NOTES

GOETHE, HOMELESS IN ROME? STATE IMMUNITY AND HUMAN RIGHTS IN *GERMANY V. ITALY (II)*

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ABSTRACT

In 2012, in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), *the International Court of Justice (ICJ) ruled that Italy had violated Germany's jurisdictional immunity by awarding damages to World War II victims of forced labor in its domestic courts. The ICJ's 2012 judgment found that customary international law did not recognize an exception to the principle of jurisdictional immunity for serious violations of fundamental human rights. To support its analysis, the Court adopted an inaccurate and incomplete reading of relevant case law and legislative practice, opting to maintain a stricter approach to immunity. Because it failed to account for the lack of a clear and definite answer to the issue posed by the case, domestic courts and states have somewhat disregarded the ICJ's judgment. In fact, courts in Italy persevered in their approach, leading Germany to file a new case before the ICJ,* Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy), *in 2022.*

This Note looks back to the 2012 judgment and highlights the flaws of its reasoning. Taking stock of the various developments that have occurred since 2012, it then offers a renewed reading of the law of jurisdictional immunity as it presently stands. Should the ICJ reach the merits of Germany's second case, this Note argues that customary international law no longer clearly bars courts from exercising jurisdiction over foreign sovereigns who have committed serious violations of fundamental human rights.

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I. Introduction

During his tour of Italy, between 1786 and 1788, Goethe visited Rome on a trip memorialized by Tischbein with a painting entitled *Goethe in the Roman Campagna*, which portrays the German author in the Roman countryside.[1] Later, the poet returned posthumously to the Italian capital with the creation of an eponymous Institute, which "promotes German language and German culture in Italy."[2] This thus far peaceful stay was, in 2022, disrupted by the prospect of a measure of attachment against various properties of Germany across Italy.[3] By May 25, 2022, the Institute's premises were to be sold at auction to execute an Italian court's judgment ordering Germany to pay reparations for acts committed during World War II; thus, Goethe was to be returned to his *Roman Campagna*, as in Tischbein's painting.

Besides the oddity of this case's presentation—in addition to the Goethe Institute, the measure of attachment also concerned the German School in Rome's facilities[4]—it piques interest as it sounds troublingly familiar to the international jurist. Indeed, it seems to be an encore to the International Court of Justice's (ICJ) 2012 judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*.[5] In this decision, the Court held that Italy had violated Germany's jurisdictional immunity—

1. Johann Heinrich Wilhelm Tischbein, *Goethe in the Roman Campagna* (1787), 164 × 206 cm, Städel Museum, Frankfurt (Ger.).

2. *See* Questions of Jurisdictional Immunities of State and Measures of Constraint Against State-Owned Property (Ger. v. It.), Application Instituting Proceedings, ¶ 58(b) (Apr. 29, 2022), https://www.icj-cij.org/sites/default/files/case-related/183/183-20220429-APP-01-00-EN.pdf. [hereinafter Application Instituting Proceedings].

3. *Id.* ¶ 27.

4. *Id.* ¶ 58(d).

5. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99 (Feb. 3).

the right of one state not to be subjected to proceedings in another state's courts[6]—by allowing its courts to entertain reparation suits brought by descendants of Italian internees and enforcement proceedings for a Greek judgment ordering reparations for the Distomo massacre of 1944.[7] This similarity was certainly not lost on Germany. When applying to the ICJ, Germany requested the indication of provisional measures on the basis of the 2012 decision which, it believed, had "authoritatively restated" its right to immunity.[8]

In the 2012 judgment, the ICJ specifically addressed Italy's claim[9] that the "particular nature of the acts"[10] in question, which all parties agreed[11] amount to "war crimes and crimes against humanity,"[12] prevented Germany's assertion of immunity. The Court squarely rejected that claim, holding that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflicts."[13] This judgment was, furthermore, a contentious decision, the holding of which is understood to be binding upon the parties before the Court.[14] Yet, and against the Italian legislature's will, it is specifically this conclusion that the Constitutional Court of the Italian Republic refused to give effect to in the domestic legal order,[15] allowing for the matter to make its way back to the Peace Palace.

This Note seeks to inform the ICJ's forthcoming decision in *Germany v. Italy (II)*. It begins by arguing in Part II that the judgment in *Germany v. Italy (I)* offered a conservative analysis of customary international law,

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6. G.A. Res. 59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property, ¶ 1 (Dec. 2, 2004) ("A State shall give effect to State immunity . . . by refraining from exercising jurisdiction in a proceeding before its courts against another State.") [hereinafter U.N. Convention on Jurisdictional Immunities].

7. Ger. v. It., 2012 I.C.J. ¶ 30.

8. Application Instituting Proceedings, *supra* note 2, ¶ 57.

9. Italy articulated two claims, one based on the "territorial tort principle," and the other entitled "[t]he subject-matter and circumstances of the claims in the Italian courts," Ger. v. It., 2012 I.C.J. ¶¶ 62, 80. This latter claim is itself divided in three strands, the first of which is of particular interest to this Note. *Id.* ¶ 80.

10. *Id.*

11. *Id.* ¶ 52 ("Germany has fully acknowledged the untold suffering inflicted on Italian men and women . . . .") (internal quotation marks omitted); *id.* ¶ 94 ("The illegality of these acts is openly acknowledged by all concerned.").

12. *Id.* ¶ 80.

13. *Id.* ¶ 91.

14. Statute of the International Court of Justice, art. 59, June 26, 1945, 33 U.N.T.S. 993.

15. *See* Corte costituzionale [Corte cost.] [Constitutional Court], 22 ottobre 2014, n. 238, Foro it. 2015, I, 1152 (It.).

based on flawed and oft inaccurate reasoning. Part III then turns to legal developments subsequent to that judgment, underlining the Court's precarious relationship with domestic jurisdictions on a subject in which they wield significant powers and responsibility. In exercising this power, domestic courts and legislatures have significantly questioned an absolute understanding of jurisdictional immunity seemingly defended by the ICJ. Considering these elements, Part IV of this Note deals with res judicata, mootness, and the merits of *Germany v. Italy (II)* to explore possible avenues for the Court's judgment, showing that customary international law does not preclude a circumstantial, permissive exception to jurisdictional immunity. Part V concludes, establishing that the ICJ's first attempt to solve this issue was unsatisfactory and that a narrower, more modest ruling on this second try may be more adequate.

II. Denying a Human Rights Exception

The "conservative"[16] 2012 judgment of the Court in *Germany v. Italy (I)* should—or, at least, could—have put an end to a "broad[] split on the significance of the nature of allegations to immunity determinations."[17] Shortly after the judgment's publication, one author argued it "is likely to put an end to the [unresolved question] of whether or not foreign States should be entitled to immunity . . . in case of serious violations of human rights."[18] Such a vow however failed to account for the flaws of the Court's reasoning on the existence and direction of customary international law. Similarly, this argument did not consider that the ICJ limited the temporal relevancy of its own judgment, stating it reflected "customary law as it presently stands," implicitly inviting future change.[19] Indeed, although it assuredly demonstrates the Court's "rhetorical finesse,"[20] this judgment exemplifies the difficulties the Court faces when identifying customary international law.

16. Horatia Muir Watt, *Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles*, 3 Revue Critique de Droit International Privé [Rev. Crit. Dr. Int'l. Priv.] 539, ¶ 3 (2012) (Fr.).

17. Lorna McGregor, *State Immunity and Human Rights: Is There a Future After Germany v. Italy?*, 11 J. Int'l Crim. Just. 125, 128 (2013).

18. Andrea Bianchi, *Gazing at the Crystal Ball (Again): State Immunity and* Jus Cogens *Beyond Germany v Italy*, 4 J. Int'l Disp. Settlement 457, 458 (2013).

19. *See* Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶¶ 91, 83 (Feb. 3) (inquiring "[W]hether customary international law *has developed to the point* where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict.") (emphasis added).

