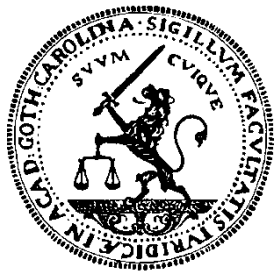

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Jurisdictional Immunities of the State

The Balance Between State Immunity and *Jus Cogens*

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Contents

Summary

The jurisdictional immunity of states in cases concerning serious human rights violations has been extensively discussed in the international legal debate and has given rise to conflicting judicial decisions by courts of various jurisdictions. While serious human rights violations constitute breaches of peremptory norms, *jus cogens,* from which no derogation is permitted, the law of state immunity is said to constitute a procedural bar to the exercise of jurisdiction by national courts. The conflict between state immunity and *jus cogens* was brought to a head in the 2012 judgement of the International Court of Justice "Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)". From the outset of this judgement, the purpose of this paper is to examine the balance in international law between state immunity and serious human right violations of *jus cogens* status. While the International Court of Justice concluded that customary international law has not yet developed to the point where a state is not entitled to immunity in case of serious violations of human rights law or the law of armed conflict, this conclusion has been contested by national courts and legal scholars. While this paper agrees with the outcome of the judgement, it does not fully agree with the arguments and reasoning of the court. According to this paper, the balance between state immunity and *jus cogens* may not yet be finally settled.

Sammanfattning

Staters immunitet i fall som rör grova kränkningar av mänskliga rättigheter har blivit flitigt omdiskuterad i den folkrättsliga debatten, och har gett upphov till motstridiga domar bland olika nationella domstolar. Medan grova kränkningar av mänskliga rättigheter utgör brott mot tvingande folkrättsliga regler, *jus cogens*, från vilka inga avsteg är tillåtna, så utgör reglerna om statsimmunitet ett processuellt hinder mot jurisdiktionsutövning av nationella domstolar. Konflikten mellan statsimmunitet och *jus cogens* fördes till sin spets i den Internationella domstolens (ICJ's) avgörande från 2012 "Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)". Med utgångspunkt i detta avgörande, syftar denna uppsats till att undersöka balansen i internationell rätt mellan statsimmunitet och grova kränkningar av mänskliga rättigheter av *jus cogens* status. Medan ICJ kom fram till att internationell sedvanerätt inte ännu har utvecklat ett undantag till statsimmuniteten för grova människorättskränkningar eller brott mot den internationella humanitära rätten, så har denna slutsats ifrågasatts av nationella domstolar och i den juridiska doktrinen. Medan denna uppsats håller med om slutsatsen i domen, så ifrågasätter den vissa av domstolens bakomliggande argument. Enligt denna uppsats är det inte säkert att balansen mellan statsimmunitet och *jus cogens* är fullständigt avgjord.

Abbreviations

CC	Italian Constitutional Court
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EU Convention	European Convention on State Immunity
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ILC	International Law Commission
ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
UN	United Nations
UN Convention	United Nations Convention on Jurisdictional Immunities of States and their Property Juris Convention of Immunities

1 Introduction

1.1 Background

The jurisdictional immunity of foreign states before national courts in cases concerning serious human rights violations or humanitarian law has been extensively debated in recent years in scholarly literature and has given rise to conflicting judicial decisions by courts of various jurisdictions. The conflict is brought to a head in cases concerning the gravest breaches of international law. On the one hand, such crimes constitute breaches of peremptory norms, *jus cogens,* from which no derogation is permitted. But on the other hand, the law of state immunity is said to constitute a procedural bar to the exercise of jurisdiction by national courts, which means that the court must dismiss the case, regardless of the nature of the allegations against the state. Because of the procedural nature of the rule of state immunity, there is also a tension between state immunity and the fundamental right of access to justice. In cases regarding serious human right violations, (such as massacres, slavery and torture), the access to a court can be crucial for the victims in order to gain redress. Thus, certain international lawyers argue that there should be an exception from state immunity, in cases concerning the gravest breaches of human rights, namely those of *jus cogens* status. In the recent years, the International Court of Justice (ICJ) judgement "Jurisdictional Immunities of the State" (Germany vs. Italy)[1] concerning this very topic, have been particularly debated. After this case was published, several international legal scholars and practitioners have held that it was now safe to say that state immunity, as a principle of international law, is protecting states from prosecution for breaches of *jus cogens* norms. However, in 2014, this conclusion was contested by the Italian Constitutional Court. In its decision no. 238[2], the Constitutional

[1] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, [hereinafter Germany vs. Italy]
[2] Judgment no. 238, 2014.

Court refused to give effect to the ICJ's judgement. This certainly re-opens the debate about whether the ICJ accomplished an appropriate balance between the rule of state immunity on the one hand and human rights of *jus cogens* status on the other hand.

