified, according to the Court, in assertions by States claiming immunity that they had a right to that immunity under international law, and in acknowledgement by States granting immunity that they were obliged by international law to do so. The Court determined 'that practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity'.[28] The Court did acknowledge, however, that while the States parties were in broad agreement about the existence of the rule of State immunity, there were differences as to how the law was to be applied, in particular, in relation to the precise scope of the so-called restrictive doctrine of State immunity.[29] More precisely, although both parties agreed that States are entitled to immunity in respect of acts *jure imperii*,[30] which in this case consisted of 'acts committed by the armed forces of a State . . . in the course of conducting an armed conflict',[31] Italy argued that immunity should not be accorded to such acts in the cases before the Italian courts for two reasons. The first of these is that customary international law provides for an exception to immunity, even for acts *jure imperii*, in the case of torts or delicts occasioning death, personal injury or damage to property on the territory of the forum State (the so-called territorial tort principle). The second case in which immunity is not available according to Italy arises where the acts in question 'involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available'.[32]

1. The territorial tort principle

In support of its first argument, Italy asserted that the territorial tort principle was recognized in the European Convention (Article 11) and in the United Nations Convention (Article 12), as well as in nine of the ten States that had adopted legislation dealing specifically with State immunity.[33] The Court appeared to accept that State practice supported the assertion that the territorial tort principle could apply to both acts *jure imperii* and acts *jure gestionis*.[34] However, the Court was not called upon

[26] ibid para 53.
[27] ibid para 54.
[28] ibid paras 55 and 56.
[29] ibid para 58.
[30] ibid paras 59–61.
[31] ibid para 61.
[32] ibid para 61.
[33] ibid para 62.
[34] ibid para 64.

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definitively to decide this issue. Rather, the issue before the Court was confined to the question of whether the territorial tort exception could be applied to 'acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in cooperation with those armed forces, in the course of conducting an armed conflict'.[35]

In relation to the European Convention, the Court found that Article 31, which provides for the non-application of the Convention to armed forces, had the effect of 'excluding from the Convention all proceedings relating to foreign armed forces'.[36] The position with regard to the United Nations Convention was more difficult, as the Convention does not include the equivalent of Article 31 of the European Convention. Nevertheless, the Court relied on the *travaux préparatoires* of the Convention to assert that 'the inclusion in the Convention of Article 12 cannot be taken as affording any support to the conclusion that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of armed conflict'.[37]

Although noting that only two States that contained the territorial tort principle in their legislation went on specifically to exclude the operation of this principle in the case of foreign armed forces, the Court placed significant reliance on the fact that, of the other seven States whose legislation included the territorial tort principle but did not exclude from the principle acts of foreign armed forces, in no case had the courts of the relevant country been called upon to apply the principle in the case of foreign armed forces acting in the context of an armed conflict.[38] With respect to national court judgments, the Court referred to decided cases in Egypt,[39] Belgium,[40] Germany,[41] the Netherlands,[42] France,[43] Italy,[44] the United Kingdom,[45] and the Republic of Ireland,[46] all of which had treated armed forces and or warships as immune on the basis that their acts were *jure imperii*. Such a position had been held to be not incompatible with the European Convention on Human Rights by the ECtHR in the *McElhinney v Ireland* case in 2001.[47] The Court concluded that these cases 'suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its forces on the territory of another State'.[48]

[35] ibid para 65. [36] ibid para 67. [37] ibid para 69. [38] ibid para 71.

[39] *Bassionni Amrane v John, Gazette des Tribunaux mixtes d'Egypte*, January 1934, 108; Annual. Digest, vol 7, 187.

[40] *S.A. Eau, gaz, électricité et applications v Office d'Aide Mutuelle*, Cour d'Appel, Brussels, Pasicrisie belge, 1957, vol 144, 2nd part, 88; ILR, vol 23, 205.

[41] *Immunity of the United Kingdom*, Court of Appeal of Schleswig, Jahrbuch für Internationales Recht, vol 7, 1957, 400; ILR, vol 24, 207.