20. Bianchi, *supra* note 18, at 468.

After a brief *chapeau*, in which the Court recognizes the seriousness of the subject matter,[21] the opinion sets the stage for its analysis of customary international law, indicating it will refer to domestic judgments, legislation, and states' claims before foreign courts.[22] Section II.A begins by placing Italy's argument in the context of the customary international law of jurisdictional immunity. Turning to the substance of the Court's analysis, Section II.B looks at the rigidity of the view adopted by the Court on the procedural placement of jurisdictional immunity in domestic litigation. Section II.C details the Court's misunderstanding of French and European case law that it relies on. Section II.D sheds light on statutory schemes regarding state-sponsored terrorism, which the Court chose to ignore.

A. *Italy's Claim and the Law of Jurisdictional Immunity*

The law of jurisdictional immunity has a long history, often traced back to Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*.[23] In *Germany v. Italy (I)*, both parties agreed that "immunity is a fundamental principle of the international legal order."[24] Lord Browne-Wilkinson expressed that the principle entails "that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state."[25]

Today, two broad principles coexist: the absolute approach and the restrictive (or relative) approach. Under the absolute approach, a "sovereign [is] completely immune from foreign jurisdiction in all cases regardless of circumstances."[26] Under the more recently developed[27] restrictive approach, "immunity [is] available as regards governmental activity, but not where the state [is] engaging in commercial activity."[28] While acts of sovereign power are referred to as *acta jure imperii*, private and commercial

21. *See* Ger. v. It., 2012 I.C.J. ¶ 52 (characterizing the German Reich's actions as "displaying a complete disregard for the 'elementary considerations of humanity'").

22. *See id.* ¶ 55.

23. *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) ("This perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.").

24. Jurisdictional Immunities of the State (Ger. v. It.), Counter-Memorial of Italy, ¶ 4.6 (Dec. 22, 2009) https://www.icj-cij.org/sites/default/files/case-related/143/16648.pdf [hereinafter Italy Counter Memo].

25. *R v. Bow St Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC (HL) 147, 201. (U.K.).

26. MALCOM N. SHAW, INTERNATIONAL LAW 701 (6th ed. 2008).

27. *See infra* note 143 and accompanying text.

28. SHAW, *supra* note 26, at 701.

activities are known as *acta jure gestionis*.[29] The ICJ noted, in *Germany v. Italy (I)*, that "many States (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*,"[30] for which states retain complete immunity.

In this case, Italy's contention was not that Germany should be denied immunity as a result of the restrictive approach. As the ICJ observed, Germany's acts, as acts of war, "clearly constituted *acta jure imperii*,"[31] for which it should have enjoyed full jurisdictional immunity. Instead, Italy argued that the "distinction between *acta jure imperii* and *acta jure gestionis* does not always operate as the leading criterion for establishing jurisdiction."[32] Italy was thus advocating that immunity could be denied for certain acts which, while categorized as *acta jure imperii*, involve "the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available."[33] In other words, acts of such blatant severity and illegality that they would make the state lose its privilege of jurisdictional immunity.

This argument failed to convince the ICJ. To reject it, though, the Court had to mischaracterize and ignore key developments from domestic courts and in national law.

B. *Jurisdictional Immunity and Procedure*

Before turning to the substance of the claim, the ICJ's opinion begins with an observation as to the nature of jurisdictional immunity. The judgment opens by reciting that this rule is "necessarily preliminary in nature,"[34] rejecting the possibility that a domestic court might have to "hold an enquiry into the merits in order to determine whether it had jurisdiction."[35] Such a characterization is, however, contradicted by significant state practice.

In a judgment that the ICJ refers to twice in other parts of its opinion, the French Court of Cassation emphatically held that, because a state's jurisdictional immunity is not absolute, a court "must appreciate the validity of [the claim to immunity] *in light of the substance of the dispute* to

29. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 59 (Feb. 3).

30. *Id.* ¶ 59.

31. *Id.* ¶ 60.

32. Italy Counter Memo, *supra* note 24, ¶ 4.7.

33. Ger. v. It., 2012 I.C.J. ¶ 61.

34. *Id.* ¶ 82.

35. *Id.* (emphasis added).

determine whether or not to sustain this objection."[36] Although this formulation may seem self-contradictory, applying restrictive immunity requires assessing whether the facts of the case warrant granting it. In countries applying restrictive immunity, such as France, determining whether the underlying act is *de jure gestionis* or *de jure imperii* will turn on a factual analysis and pertains to the merits of the case.[37] This procedural exception must be dealt with *in limine litis* (i.e., at the onset of the litigation) but must take into consideration the underlying claims and facts.[38] At the time the ICJ was deciding this case, the same understanding had been adopted by the Supreme Court of the United States[39] and the Swiss Federal Supreme Court.[40]

The ICJ's characterization of the jurisdictional immunity exception is doubtlessly meant to support the assertion that, being a *procedural* and *preliminary* rule, it does not preclude *substantive* responsibility.[41] This construction attempts to convince the reader that Italy's claim that it could exercise jurisdiction failed only because domestic courts are not the appropriate venue and not because the ICJ ignores the gravity of Italian internees' suffering or the meritoriousness of their claims. However, it ignores the absence of other working avenues for redress, a matter which was precisely at issue before the ICJ.[42]

C. *Jurisdictional Immunity in French and European Case Law*

As to the merits, the Court's analysis rests largely on a survey of decisions granting or denying jurisdictional immunity across different jurisdictions.[43] Over the course of this investigation, the analysis misconstrues three decisions of the French Court of Cassation. The ICJ relies on these three judgments dealing with plaintiffs seeking compensation for forced labor during World War II: two sought relief under labor laws before

36. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 16, 2003, 02-45.961, Bull. civ. I, No. 258 (Fr.) (emphasis added) (cited in the ICJ's judgment at ¶¶ 73 and 85) (author's translation).

37. *See id.*

38. *See id. See also infra* notes 39 and 40.

39. *See* Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004) (considering that the Foreign Sovereign Immunities Act "defies" the distinction between procedural and substantive rules).

40. Tribunal fédéral [TF] [Federal Supreme Court] Aug. 20, 1998, 124 ARRÊTS DU TRIBUNAL FÉDÉRAL [ATF] III 382, para. 3(b) (Switz.) ("Even if it is also relevant to the merits, the question of a State's jurisdictional immunity must be dealt with *in limine litis*.") (author's translation).

41. *See* Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 95 (Feb. 3) (making this point about the violation of a *jus cogens* norm).

42. *See id.* ¶ 98.

43. *See id.* ¶ 85.

labor courts[44] and one argued immunity did not apply as acts of coercion were not *acta jure imperii*.[45] In other words, none of these plaintiffs founded their claims on the premise that because Germany's actions constituted crimes against humanity or war crimes, Germany's jurisdictional immunity was precluded.[46] Unlike what the ICJ's judgment in *Germany v. Italy (I)* suggests, in none of those three cases was the Court of Cassation asked whether "international law no longer required State immunity in cases of allegations of serious violations of international human rights, war crimes or crimes against humanity."[47]

Equally unconvincing is the Court's reference to the decision of the European Court of Human Rights (ECtHR) in *Kalogeropoulou et al. v. Greece and Germany*.[48] In this case, the applicants sought to enforce a judgment obtained in Greek courts against Germany on German property in Greece.[49] Greek courts refused enforcement as the seizure of another state's property must first be authorized by Greek authorities, pursuant to domestic law and the principles of jurisdictional immunity.[50] The applicants filed suit before the ECtHR, arguing that the refusal to enforce a valid judgment violated their right to a fair trial under Article 6 § 1 of the European Convention on Human Rights (ECHR).[51] In a block quotation, the ICJ purports to draw upon the ECtHR's analysis in *Kalogeropoulou* that there is no "acceptance in international law"[52] of Italy's argument that jurisdictional immunity may be waived for crimes against humanity.[53] However, it fails to acknowledge the uniqueness of the ECtHR's role, captured in the sentence immediately following and omitted in the ICJ's opinion. There, the ECtHR writes that "[t]he Greek government cannot therefore be *required* to override the rule of State

44. Cass. 1e civ., Dec. 16, 2003, 02-45.961, Bull. civ. I, No. 258 (Fr.); Cass. 1e civ., Jan. 3, 2006, 04-47.504, JurisData 2006-031502 (Fr.).