1.2 Purpose and Questions

The purpose of this paper aims to investigate and problematize the balance between state immunity and *jus cogens* norms in public international law. The ambition is to explore how this balance has been developed in international law, with the main focus on the implications of *Germany vs. Italy*, and to give an account of the different arguments put forward in the debate. In order to fulfill this purpose, the paper will (try to) answer the following questions:

1. How are the rules of state immunity and the rules of human rights of *jus cogens* status being balanced in international law?

2. Which are the arguments behind this balance?

1.3 Limitations

Public international law generally separate immunity into two systems, state immunity (depending on the protection of an action or property) and personal immunity (depending on the protection of a certain person or that person's property).[3] This paper will solely focus on the former type of immunity, i.e. state immunity. As states cannot be found criminally liable, the examination concern immunity from civil claims,[4] and the examination therefore does not include judgments from international criminal courts.

[3] Linderfalk, 2012, p. 52.
[4] Lebeck, 2001 4, p.892, 895, Henriksen, 2017, p. 102.

Special attention will be dedicated the ICJ judgement *Germany vs. Italy,* as it is the most recent and evident ruling concerning the balance between state immunity and *jus cogens* norms, and since it recapitulates the last decades debate on the topic. The final parts of the judgement focus on jurisdiction from enforcement, as well as the measures of constraints taken against property. As this paper is focusing on adjudicative immunity in relation to *jus cogens*, these issues will not be examined. The same applies for arguments put forward not relating to the balance between state immunity and human rights rules of *jus cogens* status.

1.4 Method and Perspective

In order to pursue the purpose and answer the questions in this essay, the traditional judicial method have been employed. This method is applied in order to identify the established law and the current legal position, through the application of the generally accepted sources of law. Hence, the answers will be sought in legislation, preparatory works, and the legal doctrine.[5] Furthermore, this paper will apply a comparative international perspective by comparing the different interpretations of national and international courts of the concept of state immunity. The comparative perspective will hopefully be effective while identifying different arguments behind the balance between state immunity and *jus cogens.*

1.5 Research contribution

The conflict between *jus cogens* and the rule of state immunity have been generously debated among several scholars, for example by Lee Caplan, Mathias Reimann, and Andrea Bianchi.[6] While Caplan have criticized the

[5] Korling and Zamboni, 2013, p. 21.
[6] See for ex. Caplan 2003, Reimann 1995, Bianchi 1999, which will be discussed more thoroughly in section 2.3 and 4.2.

normative theory, according to which state immunity is void when serious human rights violations of *jus cogens* norms are concerned, Reimann and Bianchi represent views of the opposite opinion. The implications of the reactions from the Italian Constitutional Court after *Germany vs. Italy* on the balance between *jus cogens* and state immunity have been discussed by De Sena.[7]

1.6 Material

In accordance with the traditional juridical method, the material essentially consists of the traditional sources of public international law; international conventions and treaties, international customary law, general principles of law, judicial decisions and jurisprudence. [8] Except for two conventions from the Council of Europe and the United Nations (UN), the law of state immunity is mainly based on customary international law,[9] which relating to state immunity have primarily been developed through national legislation and judgements of national courts. [10] Additionally, judicial decisions from international and regional courts will be examined. Even though they constitute a submissive source of international law according to article 38 in the Statute of the International Court of Justice (ICJ statute), they provide a useful illustration of the current provisions of international law.[11] In order to facilitate the study of the international customary law of state immunity, jurisprudence of well-established scholars and acknowledged textbook authors have been employed.

[7] De Sena, 2016.
[8] Art. 38 (1) Statute of the International Court of Justice (ICJ statute).
[9] Linderfalk, 2012, p. 53.
[10] Fox, 2008, pp. 20–25.
[11] Henriksen, 2017, p.31.

1.7 Disposition

The initial part of this paper is followed by three descriptive segments. Segment two examines the rules of state immunity. Segment three outlines the relevant aspects of the ICJ's judgement *Germany vs. Italy,* relating to the purpose and questions of the paper. Segment four studies some criticism of the majority's opinion in the judgment. The paper will then be concluded with an analysis in segment five, intended to answer the questions posed in the introduction.

2 State immunity

2.1 From The Absolute Doctrine to Restrictive Immunity

Let us begin with a brief historical background, in order to gain a better understanding of the concept of state immunity. The modern rule of state immunity from foreign jurisdiction is generally considered to derive from the early nineteenth century and the Latin maxim *par in parem non habet imperium (an equal has no authority over another equal).*[12] This maxim essentially refers to the principle of sovereign equality,[13] one of the fundamental pillars of the international legal order, according to which all states are equally sovereign and thus have no right to exercise jurisdiction against each other.[14] The principle was considerably present in one of the first judgements expressing the rule of foreign state immunity; the *Schooner Exchange vs. McFaddon*[15] from 1812. *The Schooner Exchange* has had big influence on the law of state immunity since it was one of the first cases confirming that states should be protected from foreign jurisdiction.[16] The case have become renowned, partly because of the Chief Justice Marshall's explanation of the rationale of state immunity:

"One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a sovereign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign status, though not expressly stipulated, are reserved by implication, and will be extended to him." [17]

[12] Crawford, 2012, p. 488.
[13] For example, expressed in article 2(1), Charter of the United Nations.
[14] Germany vs. Italy, para 57.
[15] The Schooner Exchange vs. McFaddon, 1812.
[16] Van Alebeek, 2012, p.12.
[17] Ibid, p.137.

