13 Jurisdiction v. State Immunity in the 21st Century

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13.1 Introduction

Can a sovereign state be sued in a foreign court for severe violations of international ius cogens in armed conflicts? The tort liability of states, which is a sensitive issue related to the immunity of sovereign states, is problematic from several aspects. This area is not clearly resolved in Hungarian civil law[1] and the situation is similar in private international law as well. In the middle of the last century states enjoyed immunity even regarding their jure gestionis acts. The tension arising out of this arrangement is clearly expressed by the opinion of Georg Dahm, a professor in Heidelberg, the author of a comprehensive international law textbook first published in Germany after the World War II:

> *Par in parem non habet jurisdictionem.* No state can have jurisdiction over another state. Accordingly, sovereign states and their representatives can claim immunity before the courts and authorities of a foreign country, no proceedings may be instituted against them without their consent and no force can be used against them in such proceedings. The consequence of this rule is that most of the cases law cannot be implemented against states. Frequently occurs, that national sovereignty and the effort to maintain friendly relations among states, which are political considerations, prevail not only over local interests but also the interests of justice. This is the challenge immunity poses to legal policy. This challenge becomes more and more serious as the state loses its irrationality it becomes more pragmatic and submits itself to law and domestic jurisdiction.[2]

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1 *See,* A. Menyhárd, Az állam kártérítési felelőssége és az állami immunitás, *in* T. Nochta, T. Fabó, M. Márton (Eds.), *Ünnepi tanulmányok Kecskés László professzor 60. születésnapja tiszteletére*, Pécs, 2013, pp. 389-904.

2 Original text: '*Kein Staat sitzt über einen anderen Staat zu Gericht. Daher genießen die Staaten und ihre Repräsentanten in Verfahren vor den Behörden und Gerichten des Auslandes Immunität, dürfen sie nicht gegen ihren Willen in Verfahren verwickelt und darf namentlich kein Zwang gegen sie ausgeübt werden. Das hat zur Folge, dass Recht sich gegenüber den Staaten oft nicht durchsetzen kann. So werden nicht nur die örtlichen Interessen, sondern auch die Bedürfnisse der Rechtspflege der Rücksicht auf die staatliche Souveränität und dem Wunsch nach der Erhaltung guter Beziehungen zwischen den Staaten, also politischen Gesichtspunkten, untergeordnet. Darin liegt die Rechtspolitische Problematik der Immunität. Sie muss umso lebhafter empfunden*

The privileged position of the state in private law matters only diminished gradually, still existent in the 80s of the previous century. The opinion of László Kecskés well illustrates the situation at the time:

> The question of liability related to the acts of the state is still not efficiently handled today. In many cases, the state for example cannot be held accountable for losses caused due to its immunity. These legal arrangements are not yet handled in a fully adequate manner.[3]

This issue has not been completely resolved yet despite the differentiation of state activities between acts of jure imperii and jure gestionis, which in principle made it possible to separate the public acts and the commercial activities of states. The reason for this is that

> [I]t is often not easy to distinguish with sufficient certainty the public acts from the commercial activities of the state and it is becoming increasingly hard also in private international law to separate acts of jure imperii and acts of jure gestionis.[4]

13.2 State Immunity in Hungarian Private International Law

The principles of functional, restrictive state immunity were elaborated by the middle of the 20th century, but these principles were implemented not in the actual laws of the various countries at the same time and did not follow the same pattern. For various reasons Hungarian jurisprudence completely ignored the increased importance of functional immunity for a long time after the World War II.[5] Although Ferenc Mádl had repeatedly pointed out the unacceptability of this rigid position in several publications since the beginning of the 70s[6] and he submitted a detailed argumentation in the private international law codification process about the need to change the rules of absolute immunity as outlined in draft legis-

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werden, je mehr der Staat seinen irrationalen Nimbus verliert, sich versachlicht und rationalisiert und je mehr er sich im inländischen Bereich dem Recht und der normalen Gerichtsbarkeit unterwirft.' G. Dahm, *Völkerrecht Vol. I.*, Stuttgart, Kohlhammer Verlag, 1958. Cited by B. Fassbender, Neue deutsche Rechtsprechung zu den Fragen der Staaten- und der diplomatischen Immunität, 2006 (March) *IPRax,* pp 134-135.

3 L. Burián et al., *Magyar Nemzetközi Kollíziós Magánjog*, 3rd edn, Logod Bt, Budapest, 2006, section 567.

4 Burián et al., section 584.

5 Mádl wrote in 1974: 'Hungarian legal literature… does not categorize immunity into absolute and relative or restricted forms, only absolute immunity is recognised. Authors on this subject matter point out that states are entitled to immunity in all their acts.' F. Mádl, Állam a gazdaságban és az immunitás problémái, különös tekintettel a gazdasági integrációra, *Jogtudományi Közlöny* (1974), p. 265.