[42] *United States of America v Eemshaven Port Authority*, Supreme Court of the Netherlands, Nederlandse Jurisprudentie, 2001, No 567; ILR, vol 127, 225.

[43] *Allianz Via Insurance v United States of America* (1999), Cour d'Appel, Aix-en-Provence, 2nd Chamber, judgment of 3 September 1999, ILR, vol 127, 148.

[44] *FILT-CGIL Trento v United States of America*, Italian Court of Cassation, Rivista di diritto internazionale, vol 83, 2000, 1155; ILR, vol 128, 644.

[45] *Littrell v United States of America (No 2)*, Court of Appeal, [1995] 1 WLR 82; ILR, vol 100, 438; *Holland v Lampen-Wolfe*, House of Lords [2000] 1 WLR 1573; ILR, vol 119, 367.

[46] *McElhinney v Williams*, [1995] 3 Irish Reports 382; ILR, vol 104, 691.

[47] McElhinney v Ireland [GC], App No 31253/96, Judgment of 21 November 2001, ECHR Reports 2001-XI, 39; ILR, vol 123, 73, para. 38. [48] Judgment para 73.

In addition to examples of State practice, the Court appears to have been most persuaded by the practice of national courts that had directly considered the question of the immunity of German forces for acts committed during the Second World War.[49] The Court referred to a series of cases decided in the *Cour de cassation* in France,[50] as well as to decisions in the Constitutional Court of Slovenia,[51] and the Supreme Court of Poland,[52] and decisions of lower courts in Belgium,[53] Serbia[54] and Brazil,[55] all of which had upheld the immunity of Germany in relation to the conduct of their armed forces in the forum States. According to the Court, apart from the Italian courts in the present case, the only national courts that supported the Italian position were those of Greece.[56] However, the Court recognized that the position taken by the Hellenic Supreme Court in *Distimo* had been superseded by the decision of the Special Supreme Court in *Margellos v Federal Republic of Germany*,[57] which supported the notion that the territorial tort principle was not applicable to the acts of foreign armed forces in the conduct of armed conflict. Ultimately the Court decided that:

> State practice in the form of judicial decisions supports the position that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the position taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.[58]

2. The gravity of the violations and the consequences thereof

According to Italy, the nature of the acts giving rise to the proceedings constituted serious violations of the principles of international law amounting to war crimes and crimes against humanity. As such, Italy asserted that they contravened *jus cogens* norms and that the exercise of jurisdiction by the Italian courts was a matter of last resort.[59]

In addressing the gravity issue, the Court used the now-usual practice of highlighting the procedural nature of a claim to immunity and, in particular, its preliminary nature, pointing out that 'immunity could be negated simply by skilful construction of the

[49] ibid para 73.

[50] Case No 02-45961, 16 December 2003, *Bull. civ*., 2003, I, No 258, 206 (the *Bucheron* case); No 03-41851, 2 June 2004, *Bull. civ*., 2004, I, No 158, 132 (the *X* case) and No 04-47504, 3 January 2006 (the *Grosz* case). The ECtHR held that France had not contravened its obligations under the ECHR in *Grosz v France* (App No 14717/06, Decision of 16 June 2009 insofar as the French courts had 'given effect to an immunity required by international law'. Judgment, para 73.

[51] *Case No Up-13/99*, Judgment of 8 March 2001.

[52] *Natoniewski v Federal Republic of Germany*. Judgment of 29 October 2010, Polish Yearbook of International Law, vol XXX, 2010, 299.

[53] *Botelberghe v German State*. See Judgment, para 74.

[54] Judgment of the Court of First Instance of Leskovac, 1 November 2001.

[55] *Barreto v Federal Republic of Germany*, Federal Court, Rio de Janeiro, Judgment of 9 July 2008.

[56] Judgment para 76.

[57] Case No 6/2002. ILR, vol 129, 525.

[58] ibid para 77.

[59] ibid para 80.