The perspective on state immunity expressed in the *Schooner Exchange,* is representing what is known as *"the absolute doctrine"* (or absolute immunity), according to which, national courts were completely barred from bringing legal claims against foreign states.[18] However, the weight of the absolute doctrine can be questioned. As is showed by Alebeek, courts in Italy and Belgium rejected the absolute doctrine as early as the nineteenth century and several other states followed shortly thereafter.[19] This practice eventually led towards tendencies of a more restrictive immunity. One way to explain this shift, was that states were getting increasingly involved in border crossing commercial activities, creating a need to protect private companies' rights vis-à-vis states.[20] This development led to a more nuanced approach to state immunity among different national courts, [21] and after the Second World War, the idea that states under certain circumstances could be subjected to foreign jurisdiction was introduced. [22] The 1950 Austrian case *Dralle vs. Republic of Czechoslovakia* is commonly viewed as the breakthrough of the new "restrictive era". In this case, the Austrian Supreme Court found that a foreign state could only be protected from Austrian jurisdiction for acts of a sovereign character. [23] A few years later, in the 1963 *Claim Against the Empire of Iran Case*, the German Federal Constitutional Court held that absolute immunity was no longer a rule of customary international law. In the same case, the court also presented a distinction between sovereign acts (*jure imperii*) and non-sovereign acts (*jure gestionis*).[24]

[18] Ekpo, 2017, p.153.
[19] Alebeek, 2012, p.14-15.
[20] Sebis, 2016, p. 171.
[21] Alebeek, 2012, p.17.
[22] Henriksen, 2017, p. 105.
[23] Henriksen, 2017, p.105.
[24] Henriksen, 2017, p.105.

2.2 Current Provisions of State Immunity

Today, it is widely accepted that *jure gestionis* acts are exempt from state immunity and therefore subject to foreign jurisdiction. [25] This restrictive immunity has become an established concept in treaty law, such as in the European Convention on State Immunity[26] (EU Convention), which by December 2017 only have been ratified by eight states[27], and more importantly, the United Nations Convention on Jurisdictional Immunities of States and their Property[28] (UN Convention). Even though the latter one has not yet entered into force, it was prepared by the International Law Commission (ILC) and is of great relevance as it largely reflects customary international law. The ICJ's analysis of the rule of state immunity in customary international law has led to the conclusion that

> "[…] practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity." [29]

As was mentioned in the section above, the restrictive concept of state immunity only protects the state from foreign jurisdiction in relation to sovereign acts *(jure imperii)*. However, there is no existing rule in customary international law regulating the qualification of these acts, and it is thus up the states themselves to regulate this matter the way they see fit.[30] While the ICJ has provided no guidance on how to conduct this qualification, it has explained that *"jure imperii"* and *"jure gestionis"* does not say anything about the lawfulness of an action. Rather, it refers to whether an act fall under the law governing the exercise of sovereign power *(jus imperii),* or the law concerning non-sovereign activities of a state *(jus*

[25] Karajewski and Singer, 2012, p. 8.
[26] Adopted by the Council of Europe in 1972 and entered into force in 1976.
[27] States that have ratified: Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, United Kingdom.
[28] Adopted by the General Assembly of the United Nations on 2 December 2004. Not yet in force.
[29] Germany vs. Italy, para 56.
[30] Linderfalk, 2012, p. 54.

gestionis). Moreover, the ICJ has affirmed that a domestic court has to decide the nature of the act before it can exercise its jurisdiction. This means that the court first has to determine whether the act is *imperii* or *gestionis*, and then, if the act is *gestionis*, move on to assess whether the act is legal or illegal. [31]

The UN Convention and the EU Convention also confirms that there are exceptions to state immunity. Even if the main rule is that a state enjoys immunity in respect of itself and its property in relation to foreign states,[32] this is not a definite rule. For example, the conventions permit departures from the immunity in proceedings which relates to pecuniary compensation for personal death or injury and damage to property.[33] This exception is in principle only applicable on *jure gestionis* acts.[34]

To summarize, state immunity is a rule that enable states[35] and state representatives[36] to perform public functions without being sued or prosecuted in foreign courts. It is preventing foreign courts from exercising adjudicative and enforcement jurisdiction in cases where a state is a party. [37] As it is a procedural rule it must be dealt with before an investigation of the merits of the case.[38] The next section will discuss the relationship between state immunity and *jus cogens* norms.