6 *See,* F. Mádl, Újabb szakaszban egy korszerű magyar nemzetközi magánjogi kódexért, *Jogtudományi Közlöny* (1978), pp. 639-655. To the specific issue pp. 650-652.

lation, the regulations in the enacted Law Decree No. 13 of 1979 (hereinafter 'the Code') hardly changed at all compared to the draft. Mádl, however, did not consider this as a complete failure of his efforts in view of the political realities of those times. In a legal textbook co-authored with Lajos Vékás he pointed out that it is in itself a step in the right direction to have written regulations in the Code on this issue.[7] The Code only made a cautious step towards functional immunity and was mostly characterised by absolute immunity. Only Section 72 of the Code on the recognition of decisions by a foreign forum in matters affecting the Hungarian state, could be interpreted as a trace of functional immunity. Mádl pointed out: '[T]his section of the Code to some extent recommends a reciprocal practice of mutual immunity.'[8] This approach was already outdated when the Code took effect and it became even more out-of-date by the time the political system changed. Yet, it took quite some time before changes were implemented through the Act No. CX. 2000, taking effect on May 1 2001 and even then only the provisions on jurisdiction were amended. As far as the applicable law is concerned, the absolute immunity rule, as stipulated by section 17 (1) of the Code, is still operational today despite the fact that nothing justifies the privileged position of the Hungarian state compared to other persons when it comes to applicable law in Hungarian courts in international civil law arrangements. I consider this provision of the Code not only outdated but superfluous already when originally enacted.[9] This issue could have been easily resolved by simply removing section 17.

The jurisdiction provisions of the Code use the principle of absolute immunity as a starting point when as a general rule exclusive Hungarian jurisdiction is stipulated for procedures against the Hungarian state or the institutions of the state, while domestic jurisdiction is excluded in proceedings against foreign states or the institutions of such foreign states. The exceptions to excluded jurisdiction, however, actually shift the approach of absolute immunity to functional immunity, because they allow foreign courts proceeding in all private law matters where the state acts jure gestionis as a party to a private law arrangement. It may have been better to regulate these exceptions directly in the section pertaining to exclusive jurisdiction and not by reference to the exceptions to excluded jurisdiction, but after all these provisions are in accordance with the tendencies of international agreements on state immunity, also followed by the legislation of many countries. Although the structure of these provisions is somewhat complicated, the results are nevertheless appropriate. It would not be reassuring to have a regime where the existence or

7 F. Mádl and L. Vékás, *Nemzetközi Magánjog és Nemzetközi Gazdasági Kapcsolatok Joga*, KJK, Budapest, 1981, p. 145.

8 Mádl and Vékás, 1981, p. 148.

9 Mádl pointed out already in 1978 that it was not necessary to have conflict-of-law rules for the law applicable to legal matters involving the state and recommended not to enact these provisions. *See,* Mádl, 1978, *supra* note 6, p. 652.

lack of jurisdiction in procedures initiated in domestic courts against a foreign state or the institution of a foreign state or in procedures started by a foreign state would depend on whether the judge classifies the acts of the state in the legal arrangement on which the claim is based as jure imperii or jure gestionis. Allowing the court to make such decisions would lead to a lack of certainty of law which is intolerable in jurisdictional matters.

There is only one among the exceptions which may potentially lead to establishing jurisdiction over the jure imperii acts of a foreign state. Under Section 62/E c) of the Code, the Hungarian court or authority will have jurisdiction over a foreign state or the institution of the foreign state if the subject matter of the proceeding is a claim against a foreign state or the institution of a foreign state for personal injury or property damage if the event causing the loss occurred within the country and the person suffering the loss resided in the country at the time of the event.[10] As there is no relevant judicial practice in this regard, we can only turn to the travaux preparatoires of the draft legislation to come to the conclusion that it was not the objective of this regulation to extend Hungarian jurisdiction to tort cases for injuries caused and occurring in Hungary by jure imperii acts of foreign states.[11] However, we cannot rule out such an interpretation in international agreements about state immunity in view of the rules on tort liability of states.[12]

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10 This exception is different from the territorial tort exception regulated in international agreements and national acts on immunity in the sense that it does not require the tortfeasor be present in the country at the time of the tort.

