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State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth

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Abstract

Recently municipal courts have found that foreign states do not enjoy jurisdictional immunity with respect to civil claims involving serious violations of international law within the forum state's territory during armed conflict. This article assesses the recent judgments' potential impact, taking into account previous court practice and international human rights jurisprudence. It concludes that an exception to immunity in the above circumstances where no alternative judicial remedies exist for the victims has a basis in previous practice and may be required to give effect to international human rights obligations. A recognition by the foreign state of an individual victims' right to bring a claim before that state's courts could provide the victims with reparation in the form of satisfaction. Where no such possibility exists, a limited exception to the rule of state immunity would ensure the victims' right to access to court and to the truth.

Keywords

state immunity – *jus cogens* violations of international law – right to access to court – right to reparation – right to the truth – international crimes in domestic courts

1 Introduction

Recently courts in South Korea and Brazil ruled that foreign states did not enjoy jurisdictional immunity with respect to claims based on *jus cogens* violations

of international law committed in the forum state's territory.[1] One of the main reasons supporting this conclusion was that the application of the rule of state immunity in such cases was incompatible with the constitutional protection of the victims' right to access to court. The two decisions follow an earlier judgment of the Italian Constitutional Court, which had found that insofar as the rule of state immunity conflicted with the constitutional protection of fundamental human rights and the right to access to court, it had no legal effect in Italy.[2] While the three municipal courts relied primarily on national constitutions, the provisions cited concern rights protected by international human rights treaties.

The rule of state immunity, which provides that a state is immune from jurisdiction in a proceeding before a court of another state,[3] emerged at the beginning of the nineteenth century and developed into a rule of customary international law primarily through municipal court practice.[4] The International Law Commission (ILC) has described the doctrine of state immunity as the result of an interplay of two fundamental principles of international law, the principle of territoriality and the principle of state personality, both of which represent aspects of state sovereignty.[5] Initially understood as absolute immunity, the rule has gradually evolved to allow jurisdiction for acts of states in private or commercial activities (*acta jure gestionis*), while

1 South Korea, Seoul Central District Court, Joint Case No. 2016/505092, 34th Civil Division, Judgment (8 January 2021), available online at lbox.kr/detail/서울중앙지방법원/2016가합505092 (accessed 28 May 2022) (South Korea, Seoul Central District Court, Judgment of 8 January 2021), Section 3.I.3)(7); Brazil, Federal Supreme Court (*Supremo Tribunal Federal*), *Recurso Extraordinário com Agravo 954.858 Rio de Janeiro*, Karla Christina Azeredo Venancio Da Costa e Outro(a/s) (petitioners), ARE 954858/RJ, Judgment (23 August 2021), available online at portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf (accessed 28 May 2022) (Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ), p. 30.

2 Italy, Constitutional Court, Judgment No. 238, 22 October 2014, (Italy, Constitutional Court, Judgment No. 238), para. 3.5.

3 United Nations Convention on Jurisdictional Immunities of States and Their Property (A/Res/59/38), 16 December 2004, not yet entered into force (UN Convention), Article 7(1).

4 ILC, *Yearbook of the International Law Commission 1980, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its thirty-second session* (A/CN.4/SER.A/1980/Add.l (Part 2)) (ILC Report (1980)), p. 143, para. 7.

5 On this basis the rule on state immunity sometimes has been formulated by the maxim *par in parem imperium non habet* (equals have no sovereignty over each other), ILC, *Yearbook of the International Law Commission 1978, Volume II, Part II, Report of the Working Group on jurisdictional immunities of States and their property* (A/CN.4/L.279/Rev.1), (ILC Report (1978), p. 153, para. 11.

generally retaining immunity with respect to acts in the exercise of sovereign power (*acta jure imperii*).[6]

Could the recent municipal decisions to deny immunity to foreign states with respect to claims involving serious violations of international humanitarian and human rights law be heralding the emergence of a new exception to the rule of state immunity? Initial reactions in the literature have been cautious. Scholars have criticised the South Korean and the Brazilian judgments for not accurately reflecting the current state of international law and not providing sufficient reasons.[7] The Italian judgment has been described as a 'shock to the international community'[8] and its reliance on domestic law as 'robust dualism' that may undermine its potential to influence international custom.[9]

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6 *See* ICJ, *Jurisdictional Immunities of the State* (*Germany* v. *Italy: Greece intervening*), Judgment, 3 February 2012 (ICJ, *Germany* v. *Italy*), paras 59–61.

7 *See* E. Branca, 'Yet, it moves…': The Dynamic Evolution of State immunity in the 'Comfort Women' case', *EJIL: Talk! Blog of the European Journal of International Law* (7 April 2021), available online at www.ejiltalk.org/yet-it-moves-the-dynamic-evolution-of-state-immunity-in-the-comfort-women-case (accessed 28 May 2022), arguing with respect to Seoul Central District Court's judgment of 8 January 2021, that the court relied exclusively on the Italian jurisprudence, while ignoring other national rulings, which may deprive it from its authority in the international legal context. Branca notes, however, that while 'not accurately reflecting the current state of customary law', the judgment could contribute to 'progressively designing a privilege-free and human-rights oriented rule on State immunity', *ibid*. Lima and Saliba criticize the Brazilian judgment for failing to engage properly with international law, pointing out that legal response rooted in domestic arguments is not without its international hurdles, and for failing to provide clear answers for the non-application of the international rule, *see* C. Lima and A. Saliba, 'The Immunity Saga Reaches Latin America. The Changri-la Case', EJIL: *Talk! Blog of the European Journal of International Law* (2 December 2021), available online at www.ejiltalk.org/the-immunity-saga-reaches-latin-america-the-changri-la-case (accessed 28 May 2022).

8 *See* C. Tomuschat, 'The National Constitution Trumps International Law', 6(2) *Italian Journal of Public Law* (2014) 189–196, p. 189.

9 *See* M. Scheinin, 'The Italian Constitutional Court's Judgment 238 of 2014 Is Not Another Kadi Case', 14(3) *Journal of International Criminal Justice* (2016) 615–620, p. 618, arguing that the judgment 'suffers from a category error when it seeks to contribute to the understanding in public international law of … state immunity … through the use of the norms of the Constitution of Italy for the purpose of assessing the internal constitutionality of some acts by Italian state organs'. Kunz similarly argues that, because of its approach of 'hiding behind a dualist veil', the court cannot attempt to shape the international legal debate on state immunity, R. Kunz, 'The Italian Constitutional Court and 'Constructive Contestation': A Miscarried Attempt?', 14(3) *Journal of International Criminal Justice* (2016) 621–627, p. 625. For positive reviews *see* R. Pisillo Mazzeschi, 'Access to Justice in Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court', 24 *Italian Yearbook of International Law* (2014) 9–23, p. 10, arguing that with some adaptions the judgment could be applied at the international level; *see also* M. Frulli, 'Time Will Tell Who Just Fell and Who's Been Left Behind': On the Clash

The present article seeks to answer the above question, taking into account previous practice on the application of the rule of state immunity in similar cases and international human rights jurisprudence. To this end, Section 2 discusses the main findings of the recent decisions, defining the outer boundaries of a potential emerging exception to the rule of state immunity. Section 3 examines whether such a potential exception has any basis in previous jurisprudence on the application of the rule to claims involving acts that could be characterised as international crimes within the forum state. First, early municipal practice is analysed, identifying the main considerations that have shaped the courts' positions. Second, the ICJ's judgment on the jurisdictional immunity of the state is discussed with the view of understanding whether it could preclude the course taken recently by municipal courts. Section 4 examines the relationship between the rights of victims of serious violations of international human rights law to access to court, reparation, and the truth, on the one hand and the rule of state immunity, on the other, identifying ways in which international human rights jurisprudence may influence the interpretation of the rule. Some concluding observations will be offered at the end.