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claim'.[60] Nevertheless, the Court accepted that it had to consider the position of customary international law on the point. In what might be considered the most controversial aspect of the judgment, the Court quickly dismissed the argument, noting that there is 'almost no State practice' which might be considered to support such a proposition.[61] They highlighted, on the contrary that assertions that State immunity should be removed in the face of allegations of violations of international human rights law, war crimes, or crimes against humanity, had been rejected by national courts in Canada,[62] France,[63] Slovenia,[64] New Zealand,[65] Poland[66] and the United Kingdom.[67] The Court specifically distinguished the decision of the House of Lords in *Pinochet (No 3)*[68] on the basis that the *Pinochet* decision involved the immunity of a former head of State from the criminal jurisdiction of another State, and not the immunity of the State itself in civil proceedings. Furthermore, *Pinochet* was directly dependent on the terms of the United Nations Torture Convention of 1984, a treaty that was not relevant to the present case.[69] The Court further held that no domestic legislation, other than a very limited amendment introduced to the United States Foreign Sovereign Immunities Act 1996, included provisions for the limitation of immunity depending on the gravity of the case.[70] Finally, the Court asserted that 'there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention'.[71] Making reference to two decisions of the European Court of Human Rights in *Al-Adsani v United Kingdom*[72] and *Kalogeropoulou and others v Greece and Germany*,[73] the Court asserted that the ECtHR in both cases had concluded that there was not yet established in international law any grounds for the removal of immunity in the situation of civil claims for grave violations of international law viz. torture and crimes against humanity respectively.[74]

[60] ibid para 82. [61] ibid para 83.

[62] *Bouzari v Islamic Republic of Iran*, Court of Appeal of Ontario, (2004) Dominion Law Reports (DLR) 4th Series, vol 243, 406; ILR, vol 128, 586.

[63] Case No 02-45961, 16 December 2003, *Bull. civ*., 2003, I, No 258, 206 (the *Bucheron* case); No 03-41851, 2 June 2004, *Bull. civ*., 2004, I, No 158, 132 (the *X* case) and No 04-47504, 3 January 2006 (the *Grosz* case).

[64] *Case No Up-13/99*, Constitutional Court of Slovenia.

[65] *Fang v Jiang*, High Court, [2007] New Zealand Administrative Reports (NZAR), 420; ILR vol 141, 702.

[66] *Natoniewski*, Supreme Court, 2010, Polish Yearbook of International Law, vol XXX, 2010, 299.

[67] *Jones v Saudi Arabia*, House of Lords [2007] 1 AC 270. [68] [2000] 1 AC 147.

[69] Judgment para 87. [70] ibid para 88. [71] ibid para 89.

[72] App No 35763/97, Judgment of 21 November 2001, ECHR Reports 2001-XI, 101, para. 61; ILR, vol 123, 24.

[73] App No 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, 417; ILR, vol 129, 537.

[74] Having reached this conclusion in the present case, the Court was, nevertheless, keen to point out, as it does, the limitations of its decision in terms of its impact on other aspects of State immunity, particularly in relation to issues of criminal immunity involving individuals, as opposed to the State noting specifically that: 'In reaching this conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case'. ibid para 91.

Given this finding, it is unsurprising that the Court was rather scathing of the *jus cogens* argument put forward by Italy. Crucially, the Court did not deny that certain substantive rules of the law of armed conflict could be considered as *jus cogens*.[75] However, it did not see a conflict between those rules and the rules on State immunity. In the circumstances of the present case, the Court was clear that the violations of the law of armed conflict were openly recognized as illegal by all parties, but that did not involve any conflict with the question as to whether or not the Italian courts had jurisdiction to hear claims arising out of the violations.[76] In relation to the obligation to make reparations, the Court was even firmer:

> The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation that it does with the rule prohibiting the original wrongful act.[77]

In relation to the relationship between *jus cogens* norms and issues of jurisdiction more generally, the Court relied on its previous decisions in *Armed Activities*,[78] and in the *Arrest Warrant Case*[79] as well as the jurisprudence of the ECHR and national courts referred to above to assert that 'the argument about the effect of *jus cogens* displacing the law of State immunity has been rejected'.[80]