11 During the preparation phase of Act No. CX. 2000 amending jurisdictional provisions, the preparatory material drafted for the proposed legislation stated that the objective of changing the rules of exclusive and excluded jurisdiction related to state immunity was to introduce the concept of relative immunity, in line with the main tendency in international legal developments. According to the authors of the preparatory materials: '[T]his will make it possible to sue a foreign state or its institutions in a Hungarian court when the foreign state acts not as a sovereign in its public capacity but as party to a private law arrangement.' The preparatory material also mentioned that states have autonomy in how they chose to regulate jurisdictional issues but restrictions and limitations set by international law must be observed. It points out as an example that 'international law does provide certain immunity to states, its public institutions, certain public figures and diplomatic representatives acting abroad from the jurisdiction of the foreign state and prohibits that the legal acts and procedural steps of the institutions of the states should be re-considered by a court or another authority of another state.' When explaining the grounds for the immunity related provisions of the draft, the materials also made some reference to the fact that 'it is about fundamentally private law arrangements, also indentified by the European State Immunity Agreement as such, and which is classified by the national law (statutes or judicial case law) of countries supporting the idea of relative immunity as acta jure gestionis transactions.' *See*, O. Brávácz and T. Szőcs, *A joghatóságra és a külföldi határozatok elismerésére és végrehajtására vonatkozó szabályozás módosításának alapvonalai* (manuscript), Budapest, 2000.

12 European Convention on State Immunity, 1972; 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. 8 European states have so far become party to the European Convention on State Immunity. It took effect on June 11 1976 following its ratification by three countries. The UN Convention has been signed by twenty-eight countries until now and thirteen of those ratified it. Thirty ratifications are needed for the Convention to take effect. Hungary has not become party to either of these agreements. Both agreements treat tort cases as an exception to immunity. The first Convention formulates this exception in Art. 12, while the second Convention does so in Art. 11. Although the regulations in the two documents are not identical, it is a common feature in both that the signatory state cannot rely on immunity from the jurisdiction of another state in a proceeding where the subject matter of the case is

13.2.1 Tort Liability of States at the Beginning of the 21st Century

Although the aspects by which the jure imperii and jure gestionis acts of a state can be distinguished have crystallised by now, it is still relevant to answer the question under what restrictions can a state rely on immunity in tort cases where the state is the tortfeasor. The debate on the international level is no longer about the immunity of states in tort cases due to their jure gestionis, private law arrangements and acts, but much rather about their tort liability for losses specifically caused by jure imperii acts, where they can rely on state immunity. Multilateral international agreements on immunity and the laws in a number of countries stipulate that a state cannot rely on immunity if the case is related to tort liability for personal injury or property damage, assuming that the event causing the loss occurred within the country of the forum and the person suffering the loss resided in that country at the time of the event.[13] However, neither international agreements nor the majority of national acts on immunity extend the possibility of tort liability to cases when the loss occurred due to war activities of a state in the territory of the forum state. It has nevertheless become debated since the middle of the 1990s whether under customary international law exceptions to jurisdictional immunity should extend to tort cases in severe violation of international law and human rights in armed conflicts. This question has become more critical in procedures initiated against the Federal Republic of Germany by citizens of countries occupied by the Wehrmacht in World War II, seeking damages for losses they or their relatives suffered due to severe crimes committed against them.

13.2.2 The Background to the Procedures Filed against the Federal Republic of Germany

The peace treaties after World War II did not adequately and fully address the question of damages payable for war crimes and crimes against humanity committed against the peoples of countries occupied during the war. The Federal Republic of Germany passed legislation in 1953 on the compensation of victims. The scope of the act however only covered those who were domiciled in West Germany or West Berlin before December 31, 1952 and who were considered to be victims by the act and their descendants. Although the 1965 amendment of this act extended the scope of possible compensation to certain groups of victims of non-German nationality, a great number of foreign citizens could still not receive compensation. This issue was left unresolved by both the bilateral agreements

indemnification for personal injury or property damage, assuming that the injury or damage occurred in the territory of the forum country and the tortfeasor stayed in the country at the time of the tort.

13 Reliance on immunity is disallowed in such cases by the national laws on state immunity of the United States (Act of 1976), the United Kingdom (1978), the Republic of South Africa (1981), Canada (1985), Australia (1985), Singapore (1985), Argentina (1995), Israel (2008) and Japan (2009).

between the Federal Republic of Germany and the countries involved and the compensation treaties concluded thereafter or the re-unification of Germany in 1990. As a consequence, the victims and their descendants attempted to file individual tort claims for damages beginning with the 90s.

13.2.3 Proceedings Initiated by Greek Citizens

The first indemnification claim was filed by 257 Greek citizens for mental damage suffered in the massacre committed by Waffen SS troops in the village of Distomo in June 1944 (the *Distomo* case). The district court of Livadia in its first instance judgement decided that Germany could not rely on immunity despite the fact that the litigated acts had a jure imperii nature because of the violation of jus cogens rules of international law. The court rendered a judgement obligating the defendant in absentia to pay damages of approximately € 28 million and also to reimburse legal expenses. The judgement was upheld by the second instance court, the Areios Pagos, the highest court in Greece.[14] However, the judgement was not enforced in Greece since the Greek Minister of Justice declined to authorise it as required by section 923 of the Greek Civil Procedures Act for the enforcement of court decisions against foreign states. The claimants filed a complaint against Greece and Germany before the European Court of Human Rights for rejection of enforcement. ECHR dismissed the case referring to, among others, state immunity.[15] As the claimants were also unsuccessful in proceedings initiated in German courts for the enforcement of the Greek judgement,[16] they initiated a procedure in Italy. The Court of Appeal of Florence decided in May 2005 that the decision of the Aerios Pagos ordering the Federal Republic of Germany to reimburse legal expenses of the judicial proceedings was enforceable. The Italian Court of Cassation (Corte Suprema di Cassazione) upheld the decision in May 2008.[17] In a separate procedure, referred to as the *Margellos* case,[18] initiated by the descendants of victims who died in 1944 in a bloodshed committed in Lidoriki, the special