45. Cass. 1e civ., June 2, 2004, 03-41.851, Bull. civ. I, No. 158 (Fr.).

46. The Court of Cassation was furthermore not at liberty to raise the matter *motu proprio*. *See* Cass. 1e civ., Jan. 7, 1992, 90-43.790, Bull. Civ. I, No. 3 (Fr.) (holding that states' jurisdictional immunity "is a privilege that can only be invoked by the State when it believes it is entitled to it") (author's translation).

47. Ger. v. It., 2012 I.C.J. ¶ 85.

48. Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 417.

49. *See id.* at 421-24.

50. *Id.*

51. Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights, ECHR], art. 6 § 1, Nov. 4, 1950, E.T.S. 5.

52. Ger. v. It., 2012 I.C.J. ¶ 85 (quoting *Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 428-29).

53. *Id.*

immunity *against its will*,"[54] before adding that this "does not preclude a development in customary international law in the future."[55]

There is a fundamental difference between the negative proposition, formulated by the ECtHR, that a state is not *obligated* to waive another's jurisdictional immunity, and the positive proposition, object of the ICJ's reasoning at hand, that a state *may* elect to do so.[56] This is particularly significant as, in the words of the Supreme Court of Canada, "[s]hould an exception to state immunity for acts of torture have become customary international law, such a rule could likely be *permissive* — and not *mandatory* . . . ."[57] The ECtHR's conclusion in *Kalogeropoulou*, that an individual may not constrain a state into exercising jurisdiction it does not wish to take up, says nothing about whether a state could so choose.[58] If the state were to do so, the right to access a court protected by Article 6 § 1 of the ECHR would rather simply have been fulfilled. Furthermore, the ICJ cites to another ECtHR judgment, *Al-Adsani v. United Kingdom*, in which the Court found that the United Kingdom could decline to exercise jurisdiction against Kuwait for torture.[59] As Judge Cançado Trindade has vigorously argued in dissent, the ICJ's characterization of this judgment must be relativized because of the Grand Chamber's 9-8 split reflected in the forceful dissents,[60] which warranted more careful consideration.

D. *Jurisdictional Immunity and State-Sponsored Terrorism*

The way that the ICJ disposed of Italy's argument pertaining to the United States' adoption of the Foreign Sovereign Immunities Act (FSIA) of 1996 is also unsatisfactory and serves as a further example of the Court's cursory reasoning.[61] Upon Italy's submission, the Court briefly referred to the waiving of immunity for a designated "state sponsor of terrorism" for acts of torture and extra-judicial killings.[62] Had the

54. *Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 429 (emphases added).

55. *Id.*

56. Kazemi Estate v. Iran, [2014] S.C.R. 3, ¶ 61 (Can.).

57. *Id.*

58. *See Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 429.

59. *See* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79.

60. *Id.* at 115 (Loucaides, J., dissenting) ("Any form of blanket immunity . . . which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests . . . is a disproportionate limitation on Article 6 § 1 of the Convention . . . .").

61. *See* Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 88 (Feb. 3).

62. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I).

Court investigated this matter further, it would have had to conclude that immunity is, in the United States, understood as a matter of political choice and not of absolute customary international law.[63]

Indeed, U.S. courts have recognized that their role, when waiving immunity, was to enforce "decisions of the political branches . . . on whether to take jurisdiction."[64] The same political decision is embodied in the enforcement of the FSIA's illegal expropriation exception,[65] which courts have held illustrates the United States' concern for "the property of its citizens abroad as part of a defense of America's free enterprise system."[66] Even though "genocide [is] notably lacking"[67] from this value-based choice, FSIA remains a relevant practice of a state using political choices to waive other sovereigns' immunity. Canada followed in 2012, waiving immunity for states identified as sponsors of terrorism.[68] The Supreme Court of Canada expressed the same understanding, recognizing that, beyond international law, immunity "also reflects domestic choices made for *policy reasons*."[69]

In sum, these two states have conducted a political evaluation and grant or deny immunity in set circumstances. This evaluation may be contested, and so may the values used to conduct it, but it remains that jurisdictional immunity is not absolute in practice, and it may be limited by particular national values. Doing so, the United States and Canada reason in a manner akin to that of the Constitutional Court of Italy which, for domestic constitutional reasons, finds immunity to be unacceptable in cases of serious human rights violations.[70]

The Court's treatment of this argument, simply observing that "no counterpart [exists] in the legislation of other States"[71] is, at best, hasty. The conclusion that "[n]one of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged"[72] is also one that is unnecessarily narrow, if not outright dishonest. Gravity is

63. Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)).

64. *Id.*

65. *See* 28 U.S.C. § 1605(a)(3).

66. Federal Republic of Germany v. Philipp, 592 U.S. 169, 183 (2021).

67. *Id.* at 170.

68. Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, § 4(1) (Can.).

69. Kazemi Estate v. Iran, [2014] S.C.R. 3, ¶ 45 (Can.) (emphasis added).

70. *See infra*, Part III.

71. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 88 (Feb. 3).

72. *Id.*

indeed an inherently relative concept, which must be understood in the political context outlined above. The difference between what the U.S. Congress has decided constitutes "grave" threats to free enterprise and international peace and what Italian courts have considered to be "grave" violations of human rights in fact only proves that different countries' legal systems are moved by different sets of values and preoccupations.

Finally, the judgment's principled reasoning is also reflected in the dissenting opinions. Judge Bennouna writes that he could foresee certain "exceptional circumstances" which would justify lifting the veil of immunity.[73] Doing so, he recognizes the fragility of the Court's sole focus on principles which rest, themselves, on uncertain grounds.[74] Overall, this is a common criticism formulated in the dissenting opinions,[75] with Judge Yusuf questioning: "Is customary international law a question of relative numbers?"[76]

The judgment in *Germany v. Italy (I)* therefore comes flawed and reveals the primary concern of the Court: constraining the development of customary international law on jurisdictional immunity. Tainted with misunderstanding, misrepresentation, or dismissal of relevant practice, this ruling also demonstrates the Court's difficult task in assessing customary international law. Under its canons, it seems as though numbers (of states adopting either practice) are more significant than underlying legal reasonings. In fact, this case is an example of how the inquiry into customary international law becomes a tautology: the ICJ concludes by finding there is no practice, using domestic or international judgments which themselves find no relevant practice. However, a finding that there is no practice by another court is just that, not an expression of that state's own practice or *opinio juris*.

In the end, the Court seems to portray customary international law as an obligation to lemming-like behavior, preventing any state from breaking off from practice, however thin.[77] When it is applied beyond *jus cogens*

73. Ger. v. It., 2012 I.C.J. at 176, ¶ 24 (dissenting opinion by Bennouna, J.).

74. *See* Ger. v. It., 2012 I.C.J. at 318-19, ¶ 9 (dissenting opinion by Gaja, J.) ("In this 'grey area' States may take different positions without necessarily departing from what is required by general international law."). *See also* Ger. v. It., 2012 I.C.J. at 298, ¶ 26 (dissenting opinion by Yusuf, J.) ("State immunity is, as a matter of fact, as full of holes as Swiss cheese.").

75. *See* Ger. v. It., 2012 I.C.J. at 310-11, ¶ 3 (dissenting opinion by Gaja, J.) ("The silence kept by the majority of States cannot be interpreted as an implicit criticism . . . ."). *See also* Ger. v. It., 2012 I.C.J. at 223, ¶ 143 (dissenting opinion by Cançado Trindade, J.) ("[T]ension, prevailing also in the case law of national courts . . . .").