2 Recent Judgments Denying Immunity to Foreign States for Claims Based on Potential International Crimes

While the application of the rule of state immunity to claims involving potential international crimes has been a subject of judicial debate for more than two decades, the trend in municipal jurisprudence to deny immunity on the basis of a conflict between the rule and the victims' right to access to court emerged recently. The first court to take this position was the Italian Constitutional Court when it ruled that Italian courts could not deny their jurisdiction to civil claims based on sovereign acts constituting war crimes and crimes against humanity, committed on Italian territory.[10] The court reasoned that under Italian law, the introduction of generally recognised norms of international law was limited by the fundamental constitutional principles,[11] including the right to bring a case before a court, under Article 24, and the protection of the inviolable human

between the International Court of Justice and the Italian Constitutional Court', 14(3) *Journal of International Criminal Justice* (2016) 587–594 and R. Pavoni, 'How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?', 14(3) *Journal of International Criminal Justice* (2016) 573–585, praising the judgment for affirming the right to access to justice in international law.

10 Italy, Constitutional Court, Judgement No. 238, *supra* note 2, para. 4.1.

11 *Ibid.*, para. 3.2, *see also* para. 3.4.

rights under Article 2 of the constitution. The court saw these two provisions as inseparably connected, Article 2 being the substantive norm safeguarding the inviolability of human rights and Article 24, the procedural one, protecting the right to access to justice when rights under Article 2 are concerned.[12] It accepted that a prevailing public interest in favour of a limitation of the right to judicial protection could be identified 'only when [immunity] is connected—substantially and not just formally—to the sovereign functions of the foreign state'.[13] Granting immunity with respect to claims based on *jus cogens* violations entailed 'the absolute sacrifice' of the victims' right to judicial protection while a prevailing public interest could not be identified.[14]

The views of the Italian Constitutional Court seem to have found support in a ruling of the Seoul Central District Court. Deciding on a claim brought by victims of sexual slavery during the Second World War, the 34th division concluded that the rule of state immunity did not apply to sovereign acts committed in the forum state, violating *jus cogens* norms of international law and fundamental rights of forum state citizens.[15] Considering the special nature of the right to trial, which ensured other fundamental rights when they have been or are at risk of being violated, as well as its protection by the constitution and the Universal Declaration on Human Rights, the court found that limitations of the right to trial should be approached with caution.[16] It considered that denying jurisdiction for claims based on acts breaching *jus cogens* norms of international law, violating fundamental human rights deprives the victims of their right to trial and would be unreasonable.[17] In the court's view, the purpose of the rule of state immunity was to protect sovereign states and prevent abuse of jurisdiction. The rule thus was not intended to allow a state to avoid compensating victims for damage caused by its acts in breach of international law.[18] The court also took into account that no acts of war occurred on the Korean Peninsula and accordingly the assumption of unpredictable damage justifying state immunity for acts in armed conflict was inapplicable,[19] and that no alternative means to seek compensation were available to the victims.[20]

12 *Ibid*., para. 3.4.

13 *Ibid.*, para. 3.4.

14 *Ibid.*, para. 3.4.

15 South Korea, Seoul Central District Court, Judgment of 8 January 2021, *supra* note 1, Sections 3.C.3)(6), 3.C.3)(7).

16 *Ibid.*, Section 3.C.3).(1), referring to the right to request a trial under Article 27(1), Constitution of the Republic of Korea.

17 *Ibid*, Sections 3.C.3)(6), 3.C.3)(7).

18 *Ibid*., Sections 3.C.3)(6), 3.C.3)(7).

19 *Ibid.*, Section 3.C.3).4).

20 *Ibid*., Sections 3.C.3)(6) and 3.C.3)(7), noting that the victims were excluded from compensation agreements between South Korea and Japan, that their attempts to

Soon after this judgment, another division of the Seoul Central District Court, ruling on a similar claim, arrived at the opposite conclusion.[21] The 15th division accepted that whether an act constitutes a serious violation of fundamental rights could be assessed only on the merits of the case, after jurisdiction is established, and that state practice did not confirm the inapplicability of the rule to *jus cogens* violations.[22] The two divisions seemed to have agreed that a decision on the application of the rule of state immunity could not exclude its impact on the victims' right to trial but disagreed as to whether a limitation of this right was justified in the circumstances.[23] For the 15th division the limitation had a legitimate purpose (promoting good inter-state relations),[24] employed means that were not unfair or unjust (taking the burden out of the foreign state to stand trial before Korean courts),[25] and did not violate the constitutional requirement for a minimum infringement since alternative remedies existed for the victims, specifically exercise of diplomatic protection by the Republic of Korea.[26]

The Korean judgment of 8 January 2021, however, did not remain an isolated example of municipal practice. On 23 August 2021 the Brazilian Federal Supreme Court ruled that unlawful acts committed by foreign states in violation of human rights do not enjoy immunity from jurisdiction.[27] The case concerned the sinking of a small fishing vessel, *Changri-lá*, off the coast of Cabo Frio, Rio de Janeiro during the Second World War, which caused the death of its crewmembers.[28] Following the discovery of new documents some sixty

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bring lawsuits before Japanese courts were unsuccessful, that a 2015 political agreement between the South Korean and Japanese governments did not provide for compensation for the victims, and that for the plaintiffs, who had no bargaining or political power, the possibility to lodge a claim before the Korean courts was the only means available to seek compensation.

21 The 15th division found that under customary international law immunity applied to sovereign illegal acts in the forum state during an armed conflict, *see* Seoul Central District Court, Joint Case No. 2016/580239, 15th Civil Division, Judgment, 21 April 2021 (South Korea, Seoul Central District Court, Judgment of 21 April 2021), Sections III.2.C.(1), III.2.C.(2).(A), III.2.C.(2).(D)., III.2.C.(2).(E).

22 *Ibid.*, Section III.2.D.(3).

23 *See ibid.*, Section III.4.B.

24 *Ibid.*, Section III.4.B.(1).

25 *Ibid.*, Section III.4.B.(2).

26 *Ibid.*, Sections III.4.B.(3) and III.4.B.(3).(B), referring specifically to the 2015 Korea-Japan agreement. The court seems to have construed narrowly the right to request a trial, finding that it did not include a right to receive judgment on the merits and that it was premised on the Korean courts' jurisdiction, including article 6(1) of the constitution, which gives domestic effect to international law, *ibid.*, Section III.4.B.(3).(A).

27 Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, *supra* note 1, p. 30.

28 *Ibid.*, p. 5.

years after the event it was established that the boat was sunk by a German submarine attack.[29]

In reaching its conclusion the Brazilian Federal Supreme Court first took into account that the alleged act could amount to a war crime, a violation of the general principles of international humanitarian law,[30] and a serious human rights violation.[31] It then found that the act took place in Brazilian territorial waters.[32] The court referred to the territorial tort exception in the UN Convention and the Basle Convention,[33] neither of which applied to Brazil, without drawing a conclusion. This reference and the explicit finding that the underlying act took place within the territory of Brazil, however, could suggest that the court had given weight to the principle of territoriality and had taken into account that this principle continued to apply to claims based on sovereign acts occasioning death, injury, or property damage. As noted by the ICJ, according to the principle of territoriality, every state possesses sovereignty over its territory and has jurisdiction over events and persons within that territory.[34] While exceptions to immunity are a departure from the principle of sovereign equality, immunity could be seen as a departure from the principle of territorial sovereignty.[35]

A decisive consideration for the court, however, seems to have been the impact of the rule of state immunity on the rights of the victims, specifically, the rights to life, access to justice and the truth.[36] The court accepted that the absence of response to the alleged violation for almost sixty years had deprived the victims' families of their right to the truth.[37] It found also that denying the victims the right to hold the violator accountable or forcing them to seek justice in foreign jurisdiction would create an anomie or 'a zone of indifference of the law with the law itself'.[38] Citing the Brazilian Constitution, which gives