14 *Prefectura of Voiotia v. Federal Republic of Germany*, No. 11/2000, *ILR*, Vol. 129, p. 513. S. Hobe, 'Durchbrechung der Staatenimmunität bei schweren Menschenrechtsverletzungen – NS Delikte vor dem Aeropag', *IPRax* (2001), pp. 368-372.

15 *Kalogeropoulou and Others v. Greece and Germany*, No. 59021/00, ECHR 2002-X, p. 417. K. Bartsch-Eberling, 'Jus Cogens v. State Immunity Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. *Greece and Germany* Decision, 2002, www.germanlawjournal.com/article.php?id=271 (visited on January 11 2013).

16 The German Constitutional Court did not find the plaintiffs' claim jusitified by international or German law. For a short summary of the judgement *see,* J. Stemplewitz, 'Report Bundesgerichtshof in Zivilsachen 2003/2004', in R.A. Miller and P. Zumbansen (Eds.), *Annual of German and European Law Vol. II/III,* Berghahn books, 2004, pp. 364-366.

17 *See* M. Stürner, 'Staatenimmunität bei Entschädigungsklagen wegen Kriegsverbrechen', *IPRax* (2011), pp. 600-603.

18 Greek Special Supreme Court, *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002.

court of eleven members called Anotato Eidikio Dikastirio, which, in accordance with Article 100(1)f of the Constitution of Greece has jurisdiction in relation to the settlement of controversies regarding the determination of generally recognized rules of international law, decided in September 2002 with a majority of 6 to 5 that the Federal Republic of Germany could not be sued as it was entitled to state immunity, and proceedings related to losses caused in armed conflicts are no exception to this rule[19]

13.2.4 Proceedings Initiated by Italian Citizens

After occupying most of Italy in the autumn of 1943, Germans captured approximately 600 thousand Italian soldiers and deported them to Germany where they were held in forced labour camps, and they were denied the status of prisoner of war. In Italy, tens of thousands of resistance fighters and a similar number of civilians became victims to the various cleansing operations.

Luigi Ferrini, one of those who had been deported, filed an indemnification claim against Germany. The claim was dismissed by both the Court of Arezzo as well as the Florence Court of Appeal on the grounds that Italy had no jurisdiction over the defendant. The Court of Cassation in its third instance decision, however, held in its judgement in November 2003 and March 2004 that Germany could not rely on immunity because immunity does not apply to those jure imperii acts which constitute a severe violation of jus cogens norms of international law.[20] The Florence Court of Appeal decided in its repeated procedure that the defendant should pay damages and reimburse case-related legal fees. The judgement stated that jurisdictional immunity is not absolute and does not cover severe acts in violation of international law invoked in the case.

Two new proceedings were launched in April 2004 with a factual basis similar to that of the *Ferrini* case. Giovanni Mantelli and 11 other claimants initiated the first case in the Court of Turin, and Liberato Maietta filed the second case in the Court of Sciacca.[21] The Federal Republic of Germany filed an interlocutory appeal requesting a declaration of lack of jurisdiction. The Italian Court of Cassation confirmed in both cases in its decision of May 2008 that Italian courts had jurisdiction over the claims.[22] 50 similar claims for damages were pending before courts at that time.

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19 Bartsch-Eberling, 2002, pp. 481-482.

20 P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court's Decision on the Ferrini Case', 16(1) *The European Journal of International Law* (2005).

21 M. Potesta, 'State Immunity and Ius Cogens Violations The Alien Tort Statute against the Backdrop of the Latest Developments in the 'Law of Nations', www.boalt.org/bjil/documents/Potesta_FINAL.pdf (visited on January 12 2013).