[31] Germany vs Italy, para 60.
[32] UN convention, art 5.
[33] Art 12, UN Convention, art 11, EU Convention.
[34] See discussion about "the territorial tort principle", Germany vs. Italy, paras 62-78.
[35] Definition of the state, see Art. 1 Montevideo Convention on Rights and Duties of States.
[36] In relation to the concept of state immunity, the term "state" includes the state and its various organs of government, such as ministers, diplomatic missions, and armed forces (see UN Convention, art 2(b).
[37] Crawford, 2012, p.487.
[38] Henriksen, 2017, p.103.

2.3 State Immunity and *Jus Cogens*

Before discussing the relationship between state immunity and *jus cogens*, a few words will be mentioned about the relationship between the concept of *jus cogens* and human rights. A *jus cogens* norm is a norm accepted by the international community of states as a whole, as a superior norm of international law.[39] Thus, *jus cogens* is a not a source of international law, but rather a trait that characterizes a small group of universally applicable rules of international customary law, as that part of international law which is not only binding on all states regardless of their consent, but which also permits no derogation. [40] Fundamental human rights, being regulated by customary international law and in treaties, many times also have the status of *jus cogens*. While it is uncertain what other human rights may fall under this category, it is established that among them are the protection against *genocide, torture, enslavement, crimes against humanity* and *war crimes*. [41] A state that commits or permits any of these acts, violates international law, regardless of its relation to any human rights convention. Consequently, one may think that human rights of *jus cogens* status would have primacy over any other rules of international law, including the rules of state immunity.

As have been explained above, there are some exceptions to state immunity, in cases of actions *jure gestionis*. However, it is less certain whether there exists an exception based on the status of *jus cogens.* In fact, an exception for civil claims for serious human rights violations was considered but not adopted in the UN Convention on Immunity, due to lack of consensus.[42] The relation between state immunity and *jus cogens* norms thus seem to be rather unclear. It was thoroughly discussed in *Al-Adsani vs. United Kingdom*[43] decided by the European Court of Human rights. In this case, the

[39] On the concept of *jus cogens, see* article 53 of the Vienna Convention on the Law of Treaties.
[40] Linderfalk, 2012, p. 36.
[41] Linderfalk, 2012, p. 35.
[42] Yearbook of the International Law Commission 1999, p. 172.
[43] Al-Adsani v. The United Kingdom, 2001.

court, by a slight 9-to-8 majority of the judges, concluded that the violation of the *jus cogens* norm on the prohibition of torture[44] could not trigger an exception of state immunity in civil suits. However, in a joint dissenting opinion, six judges agreed that *jus cogens* norms superseded ordinary international rules, including the rules on state immunity.[45] According to Caplan, this gave rise to the legal *"normative hierarchy theory",* which holds that state immunity is void when serious human rights violations of *jus cogens* norms are concerned.[46] More specifically, the normative theory stated that since the prohibition of torture, unlike the rule of state immunity, is a *jus cogens* norm, state immunity is not applicable in cases concerning serious human right violations.[47] Similar arguments has also been supported in judgements from national courts.[48]

To summarize, it is far from certain how to define the balance between *jus cogens* and state immunity. In 2012, the ICJ delivered a judgement which hopefully would bring some clarity on this matter. This judgement will be discussed in the following section.

[44] See art 3 ECHR, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[45] Alebeek, 2012, p. 318.
[46] Caplan, 2003, p. 741, and Henriksen, 2017, p.118.
[47] Caplan, 2003, p.742.
[48] For practice in Italy, see Ferrini v Federal Republic of Germany, 2003. For practice in Greece, see prefecture of Voiotia v Federal Republic of Germany, 2000.

3 Germany *versus* Italy

3.1 The Facts

The background of the case dates back to events occurring during the Second World War, when a large part of the Italian territory was occupied by Germany. The occupation resulted in a number of atrocious crimes committed by the German forces, such as massacres, deportations and enslavement. After the war, when the Italian victims brought civil claims against Germany in Italian courts to call for compensation,[49] Germany challenged the proceedings with reference to jurisdictional immunity before foreign courts. In December 2008, Germany filed an application to the ICJ instituting proceedings against Italy alleging that Italy had failed to respect the jurisdictional immunity enjoyed by Germany under international law.[50] However, the Italian courts responded that jurisdictional immunity is not absolute, and that it should be set aside in cases of crimes under international law. [51] Italy's main arguments were that Germany was not entitled to immunity since; (1) the acts involved the most serious crimes in international law, (2) which constituted breaches of *jus cogens*, (3) for which no alternative means of redress were available. [52] These arguments will be examined in the next section.