29 *Ibid.*, pp. 5–6, 30.
30 *Ibid.*, p. 7.
31 *Ibid.*, p. 8.
32 *Ibid.*, pp. 9–11.
33 European Convention on State Immunity, Basle (Council of Europe, ETS No. 74), 16 May 1972, entry into force 11 June 1976 (Basle Convention). The territorial tort exception excludes jurisdictional immunity in proceedings relating to redress for injury to person or damage to property, irrespective of whether the underlying act was carried out in the exercise of sovereign or non-sovereign function, provided that the events took place in the forum state and the author was present in the forum state's territory at the material time, *see* Article 11, Basle Convention; Article 12, UN Convention.
34 *See* ICJ, *Germany* v. *Italy*, para. 57.
35 *Ibid.*
36 Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, pp. 24, 27–28.
37 *Ibid.*, p. 24.
38 *Ibid.*, pp. 24, 25, 27.

prevalence to human rights, the court concluded that the human rights to life, access to justice, and the truth must prevail.[39]

The three municipal courts, therefore, seem to have agreed that the rule of state immunity does not apply to sovereign acts that could be characterised as international crimes committed in the forum state territory, where no alternative mechanisms for access to court are available to the victims. At first sight the Italian and the Korean judgments could be interpreted as basing their conclusions on the alleged act's illegality under international law. The two courts clearly took the position that the rule of state immunity was intended to apply to acts in the exercise of regular government functions, not to violations of international law. Such an approach is limited because of the difficulty in determining the illegality of the alleged act at the preliminary stage of establishing jurisdiction, an issue raised in the literature and in the ICJ judgment in *Germany v. Italy*. While the two courts took into account the potential unlawfulness of the underlying events, ultimately the courts relied on the conflict between the rule of state immunity and the norms protecting the victims' right to access to court, both of which are procedural norms relevant to the question of jurisdiction. To establish jurisdiction, a court would need not make a finding on the illegality of the underlying act but only satisfy itself that the victim had standing. The arguments and evidence submitted with the claim may constitute a sufficient basis to make a *prima facie* determination that the plaintiff could be a victim of a serious violation of international law committed by organs of the foreign state in the forum state territory.

The exception to immunity defined by the three municipal courts thus seems to be rather narrow. First, it does not apply to any tortious acts in an armed conflict but only to those that could constitute violations of absolute norms of international law or could be defined as international crimes. Second, the exception does not apply to violations of absolute norms of international law committed anywhere in the world but only to those committed within the forum state's territory. A trend to exclude immunity for violations of *jus cogens* or peremptory norms of international law was first identified by the ILC in 1999.[40] Some of this early practice, however, concerned acts committed outside the forum state's territory.[41] In contrast, the recent judgments make it

39 *Ibid.*, p. 27 citing Article 4.11, Brazilian Constitution.

40 ILC, *Extract from the Yearbook of the International Law Commission, 1999, vol. II*(2)*, Report of the International Law Commission on the work of its fifty-first session, 3 May – 23 July 1999, Official Records of the General Assembly, Fifty-fourth session, Supplement No.10* (A/54/10) (ILC Report (1999)), Appendix, p. 172, para. 3.

41 ILC referred to a growing number of civil claims primarily before UK and US courts regarding acts of torture in the defendant state and US legislation denying state immunity in cases of terrorism, *ibid.*, Appendix, p. 172, paras 4–7, 9–10.

clear that the nature of the alleged act could be taken into account only where the principle of territoriality applies. A third condition to allow the exception is the absence of alternative judicial mechanisms for the victims, as proceedings in the territorial state seem to have been the only available judicial remedy.[42] Under national constitutions and international human rights treaties victims of serious violations have a right to access to court and the state has a corresponding obligation to ensure this right. In light of applicable constitutional and treaty provisions the exception to immunity may be seen not only as reasonable but also as necessary to fulfil a state's obligations. The recent judgments suggest that an exception to immunity was granted because all three conditions were met. The three conditions therefore applied cumulatively.

The Brazilian Federal Supreme Court was the first and the only court to date to find that application of state immunity in such circumstances was inconsistent with the victims' right to the truth. The court relied on Article 32 of Additional Protocol I (API), providing that the activities of parties to a conflict with respect to the missing should be guided by the right of the families to know the fate of their relatives.[43] It would be difficult to agree that the API created a legally enforceable individual human right, considering that it introduced an obligation of effort, rather than one of result, and, as noted by the International Committee of the Red Cross (ICRC), did not impose any obligations on a state party with respect to its own nationals.[44] International human rights jurisprudence, however, has recognised a victims' right to the truth as a right to receive a judicial verification of the facts of the violation and the role of those involved. The Brazilian court's position that unavailability of judicial avenues for elucidation of the circumstances of potential serious violations denies the exercise of the right to the truth as a human right[45] is consistent with this jurisprudence. As it will be discussed below, civil proceedings provide a judicial fact-finding forum, which could lead to establishing the underlying

42 The Brazilian judgment considered not only legal but also factual barriers to access to court but none of the other courts adopted this approach.

43 Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, *supra* note 1, p. 24, referring to International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1125 UNTS 3), 8 June 1977, entry into force 7 December 1978 (Additional Protocol I or API).

44 In this respect, the ICRC has noted that the Drafting Committee had clearly confirmed that the section on the missing and the dead did not impose any obligations on a state party with respect to its own nationals, C.Pilloud, J. Pictet, Y. Sandoz, and C. Swinarski. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva, 1987), para. 1212.

45 Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, *supra* note 1, p. 24.

facts and their unlawfulness and could serve as a mechanism to ensure the victims' right to the truth.

3 Is the Recent Municipal Court Practice a Departure from Earlier Jurisprudence?

3.1 *Early Municipal Court Practice*

The ILC observes that since the emergence of state immunity as a rule of customary law in the nineteenth century, municipal court practice has been divergent.[46] The practice on the application of the rule in cases of serious human rights violations is no exception. One of the first courts to rule on the issue on the basis of customary international law was the Hellenic Supreme Court, which found that the territorial tort exception applied to tortious acts committed in an armed conflict, provided that the underlying acts targeted specific individuals and were not connected to military action.[47] According to the court, state immunity did not apply to criminal acts by organs of an occupying power, committed as an 'abuse of sovereign power … contrary to … principle[s] generally accepted by civilised nations'.[48] The judgment's reference to the territorial tort exception of the Basle Convention, which was ratified by Germany but not by Greece, could hardly be seen as a reference to applicable treaty law. However, it could be seen as an indication that the court may have considered the reasonableness of excluding national jurisdiction to claims based on acts as those alleged, as the territorial tort exception allowed jurisdiction for claims for redress for injury or damage caused by sovereign acts in the territorial state. The other main reason supporting the court's conclusion was the alleged act's unlawfulness under international law. The court distinguished between conduct in the course of military action, which it saw as part of the relationship between states and, therefore, immune from jurisdiction and acts targeting specific individuals in violation of international law, to which the rule should not apply.

46 ILC Report (1978), *supra* note 5, p. 154, para. 26; ILC Report (1980), *supra* note 4, p. 143, para. 8.

47 Greece, Court of Cassation (*Areios Pago*), *Prefecture of Voiotia* v. *Federal Republic of Germany*, Case No. 11/2000, Judgment, 4 May 2000, 129 ILR 513 (Greece, Hellenic Supreme Court, *Voiotia* v. *Germany*, 129 ILR 513), pp. 518–519.

48 *Ibid*. The claim concerned the killings of Greek nationals by German forces in the Greek village of Distomo in June 1944.