22 The reasons provided for the jurisdiction decision of the Court of Cassation in the *Ferrini* case was confirmed in the criminal procedure against Max Josef Milde, the ex-member of the Hermann Göring SS Division, in which the Military Court of Rome sentenced the defendant in absentia for life imprisonment and ordered

13.2.5 *Poland: The* Natoniewski *Case*

In October 2007 Winicjusz Natoniewski filed an indemnification claim in the district court of Gdańsk. At the age of 6 Natoniewski suffered extensive burning injuries when SS troops burned down his village of Szczecyn in East Poland[23] in a cleansing operation. Male adults were killed, women and children were deported. The claimant requested that the court order the Federal Republic of Germany to pay damages of one million Polish Zloty. Unlike in the proceedings before Italian courts, both the first instance as well as the second instance court decided following an appeal that the case is inadmissible due to the immunity of the defendant. Citing the decision of the European Court of Justice in the *Lechouritou* case,[24] the courts declared in their judgement their lack of jurisdiction based on the Brussels I Regulation, as the case could not be considered to have a civil or commercial nature. The judgements did not delve into the examination of whether Polish civil procedural rules would allow the declaration of jurisdiction.[25] The Supreme Court of Poland (Sąd Najwyższy) in its decision of 29 October 2010 upheld the decisions of the first and second instance courts to declare lack of jurisdiction on the grounds of immunity.[26] The Supreme Court also considered in its judgement if norms of customary international law had developed based on which reliance on immunity would be impermissible in such cases. While

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him jointly with the Federal Republic of Germany to pay damages. *See*, A. Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case relating to the World War II – The Civitella Case', 7(3) *Journal of International Criminal Justice* (2009), pp. 597-695.

23 This is not identical with the town of Szczecin (in German Stettin) at the river Oder. Szczecyn was a village situated west of Zamość (re-named as Himmlerstadt by the Germans) in the territory of the Polish General Governorate (which today belongs to the Lublin voivodeship). It was fully demolished together with five other villages by German and Ukrainian SS troops. The objective of the Germans was to establish a so-called 'Ostlandstützpunkt' in this area by ethnically cleansing and deporting Polish population and the settlement of German nationals in order to establish a link to the future East German zones. Horst Köhler, the later president of Germany was among those German nationals, who – along with his parents – was re-settled in 1943 from Bessarabia to what is today Skeirbieszów (called Heidenstein in German at that time).

24 Judgement of 15 February 2007 in Case 292/05, *Erini Lechouritou and others v. Federal Republic of Germany,* [2007] ECR at p. 1540. The basis for the primary proceeding was the massacre by the soldiers of the German army in Kalavrita in December 1943, causing 676 casualties.

25 According to Section 1103 subsection 3 of the Polish Civil Procedure Act, the court has territorial jurisdiction over tort cases if the tort was committed in its territory. As per Section 45 of the Act, it is the Supreme Court who decides in a closed session in domestic jurisdiction issues if no domestic court's jurisdiction can be otherwise established. In a case resolved in 2007 (AZ:I Co 29/07) the Supreme Court decided that the Warsaw Military Court had jurisdiction in a proceeding initiated against the Federal Republic of Germany for damages for a medical experiment performed on the claimant's father during the war.

26 Sygn. akt IV CSK465/09. Criticised by R. Nowosielski, 'State Immunity and the Right to Access to Court the Natoniewski Case before the Polish Courts', *Polish Yearbook of International Law* (2010), pp. 263-276. http://ssrn.com/abstract=2173035 (visited on January 12 2013), *see also*, Stürner, *supra* note 17, p. 601, and K. Majchrzak, 'Deutsche Verbrechen gegen die Menschlichkeit vor polnischen Gerichten – Aufweichung der Staatenimmunität durch zivilrechtliche Klagen?', www.rav.de/publikationen/infobriefe/infobrief-104-2010/deutsche-verbrechen-gegen-die-menschlichkeit-vor-polnischen-gerichten/ (visited on January 16 2013).

emphasising the utmost importance of respect for human rights, it also stated that the effective implementation of human rights and observing the immunity of states are not mutually exclusive objectives and that immunity does not unduly restrict the right of access to court.

13.2.6 Views on the Extent of Immunity in Legal Literature

In view of the conflicting judgements by the Greek, Italian and Polish courts on jurisdiction issues, it is not surprising at all that the arguments for and against the existence of immunity in relation to severe violations of international law in armed conflicts were not only to be heard in court rooms but a vivid scientific discussion has developed in the legal literature as well. The German position represented in litigation procedures and the majority opinion in scholarly commentary is that not even severe violations of human rights and the norms of jus cogens deprive a state of its ability to rely on immunity.[27] State immunity from jurisdiction guarantees that traditional dispute settlement forms based on international law take precedence over civil law dispute resolution. This principle has remained valid even though the views on state immunity changed after the middle of the 20th century. Within the framework of opinions emphasizing the coordinating role of international law, the approach of co-operative international law with a relative stance on state immunity has taken over the place of the original approach of absolute sovereignty and immunity. In this approach, a state can be held accountable in a foreign forum for jure gestionis acts but jure imperii acts continue to enjoy immunity from jurisdiction. According to the German position, no norm has evolved (as of yet) in (customary) international law according to which a state cannot rely on immunity in cases when individuals or their descendants file claims in a regular foreign court for severe violations of human rights committed abroad by individuals whose acts are considered to be state acts.[28] The basis of this position is that although international agreements on immunity recognize the exception to immunity in tort cases, the scope of this exception does not extend to activities in armed conflicts. In addition, they also refer to the fact that the laws and judicial practices of individual countries cannot be interpreted as extending jurisdiction to war crimes, not even in the United States, where state immunity is mostly restricted by laws and relevant court decisions in tort cases for jure imperii acts. Geimer expressed a very clear and strong view when he stated that denying the immunity of a defendant state constitutes a violation of international law, and the state of the forum has international legal responsibility for such violations. The judgement in the *Distomo* case was never enforced in Greece, so eventually no quantifiable damage occurred that Greece could be held accountable for.