Finally, the Court considered the last resort argument and began by condemning Germany for deciding to deny compensation to prisoners of war as a group, noting that any immunity to which it was entitled did not affect that State's international responsibility or its obligation to make reparation.[81] Nevertheless, the Court could find no rule of international law that linked the enjoyment of immunity with the existence of 'effective alternative means of securing redress'.[82] The Court noted that their decision on German immunity may have the effect of precluding judicial redress for some Italian nationals, but suggested that the question of providing compensation for those not already compensated could be negotiated between the two States concerned.[83]

3. The charge over Villa Vigoni and the enforcement of Greek decisions

The Court did not dwell too long on the question of the legal charge over the Villa Vigoni, not least as a result of the position taken by Italy not to object to an order by the Court to bring the measure to an end.[84] Having established that immunity of enforcement in relation to property owned by a State on foreign territory is broader than the jurisdiction immunity enjoyed by States in foreign courts,[85] the Court referred to Article 19 of the United Nations Convention and to State practice in Germany, Switzerland, the United Kingdom and Spain in order to establish that:

> the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes

[75] The Court specifically referred to the prohibition of 'the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour'. [76] Judgment paras 92–97. [77] ibid para 94.
[78] *Armed Activities on the Territory of the Congo* (New Application: 2002), Judgment, ICJ Reports 2006, 6, paras 64 and 125.
[79] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, ICJ Reports 2002, 3, paras 58 and 78. [80] ibid para 96. [81] ibid para 100. [82] ibid para 101.
[83] ibid para 104. [84] ibid para 38. [85] ibid para 113.

> falling within Germany's sovereign functions . . . the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.[86]

With regard to the enforcement by Italian Courts of the decision of Greek civil claims against Germany, the Court was of the view that there was no need to consider whether the Greek courts had violated Germany's immunity, given that the decision to enforce was itself the exercise of a jurisdictional power by the Italian courts equivalent to a decision on the merits of the case.[87] Having already determined that such a decision would be in violation of Germany's rights to immunity, it was not difficult for the Court to determine that 'the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity'.[88]

D. Judge Conçado Trindade's Dissents

While the Court may be regarded as having delivered a significant judgment upholding Germany's immunity, the case is notable also for the trenchant dissenting opinions of Judge Conçado Trindade in relation to both the 2010 Counter-Claim Order and to the 2012 Judgment. Indeed, on both occasions, the length of Trindade's opinion significantly exceeded the opinion of the Court. It would be impossible to do justice to the entirety of Trindade's analysis within the confines of this short analysis and so only one or two of his key points will be discussed here.

The position taken by Trindade will not surprise anyone familiar with his background as a renowned academic and former President of the Inter-American Court of Human Rights, as well as his history as 'a surviving Judge from the painful international adjudication of a cycle of cases of massacres that recently reached a contemporary international tribunal, the IACtHR, during which [he] was in contact with the more sombre side of human nature'.[89] At the core of his analysis, therefore, is his focus on the notion of fundamental human values and his rejection of the State-centric approach of international law in favour of an approach that centred on the human person.[90]

Specifically, in his Dissent to the 2010 Counter-Claim, Trindade was highly critical of the Court's decision not to allow Italy's counter-claim which he regarded as 'a step backwards' in so far as it did not address key issues of the sound administration of justice and the achievement of practical and procedural equality between the parties. He was particularly critical of the summary rejection of the counter-claim by the majority.[91] He further focussed on the historical significance and importance of the notion of 'continuing situation' particularly within the domain of international human rights law. A 'continuing situation' links a recent act or omission with original facts giving rise to a current claim.[92] In the present case, according to Trindade, the facts of the Second World War connected to the facts of the two 1961 Agreements between Germany and Italy and the Agreements link into the present-day claims for reparation,