76. Ger. v. It., 2012 I.C.J. at 297, ¶ 24 (dissenting opinion by Yusuf, J.).

77. *See*, Jones v. Saudi Arabia [2006] UKHL 26, [63] ("[T]he same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a

norms—norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"[78]—such an attitude will inevitably bring customary international law into a deadlock, relegating it to a dusty shelf. The ICJ's failure to engage with the arguments developed by Italian and Greek courts in the judgments that gave rise to this dispute, properly discuss French and European case law, and account for the FSIA has undermined the perennity of its ruling, coming under intense criticism in a tense dialogue with domestic jurisdictions.

III. An Insufficient and Contentious Judicial Dialogue

Given its very nature, jurisdictional immunity is meant to apply before domestic fora, making national courts the ordinary jurisdictions for its implementation and enforcement.[79] By extension, this primary responsibility also yields significant power to national courts to contribute to and shape state practice.[80] Such a role is also reinforced by the relatively late development of doctrine on the subject,[81] leaving national judges to lead the way. Because of this particularity, the ICJ is bound, when it addresses a case pertaining to jurisdictional immunity, to engage with domestic judgments. Each engagement—as well as the reciprocal response of domestic courts—constitutes an iteration of judicial dialogue.[82]

When the term was first coined, the notion of "dialogue of judges" was presented as a peaceful and constructive alternative to a "judges' war,"[83] which would avoid having different judges reach contradictory decisions, ignoring one another. The hope is that dialogue in international

national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.") (illustrating the same sentiment and how the ICJ further adopts the House of Lords' approach to customary international law here).

78. Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 142 (2019).

79. *See* André Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 Chinese J. Int'l L. 301, 315 (2006) (making a similar observation about diplomatic protection).

80. *See* Bianchi, *supra* note 18, at 474 ("[T]his is an area of law in which the activism of domestic courts has always led the way, one way or the other.").

81. *See* TF May. 22, 2007, 4C_379/2006, para. 3.4. (Switz.) ("However, the case law and doctrine do not offer teachings regarding a tortuous action for the reparation of damages pursuant to crimes against humanity, life and bodily integrity, committed abroad, by foreign perpetrators.").

82. *See* Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation*, *in* The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence 72, 73-74 (Helmut Philipp Aust & Georg Nolte eds., 2016) (discussing the concept of judicial dialogue and its role in interpretation).

83. CE Ass., Dec. 22, 1978, *Ministre de l'Intérieur v. M. Cohn-Bendit*, D. 1979, 155, 161 (Fr.) (conclusions Bruno Genevois).

legal orders can help solve normative and value conflicts, by ensuring mutual, reciprocal awareness.[84] Although the ICJ does not have a preliminary ruling mechanism that could function as a formal means of communication,[85] having to rule on the same issue as other courts necessarily creates such a dialogue. This indirect conversation, then, could be a way to accommodate different legal regimes' diverging priorities and concerns to produce a coherent and enforceable whole.

As a matter of fact, the ICJ occasionally demonstrates cognizance of and deference to domestic judicial rules and customs, avoiding "making any judgment upon the judicial system" of states.[86] A similar kind of language can be found in domestic courts' judgments[87] and is attested to by their explicit reference to ICJ judgments.[88] Even though the ICJ was not designed and does not function as an appellate court,[89] it must nevertheless deal with the consequences arising from domestic courts' judgments. And it does not usually shy away from doing so, as when it evaluates the likelihood of success in local remedies.[90] Because it is not an appellate court, it is also not itself able to ensure compliance with its rulings from domestic jurisdictions. In the absence of functional hierarchy, the "dialogue of judges" is therefore imposed upon it, as domestic courts could easily opt for war instead.[91]

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84. *See generally* ANA BOBIĆ, THE JURISPRUDENCE OF CONSTITUTIONAL CONFLICT IN THE EUROPEAN UNION (Paul Craig & Gráinne de Búrca eds., 2022) (providing an overview of the consequences of a deteriorating judicial dialogue within the European Union).

85. Unlike, for instance, the ECtHR or the ECJ. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, June 7, 2016 O.J. (C 202) 1; Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Oct. 2, 2013, C.E.T.S. No. 214.

86. Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 I.C.J 51, ¶ 72 (Mar. 30), https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf.

87. *See* Corte cost., 22 ottobre 2014, n. 238, Forto it. 2015, I, 1152, *Considerato in diritto* § 1 (It.) ("[T]he ICJ has 'absolute and exclusive competence' as to the interpretation of international law.") (rejecting Cristina M. Mariottini, *Deutsche Bahn AG v. Regione Sterea Ellada*, 114 AM. J. INT'L L. 486, 490 (2020) ("[Domestic courts] are not necessarily bound to follow the ICJ's interpretations of law.")).

88. *See* Cass. 1e civ., June 28, 2023, 21-19.766, D. 2023, 1267 (Fr.); Federal Republic of Germany v. Philipp, 592 U.S. 169, 182 (2021).

89. *See* Statute of the International Court of Justice, *supra* n. 14, art. 36.

90. *See* Certain Iranian Assets, 2023 I.C.J. ¶ 71-73.

91. Unlike when a superior court reverses or vacates a lower court's judgment, the ICJ cannot formally overturn a domestic decision. The Court itself has no legal power to force compliance over recalcitrant domestic courts and would depend on states to bring repeat cases (as is the case here) to enforce its decisions.

The ICJ does not, however, engage with the substance of domestic legal constraints that a domestic judge may be subject to.[92] This observation is not to say the international legal order should be dependent on domestic law, but rather that ensuring its effectiveness requires the ICJ to recognize—specifically in areas where domestic courts are to be particularly active—that domestic systems may occasionally face conflicting principles. Otherwise, subsequent developments such as those that came about in Italy are all but inevitable.

In the aftermath of *Germany v. Italy (I)*, Italy codified the substance of the ICJ's judgment in a 2013 statute, intended to settle any further controversy.[93] That statute was short-lived because it was held unconstitutional by the Constitutional Court of Italy in 2014.[94] Specifically, the Constitutional Court found, applying its well-established "counter-limits doctrine," that "insofar as the law of immunity from jurisdiction of States conflicts with [the inviolability of fundamental rights, including human dignity and the right of access to justice] it has not entered the Italian legal order and, therefore, does not have any effect therein."[95]

Without rejecting the ICJ's power over and determination of the boundaries of customary international law, the Constitutional Court of Italy nonetheless denies its implementation. It is precisely by resorting to different preoccupations—the protection of Italy's constitutional identity and the fundamental principles of its legal order—that the ICJ's judgment was circumvented. Here, because the Court's judgment remained silent on the underlying questions of fundamental human rights, it also marked a clear way for domestic courts to contest its conclusion.

The result is unequivocal for the Italian judge: international law may have its way, sanctioned by the ICJ, but "so long as" it is contrary to concurrent Italian constitutional norms, it remains nothing but a sealed proclamation. That the "so long as" doctrine, which was theorized by the German Federal Constitutional Court,[96] should be applied against its creator, is a feat of irony not lost upon judicial history.

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92. For the particular case of the protection of fundamental rights afforded under a national constitution potentially conflicting with European Union law, see Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Gertreide und Futtermittel, 1970 E.C.R. 1125.

93. Legge 14 gennaio 2013, n. 5, G.U. Jan. 29, 2013, n. 24 (It.).

94. Corte cost., 22 ottobre 2014, n. 238, Forto it. 2015, I, 1152 (It.).

95. *Id.* at *Considerato in diritto* § 3.5.

96. See, in particular, the Federal Constitutional Court's *Solange II* ("so long as") judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, BVerfGE 73, 339 (Ger.).