[49] See for example Ferrini v Federal Republic of Germany, 2003.
[50] Germany vs. Italy, para 1.
[51] Germany vs. Italy, paras 27-29.
[52] Germany vs. Italy, para 61.

3.2 The Judgement

3.2.1 The Gravity of the Violations

The first question was whether the gravity of the violations could deprive Germany of the right to immunity. The court had to inquire if customary international law had developed to the point where a state is not entitled to immunity in case of serious violations of human rights law or the law of armed conflict. [53] It commenced by noting that Italian courts seemed to be the only national courts showing state practice in support of such an exception. In fact, the ICJ emphasized that there was a substantial body of state practice from other countries which demonstrated that customary international law did not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it was accused, or the peremptory nature of the rule which it had allegedly violated. [54] On the contrary, decisions from Canadian, French, Slovenian, and British courts had rejected similar arguments relating to human rights law and *jus cogens* violations. [55] This was also supported by the examination of national legislation, the EU convention on immunity, and the UN convention on immunity.[56] It should be noted, that it was not contested that the actions of the German armed forces constituted serious violations of the law of armed conflict, which amounted to crimes under international law. [57] However, these crimes were qualified by the ICJ as *jure imperii,* since a decision to employ a nation's armed forces in an armed conflict constituted a typically sovereign act in the courts opinion. [58] The Court concluded that, under the current rules of customary international law, a state cannot be deprived of immunity merely

[53] Germany vs. Italy, para 83.
[54] Ibid, para 84.
[55] Ibid, para 85.
[56] Ibid. paras 88-89.
[57] Ibid. para 52.
[58] Ibid, para 60. See also Separate Opinion of Judge Koroma, "Jurisdictional Immunities of the State" (Germany vs. Italy), para 4.

because of the fact that it is accused of serious human rights violations of international law, or the international law of armed conflict.[59]

3.2.2 *Jus Cogens*

Next, the ICJ turned to the argument that there was a conflict between *jus cogens* rules, forming part of the law of armed conflict on the one hand, and granting immunity on the other hand. Italy claimed that since *jus cogens* always prevail over any rule of international law, and since the rule of state immunity does not have the status of *jus cogens*, the rule of immunity must give way.[60] However, the court did not recognize the existence of a conflict between *jus cogens* and the law of state immunity, since the two sets of rules address different matters. The rules of state immunity are procedural in character (in contrast to *jus cogens* which are substantive), and do not say anything about whether the actions are lawful or not. Recognizing the immunity of a foreign state in accordance with customary international law, is not the same as recognizing a breach of a *jus cogens* rule as lawful and cannot contravene the principle in article 41 of the International Law Commission's Articles on State Responsibility[61] (ILC Articles). Consequently, granting immunity cannot be considered as a breach *of jus cogens* according to article 40 of the ILC Articles. [62]

Although the ICJ acknowledged that a *jus cogens* rule is one from which no derogation is permitted, it emphasized that the rules determining the scope and extent of jurisdiction and when it may be exercised, does not breach the substantive rules which has *jus cogens* status.[63] In fact, The ICJ have already taken that approach in two cases. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not give the court a

[59] Germany vs. Italy, para 91.
[60] Ibid, para 92.
[61] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[62] Germany vs. Italy, para 93.
[63] Ibid, para 95.

jurisdiction which it would not otherwise possess.[64] In *Arrest Warrant*, the court held, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules of *jus cogens* did not deny the state to demand immunity on his behalf.[65] The Court considered that the same reasoning was applicable regarding the immunity of one state from proceedings in the courts of another. [66] In addition, the argument that *jus cogens* was displacing the law of State immunity, had been rejected by several national courts, such as the United Kingdom, Canada, Poland, Slovenia, New Zealand and Greece, as well as the European Court of Human Rights. An examination of the state's national legislation pointed at the same conclusion.[67] Thus, the ICJ concluded that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on state immunity was not affected. [68]

3.2.3 The Last Resort Argument

Italy also defended a denial of immunity on the basis that Italian Courts were the *last resort* for the victims.[69] The Italian courts wanted to allow certain categories of Italian victims, who were unable to obtain effective reparations for crimes committed by Germany, to have an alternative means of redress.[70] The ICJ could not accept Italy's argument that the fact that Germany had failed to compensate the Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court could not find any basis in the state practice, that international law makes state immunity dependent upon the existence of an effective way of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections

[64] Armed Activities on the Territory of the Congo, 2006, paras. 64, 125.
[65] Arrest Warrant, 2002, paras. 58, 78.
[66] Germany vs. Italy, para 95.
[67] Ibid, para 96.
[68] Ibid, para 97.
[69] Ibid, para 98.
[70] Ibid, para 99, *see also* para 26.

based on immunity, was there any evidence that entitlement to immunity is subjected to such a precondition.[71] Similarly, such a condition did not exist in the EU Convention or the UN Convention.[72] The ICJ therefore rejected Italy's argument that there was a "last resort" exception to state immunity.[73]