[86] ibid paras 119–120. [87] ibid paras 127–128. [88] ibid para 131.
[89] Judge Conçado Trindade Dissenting Opinion to the Judgment of the Court [hereinafter 2012 Judgment Dissent] para 289.
[90] ibid paras 32–40. This approach, according to the learned Judge, was echoed in the work of learned institutions of international law ibid paras 41–52.
[91] ibid para 30. [92] ibid paras 60–83, especially paras 73–74.

thereby creating a 'continuing situation' which was neither broken by Article 77(4) of the 1947 Peace Treaty, nor by Article 27(a) of the 1957 European Convention for the Peaceful Settlement of Disputes. Accordingly, Italy's counter-claim ought to have been admitted and not dismissed on the basis of lack of jurisdiction *ratione temporis*.[93]

In concluding his dissent to the 2012 Judgment, Trindade berated the Court for its 'deconstruction' of *jus cogens*. He criticized the Court for its restrictive review of *opinio juris* 'reducing it to the subjective component of custom and distancing it from the general principles of law, up to a point of not taking account of it at all'.[94] He further challenged the Court about its encouragement of the 'stagnation' of *jus cogens* whenever claims of State immunity are at stake, based on 'incongruous case-law of national courts'[95] and 'pieces of sparse legislation in a handful of States'.[96]

E. Analysis

From a strictly doctrinal perspective, there is no doubting the correctness of the Court's decision in this case. The Court has undertaken a detailed scientific analysis of the primary sources of international law, including treaties and customary international law, to conclude that a State is immune from proceedings in the domestic courts of foreign States relating to the acts of its armed forces and associated organs in a foreign State in the context of armed conflict. The Court's starting point is that State immunity is itself an established rule of international law, rather than exception to the rule that a State has jurisdiction over all acts committed on its territory. This starting point is certainly not controversial and reflects contemporary international law on the subject.[97] The issue then becomes one of identifying possible exceptions to the established rule of State immunity.

It is a trite observation that State immunity has developed from a position of absolute immunity towards more restrictive immunity, which recognizes that certain acts of a State, particularly those relating to commercial contracts, do not attract immunity from the jurisdiction of the domestic courts of foreign States.[98] The development of the restrictive doctrine occurred primarily as a process of customary international law formation emanating from the decisions of domestic courts and domestic legislation. The fundamental question faced by the Court in this case concerned whether the recognized exceptions to immunity included a restriction on immunity in relation to the conduct of armed forces in foreign States.

The immunity of States for the conduct of armed forces in the context of armed conflict is not directly regulated by any international convention and derives essentially from customary international law. The regulation of State immunity by international treaties remains relatively limited. However, the Court pointed to the European Convention on State Immunity 1957 and highlighted the express exclusion of proceedings relating to foreign armed forces, rightly concluding that the exclusion had the effect of retaining immunity for such activities, particularly in relation to tortious claims

[93] ibid.
[94] 2012 Judgment Dissent para 290.
[95] ibid para 293.
[96] ibid, para 294.
[97] See the United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004, Article 5. See, more generally, H Fox, *The Law of States Immunity* (OUP 2002) ch 3, especially 52–3.
[98] UN Convention Articles 10–17. See also Fox (n 97) 272–322.

arising therefrom. The Court's analysis of the United Nations Convention might be open to criticism from two perspectives. First on the basis that the Convention is not yet in force and, second, on the basis that the Convention does not specifically exclude tortious claims resulting from the activities of foreign armed forces. In relation to the second point, the Convention does contain an exclusion for tortious acts committed on the territory of the forum State in Article 12. However, the Court's reliance on the *travaux préparatoires* of the Convention answers both of these criticisms insofar as the Court did not rely directly on the Convention itself but rather on the customary international law developed in relation to the Convention arising from Statements of participants in the drafting of the Convention. This was further supported by State practice and *opinio juris* deriving from the legislation of States who had legislated in this area. Furthermore, challenges to the immunity of States in respect of the activities of armed forces in the conduct of armed conflict, particularly the activities of German armed forces during the Second World War, have been brought in the domestic courts of various countries and, on the whole, domestic courts have upheld State immunity. It would seem, therefore that the reasoning of the Court that such acts were acts *jure imperii* and so entitled to immunity was probably correct.