The Italian Court of Cassation generally agreed with the Hellenic Supreme Court. It allowed compensation claims against a foreign state based on events of the Second World War, the main argument in support being that *jus cogens* rules of international law protecting fundamental human rights trump the rule of state immunity.[49] While space does not allow a more detailed exploration of the Italian jurisprudence, the Court of Cassation's took into account that: municipal jurisprudence affirming state immunity in similar cases concerned crimes committed outside the forum state,[50] there was a growing recognition of the territorial tort exception,[51] Italy's compliance with international law could not breach the principles of the Italian Constitution, including those protecting fundamental human rights,[52] and international law had evolved profoundly since the end of the war.[53]

Several municipal courts came to the opposite conclusion. Two years after the first Greek judgment, another chamber of the Hellenic Supreme Court, the Special Supreme Court, found in *Margellos* that a foreign state was entitled to jurisdictional immunity with respect to a claim based on allegations of *jus cogens* violations of international law, committed during the Second World War.[54] To reach this conclusion the Special Supreme Court relied primarily on two judgments of the European Court of Human Rights (ECtHR)—*McElhinney v. Ireland* and *Al-Adsani v. United Kingdom*.[55] This is problematic because in both cases the ECtHR restricted the application of the rule of state immunity to circumstances that were materially different from those in *Margellos*.

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49 Italy, Court of Cassation, *Ferrini* v. *Federal Republic of Germany*, Decision No. 5044/2004, Judgment, 11 March 2004 (Italy, Court of Cassation, *Ferrini* v. *Germany*), 128 ILR 659; Italy, Court of Cassation, *Germany* v. *Mantelli*, Case No. 14201/2008, Decision on Jurisdiction, 29 May 2008, Oxford Reports on International Law (ORIL), edited by A. Nollkaemper and A. Reinisch; reporters: A. Chechi and R. Pavoni (paragraph numbers refer to the numbers assigned by ORIL to the original text), para. 11; Italy, Court of Cassation, *Germany* v. *Milde*, Case No. 1072/2009, Judgment, 13 January 2009, ORIL, edited by A. Nollkaemper and A. Reinisch; reporter: M. Iovane (paragraph numbers refer to the numbers assigned by ORIL to the original text) (Italy, Court of Cassation, *Germany* v. *Milde* ORIL); Italy, Court of Cassation, *Federal Republic of Germany* v. *Prefecture of Voiotia*, Case No. 11163/11, Judgment, 12 January 2011, 150 ILR 706 (Italy, Court of Cassation, *Germany* v. *Voiotia*, 150 ILR 706).

50 Italy, Court of Cassation, *Ferrini* v. *Germany*, 128 ILR 659, p. 670, para. 10; Italy, Court of Cassation, *Germany* v. *Voiotia*, 150 ILR 706, p. 713, paras 31, 32.

51 Italy, Court of Cassation, *Ferrini* v. *Germany*, 128 ILR 659, pp. 671–673, paras 10.1–10.2.

52 Italy, Court of Cassation, *Germany* v. *Milde* ORIL, para. 7.

53 Italy, Court of Cassation, *Germany* v. *Voiotia*, 150 ILR 706, pp. 723–724, para. 48.

54 Greece, Special Supreme Court, *Margellos and Others* v. *the Federal Republic of Germany*, Case No. 6/2002, Judgment, 17 September 2002, 129 ILR 525 (Greece, Special Supreme Court, *Margellos* v. *Germany*, 129 ILR 525), p. 526.

55 *Ibid*., pp. 530, 531, para. 13.

In *McElhinney v. Ireland* the ECtHR took into account that it was open to the applicant to bring an action against the UK government before UK courts.[56] In *Margellos* the question whether the plaintiff had effective alternative means to exercise their right to access to justice was not discussed.[57]

The Special Supreme Court's reliance on *Al-Adsani v. UK* raises more questions. The acts supporting the claim in *Al-Adsani* did not take place in the territory of the UK but in Kuwait.[58] In its judgment the ECtHR made it crystal clear that its interpretation of the rule of state immunity concerned precisely this kind of situation—immunity in respect of 'civil claims for damages for alleged torture *committed outside of the forum state*'.[59] In *Al-Adsani* the principle of territoriality did not apply. The situation in *Margellos* was materially distinct as the alleged *jus cogens* violations took place in the forum state. Neither the majority nor the dissenters addressed this aspect of *Al-Adsani*. One could wonder, therefore, whether the Special Supreme Court's decision in *Margellos* might have been given *per incuriam*, *i.e.* whether it might have been 'wrongly decided, because the judges were ill-informed about the applicable law'.[60] This observation is important because, as will be discussed below, the decision of the Special Supreme Court in *Margellos* was a factor defining the position of other domestic courts and was relied on by the majority of the ICJ in *Germany v. Italy*.

After *Margellos*, other municipal courts followed suit. In 2003 the German Federal Court of Justice found that jurisdictional immunity applied to sovereign acts in an armed conflict.[61] Its main reasons were that the territorial tort

56 The ECtHR referred to the initial correspondence between the applicant and the UK government, in which the UK government had made it clear that there was no legal bar to bringing an action in Northern Ireland. In his response to the UK government the applicant had expressed his preference to do that in Ireland without referring to any procedural or other barriers, ECtHR, *McElhinney* v. *Ireland*, App. no. 31253/96, Judgment, 21 November 2001 (ECtHR, *McElhinney* v. *Ireland*), para. 39.

57 The court noted that liability could be asserted by other means, including by the victims in the courts of the defendant state, but did not enter into a discussion whether such a possibility existed under German law, Greece, Special Supreme Court, *Margellos* v. *Germany*, 129 ILR 525, p. 532, para. 14.

58 ECtHR, *Al-Adsani* v. *UK*, App. no. 35763/97, Judgment, 21 November 2001, (ECtHR, *Al-Adsani* v. *UK*), paras 10–12.

59 *Ibid.*, para. 66 (emphasis added).

60 *See* ICTY, *Prosecutor* v. *Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgment, 24 March 2000, para. 108.

61 Germany, Federal Court of Justice, *Greek Citizens* v. *Germany*, Decision, 26 June 2003, 129 ILR 556 (Germany, Federal Court of Justice, *Greek Citizens* v. *Germany* 129 ILR 556), pp. 559–562.

exception in the Basle Convention did not cover military action in wartime, especially not retroactively[62] and that since the Greek Special Supreme Court's ruling in *Margellos*, there was no doubt as to the application of the rule of state immunity.[63]

The French Court of Cassation similarly dismissed three compensation claims against a foreign state by French citizens who had been subjected to forced labour during the war,[64] finding that the foreign state had acted in its public powers.[65] The Court of Cassation did not provide further reasons for its decision.[66]

The Brazilian Superior Court of Justice took a similar position, finding that immunity for acts *jure imperii* was absolute and not subject to exceptions based on the alleged financial status of the claimant, whether the act was conducted in the territory of the forum state, or constituted a human rights violation.[67] The case before the Brazilian Superior Court of Justice concerned the sinking of *Changri-lá*,[68] the same fishing vessel as the more recent case before the Brazilian Federal Supreme Court, discussed earlier. In light of the latter decision, the ruling of the Brazilian Superior Court of Justice may no longer represent the authoritative position of the Brazilian judiciary.[69]

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62 *Ibid.*, pp. 560–561.

63 *Ibid.*, pp. 561–562.

64 *See* ICJ, *Germany* v. *Italy*, *supra* note 6, para. 73, citing France, Court of Cassation, Case No. 02-45961, 16 December 2003, Bull. civ., 2003, I, No. 258, p. 206 (the *Bucheron* case); France, Court of Cassation, Case No. 03-41851, 2 June 2004, Bull. civ., 2004, I, No. 158, p. 132 (the *X* case) and France, Court of Cassation, Case No. 04-47504, 3 January 2006 (the *Grosz* case).

65 C. Tomuschat, 'The international law of state immunity and its development by national institutions', 44(4) *Vanderbilt Journal of Transnational Law* (2011), 1105–1140, p. 1134.

66 *Ibid,* p. 1134–1135.