To summarize, Italy lost on all aspects.[74] By twelve votes to three, the court found that Italy had violated its obligations under international law to respect Germany's state immunity, by allowing civil claims to be brought against it, based on violations of international humanitarian law committed by Germany between 1943 and 1945.[75] The court ordered Italy to ensure that all decisions of its courts (and other judicial authorities) infringing Germany's sovereign immunity, should cease to have effect, either by enacting appropriate legislation or by any other ways of its own choosing. [76]

[71]Germany vs. Italy, para 101.
[72] Ibid, para 101.
[73] Ibid, para 103.
[74] Ibid, para 107.
[75] Ibid, para 139 (1).
[76] Ibid, para 139 (4).

4 Criticism of the Current Provisions

4.1 The Separate and Dissenting Opinions

This section will examine the separate and dissenting opinions in *Germany vs. Italy*. Thereafter follows an examination of selected critical contributions in the legal doctrine, and a brief summary of the Italian Constitutional Courts response to the ICJ's judgement.

The separate opinion of judge Bennouna dismissed the majority's opinion that there existed no conflict between rules of *jus cogens* and rules of state immunity. Contrary, he argued that the question of jurisdictional immunity raises fundamental ethical and juridical problems, "which cannot be evaded simply by characterizing immunity as a simple matter of procedure."[77] Instead, in order to rule on the issue of immunity, and on the arguments for lifting immunity put forward by the claimant, the court has to examine the merits of the case.[78] Thus, Bennouna dismisses the argument that immunity rules are preliminary rules. Furthermore, Judge Bennouna argued that a state should face the risk of losing the benefit of its immunity before the courts of the forum state, in exceptional circumstances, when the state rejects any engagement of its responsibility for the crimes. In such cases, the victims' rights to have access to justice in their own country, would then be prioritized, if the state in question had refused to submit to the fundamental principles of law. [79] This is motivated by the need to maintain the rule of law. According to Bennonuna, the rule of law at the international level serves, *inter alia*, to discourage state leaders, from engaging in violations of

[77] Separate Opinion of judge Bennouna, Germany vs Italy, para 9.
[78] Ibid, para 29.
[79] Ibid, para 15.

peremptory norms of law relating to the prevention of international crimes.[80] Thus, if the merits of the case in crimes relating to human rights violations should be ignored because of state immunity, it could open the door to abuses with the potential to undermine the very foundations of international legality. [81]

In the dissenting opinion of Judge Cançado Trindade it was held, contrary to the majority's opinion, that *jus cogens* indeed removes any bar to jurisdiction, for the purpose of achieving reparation to the victims. [82] Accordingly,

"[t]here can be no prerogative or privilege of State immunity in cases of international crimes, […]: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities."[83]

Thus, in Trinidades opinion, the grave breaches of human rights and of international humanitarian law described in *Germany vs. Italy*, amount to breaches of *jus cogens*, which triggers state responsibility and the right to reparation of the victims.[84] Therefore, the need for redress for the victims should be the main priority, and states should be held accountable for their crimes. Indeed, he maintains that "[s]tate atrocities are not to be covered up by the shield of State immunity."[85] Hardly surprising, Trindade also rejected the argument of the ICJ that there existed no conflict between procedural and substantive rules. Instead, he claimed that there obviously existed a conflict between the two rules, and that ignoring this conflict would result in depriving *jus cogens* of its effects and legal consequences.[86]

[80] Separate Opinion of judge Bennouna, Germany vs Italy, para 35.
[81] Ibid, para 16.
[82] Dissenting Opinion of Judge Cançado Trindade, Jurisdictional Immunities of the state (Germany vs. Italy), para 303.
[83] Ibid, para 315.
[84] Ibid, para 313.
[85] Ibid, para 303.
[86] Ibid, para 315.

Moreover, Trinidade rejected the distinction between acts *jure imperii* and acts *jure gestionis*, as being inadequate to the examination of war crimes and crimes against humanity. These actions "[…] are not to be considered acta jure gestionis, or else "private acts"; they are crimes. They are not to be considered acta jure imperii either; they are grave delicta, crimes."[87] Thus, this distinction could not be applied in relation to breaches of *jus cogens*.