Although comprehensively rejected by Judge Trindade, it is difficult also not to agree with the conclusions of the majority that the notion of *jus cogens* does not have the effect of overriding the procedural immunity of States from the domestic jurisdiction of foreign States. Additionally, the Court was not wrong to assert that the non-existence of an alternative means of securing a remedy should have the effect of removing immunity. In reaching these conclusions, the Court followed its own previous rulings and also those of the European Court of Human Rights. The Court also repeatedly asserted its belief that the specific finding of immunity for Germany did not devolve Germany of its obligations to make reparations for the activities of its armed forces during the Second World War and called upon Germany and Italy to negotiate further on this issue. In relation to this it is important to assert that the effect of this decision is only to prevent individuals from pursuing reparations claims directly in the Italian courts.

Of course, this conclusion is anathema to many. It certainly is to Judge Trindade. To leave the analysis of the case at this point without commenting on Judge Trindade's dissents would be wrong. Trindade has provided a significant service to those commentators concerned with the broader role of the International Court of Justice and, in particular, with those concerned about the relationship between State immunity and human rights. His detailed opinion is both challenging and persuasive. Read independently of the Court's judgment, it provides a coherent and thoughtful critique not only of the judgment itself but also of the nature and function of international law. Perhaps Trindade may be criticized for developing a conceptual approach to what ought to be a purely doctrinal function, that is, to determine the current state of the law in relation to the facts presented to him. However, that would be to do him a disservice.

Broadly stated Trindade highlights the problem of fragmentation of international law. In particular, his analysis draws attention to the different and fractured approaches of judges and scholars to the relationship between immunities from jurisdiction and the question of reparations specifically, and with human rights obligations more generally. His narrative questions how international lawyers are able to develop coherent analyses

of emerging concepts in international law in areas such as international criminal law, international humanitarian law and human rights when faced with established concepts such as immunities from jurisdiction. He repeatedly eschews the 'short-sighted' State-centric approach of the Court in favour of an approach that has at its heart the notion of the human person, fundamental human values and the imperative of justice. His final analysis highlights the importance of the primacy of *jus cogens* and his refusal to accept the 'deconstruction' and 'stagnation' of *jus cogens*.[99] These criticisms demand further analysis and exploration and will undoubtedly give rise to further comment in this and other academic journals.

F. Conclusions

The effect of this case, with its significant majority in favour, is to embed still further the rule of State immunity. As with many domestic and international decisions dealing with State immunity it must be read in a restrictive light insofar as it deals specifically with the immunity of a State in civil proceedings in respect of the conduct of its armed forces in the context of an armed conflict. It does not deal, for example, with the question of the immunity of State officials facing criminal prosecution in a foreign State.[100] Nevertheless, the decision may have the effect of stagnating what many consider to be an outdated principle. If international law is to change in this regard, it will be necessary for States to enact a convention that develops still further the accepted exceptions to State immunity. This was, indeed, one of the purposes of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property. Although not yet in force, the Convention has gone a long way to solidify customary international law supporting the restrictive principle of State immunity. However, for many the Convention did not go far enough. The difficulty is, that given the attitude of States to the possible inclusion of a human rights protocol to the 2004 UN Convention, further development aimed at restricting State immunity still further may seem a long way off. An alternative approach would be to seek to develop further exceptions to immunity through the processes of customary international law. However, if one accepts that customary international law can be changed through breach where it is accompanied by a supportive reaction of other States, then that option too has been firmly rejected by the Court's finding that the decisions of the Italian courts denying immunity to Germany in the present circumstances are straightforwardly a breach and nothing more. Judge Trindade's perspectives may be intellectually correct and supported by many, and perhaps a majority of scholars writing in this field. However, the immediate development of a more human rights based approach to the limiting of State immunity has been made significantly more difficult as a result of this decision.

J Craig Barker*

[99] 2012 Judgment Dissent para 288.

[100] ibid para 91.

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