27 This view is held among others by Hobe, *supra* note 14 and Stürner, *supra* note 17 with additional citations.
28 This is the opinion of the researcher of the Milan University. Potesta in his study cited *supra* note 21.

Nevertheless, the court decision against the Federal Republic of Germany in itself means a violation of international law. Accordingly, Germany has a valid international claim to overturn judgements in violation of its state immunity. Italy also violated international law by declaring the *Distomo* case judgement to be enforceable and if enforcement would actually occur against the assets of the Federal Republic of Germany not serving jure imperii purposes, this would constitute a further violation of international law.[29]

The opposing view, which denies reliance on state immunity concerning acts of severe violation of international jus cogens norms and human rights, is also widely represented in scholarly publications.[30] The judicial practices of the countries involved, as we have seen above, also follow various patterns. The Areios Pagos and the Anotato Eidikio Dikastirio came to a different decision, the Polish Supreme Court declared a lack of jurisdiction while the Italian Court of Cassation did not find it justified to rely on state immunity.

13.2.7 *The Judgement of the International Court of Justice in the* Germany v. Italy *Case*[31]

In December 2008, the Federal Republic of Germany initiated proceedings against Italy before the International Court of Justice (hereinafter: the Court) for violation of international law. The starting point of the German memorial was that sovereign immunity is a fundamental principle in international law. Relative immunity and distinction between acta jure imperii and acta jure gestionis are key aspects already today in dealing with jurisdictional immunity. There is no settled practice supported by opinio juris that would create an exception to immunity in case armed forces violate human rights in war.[32]

Greece intervened in the proceedings.[33] The key feature of the Italian argumentation was that state immunity on the one hand and the effective reparation of losses suffered by

29 R. Geimer, 'Los Desastres de la Guerra und das Brüssel I. System', *IPRax* (2008), pp. 225-227. The Florence Appellate Court ordered enforcement on June 12 2006 against a building situated in Menaggio on the west coast of Como Lake, which is owned by the Federal Republic of Germany and used for cultural purposes (Villa Vigoni). A mortgage was registered on the property pursuant to the court order. The appeal filed against the enforcement was rejected by the Court on October 10, 2008. In view of the proceedings before the International Court of Justice, Italian parliament suspended the enforcement of all judgments against Germany until December 31 2011.

30 Bartsch-Eberling, p. 19, with citations of further authors.

31 Jurisdictional immunities of the State (*Germany v. Italy*: Greece intevening) Judgement of 3 February 2012, www.icj-cij.org/homepage/index.php?lang=en (visited on January 22, 2013). For a general assessment of the judgement, *see* B. Hess, 'Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf', *IPRax* (2012), pp. 201-206.

32 International Court of Justice Case Concerning Jurisdictional Immunities of the State (*Germany v. Italy*) Memorial of the Federal Republic of Germany 12 June of 2009, Paras. 48-56, www.icj-cij.org/docket/files/143/16644.pdf (visited on January 21 2013).

33 This request of Greece submitted on January 13 2011 was approved by the Court with a fourteen to one majority decision on July 4 2011, www.icj-cij.org/docket/files/143/16556.pdf (visited on January 22 2013).

victims on the other, are inseparable, interdependent issues. The victims have not received adequate compensation through international agreements between the countries involved or through compensation laws unilaterally adopted by Germany. The Federal Republic of Germany has systematically refused to provide compensation to the victims who turned to Italian courts with their claims because they had been denied access to court before. Under such circumstances, it was a legitimate decision by the court to set aside immunity.[34] The Greek statement interpreted the conflicting decisions of Greek courts and with reference to new tendencies in customary international law it emphasized the unresolved nature of the issue and the importance of the decision.[35]

The Court decided on 3 February 2012 with a majority12:3 that Germany is entitled to jurisdictional immunity in proceedings before Italian and Greek courts and declared that neither crimes of war committed in the country of the forum nor violation of international jus cogens will constitute an exception to such jurisdictional immunity.

13.2.8 Key Points of the Judgement

Although neither party had a difference of opinion in this regard, the Court underlined that immunity is a norm rooted in customary international law and a fundamental principle of international law. Immunity has a direct relationship with the territorial sovereignty of states and the principle of sovereign equality. It stems from sovereignty that states have jurisdiction over events and persons within their territory. Exceptions to immunity represent exceptions to sovereign equality and the resulting jurisdiction of states (paragraphs 56 and 57).