In the separate opinion of judge Koroma, it is held that the ICJ applied the law correctly as it exists today, but that new exceptions to state immunity may continue to develop in the future. [88]

4.2 The Legal Doctrine

The idea that there should be an exception to state immunity in cases of serious human rights violations has been argued by several scholars. Reimann claims that an exception to state immunity in cases of serious human rights violations is of importance in order to give individuals access to justice. Indeed, in most cases, actions against individual perpetrators are useless, since they often are unidentifiable or dead. Thus, the victim's only hope for redress is generally to sue the foreign state itself.[89] Because of this, Reimann means that it is about time to establish a denial of state immunity for certain, particularly horrendous crimes. In his opinion, this would also be consonant with the developments that have dominated international law subsequently to the second world war; a more restrictive state immunity, and a more extensive human rights protection. [90] State immunity should not be granted unconditionally. Instead, states should be obliged to fulfill at least the most fundamental obligations of the international community in order to enjoy state immunity. Indeed, Reimann notes that, "[i]t makes no sense to recognize unconditionally binding norms of international law and at

[87] Dissenting Opinion of Judge Cançado Trindade, Germany vs. Italy, para 178.
[88] Separate Opinon judge Koroma, Germany vs. Italy, para 7.
[89] Reimann, 1995, p. 405.
[90] Reimann, 1995, p. 406.

the same time to shield perpetrators who violate these norms from legal action."[91] In accordance with this argument, Ekpo holds that, since there is a legal obligation to *ensure* and *secure* human rights of individuals under international law[92], prosecution of human rights crimes should have primacy over the doctrine of state immunity.[93]

Another interesting criticism is that the immunities of states in relation to *jus cogens* creates an inconsistency with immunity rules in criminal proceedings. This criticism is being lifted by Bianchi. He compared the scope of state immunity with the 1998 Pinochet case[94] in the House of Lords (which was a criminal proceeding), and concluded that, while states and state representatives would continue to be held immune in civil proceedings for acts of torture and other crimes of international law, as regards criminal proceedings they might be prosecuted, and no plea of immunity might be available to them. According to Bianchi, this creates an undesirable inconsistency which ought to be remedied by denying immunity also to states and state officials in civil proceedings. [95] Furthermore, Bianchi seems to support the ideas put forward by the normative hierarchy theory, stating that the "reliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights." [96]

In line with the view set out in the separate opinion of judge Koroma briefly mentioned above, Henriksen considers the tension between state immunity and *jus cogens* to constitute one part of the law of state immunity that may change in the future.[97]

[91] Reimann, 1995, p. 423.
[92] Art 2(1) International Covenant on Civil and Political Rights 1966, art 2(1), and art 1 European Convention on Human Rights.
[93] Ekpo, 2017, p.154.
[94] Pinochet, 25th November 1998, House of Lords.
[95] Bianchi, 1999, p. 264.
[96] Bianchi, 1994, p. 219.
[97] Henriksen, 2017, p.109.

4.3 Judgement no. 238

As was stated above, the ICJ asserted that Italy had to, for example by passing appropriate laws, ensure that the decisions of its courts no longer infringed the German immunity.[98] Thus, the Italian legislator passed a law ratifying the UN Convention, and by doing so, it provided a statutory basis for the judicial implementation of *Germany vs Italy*. Consequently, final judgments could be challenged if conflicting with an ICJ judgment barring Italy from exercising jurisdiction.[99] However, two years after *Germany vs. Italy*, the Italian Constitutional Court (CC) delivered the judgement no. 238, where it refused to give effect to the judgement of the ICJ.[100] The legal arguments behind this decision was that the customary regime on state immunity (in the scope defined by the ICJ) was incompatible with articles 2 and 24 of the Italian Constitution.[101] The CC meant that both article 2 – which provides a recognition of the fundamental rights of every human being, and article 24 – which provides the right to judicial protection – would have been unlawfully sacrificed as a result of an implementation of the ICJ judgement. [102]

In the judgement no. 238, the CC did not agree with the argument of the ICJ that state immunity, being a procedural rule, could prevent the Italian court from examining the claims against another state, even in the case of a peremptory norm being relevant to the merits. In accordance with the separate opinion of judge Bennouna[103], the CC asserted that an objection concerning jurisdiction, necessarily required an examination of the arguments put forward in the claims of the parties.[104] The CC furthermore held that a state immunity without any exceptions, would be depriving the victims of their rights to obtain redress. This, the CC concluded, would

[98] Germany vs. Italy, para 137.
[99] Fontanelli, 2014.
[100] Judgement no. 238, 2014. para 5.1.
[101] De Sena, 2016, pp. 99–101.
[102] Judgement no 238, 2014, para 3.4.
[103] See above, section 4.1.
[104] Judgement no 238, 2014, para 2.2.

constitute a breach of the fundamental principles in articles 2 and 24 in the Italian Constitution.[105] Here, a parallel can be drawn to the dissenting opinion of judge Trinidade, also giving priority to the need for redress.