67 Brazil, Superior Court of Justice, *Changri-lá, Apúlio Aguiar Coutinho and ors* (*on behalf of Vieira de Aguiar*) v. *Germany*, Reparation proceedings, ordinary appeal judgment, No 2008/0042275-3, ILDC 1160 (BR 2008), judgment, 15 April 2008, ORIL, edited by A. Nollkaemper and A. Reinisch; reporters: A. Saliba and T. Garcia Maia (Brazil, Superior Court of Justice, *Changri-lá* v. *Germany*, ORIL), para. 15.

68 *Ibid.*, p. 3, reporter's notes F3, F4. In a case involving the sinking of another fishing vessel, *Barreto*, in similar circumstances, the district court of Rio de Janeiro followed the same approach and ruled that a foreign state's immunity from jurisdiction relating to public acts is absolute and does not allow exceptions, Brazil, Federal Court, Rio de Janeiro District, No 21 Court District, *Barreto* v. *Federal Republic of Germany*, Case No 66-RJ (2008/0042275-3), Decision, 9 July 2008, 168 ILR 475 (Brazil, District Court of Rio de Janeiro, *Barreto* v. *Federal Republic of Germany*).

69 The Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*) has jurisdiction as first instance court over cases involving members of the government and as court of appeal in general cases, whereas the Brazilian Federal Supreme Court (*Supremo Tribunal Federal*) acts as a constitutional court and as a court of appeal in certain cases, *see* Articles

Two other municipal courts also agreed that the rule on jurisdictional immunity applied to serious human rights violations committed during the Second World War but identified a conflict between this rule and the victims' right to access to court under national constitutions and the ECHR.[70] The Constitutional Court of Slovenia[71] and the Polish Supreme Court[72] granted immunity to Germany after conducting their own assessment of municipal practice.[73] Both courts discussed the conflict between the victims' right to access to justice and the application of the rule of state immunity, concluding that it did not materialise in the circumstances. The Slovenian Constitutional Court accepted that the victim could initiate proceedings before German courts according to the general rules on jurisdiction (*actor sequitur forum rei*).[74] In the words of the Polish Supreme Court, the victim had 'alternative, reasonable and effective legal means to protect his rights', namely 'as a rule, the possibility of bringing an action in the courts of the country that committed the act in violation of fundamental human rights'.[75] Neither judgment

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102 and 105, Brazilian Constitution. As discussed earlier, on 23 August 2021 the Brazilian Federal Supreme Court found that a foreign state did not enjoy immunity with respect to unlawful acts violating human rights, *see supra* note 27.

70 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (Council of Europe, ETS No. 5), 4 November 1950, entry into force 3 September 1953 (ECHR).

71 Slovenia, Constitutional Court, *A. A. against Supreme Court Order No. II Ips 55/98*, Decision, 8 March 2001, available online at www.us-rs.si/documents/f8/e1/up-13–992.pdf (accessed 28 May 2022) (Slovenia, Constitutional Court, *A.A.* Decision), p. 1.

72 Poland, Supreme Court, *Winicjusz Natoniewski* v. *Federal Republic of Germany*, SN IV CSK 465/09, Judgment, 29 October 2010, ORIL, edited by A. Nollkaemper and A. Reinisch; reporter: J. Krzeminska-Vamvaka (referred to as Winicjusz N v. Federal Republic of Germany), paragraph numbers refer to the numbers assigned by ORIL to the original text (Poland, Supreme Court, *Natoniewski* v. *Germany*, ORIL), para. 1.

73 The Slovenian court found that there was not yet general state practice accepted as law to support the conclusion that jurisdictional immunity did not apply to a compensation claim based on acts during the Second World War, Slovenia, Constitutional Court, *A.A.* Decision, *supra* note 71, paras 11, 14. The Polish Supreme Court reasoned that while the territorial tort clause in principle applied, it did not cover acts in an armed conflict and that in light of the Greek Supreme Court's ruling in *Margellos* and the UK House of Lords ruling in *Jones* v. *the Kingdom of Saudi Arabia,* jurisdictional immunity applied to *jus cogens* violations of international law, Poland, Supreme Court, *Natoniewski* v. *Germany*, ORIL, *supra* note 72, paras 32–34, 36, 38, 41, 60, 46, 51, 52 and 55. The court, however, did not take into account that *Jones* v. *the Kingdom of Saudi Arabia* and the ECtHR's judgment in *Al-Adsani*, on which *Margellos* was based, concerned acts outside the forum state. In contrast, the case before the Polish Supreme Court the condition of territoriality was met, since the underlying acts occurred in Poland.

74 Slovenia, Constitutional Court, *A.A.* Decision, para. 21, *see also* para. 18.

75 Poland, Supreme Court, *Natoniewski* v. *Germany*, ORIL, para. 61.

reveals whether the courts received submissions on this issue or what other considerations might have guided them. In 2003 the German Federal Court of Justice clarified that under German law there was no right for individual victims of armed conflict to claim compensation directly from the responsible state, based on the law applicable at the time of the underlying events, *i.e.*, 1944.[76] It is unclear how the Slovenian Constitutional Court and the Polish Supreme Court would have resolved the conflict between the victim's right to access to court and the application of the rule of state immunity had they been aware that legal action before German courts was not an available avenue to the victims.

The above discussion shows that the early court practice on whether a foreign state is entitled to immunity for *jus cogens* violations of international law was divergent. The low number of municipal court rulings and, in some cases, the limited reasoning makes it difficult to draw a firm conclusion. While states have been careful not to encroach upon the rights and privileges of other states, the above practice suggests that there are two clear situations in which states are likely to accord immunity: if the alleged *jus cogens* violations took place outside of the forum state territory, or if alternative means of redress are available to the victims. Beyond these two categories no clear answers exist. The municipal practice discussed above does not exclude that states might be inclined to consider a restriction to state immunity for civil claims based on *jus cogens* violations of international law committed in the forum state's territory if no alternative means for access to court are available to the victims.

3.2 *The ICJ Judgment in Germany v. Italy*

In *Germany v. Italy* the ICJ found that by exercising jurisdiction over Germany with regard to claims based on acts by German forces during the Second World War, Italian courts had violated Italy's obligation to accord jurisdictional immunity to Germany.[77] The recent practice denying immunity to a foreign state thus could be seen as being in direct contradiction with the ICJ's ruling. The municipal courts have sought to distance themselves from the ICJ judgment by limiting the scope of their inquiry to the compatibility of the ruling with national constitutions[78] or by finding that the ruling was not binding on

76 Germany, Federal Court of Justice, *Greek Citizens* v. *Germany*, 129 ILR 556, *supra* note 61, p. 565. *See also* Germany, *Federal Constitutional Court, Greek Citizens* v. *Federal Republic of Germany* (*Distomo Massacre* Case), Case No. 2 BvR 1476/03, Decision, 15 February 2006, 135 ILR 186 (Germany, Federal Constitutional Court, *Greek Citizens* v. *Germany*, 135 ILR 186), p. 191.

77 ICJ, *Germany* v. *Italy*, para. 107.

78 Italy, Constitutional Court, Judgement No. 238, paras 3.1, 3.2; *see* South Korea, Seoul Central District Court, Judgment of 8 January 2021, Section 3.C.3)(7).

them.[79] A closer look at the ICJ judgment may reveal, however, that the ICJ did not pronounce on the questions, which formed the basis of the courts' decisions to deny immunity.

As discussed in Section 2, the recent municipal practice allowed a limited exception to the rule of state immunity for acts that may be characterised as serious violations of international law, committed in the forum state's territory, when no alternative judicial remedies were available to the victims. It was these three factors together that shaped the municipal courts' approach. The ICJ's inquiry, structured around Italy's main arguments, considered two related but nevertheless distinct questions. First, whether under customary international law there was an exception to state immunity for sovereign acts occasioning death, personal injury, or damage to property on the territory of the forum state during armed conflict.[80] Second, whether state immunity applied to acts violating *jus cogens* rules of international law, irrespective of where the acts took place.[81] The first question before the ICJ was broader than the question before the municipal courts as it was not limited to serious violations of international law but included any tortious acts by members of a foreign force on the forum state's territory. The second question was also broader as it was not limited to *jus cogens* violations on the territory of the forum state but concerned events occurring anywhere in the world. Neither of these two questions, separately or together, specifically addressed the narrow issue of whether immunity applied to serious violations of international law committed in the forum state territory by the armed forces of a foreign state during armed conflict.