The Court – contrary to the German position – observed that in respect of the application of the law it is not the time of the contended events but the time of the proceedings in Italy that govern the extent of state immunity. By the time the proceedings took place in Italy, it became widespread to distinguish between acta jure gentionis and acta jure imperii. States have limited the extent of immunity in the first category which is also reflected in international agreements on immunity. The acts of German armed forces clearly constituted acta jure imperii, notwithstanding the fact that these acts were unlawful, as recognised also by the Federal Republic of Germany (paragraphs 58, 59 and 60).

The Court then considered the argument put forward by Italy which claimed that according to customary international law a state is no longer entitled to immunity in

34 International Court of Justice Case Concerning Jurisdictional Immunities of the State (*Germany v. Italy*) Counter Memorial of Italy Chapter 2, especially sections II, III and IV, www.icj-cij.org/docket/files/143/16652.pdf (visited on January 22 2013).

35 International Court of Justice Jurisdictional immunities of the State (*Germany v. Italy*: Greece intervening) Written Statement of the Hellenic Republic 3. August 2011, www.icj-cij.org/docket/files/143/16658.pdf (visited on January 22 2013).

respect of jure imperii acts committed in the forum state which caused death, personal injury or property damage. According to the Court, neither the international agreements on state immunity, nor national legislations on immunity or general judicial practice support the position of Italy. In customary international law jure imperii torts committed in the forum state by the army or other organs of another state in an armed conflict constitute no exception to immunity rules (paragraphs 62-79).

After addressing the above issues, the Court continued to consider further arguments which – according to Italy – could justify in the specific case the denial of immunity. These arguments were the following: 1) Those acts which gave rise to the claims severally violated international norms on armed conflicts, constituting war crimes and crimes against humanity. 2) These unlawful acts constituted a violation of jus cogens of international law. 3) As the claimants have been denied all other forms of redress, the exercise of the jurisdiction by Italian courts was the last resort for the claimants to receive compensation for their injuries (paragraph 80).

As for the first argument, the Court pointed out that – as it was already stated – the acts constituting the basis for the proceedings undoubtedly meant a severe violation of international law applicable in armed conflicts (or using a current term: international humanitarian law), but jurisdictional immunity blocks proceedings at its commencement, therefore it is impossible to consider the merits of the case including how severe the violations were. If immunity could be denied on the basis that the state presumably committed a serious violation of international law, the entitlement of a state to immunity could be simply negated through a skilful claim. It is, nevertheless, to be considered whether customary international law has developed to a stage whereby a state is no longer entitled to immunity in case of severe violation of humanitarian international law. The Court made reference to its prior statements and confirmed its conclusion that except for the judgements of Greek courts cited in this case there is no judicial practice[36] or international rules which would support such an assumption. The Court considered the judgement of the House of Lords in the *Pinochet* case[37] and the reference made to Section 1605A of the United States Foreign Sovereign Immunities Act[38] to be irrelevant. The Court repeated its earlier statement

36 The Court made reference – among other cases – to the *Natoniewski* case (*see* above).

37 The High Court in its first instance ruling accepted reliance on immunity. The House of Lords, however, decided with a six to one majority in a repeated proceeding on March 24, 1999 that Pinochet cannot claim immunity because international law does not provide such a privilege in case of crimes like torture and genocide even if Pinochet committed such crimes while in office as head of state. For the details assessment of the case, *see* M. Davies, 'The Pinochet Case', *University of London Institute of Latin American Studies Research Papers* 53, and M. Byers, 'The Law and Politics of the Pinochet Case', *Duke Journal of Comparative and International Law* (2000), pp. 415-441.

38 The first national legislation with rules on exceptions to state immunity in acta jure imperii was the Foreign Sovereign Immunities Act (FSIA) of 1976, more specifically Section 1605 (a). Section 1605 (a) subsection (3) of FSIA allows jurisdiction over a foreign state or state organisation in cases when rights in property were taken in violation of international law. (With regards to this exception and the judicial practice also

regarding relevant international agreements, specifically discussing the considerations made in preparation of the United Nations Convention with respect to acts causing death or personal injury through the violation of jus cogens human rights which raised the idea of the possible codification of restricted immunity which was however eventually omitted from text of the Convention. The Court further made reference to the fact that the judgements of the European Court of Human Rights[39] also came to the conclusion that international law disallows the exclusion of such acts from immunity. Based on these considerations, the Court concluded that under the present state of international law a state cannot be deprived of immunity even in cases where severe violations of human rights occurred in armed conflicts (paragraphs 83-91).