Regarding the balance between state immunity and *jus cogens*, they saw no need to balance the two principles at all; war crimes and crimes against humanity simply could not qualify as acts *jure imperii,* as that would have the outcome that states could commit serious human rights violations without breaking the law. In the Court's opinion, state immunity is not intended to cover these types of actions, since:

"It [state immunity] does not protect behaviors that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are in breach of inviolable rights, as was recognized, in the present case, by the ICJ itself, (…)"[106]

To summarize, the reasoning of the CC ultimately came down to the argument that international crimes of *jus cogens* cannot qualify as acts *jure imperii*. The main distinction from the arguments brought before the ICJ was that, this time, the CC merely defined the application of Italian law, (not customary international law), on state immunity. According to the 2016 Yearbook of International Humanitarian Law, Italy seems to continue to uphold its case law on war crimes and state immunity from jurisdiction in line with Judgement no. 238. [107]

[105] Judgement no 238, 2014, para 3.4.
[106] Ibid, para 3.4.
[107] Yearbook of International Humanitarian Law, 2016, p. 24.

5 Analysis

5.1 The Balance Between the Rules

The purpose of this paper has been to investigate and problematize the balance between state immunity and human rights violations of *jus cogens* status in international law. The examination of the concept of state immunity has showed that the conflict originally emanates from the tension between two fundamental principles of public international law; the principle of sovereign equality and the principle of territorial sovereignty. Exceptions to state immunity represents a departure from the principle of sovereign equality, while the granting of state immunity may represent a departure from the principle of territorial sovereignty, and the adjudicative jurisdiction which flows from it. Thus, state immunity exists as an exception to the overriding principle of adjudicatory jurisdiction stemming from territorial sovereignty. In cases regarding crimes against *jus cogens* norms, additional interests are being placed on the scales, rendering the tension even more delicate.

As was confirmed by the discussion of the ICJ in *Germany vs. Italy*, it can be concluded that all sovereign (*imperii*) acts committed by a state is protected by state immunity. This is regardless of the gravity of the breach, or the fact that the act constitutes a breach of *jus cogens.* All acts ordered by a state, which are not purely commercial, fall within the qualification *jure imperii*. A state cannot be sued in a civil suit for ordering massacres, torture and other crimes of *jus cogens* status: there exists no exception from state immunity in cases of breaches of *jus cogens* norms. From a rational point of view, this conclusion appears to be quite reasonable to me. At least if one examines the relevant practice from the perspective of the formation process of a specific exception in customary international law to the traditional rule on state immunity. But In accordance with for example Reimann, judge Bennouna and judge Trinidade, I nevertheless find it hard to accept that

victims of war crimes and serious human rights violations will be rejected to bring their cases in front of a court. Yet, this is what the law is. What the law should be is another story. Since the rule of sovereign immunity is neither a matter of *jus cogens* nor provided by treaty, it is simply a rule of customary international law. And like all such law, it is not cast in stone. Instead, it is somewhat ever-changing in two ways. First, its substance and shapes are not exact to begin with, and therefore there is room for debate about its scope. Second, it is subject to a constant development and modification, which has been illustrated for example by the movement from the absolute doctrine to the restrictive immunity in the end of the nineteenth century. One should be reminded that this movement was created by decisions from national courts, unwilling to accept the prevalent scope of state immunity. From this perspective, it is possible that such a movement might emerge once again, and even, that the CC's judgement constitutes the beginning of a development in that direction. Thus, although the balance between the rules of state immunity and *jus cogens* appears to weigh in favor of state immunity, this might change in the future. State immunity seems to be a matter of changing practice, of degree, and of argument.

5.2 The Arguments Behind the Balance

The second question in this paper regarded the arguments behind the balance between state immunity and *jus cogens*. From the examination of the criticism of the current provisions there can, in my opinion, be distinguished three types of main arguments of a balance in favor of *jus cogens*. These are; the normative hierarchy argument (state immunity is void when serious human rights violations of *jus cogens* norms are concerned), the "qualification" argument (crimes of *jus cogens* cannot be qualified as sovereign acts), and the redress argument (breaches of *jus cogens* triggers state responsibility state responsibility and the right to reparation of the victims). The tendency in public international law against a

more extensive human rights protection might further strengthen these arguments in the future.

On the other side of the scales, the ICJ has concluded that there is no basis in international customary law, that makes state immunity dependent upon the existence of an effective way of securing redress, or the gravity of a violation. Even more importantly, the main argument of a balance in favor of state immunity seems to be that since the rules of state immunity and *jus cogens* are of different characters, they can never be in conflict with each other. Instead, the rules of state immunity have to be applied preliminary. I do not agree with the ICJ that there exists is no conflict between *jus cogens* and state immunity. If it is true, on the one hand, that customary law has not developed to the point where there is an exception to state immunity in cases of serious violations of international human rights law or the international law of armed conflict, it should also be true, on the other hand, that both the rule on state immunity and the legal regime for serious violations of human rights constitutes two conflicting, fundamental principles of international law: i.e., the sovereign equality of states and the protection of inviolable human rights. Thus, I believe that the balance between state immunity and *jus cogens* may have to be reassessed again in the future.

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