Brazil has also joined Italy in this movement to carve out an exception to jurisdictional immunity for serious violations of human rights. In its 2021 *Changri-lá* judgment, the Federal Supreme Court was called upon to rule on Germany's claim to immunity in proceedings concerning the 1943 sinking of a fishing boat by a German U-boat, off the Brazilian coast.[97] The court there held that "unlawful acts committed by foreign States in violation of human rights do not enjoy immunity from national jurisdiction."[98] Once again, this holding rests upon the prioritization of human rights under the national constitution.[99] Grounding its analysis in Judge Cançado Trindade's dissent, the court indeed found that "'access to justice' is itself a fundamental human right sufficient to cast aside immunity in this case."[100]

Similarly, a South Korean court agreed to waive Japan's jurisdictional immunity in a case seeking reparations for so-called "comfort women" because applying it led to "access to courts under the Constitution [to] become void."[101] In its January 2021 judgment, the Seoul District Court first disputed the ICJ's reasoning as to the procedural nature of immunity, holding that "the procedural law needs to be interpreted and applied in a way that '. . . best realizes the rights . . . under substantive law.'"[102] Secondly, the judgment "highlighted an exception to state immunity through the prism of the fundamental norms."[103] The 2021 holding of the Seoul District Court also draws upon an earlier trend in which the Supreme Court of Korea had allowed claims from deportees subjected to forced labor to proceed against Japanese corporations, on the basis of the victims' fundamental right to a court.[104]

These judgments have certainly drawn intense criticism, which unwaveringly appeals to conservative arguments advocating for the preservation of the status quo of restrictive jurisdictional immunity. One author writes that the Constitutional Court of Italy demonstrates "'typically

97. Eduardo Cavalcanti de Mello Filho, *Karla Christina Azeredo Venâncio da Costa and Others v. Federal Republic of Germany*, 117 AM. J. INT'L L. 309, 309 (2023).

98. *Id.* at 312 (quoting S.T.F., ARE 954858/RJ, Relator: Min. Edson Fachin, 23.08.2021, 191, Diário da Justiça Eletrônico [D.J.e], 09.24.2021, 39 (Braz.)).

99. *Id.* at 311.

100. *Id.* at 312 (quoting S.T.F., ARE 954858/RJ, Relator: Min. Edson Fachin, 23.08.2021, 191, D.J.e, 09.24.2021, 39 (Braz.)).

101. Dimitris Liakopoulos, *State Immunity and Inter-State Negotiations on Comfort Women*, 19 INDONESIAN J. INT'L L. 599, 607 (2022).

102. *Id.* at 606.

103. *Id.* at 607.

104. Delphine Porcheron, *Les actions civiles transnationales en réparation des û crimes du passé ý*, 4 REV. CRIT. DR. INT'L. PRIV. 645, 656-57 (2020).

Italian' opportunist proclivity"[105] and uses reasoning "based on the (doubtful) premise that national law might be 'more enlightened' than international law is."[106] Another criticized the Brazilian judgment for "conflat[ing] the concepts [of] human rights rules and *jus cogens* rules, weakening the opinion's analysis of international law."[107]

Other cracks are appearing elsewhere in the ICJ's edifice of jurisdictional immunity. In 1998, the estate of Alisa M. Flatow obtained a judgment against Iran for her wrongful death in a suicide bombing in Israel, where she was studying.[108] The case was brought before the U.S. District Court for the District of Columbia under the FSIA and was premised on Iran's sponsorship of the terrorist group which claimed responsibility for the attack.[109] In the aftermath of this case, the plaintiffs sought enforcement in France.[110] On appeal before the French Court of Cassation, they argued—as Italy had before the ICJ—that their fundamental right to a court should prevail.[111] The Court of Cassation, though making an explicit reference to the ICJ's judgment in *Germany v. Italy (I)*, refused to reject this argument on the sole principled grounds of international law.[112]

Indeed, the Court of Cassation first recalled an earlier judgment in which it had conducted a proportionality test between the prohibition of terrorist acts and the aims of jurisdictional immunity.[113] It then went on to add,

> [The court below] correctly held that even if the prohibition of terrorist acts could constitute a jus cogens norm of international law which *could legitimately restrict jurisdictional immunity*,

105. Carlo Focarelli, *State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years on*, 1 ITALIAN REV. INT'L & COMPAR. L. 29, 58 (2021).

106. *Id.* at 54.

107. Filho, *supra* note 97, at 313 (2023).

108. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

109. *Id.* at 8-10.

110. Cass., 1e civ., June 28, 2023, 21-19.766, D. 2023, 1267 (Fr.).

111. The plaintiffs namely argued that "the prohibition of acts of terrorism constitutes an imperative norm of international law whose very nature should absolutely oppose any invocation of a jurisdictional immunity by a State held liable for having actively participated in such acts" (§ 3(3°)) and that "the impossibility, for a party having obtained the definitive and irrevocable sentencing of a foreign State due to its direct implication in a terrorist attack, to obtain a recognition of this sentence in France, constitutes a manifestly disproportionate interference with its right to access to a tribunal" (§ 3(4°)). *Id.* ¶ 3 (author's translation).

112. *Id.* ¶ 10.

113. *Id.* ¶ 11 (citing Cass., 1e civ., Mar. 9, 2011, 09-14.743, Bull. civ. I, No. 49 (Fr.)).

> which does not follow from the current state of international law, the circumstances of the instant case could not allow for an exception to this immunity, since the Iranian State's sentencing to payment of damages . . . did not rest upon the demonstration of the direct implication of the Islamic Republic of Iran or its agents in the attack, but only on the tortious liability that this State should bear for the aid or material help provided to the group which claimed responsibility for the attack.[114]

Although the French Court of Cassation ultimately did not waive Iran's immunity, the mere suggestion that a proportionality test, between the right to access a court and the policy objectives of immunity, could be used to determine the fate of jurisdictional immunity is novel and revealing. Such an idea is also in direct contradiction with the ICJ's holding that "[i]mmunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed."[115] The fact that it was articulated after the ICJ's 2012 judgment, in a decision that cites to that same judgment, shows the true measure of the gap between the ICJ's principled, definitive understanding of immunity and the more malleable approach taken by domestic courts. The judicial dialogue on this subject is, it seems, rather cold. This holding also adds to the dynamic of relativization of jurisdictional immunity illustrated in Italy and elsewhere and perhaps indicates a willingness to entertain other claims, especially where *jus cogens* is concerned.[116]

Beyond judicial resistance, jurisdictional immunity has also been eroded by political and statutory choices. In the United States, as of 2016, "upward of one thousand American nationals have been awarded billions of dollars in damages against the Islamic Republic of Iran by U.S. courts on the basis of state sponsorship of terrorist activity."[117] And Canada's similar mechanism—as well as Canadian enforcement of U.S. judgments—is the subject of its own set of proceedings before the ICJ.[118]

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114. *Id.* ¶ 14 (author's translation) (emphasis added).

115. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 106 (Feb. 3).

116. *See* Baptiste Tranchant, *Jurisprudence française en matière de droit international public*, 124 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [REV. GEN. DR. INT'L. PUB.] 713, 718 (2020) (Fr.).

117. *Rubin v. Islamic Republic of Iran*, 130 HARV. L. REV. 761, 761 (2016).

118. For Iran's action before the ICJ against Canada, see Application Instituting Proceedings, Alleged Violations of State Immunities (Iran v. Can.), 2023 I.C.J. Pleadings 189 (June 27, 2023), https://icj-cij.org/sites/default/files/case-related/189/189-20230628-app-01-00-en.pdf.

Although some authors seek, with a great deal of acrobatics, to distinguish terrorism from war crimes, making the former a basis for waiving jurisdictional immunity,[119] both terrorism and human rights violations should be considered together. As is apparent from the way enforcement is dealt with in other jurisdictions, cases arising out of terrorist attacks mobilize the same principles to waive jurisdictional immunity. Indeed, the plaintiffs in the previously mentioned *Flatow* case also sought to enforce the same judgment in Italy, where the Italian Supreme Court of Cassation unsurprisingly held that Iran did not enjoy immunity as the terrorist attack it related to was a crime against humanity "insofar as it forms part of a systematic and deliberate attack [against] the civilian population."[120]

The existence of a "human rights exception" is no longer simply a fruit of the innovation of a rogue, activist domestic court system. Italian judgments have sparked significant interest in a matter that is no longer protected by the shield of absolutism the ICJ had initially defended in Germany *v. Italy (I)*.