The municipal court practice cited by the ICJ, while relevant to the two questions the ICJ explored, could be of less significance to the narrower question before the municipal courts. The practice the ICJ considered under the first question included judgments relating to tortious acts, in times of peace or during occupation, by foreign forces present in the territorial state with that state's consent.[82] A small number of municipal cases dealt specifically with

79 Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, p. 23, citing Articles 38 and 59, ICJ Statute.

80 ICJ, *Germany* v. *Italy*, para. 65, *see also* para. 62.

81 *Ibid.*, paras 61 and 80.

82 *See ibid.*, para. 72, citing Egypt, *Bassionni Amrane v. John*, Gazette des Tribunaux mixtes d'Egypte, January 1934, p. 108 (concerning a road traffic accident by a member of the British Army of Occupation in Egypt); Belgium, Cour d'appel, Brussels, *S.A. Eau, gaz, électricité et applications* v. *Office d'aide mutuelle*, Pasicrisie belge, 1956 (cited in error 1957), Vol. 144, 2nd Part, p. 88; ILR, Vol. 23, p. 205 (concerning an accident caused by a British army truck transporting soldiers returning from leave); Germany Court of Appeal of Schleswig (Immunity of the United Kingdom, 7 *Jahrbuch für Internationales Recht*, 1957,

serious violations of international law in armed conflict. Most of these judgments were discussed in Section 3.1.[83] As we have seen this practice was divergent and nuanced and, in and of itself, could be seen as insufficient to draw a firm conclusion on whether immunity applied to *jus cogens* violations within the territorial state during armed conflict.

The jurisprudence discussed in relation to the second question—whether immunity applied to *jus cogens* violations irrespective of where the acts took place—concerned almost exclusively potential *jus cogens* violations outside of the forum state. The ECtHR judgment in *Al-Adsani*, on which the ICJ relied, made it clear that its ruling concerned the jurisdictional immunity of a state 'in a civil suit for damages in respect of acts of torture within the territory of *that* State'.[84] According to the ECtHR, there was not yet acceptance in international law that states are not entitled to immunity 'in respect of civil claims

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Vol. 7, p. 400; ILR, Vol. 24, p. 207) (concerning accident in the execution of a contract between a private contractor and British army officers in the Soviet-occupied zone of Germany); the Netherlands, Supreme Court, *United States of America* v. *Eemshaven Port Authority*, 2001, No. 567; ILR, Vol. 127, p. 225 (concerning damage caused by load falling overboard a US ship berthed in a Dutch port in 1990); France, Cour d'appel, Aix-en-Provence, 2nd Chamber, *Allianz Via Insurance* v. *United States of America* (1999), judgment of 3 September 1999, ILR, Vol. 127, p. 148 (concerning damage caused by USS Theodore Roosevelt at anchor off Marseilles in 1989); Italy, Court of Cassation, *FILT-CGIL Trento* v. *United States of America*, 83 *Rivista di diritto internazionale* (2000), 1155; ILR, Vol. 128, p. 644 (concerning a claim seeking restriction of low-flying training flights by US aircraft operating in Italy pursuant to a NATO agreement); UK, Court of Appeal, *Littrell* v. *United States of America* (*No. 2*), [1995] 1 Weekly Law Reports (WLR) 82; ILR, Vol. 100, p. 438 (concerning damages sustained by US Air Force member, during treatment in a US Air Force hospital in the UK); UK, House of Lords, *Holland* v. *Lampen-Wolfe*, [2000] 1 WLR 1573 (concerning a libel lawsuit by a US citizen teaching at US military base against a US citizen employed by the US Department of Defence); Ireland, Supreme Court, *McElhinney* v. *Williams*, [1995] 3 Irish Reports 382; ILR, Vol. 104, p. 691, ILR, Vol. 119, p. 367 (concerning an incident in which a British soldier, guarding a checkpoint at the border had entered the Republic of Ireland and attempted to fire a gun).

83 *See* ICJ, *Germany* v. *Italy*, paras 73 (referring the *Bucheron* case, the X case, and the *Grosz* case before the French Court of Cassation), 74 (referring to Slovenia, Constitutional Court, *A.A.* Decision, *supra* note 71; Poland, Supreme Court, *Natoniewski* v. *Germany*, *supra* note 72, and Brazil, District Court of Rio de Janeiro, *Barreto* v. *Federal Republic of Germany*, *supra* note 68), 75 (referring to Germany, Federal Court of Justice, *Greek Citizens* v. *Germany* 129 ILR 556, *supra* note 61). The ICJ cited also two lower court decisions from Belgium and Serbia, *see* ICJ, *Germany* v. *Italy*, para. 74, referring to Belgium, Court of First Instance of Ghent, *Botelberghe* v. *German State*, (2000) 168 ILR 471 and Serbia, Court of First Instance of Leskovac, judgment of 1 November 2001 (unnamed and unpublished).

84 ECtHR, *Al-Adsani* v. *the UK*, para. 61 (emphasis added), cited in ICJ, *Germany* v. *Italy*, para. 90.

for damages for alleged torture *committed outside the forum State*'.[85] This qualification could be seen as defining the boundaries of state immunity for acts potentially violating *jus cogens* rules of international law. The principle of territoriality and the territorial state's consent historically have played an important role in shaping the rule of state immunity. The fact that the ECtHR was careful to limit its finding to *jus cogens* violations *outside* the forum state should be seen in this context. The ECtHR has not ruled yet on the merits of an application concerning violations of *jus cogens* rules committed *within* the territory of the forum state.[86]

Similar conclusions could be drawn from the municipal practice cited in the court's consideration of the second question. The judgments of the UK House of Lords in *Jones v. Saudi Arabia*, of the Canadian Court of Appeal of Ontario in *Bouzari v. Islamic Republic of Iran*, and of the High Court of New Zealand in *Fang v. Jiang*,[87] concerned acts of torture allegedly committed outside of the territory of the forum state (respectively in Iran, Saudi Arabia, and China). The decisions of the Greek Special Supreme Court in *Margellos* and of the Polish Supreme Court in *Natoniewski*, were based on *jus cogens* violations of international law committed in the forum state. As discussed earlier, however, the two courts might have been influenced by what could be seen as an incorrect, or at least incomplete, interpretation of the ECtHR's judgment in *Al-Adsani*.

In light of the above, it would not be unreasonable to conclude that neither the two main questions of the ICJ's inquiry, nor the municipal court practice cited in the discussion provided an answer to the narrow question whether the rule of state immunity applied to civil claims involving sovereign acts that could be qualified as *jus cogens* violations or as international crimes committed in the forum state during armed conflict. As noted in Section 2, the recent

85 *Ibid.*, para. 66 (emphasis added). In its subsequent jurisprudence the ECtHR affirmed this position. In *Jones* v. *the UK* the ECtHR concluded that the approach of the Grand Chamber in *Al-Adsani* should be followed and found that the striking out of a claim against Saudi Arabia by UK courts in circumstances identical as those in *Al-Adsani* did not amount to an unjustified restriction on the victim's right to access to a court, ECtHR, *Jones and Others* v. *the United Kingdom*, App nos. 34356/06 and 40528/06, Judgment, 14 January 2014 (*Jones* v. *the UK*), paras 195, 196, 198. In one case, *Kalogeropoulou and Others* v. *Greece and Germany*, Decision No. 59021/00, Case Report ECtHR 2002-X, the ECtHR dismissed as manifestly ill-founded at the admissibility stage an application concerning acts committed in the forum state. However, this application did not concern a judicial refusal to hear a civil claim against a foreign state but a failure of the executive authorities to allow enforcement proceedings, to which a different standard applies, *see* Article 19, UN Convention; Article 23, Basle Convention.