Regarding the conflict between the violation of international jus cogens norms and the immunity a state enjoys based on customary international law, and the argument on the necessity to deny immunity in such cases, the Court declared that no such conflict exists. The rules of law of armed conflicts prohibiting the murder of civilians, the use of force against them, and the deportation of civilians and prisoners of war to forced labour on one hand, and the rules of state immunity on the other hand are different matters of law serving different objectives. Jurisdictional immunity has a procedural character. Dismissing civil indemnification claims due to lack of jurisdiction does not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. This also means that the application of current state immunity rules for acts committed between 1943 and 1945 is not a violation of the prohibition to apply law retrospectively. For the same reason, granting immunity does not amount to recognising the acts in breach of jus cogens to be lawful. As a matter of fact, Germany openly acknowledged

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impacting Hungary, *see*, S. Szabó, State immunity and jurisdiction in American courts cases on expropriated works of art/Állami immunitás és joghatóság a kisajátított műkincsekkel kapcsolatos amerikai perekben, *Magyar Jog*, 2011, pp. 489-502). Subsection (5) of FSIA 1605 creates a general exception for cases when a foreign state commits some tort in the territory of the US and the damage also occurs in the US. In an amendment of the Act in 1997, this section was expanded with subsection (7), which extends jurisdiction to tort claims against states based on act of torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support for such an act. For the application of this exception (called the terrorism exception in legal literature) it is not required that the tortuous act should have territorial or any other connection with the US, but the tortfeasor needs to have acted within the scope of his office, employment or agency. This amendment, which further restricted immunity, was clearly inspired the 1988 outrage over Lockerbie but it was only applied against countries which the Department of State classified as 'rouge states' supporting terrorism. Currently Cuba, Iran, Syria are such states. Iraq, Afghanistan, North Korea, Southern Yemen and Libya were earlier listed as countries supporting terrorism and have been since removed from the list. Subsection (7) of FSIA 1605 (a) was replaced by section 1605 A in 2008. The objective of the new provision was unchanged, but the position of the plaintiffs was strengthened because they can use the specific provision of a federal act as a basis of their claim and they can claim punitive damages by the state supporting terrorism.

39 The Court referred to the decisions *Al-adsani v. United Kingdom* (No. 35763/97, (www.unhcr.org/refworld/country,,ECHR,,KWT,4562d8cf2,3fe6c7b54,0.html, visited on January 23 2013) and *Kalogeropolou and others v. Greece* (*see* footnote 15).

the unlawfulness of the events covered in the proceedings. Denying immunity cannot be justified by the duty of the state in breach to make reparation, either, since this duty is independent from the rules on how such reparation duties must be met. The practice of the past 100 years for the settlement of armed conflicts between states shows that peace treaties adequately addressed the issue of compensation by payment of a lump sum or by set-offs, therefore it would be hard to conclude that international law requires payment of a full compensation to each victim individually. The Court held that the argument regarding the conflict between the rules on the extent and the application of jurisdictional immunity and the rules of jus cogens is unfounded and disagreed with the idea that the application of any rule not having the character of ius cogens could be denied if it would make the enforcement of a jus cogens rule impossible. The Court cited its own practice and the judgements of some national courts to support this opinion (paragraphs 92-97).

The Court also expressed its disagreement with the argument that using state immunity deprives the victims of their last resort to claim compensation and argued that such claims may be settled through international agreements. Italian courts cannot deprive the Federal Republic of Germany of its jurisdictional immunity even if compensation based on international agreements and Germany's own domestic laws de facto have not compensated the loss of each individual. The Court understood that its judgement obligating Italian courts to respect the immunity of the Federal Republic of Germany may preclude judicial redress for Italian nationals concerned but it believed that the claims of those victim groups that have not been yet compensated can be resolved through negotiations between the two states (paragraphs 98-104).

With regards to the German complaint against the enforcement in the *Distomo* case, which was ordered by Italian courts but suspended by the Italian parliament in view of the proceedings before ICJ, the Court concluded that measures taken[40] in the enforcement procedure against the building of Villa Vigoni violated the jurisdictional immunity of Germany (paragraphs 109-120).

The Court also declared that Italian courts were in breach of German immunity also by declaring the judgements by Greek courts in the *Distomo* case to be enforceable (paragraphs 121-133).

13.3 Conclusions

The decision of the Court reached with a convincing majority supported the position of those who argue that – at least as of today – no common exception has been developed in customary international law which would allow to sue a state in the court of another state

40 *See supra* note 29.

in a regular procedure seeking compensation for losses caused in the forum state by severe violation of human rights, if the loss occurs due to events in an armed conflict. The conflict between the need in international law to protect state sovereignty and the right of those suffering losses for adequate access to justice and to receive compensation continues to exist. The thoughts of Georg Dahm quoted in the introduction remain valid in the second decade of the 21st century. The legal systems' need for justice is overridden by efforts to maintain national sovereignty and friendly relations among states, although to a significantly lesser extent compared to the situation half a century ago. Accordingly, we may say that no appropriate resolution for these legal arrangements has been reached as of yet.