IV. Perspectives for *Germany v. Italy (II)*

Considering the developments since the ICJ decided *Germany v. Italy (I)*, it is clear that the Court cannot simply refer to or merely reaffirm its first judgment to render its judgment on *Germany v. Italy (II)*. However, some procedural questions must be overcome before the Court may deal with the merits. Section IV.A begins with the issue of res judicata, as the similarities between both cases could raise an argument that *Germany v. Italy (II)* is precluded by *Germany v. Italy (I)*. Section IV.B turns to mootness and shows that the ICJ could use the recent adoption of a comprehensive indemnification scheme by Italy to avoid deciding on the merits. Finally, if the Court were to reach the merits, Section IV.C suggests a desirable outcome, in the form of recognizing a narrow and circumstantial exception to jurisdictional immunity in the case at hand.

A. *Res Judicata*

Prior to reaching the merits of this new, repeat case, the ICJ will first have to deal with the issue of res judicata. It is indeed notable that, although it was allegedly considering turning to the United Nations Security Council for enforcement of the 2012 judgment, pursuant to

119. *See* William S. Dodge, *Why Terrorism Exceptions to State Immunity Do Not Violate International Law*, Just Sec. (Aug. 10, 2023), https://www.justsecurity.org/87525/why-terrorism-exceptions-to-state-immunity-do-not-violate-international-law/.

120. Emanuel Castellarin, *Jurisprudence étrangère intéressant le droit international*, 4 Rev. Gen. Dr. Int'l. Pub. 819, 871 (2015) (Fr.).

Article 94(2) of the U.N. Charter,[121] Germany instead chose to file a new case before the Court.[122] In this new application, despite relying heavily upon the 2012 judgment, Germany steered clear from asking the Court to make any decision as to a failure to comply on Italy's part. Instead, it asked that the Court adjudge and declare the following:

> Italy has violated, and continues to violate, its obligation to respect Germany's sovereign immunity by allowing civil claims to be brought against Germany based on violations of international humanitarian law committed by the German Reich between 1943 and 1945, including, but not limited to, in 25 proceedings, listed in Annex 6, instituted against Germany since the judgment of the Italian Constitutional Court of 22 October 2014.[123]

For comparison, in 2012, the Court concluded "that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945."[124]

Whether Italy would raise res judicata—and thus, implicitly at least, acquiesce to the 2012 judgment's holding and recognize a failure, on its part, to faithfully execute it—could be irrelevant. Indeed, the Court has previously suggested that it could, *sua sponte*, rule on res judicata.[125]

To identify whether entertaining this new application would frustrate the principle of res judicata, the Court analyzes not only the triple identity of parties, object, and legal grounds, but also must "ascertain the content of the decision, the finality of which is to be guaranteed."[126] Although this

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121. U.N. Charter art. 94, ¶ 2.

122. *See* Joseph Weiler, *Editorial: Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux)*, EJIL:TALK! (Oct. 18, 2021), https://www.ejiltalk.org/germany-v-italy-jurisdictional-immunities-redux-and-redux-and-redux/.

123. Application Instituting Proceedings, *supra* note 2, ¶ 43.

124. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99 ¶ 139(1) (Feb. 3).

125. *See e.g.*, South West Africa (Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6, at 333 (July 18) (Jessup, J., dissenting) ("Moreover, the Court is always free, sua sponte, to examine into its own jurisdiction."); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 289-90 ¶ 15 (Feb. 26) (separate opinion by Owada, J.).

126. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. 100, ¶ 59 (Mar. 17).

matter can usually be resolved by looking at the judgment's operative clause, it may be necessary to refer to the reasoning to construe it.[127]

In the instant case, a first observation can be made that the 2012 judgment only constitutes res judicata for facts prior to the institution of proceedings. This would preclude any new analysis of the same issues (i.e., the same judgments from Italian courts). Second, Germany's new claim is somewhat poorly delimited (particularly because of the use of "including, but not limited to"),[128] as it alleges a lack of awareness of all civil cases pending against it in Italy.[129] Third, the final clause of Germany's pleading (which refers to cases "instituted against Germany since the judgment of the Italian Constitutional Court of 22 October 2014") could be interpreted to mean that the October 22, 2014 judgment constitutes the commencement of the new application's factual timeframe. Because it is subsequent to the ICJ's 2012 judgment, this reading would circumvent the res judicata question and allow the Court to proceed with the merits.

Even if the legal question is identical to that presented to the Court in 2012, the facts are different and the dispute arising out of these new developments are not precluded by the first judgment. Germany could even make the argument that the failure to comply with the order and injunction contained in the first judgment—directing Italy to prevent future violations of Germany's immunity—is an autonomous pleading that the Court has jurisdiction to entertain in new proceedings.[130] And more crucially to this case, the ICJ Statute does not contemplate any *stare decisis* for its decisions as to the underlying law.[131] In other words, nothing prevents Italy from meaningfully arguing that the Court should adopt a different view in this new case and reject Germany's pleadings.

B. *Mootness*

A second hurdle the ICJ would have to overcome is whether the case has become moot. The Court has previously considered that where "the objective of the Applicant has in effect been accomplished,"[132] it could, *sua sponte*, find that its adjudication would be "fruitless"[133] and

127. *Id.* ¶ 61.

128. Application Instituting Proceedings, *supra* note 2, ¶ 43.

129. *Id.* ¶ 21.

130. *See* Edgardo Sobenes Obregon, *Non-Compliance of Judgments and the Inherent Jurisdiction of the ICJ*, 7 J. TERRITORIAL & MAR. STUD. 53, 64 (2020).

131. *See* Statute of the International Court of Justice, *supra* n. 14, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

132. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 52 (Dec. 20).

133. *Id.* ¶ 58.

dismiss the application. In the Court's language, this dismissal for mootness is ordered because the claim "no longer has any object."[134] And the ICJ has previously been accused of manipulating this principle in a "policy-oriented" manner,[135] meaning that the Court would not be unsympathetic to this argument should it want to avoid reaching the merits of a case.

Accordingly, the procedural history of *Germany v. Italy (II)* is of particular interest. Upon applying to the ICJ, Germany had also requested the indication of provisional measures at the onset, asking the Court to urgently order Italy to ensure its properties would not be seized and sold, before any irreparable harm may be caused.[136] This part of the application was later withdrawn by Germany, on the grounds that Italy's adoption of a decree-law preventing the execution of the measures of constraint against German property "addressed the central concern informing the Request for provisional measures."[137]

Furthermore, Italy adopted a new scheme, awarding reparations for crimes committed by Nazi Germany during World War II.[138] The program, which is exclusive of any other jurisdictional recourses by victims and is intended to definitively settle all such claims, was held constitutional by the Constitutional Court of the Italian Republic because it satisfies the victims' right to access a court.[139] As a direct consequence, the measures of attachment which were the basis for the 2022 application have been vacated, and the parties have requested additional time for their respective filings, to consider the consequences of this judgment.[140]

Despite the absence of a positive recognition by Italy that it had infringed upon the rights of Germany, the injury suffered by Germany is no longer material. Its property has not been sold off at auction, and any outstanding liability cases have been redirected into the new scheme. Furthermore, no future case should arise, given that this reparation scheme is exclusive and imposes a specific statute of limitation.

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134. *Id.* ¶ 58. *See also* Dispute over the Status and Use of the Waters of the Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 614, ¶ 163 (Dec. 1).

135. *See* Jose Juste Ruiz, *Mootness in International Adjudication: The Nuclear Tests Cases*, 20 GER. Y. B. INT'L L. 258, 364 (1977).

136. Application Instituting Proceedings, *supra* note 2, ¶¶ 85-86.

137. Ger. v. It., Withdrawal of the Request for the Indication of Provisional Measures, Order, 2022 I.C.J. 462, 465 (May 10).