86 *See supra* note 85.

87 *See* ICJ, *Germany* v. *Italy*, para. 85.

municipal rulings to deny immunity took into account that the application of the rule in such cases violated the victims' right to an effective remedy. The ICJ did not address the potential conflict between the rule of state immunity and the access to court rights of the victims. In considering Italy's second argument, that immunity did not apply to *jus cogens* violations, it rejected the proposition that denying immunity was justified as a means of last resort, finding no basis in state practice for this proposition.[88] We have seen that at least two municipal courts had identified a potential conflict between the rule of state immunity and the victims' right to access to court, noting, incorrectly, that alternative mechanisms were available to the victims. In *McElhinney v. Ireland*, cited by the ICJ, the ECtHR took into account that there was no bar for the victim to bring action before the courts of the foreign state.[89] The ICJ also found that there was no conflict between *jus cogens* rules and the rule of state immunity, reasoning that since the former was a procedural rule, it did not concern the lawfulness of the alleged act, nor did it conflict with the state's duty to make reparation,[90] and in any event, a rule on when jurisdiction may be exercised did not derogate from substantive *jus cogens* rules.[91] The ICJ did not specifically consider which *jus cogens* norms were violated or the potential impact the application of the rule may have on the victims' right to an effective remedy under international human rights treaties.

The ICJ judgment thus should not be seen as precluding a ruling by domestic courts on whether immunity applied to acts that could be qualified as *jus cogens* violations of international law, committed within the forum state in armed conflict where no alternative effective remedy was available to the victim.

88 *Ibid.*, paras 98 and 101.

89 ECtHR, *McElhinney* v. *Ireland*, paras 39, 40.

90 *Ibid.*, paras 93–94. *See also*, *ibid.*, para. 82.

91 *Ibid.*, para. 96. In addition to judgments already mentioned, the ICJ cited a decision of the French Court of Cassation of 9 March 2011 in *La Réunion aérienne* v. *Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, Bull. civ., March 2011, No. 49, p. 49) in support of its conclusion that there was no rule of customary international law excluding state immunity for *jus cogens* violations. El Sawah points out, however, that a careful analysis may lead to a different conclusion as the French court had emphasized that Libya was not accused of having committed or supported the alleged acts of terrorism, but of not repressing or disavowing them. The French court held that 'assuming that the prohibition of acts of terrorism could be placed at the level of an international norm of *jus cogens*, *which … could constitute a legitimate restriction to immunity from jurisdiction*, such a restriction would be disproportionate … since the foreign State's liability is not sought based on the commission of acts of terrorism but on its moral responsibility', S. El Sawah, 'Jurisdictional Immunity of States and Non- commercial Torts', in T. Ruys, N. Angelet, and L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, Cambridge, 2019), pp. 155–156 (emphasis added).

4 State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth

States parties to international human rights treaties have an obligation to ensure that victims of human rights violations have the right to an effective domestic remedy.[92] Human rights treaties and treaty bodies' jurisprudence make clear that in cases of serious human rights violations this remedy must be judicial. The Human Rights Committee (HRC), for example, has found that under the ICCPR a judicial remedy is required with respect to serious human rights violations such as torture and enforced disappearance.[93] It has also found a violation of the state's obligation to ensure an effective remedy on the basis of both lack of an effective investigation and the promulgation of domestic legislation prohibiting, on pain of imprisonment, the pursuit of legal remedies in such cases.[94] The ECtHR has interpreted the right to an effective remedy as requiring a remedy before a local court, regularly instituted, which is competent to both deal with the substance of the complaint and grant appropriate relief.[95] Furthermore, the domestic remedy must be effective in

92 International Covenant on Civil and Political Rights (UNGA Res.2200A (XXI)), 16 December 1966, entry into force 23 March 1976 (ICCPR), Article 2(3); International Convention on the Elimination of All Forms of Racial Discrimination (UNGA Res.2106 (XX)), 21 December 1965, entry into force 4 January 1969, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA Res.39/46), 10 December 1984, entry into force 26 June 1987 (CAT), Article 13; International Convention for the Protection of All Persons from Enforced Disappearance (UNGA Res.A/RES/61/177), 12 January 2007, entry into force 23 December 2010 (ICPPED), Article 8(2). With respect to regional treaties *see* ECHR, Article 13; American Convention on Human Rights (Organization of American States, Inter-American Specialized Conference on Human Rights, San José), 22 November 1969, entry into force 18 July 1978 (ACHR), Articles 8(1) and 25. The African Charter on Human and Peoples' Rights ((Organization of African Unity (CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, entry into force 21 October 1986), does not define explicitly a right to redress or a right to an effective remedy but the African Commission on Human and Peoples' Rights (African Commission) has articulated these rights through interpretation of the charter and other human rights documents, *see* African Commission, *General Comment No. 4 on the African Charter on Human and People's Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (*Article 5*) (African Commission, General Comment No. 4), paras 5–6.

93 HRC, *Sarita Devi Sharma et. al.* v. *Nepal*, Communication No. 2364/2014, Views, 6 April 2018 (CCPR//C/122/D/2364/2014), para. 8.4. In this respect, the committee has accepted that transitional justice bodies are not judicial organs capable of providing a judicial remedy, *ibid*.

94 HRC, *Farida Khirani* v. *Algeria*, Communication No. 1905/2009, Views, 26 March 2012 (CCPR//C/104/D/1905/2009), para. 7.10.

95 *See* H. Van der Wilt and S. Lyngdorf, 'Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness'

law and in practice, which requires that its exercise must not be hindered by the domestic authorities.[96] In the Inter-American system an effective judicial remedy is required by the text of Article 25(1) of the ACHR. It appears that an exception to the requirement for judicial remedy is allowed only in limited circumstances under the African Charter. The African Commission has accepted that non-judicial proceedings may constitute an effective remedy in cases of torture or inhumane treatment, provided that the victims have chosen for such proceedings.[97] In cases of serious human rights violations, the right to an effective remedy under international human rights treaties, therefore, is a right to a judicial remedy, requiring states to ensure that victims of serious human rights violations have access to a court of law. Alternative non-judicial remedies, such as the exercise of diplomatic protection by the state of the victims, are unlikely to meet this requirement.

Currently, it is widely accepted that an individual right to reparation for violations of international human rights law is developing under customary international law.[98] Scholarly opinion[99] and court practice[100] are divided as to

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and 'Inability' in the Context of the Complementarity Principle', 9 *International Criminal Law Review* (2009) 39–75, p. 47. *See also* ECtHR, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, App. no. 39630, Judgment, 13 December 2012 (ECtHR, *El-Masri* v. *FYROM*), para. 255.

96 ECtHR, *El-Masri* v. *FYROM*, para. 255.

97 African Commission, General Comment No. 4, para. 23.

98 E. Gillard, 'Reparations for violations of international humanitarian law', 85/851 *International Review of the Red Cross* (2003), 529–553 (Gillard), p. 536; R. Pisillo-Mazzeschi, Riccardo, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 *Journal of International Criminal Justice* (2003) 339–347, pp. 343, 347.

99 *See* C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual* (Martinus Nijhoff, Leiden, 1999), pp. 1–25; F. Haldemann, 'Principle 31. Rights and Duties Arising Out of the Obligation to Make Reparation', in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity, a Commentary* (Oxford University Press, Oxford, 2018), pp. 335–348; D. Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance, in W. Heintschel von Heinegg and V. Epping (eds.), *International Humanitarian Law Facing New Challenges*, (Springer, Berlin, Heidelberg, 2007), pp. 171–206. *But see* F. Kalshoven, 'Some Comments on the International Responsibility of States', in in W. Heintschel von Heinegg and V. Epping (eds.), *International Humanitarian Law Facing New Challenges*, (Springer, Berlin, Heidelberg, 2007), pp. 207–214; R. Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims?', in A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual* (Martinus Nijhoff, Leiden, 1999), pp. 149–172; C. Evans, 'The Right to Reparation in International Law for Victims of Armed Conflict' (Cambridge University Press, Cambridge, 2012).