138. *See* Andrea Maria Pelliconi, *The Italian Constitutional Court's New Decision on State Immunity and the ICJ Germany v. Italy No. 2*, EJIL:TALK! (July 28, 2023), https://www.ejiltalk.org/the-italian-constitutional-courts-new-decision-on-state-immunity-and-the-icj-germany-vs-italy-no-2/.

139. Corte cost., 4 luglio 2023, n. 159, 34 (It.).

140. Ger. v. It., Order, 2023 I.C.J 351 (May 30).

At first glance, it thus seems that all of Germany's submissions have been answered positively. In other words, its objectives have been accomplished and the case presently lacks an object.

Whether or not the parties raise the issue, the Court would therefore have strong grounds for considering that the case is moot and dismiss it without turning to the merits, the difficulties of which can also weigh strongly in favor of such a resolution, as it has in the past.

C. *Merits*

This leads, in turn, to the substantive question the Court must resolve in this case. Specifically, whether, since its 2012 judgment, new state practice and *opinio juris* have arisen, so that the ICJ would reach a different conclusion under customary international law.

Upon acceding to the U.N. Convention on Jurisdictional Immunities of States and Their Properties of 2004,[141] six states, including Italy, appended reservations and declarations expressing that they would not construe the Convention to prevent developments of jurisdictional immunities rules pertaining to human rights violations.[142] For instance, while preparing for Switzerland's ratification, its Federal Council noted that "the current trend presages a possible evolution of international law towards an exception to States immunity in the case of civil procedures arising out of serious violations of human rights committed out of the forum State."[143] Finland, Norway, and Sweden all declared, in identical terms, that the instrument "is without prejudice to any future international legal development concerning the protection of human rights."[144] Liechtenstein, for its part, considers that it "does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum."[145]

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141. U.N. Convention on Jurisdictional Immunities, *supra* note 6.

142. *See 13. United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en (last visited Nov. 3, 2024) (reservations by Finland, Italy, Liechtenstein, Norway, Sweden, and Switzerland).

143. Message concernant l'approbation et la mise en œuvre de la Convention de l'ONU sur les immunités juridictionnelles des Etats et de leurs biens, Feuille Fédérale [FF] 1443, 1466 (2009) (Switz.) (author's translation).

144. *13. United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* n. 142.

145. *Id.*

These reservations have notably been made both before and after the ICJ's judgment in *Germany v. Italy (I)*,[146] underlining the persistent interest in and doubts on the matter, despite the Court's restrictive holding. These reservations also mean that the Court cannot, if it considers the Convention to reflect customary international law, readily rely upon its silence on serious human rights violations. Because states have explicitly made reservations, the ICJ cannot consider that an absence of an exception is equivalent to a denial that this exception can and does exist.

The development of state practice of restricting immunities, explored *supra* in Part III, either by virtue of a judicial balancing exercise (finding that the commitment to human rights outweighs the benefits of the reciprocal application of jurisdictional immunity in Italy, Greece, Brazil, and South Korea) or political value-driven, statutory choices (adding pressure onto the fight against designated sponsors of terrorism, in the United States and Canada) has certainly dented the Court's presentation of an almost unanimous international custom. The depiction of Italy and the United States as two unique outliers no longer holds true. Whether there is sufficient momentum to activate the carefully worded reservations some states have articulated with respect to the U.N. Convention on Jurisdictional Immunities remains to be seen.

It is worth recalling that the restrictive application of sovereign immunity was born out of a strikingly similar movement. As early as 1886, Italian courts began applying a restrictive view of immunity, followed closely by Belgium in 1903, Switzerland in 1918, Egypt in 1920, and Greece in 1928.[147] There is therefore nothing inherently stable to the customary international law of jurisdictional immunities that could bind states.

A breakoff can, for customary international law, mean the creation of a new norm or the amendment of an existing one. Charney writes that "[n]ations forge new law by breaking existing law, thereby leading the way for other nations to follow."[148] This idea of change is, in fact, closely linked to the theoretical definition of custom as "result[ing] entirely from the *constant* expression of the legal convictions and of the needs

146. The relevant reservations of Norway (Mar. 27, 2006), Sweden (Dec. 23, 2009), and Switzerland (Apr. 10, 2010), were made before the ICJ's Feb. 3, 2012 judgment was delivered. *Id.* Others were made subsequently, including by Finland (Apr. 23, 2014) and Liechtenstein (Apr. 22, 2015). *Id.*

147. Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209, 214 (2015).

148. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985).

of the nations in their mutual intercourse."[149] When this expression is shaken by inconsistency, it precludes a norm from being recognized as customary international law as it no longer enjoys sufficient state practice to establish it.

It would be a stretch to argue that the state practice described in Part III is sufficient to positively establish the existence of an exception to state immunity for serious violations of human rights. Be that as it may, states' objections to an absolute understanding of immunity require a more thoughtful resolution on the part of the ICJ. The Court indeed has the undeniable power to state what customary international law is. It does not, however, have the power to constrain its development or bar its mutations. Indeed, Article 38(1) of the ICJ Statute allows the Court to "apply" international custom,[150] certainly not to "make," let alone "break" it.

The Court explicitly held in the *Asylum* case that where there is "so much uncertainty and contradiction, so much fluctuation and contradiction," an inquiry into customary international law can simply be inconclusive.[151] This non-conclusion resembles that of other international courts which, when unable to identify meaningful state practice or common ground, hold that states enjoy a greater margin of appreciation.[152]

In the ICJ's jurisprudence—or, more accurately, the Permanent Court of International Justice's (PCIJ's) jurisprudence—this principle could resemble that of the *Lotus* case, in which the Court wrote that "[r]estrictions on the independence of States cannot … be presumed."[153] Although states have repeatedly understood this phraseology to mean that anything that is not prohibited is permitted, the Court has long avoided the question, occasionally suggesting this reading was

149. LEAGUE OF NATIONS ADVISORY COMM. OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH-JULY 24TH 1920 322 (1920), https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf (emphasis added).

150. Statute of the International Court of Justice, *supra* n. 14, art. 38 ¶ 1.

151. Asylum (Colom. v. Peru), Judgment, 1950 I.C.J. 266, 277 (Nov. 20).

152. For an emblematic application by the ECtHR of this principle to the question of the right to an abortion under Article 8 ECHR (Right to Respect for Private and Family Life), *see* A, B, and C v. Ireland, App. No. 25579/05, ¶ 232 (Dec. 16, 2010), https://hudoc.echr.coe.int/eng?i=001-102332 ("Where … there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.").

153. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

inconsistent with the developments of public international law.[154] It is therefore unlikely that the Court would hold, after considering customary international law to be insufficiently determinate, that the so-called *Lotus* principle enabled Italy to act as it saw fit.

Furthermore, it has also been suggested that while finding that there was nothing to conclude was acceptable in advisory proceedings, as the Court did in the *Nuclear Weapons* case,[155] the same could not be said of contentious proceedings. In such proceedings, the ICJ has "the duty to exercise the authority the parties have granted to it."[156] The *non liquet*—a finding that "it isn't clear" because of a gap in the law[157]—escape route would thus be unavailable, and the Court could not simply conclude that legal developments prevent it from deciding on the merits. Rule, then, the Court shall.

If the ICJ does, in line with the *Asylum* case, consider there is insufficient stability in practice, it can then resort to the overarching general principles of international law, as is contemplated by Article 38(1)(c) of the ICJ Statute[158] and as it had done in *Nuclear Weapons*.[159] This would be a particularly appropriate time and place for the Court to draw upon the underlying facts of the case before it, and thus answer Judge Bennouna's 2012 call to turn to the "exceptional circumstances"[160] of this matter.

This case would be the ideal situation for such a holding based on exceptional circumstances. Here, neither party disputes the materiality or qualification of the crimes at play; better yet, Germany has explicitly acknowledged its responsibility.[161] The novel state practice referred to

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154. *See* Hugh Handeyside, *The* Lotus *Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 93-94 (2007); An Hertogen, *Letting* Lotus *Bloom*, 26 EUR. J. INT'L L 901, 902 (2015).

155. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105 (July 8) ("However, in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake . . . .").

156. Prosper Weil, *"The Court Cannot Conclude Definitively . . ."* Non Liquet *Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 115 (1997).

157. Stephen C. Neff, *In Search of Clarity:* Non Liquet *and International Law*, *in* INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE 63, 63 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

158. Statute of the International Court of Justice, *supra* 14, art. 38, ¶ 1(c).

159. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 23.

160. Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 172 ¶ 26 (Feb. 3). (dissenting opinion by Bennouna, J.).

161. Ger. v. It., 2012 I.C.J. ¶ 52.

above—besides the U.S. and Canadian statutes against terrorism—specifically relates to crimes committed during World War II and lends itself to such a narrow construction and reading.

Unlike vague notions such as "terrorism" or "serious violations of human rights," carving out a circumstantial exception would not completely upend the fundamental principles of state immunity. This would avoid the risks inherent to domestic interpretation of such wide and volatile concepts and give the ICJ the comfort of remaining the master of the balancing test it would conduct. By ruling on a *permissive* exception, rather than a *compulsory* one, the Court would furthermore allow each state to decide whether to exercise jurisdiction (or grant enforcement of awards). The ultimate effects of these cases are indeed rather uncertain, given the difficulties of enforcing them across jurisdictions.[162]

The Court could thus find that because of the *jus cogens* prohibition of the crimes giving rise to the actions before Italian courts,[163] and considering Germany's lack of effort to ensure effective compensation for the victims, Italy's actions may become justified. This is analogous to the Court's holding that the use or threat of nuclear weapons may be permissible "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[164] Immunity can remain the rule, limited only in the face of clear and acknowledged violations of the most fundamental principles of human rights, when no other avenue remains possible.

This argument would not, however, lead to entirely satisfy Italy. To the contrary, Goethe might not (yet) be thrown out of Rome. In fact, an important limit to the enforcement of a decision against a foreign

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162. See Cass., sez. un., 14 settembre 2015, n. 43696, 32 (It.) as a recent example (applying the same exception to jurisdictional immunity, Italian courts have awarded compensation to the families of Italian servicemen killed in a helicopter crash, during the war in the former Socialist Federalist Republic of Yugoslavia. Serbia, as successor, was declared jointly responsible for these damages, and ordered to pay reparations in an amount exceeding one million euros). *See also* Karin Ollers-Frahm, *A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity*, 76 HEIDELBERG J. INT'L L. 193 (2016). The plaintiffs have sought to obtain funds appropriated by the European Union for the benefit of Serbia before the European Court of Justice (ECJ). In a 2021 order, the ECJ held that this seizure would "interfere with the proper operation of the Union," and that the Commission validly exercised its discretion to refuse it. Case C-593/20 SA, Moro v. Commission, ECLI:EU:C:2021:535, ¶ 19 (June 29, 2021) (author's translation).

163. *See e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 146-47 (2019); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 99 (July 20).

164. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 105(2)(E).

sovereign is found in the type of property that may be seized. This is both reflected in state practice[165] and embodied in Article 19(c) of the U.N. Convention on Jurisdictional Immunities, which permits unconsented measures of constraint only on property "specifically in use or intended for use by the State for other than government non-commercial purposes and . . . in the territory of the State of the forum."[166]

Italian courts themselves apply this same principle, including in cases concerning World War II reparations,[167] and, specifically, to the case of the property subject of the new proceedings before the ICJ.[168] Finding that Italy could validly exercise jurisdiction under the circumstances does not prevent the Court from finding it allowed the attachment of unattainable property.[169]

The Goethe Institute, which assumes responsibilities related to the cultural and linguistic influence of Germany in Italy, and the German School in Rome are clearly both used for government non-commercial purposes. They are therefore beyond the reach of involuntary seizure under customary international law. Their attachment is itself a violation of customary international law, reflected in the U.N. Convention on Jurisdictional Immunities.

The ICJ therefore has different procedural tools to decide *Germany v. Italy (II)*. Res judicata could lead the Court to reject Germany's second case as precluded, leaving it to pursue enforcement measures. The Court could also find that the controversy has become moot, given that Italy has stayed the proceedings against Germany and adopted a comprehensive national indemnification scheme for World War II victims. If the Court did not dispose of the case on either of these notions, it should, in light of the developments since its 2012 judgment, find for Italy and recognize that a narrow, circumstantial exception exists for the case at hand.

V. Conclusion

The ICJ's *Germany v. Italy (I)* judgment was an unsatisfactory response to the serious and meritorious question of the existence and scope of a

165. *See* SHAW, *supra* note 26, at 744-48.

166. U.N. Convention on Jurisdictional Immunities, *supra* note 6, art. 19(c).

167. *See* Corte cost., 4 luglio 2023, n. 159, § 3.2 (recalling that the Villa Vigoni, housing the German-Italian Centre for the European Dialogue cannot be seized because it is used for "public purposes").

168. *Id.* ¶ 3.3.

169. Italian courts have held that the respondent has the burden of establishing the nature of the property being attached and prove whether it is "public" in nature. Because Germany failed to participate in the proceedings, the courts did not turn to this question. *See* Pelliconi, *supra* note 138.

human rights exception to jurisdictional immunity in the context of World War II reparations. This issue's return to the Court's docket, involving subsequent developments between the same parties, comes as a useful opportunity to offer a clearer, more convincing, and better-grounded reading of customary international law in *Germany v. Italy (II)*. The Court's analysis should carefully consider developments in state practice subsequent to the 2012 judgment, including judicial decisions from Italy, Greece, Brazil, and South Korea, Canadian and U.S. legislation, and other states' express reservations, which point towards an erosion of jurisdictional immunity in the face of the most serious violations of human rights. Even if this practice does not (yet) amount to sufficient evidence of a well-settled and accepted custom, the Court cannot simply disregard it as irrelevant or unconvincing.

Res judicata, on the one hand, does not seem to pose such an issue, for the new claims brought by Germany arise out of new facts, subsequent to the 2012 judgment. Because of the absence of *stare decisis* in ICJ proceedings, the legal reasoning of that judgment is also—formally, at least—not binding upon the Court.

On the other hand, given Italy's new indemnification scheme for World War II victims, which also prevents any new such case from arising, the case's mootness is an important question. This mootness may also be provoked by Germany, if it withdraws its application, or may be raised by the Court. Given its record of using this notion to avoid ruling on certain issues, as well as its wide reading of what can trigger mootness, there is a serious possibility the Court could use this avenue to decline to rule.

If the ICJ does get past the hurdles of res judicata and mootness and reaches the merits, it should carve out a narrow exception for this case, drawing on the relevant international practice while maintaining the overarching principles of jurisdictional immunity. Because practice on the matter remains in its early stages, ruling on such specific grounds would allow the Court to avoid exceeding its mandate with regard to customary international law. When its boundaries are unclear or blurring, the ICJ should not decide an issue that is greater than the particular controversy at hand. A judgment on these grounds would furthermore allow states to proceed in their development of practice and, possibly lead to the formation of a new custom.

The ICJ is no legislature. It is not asked to rule on international law in the abstract, but to resolve individual disputes between states. By remaining faithful to the mission conferred upon it by its Statute, the Court can find, in the exceptional circumstances of the case, that Italy's

exercise of jurisdiction was lawful under customary international law, interpreted in the light of general principles of international law.

As for Goethe, however, he should not be too prompt to pack up his belongings, for the enforcement proceedings against the Institute were themselves unlawful. Given that the Goethe Institute unmistakably serves a governmental non-commercial purpose, it could not be seized and subjected to measures of constraint. Recognizing an exception to jurisdictional immunity does not require allowing the seizure of any and all property of a foreign state in a way that would be unsupported by customary international law.