100 Such a right has not been recognised by courts in Japan (*see* H. Fujita, 'Introduction: Post-War Compensation Litigation from the Viewpoint of International Law', in

whether an analogous right exists for victims of violations of the law of armed conflict. There is no disagreement, however, that a state's obligation to make reparation for its international humanitarian law violations is firmly established as a norm of customary law.[101] It is also accepted that reparation for both international human rights and humanitarian law violations is not limited to financial compensation and may take a variety of forms.[102] These include satisfaction, which has been defined as 'verification of the facts and full and public disclosure of the truth'.[103]

The right of victims of serious human rights violations to receive a judicial verification of the facts of the violation and the role of those involved, or the right to the truth, is a bourgeoning right. It is derived by human rights jurisprudence from the obligation under human rights treaties to conduct an effective investigation into serious violations of the right to life, the right to humane treatment and the right to liberty and security, in times of peace and during armed conflict, and from the obligation to ensure to the victims of such acts the right to an effective remedy. Under international human rights jurisprudence, the primary means to ensure the right to the truth is an effective

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H. Fujita, I. Suzuki, and K. Nagano, Kantaro (eds.), *War and the Rights of Individuals* (Nippon-Hyoron-sha, Tokyo, 1999), pp. 9–20, p. 13; K. Japutra, 'The Interest of States in Accountability for Sexual Violence in Armed Conflicts: A Case Study of Comfort Women of the Second World War', in M. Bergsmo and T. Song (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher, Florence, 2018), pp. 171–227, pp. 190–195) and Germany (*see* Germany, Federal Court of Justice, *Greek Citizens* v. *Germany* 129 ILR 556, p. 565; Germany, *Federal Constitutional Court, Greek Citizens* v. *Federal Republic of Germany*, 135 ILR 186, p. 191). For the opposite view *see* Greece, Special Supreme Court, *Margellos* v. *Germany*, 129 ILR 525, p. 532, para. 14; Slovenia, Constitutional Court, *A.A.* Decision, para. 21; Italy, Constitutional Court, Judgment No. 238; France, *Conseil d'Etat*, Case No. 238689, M. Papon, decision, 12 April 2002 (ordering the French government to pay half of the damages awarded to the civil parties); Poland, Supreme Court, *Natoniewski* v. *Germany*, ORIL, para. 61; South Korea, Seoul Central District Court, Judgment of 8 January 2021, Section 3.C.3)(6)); and Brazil, Federal Supreme Court, *Changri-lá*, ARE 954858/RJ, p. 24.

101 *See* ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (A/56/49(Vol. I)/Corr.4 (2001)), Article 31(1). *See also* J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005), p. 537.

102 For forms of reparation under international humanitarian law, *see* Fleck, *supra* note 99, p. 199; Gillard, *supra* note 98, pp. 531–532. For forms of reparation under international human rights law *see* HRC, *General Comment No. 31* [*80*] *The Nature of the General Legal Obligation on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13), para. 16; CAT, Article 14; ICPPED, Articles 24(4), 24(5)(b) and (c).

103 *See* Committee against Torture, *General Comment No. 3* (*2012*) *Implementation of article 14 by States parties* (CAT/C/GC/3), paras 2 and 16.

criminal investigation. The right to the truth, however, is a right to know the facts. As a judicial fact-finding forum, civil proceedings are capable of reaching factual conclusions about what occurred and about the lawfulness of the underlying acts and could serve as a mechanism to ensure the victims' right to the truth. Removing jurisdictional hurdles would enable victims to initiate judicial proceedings, which could eventually lead to establishing the facts of the underlying events. Civil proceedings would not discharge the authorities' obligation to investigate international crimes nor would they replace the judicial findings of a criminal court. However, when criminal trials are not a realistic option—because the accused are unavailable due to death, absconding from justice, or found to be unfit to stand trial, or when the criminal trial could not lead to establishing the factual circumstances of a serious violation of international law, for reasons such as successful defence of alibi, a finding that the perpetrators were not under the accused's command, or because certain incidents have been excluded from the indictment as a result of plea bargaining, among others—civil proceedings may provide a mechanism to satisfy the victims' right to the truth. If a criminal trial involving the same underlying acts eventually takes place, the findings of the civil court could be considered and weighed by the criminal court as part of the evidence admitted in the criminal proceedings. The conclusions of the former would not bound the latter, as each court would be following its own rules of procedure.

Recognition by the foreign state, which is alleged to have committed the acts in question within the territory of the forum state, of an individual victims' right to claim reparation in the foreign state's courts would provide the victims with an avenue to receive judicial verification and public acknowledgement of the facts surrounding serious violations of international humanitarian and human rights law. Equipped with the attendant fair trial guarantees, civil proceedings in the state alleged to have carried out the acts in question could provide reparation to the victims in the form of satisfaction or judicial verification and public disclosure of the facts.

Jurisdictional immunity should be distinguished from immunity from execution,[104] to which stricter rules apply. Without the cooperation of the state perpetrator it may be impossible to enforce an award for compensation by a civil court in the territorial state. This, however, should not be a reason to deny jurisdiction. The right to reparation for humanitarian law violations is often seen as having serious financial implications for the responsible state but for

104 *See* Article 19, UN Convention; Article 23, Basle Convention.

the victims the financial award may be less significant. Studies suggest that a main factor motivating the victims' decision to bring a claim against a foreign state is the need for them to receive an official acknowledgment and public disclosure of the facts of their ordeal and to have their voices heard.[105]

5 Conclusion

Recent municipal court practice has denied jurisdictional immunity to foreign states for claims based on *jus cogens* violations in the forum state, finding the rule incompatible with the constitutional protection of fundamental human rights and specifically the right to access to court. The recent jurisprudence is rooted in earlier municipal court practice. The ICJ did not consider specifically whether the rule of state immunity applied to acts that could be characterised as *jus cogens* violations or international crimes committed within the territorial state if no alternative mechanisms to exercise the victims' right to access to court existed. Recognition by the responsible state of an individual right to claim compensation for serious international law violations in armed conflict could provide victims with reparation in the form of satisfaction.

When legal or other hurdles make it impossible for victims to institute proceedings before the courts of that state, an exception to the jurisdictional immunity in the territorial state could ensure the victims' rights to access to court and to the truth. Establishing the facts of an alleged serious human rights violation through the judicial process and making the judicial findings public would also satisfy the general public's interest to know the factual circumstances of potentially serious violations of international law. Rather than having a negative effect on bilateral relations, fair and public civil proceedings, in which the rights of the parties are fully respected, may help the general

105 Japutra's study reveals that at least in five lawsuits initiated by victims of the 'comfort women' system in Japan the first relief sought by the plaintiffs was not financial compensation but an official apology from the Japanese government, Japutra, *supra* note 100, pp. 189, 190, 193, 194, 195. Some claims have also sought revision of the presentation of the 'comfort women' system in Japanese school textbooks, *see* Japutra, *supra* note 100, p. 189. Frits Kalshoven has made similar observations. Commenting on his experience as an expert witness in the 'comfort women' cases before the Tokyo District Court, he notes:

> I learned one important thing. These women, victims of multiple rape by members of the Japanese armed forces in territories under Japanese occupation were not seeking financial retribution: what they really wanted was to be able to tell their story – a thing many of them had not been able to do for long years after the war. Kalshoven, *supra* note 99, p. 213.

public on both sides of the conflict understand better and acknowledge what had occurred. In this way civil proceedings could foster reconciliation and mutual trust in the long term.

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