Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany v Italy*

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1 Introduction

On 3 February 2012, the International Court of Justice (ICJ) handed down its much awaited decision in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*.¹ The dispute arose because Italian courts had (1) allowed civil claims based on violations of international humanitarian law by the German Third Reich during the Second World War to be brought against Germany; (2) declared Greek judgments holding Germany liable for damages in civil suits arising out of similar violations of humanitarian law to be enforceable in Italy; and (3) taken consequential measures of constraint against German state property used for government and non-commercial purposes. Germany claimed that Italy had violated its obligation to respect the immunity that Germany enjoys under international law, and Italy argued that international law had developed relevant exceptions to immunity. The Court found in favour of Germany on all counts, and by a clear majority. The decision was widely anticipated, and on first read the conclusions and reasoning of the Court appear

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¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012 (not yet reported), available on the ICJ website at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=143>> [last accessed 14 May 2012].

inevitable, obvious, and even banal. But the apparent simplicity of the issues presented to and analysed by the Court is deceptive.

Any number of points in the judgment would be worthy of detailed analysis. For instance, one may question the basic approach of the Court to the question of sources and methodology, in particular the appropriateness of determining the implications of norms of *ius cogens* as an ordinary question of customary international law identification. The (happy) dismissal (at paragraph 60) of the unsatisfactory argument (suggested by Lords Browne–Wilkinson, Hutton and Phillips in *Pinochet*,² and noted in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case³) that acts contrary to international law could not constitute official conduct, and therefore could not attract immunity—which would enhance *individual* responsibility but risk sacrificing *state* responsibility. The Court’s unconvincing suggestion (at paragraph 82) that there would be a “logical problem” with considering the gravity of the offence as part of determining immunity—in the face of the well-accepted principle of *competence–competence*, reflected in the fact that courts already determine whether, for instance, conduct was official or unofficial as part of the preliminary immunity question. Or the somewhat clumsy sidestepping (at paragraph 127) of the *Monetary Gold* problem (Greece, although intervening, not being a party to proceedings)⁴ in respect of the claim against Italy regarding recognition of the Greek *Distomo* judgment—‘solved’ by noting that immunity might be different for the Italian and Greek proceedings because of the purely hypothetical and unargued possibility of a territorially limited waiver.

The focus of this comment is on three further issues, which will each be examined in turn: first, the Court’s analysis of the ‘territorial tort’ exception to immunity, and dismissal of its applicability to the conduct of armed forces in the context of an armed conflict; second, Italy’s arguments based on the *ius cogens* status of the norms which had been violated by Germany and the lack of alternative means of enforcing those norms, rejected by the Court through its assertion of a decisive substance/procedure distinction; and third, the perhaps curious absence (in either the Court’s judgment or Italian pleadings)

² *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147, at 203–4, 262, and 292, respectively.

³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, p. 3, at 88–9 (Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion).

⁴ See *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America)*, Preliminary Question, Judgment, ICJ Reports 1954, p. 19, at 32.

of the argument that any violation of immunity might be justified as a lawful countermeasure.

2 The territorial tort exception

Some (but not all) of the claimants in the Italian civil proceedings in which Germany had been denied immunity were claiming in respect of torts under Italian law (amounting to war crimes under international humanitarian law) that were carried out in Italian territory by German soldiers. In respect of these claimants, Italy argued that the denial of immunity was a recognised exception to state immunity under international law. It is generally recognised that *some* kind of exception to immunity applies in respect of torts committed in the territory of the forum state—such an exception is, for instance, reflected in Article 12 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that:

Unless otherwise agreed between the states concerned, a state cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the state, if the act or omission occurred in whole or in part in the territory of that other state and if the author of the act or omission was present in that territory at the time of the act or omission.⁵

In its commentary on that passage, the International Law Commission (ILC) had suggested that the:

physical injury ... appears to be confined principally to insurable risks. The areas of damage envisaged in Article 12 are mainly concerned with accidental death or physical injuries to persons ... involved in traffic accidents ... Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding be-

⁵ 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/Res/59/38 Annex, Art. 12 (not yet in force).

hind the cloak of State immunity and evading its liability to the injured individuals.⁶

However, as the Court noted (at paragraph 64), state practice does not appear to support the limitation of the territorial tort exception to personal accidents in this way. No national statute providing for the exception limits its applicability to ‘private’ or insurable claims, although China and the United States⁷ have criticised the inclusion of sovereign acts within the scope of Article 12, and the European Court of Human Rights was unconvinced that the exception was clearly established outside the context of such claims in *McElhinney v Ireland*.⁸

The ICJ (at paragraph 65) declined to deal with this exception as a matter of general principle, preferring to focus on the context of the specific claims at hand. As a result, the Court’s conclusion on the immunity claim was deliberately narrow, finding only that there is no “territorial tort” exception to immunity in the context of claims arising out of the acts of armed forces during an armed conflict.

In reaching this conclusion, the Court relied on an analysis of state practice, and concluded that states have not generally recognised an exception to state immunity in respect of the conduct of armed forces. Although various national statutes provide for an exception to immunity in respect of territorial torts, most exclude at least some conduct of armed forces from that exception, or from the immunity regime in its entirety, as does Article 31 of the European Convention on State Immunity.⁹ No such exclusion is provided for in the text of the UN Convention, but (as noted by the Court at paragraph 69) the ILC commentary¹⁰ and statements by the Chairman of the *Ad Hoc* Committee¹¹ suggest that states in the negotiations had generally understood that Article 12 would not apply to “situations involving armed conflicts”.

But on closer examination, it is not entirely clear that the evidence relied on by the Court provides sufficient foundation for its conclusions. Of the national statutes examined by the Court (at paragraph 71), only the UK and

⁶ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, 1991/43 (II) ILC Ybk, at 45.

⁷ Contradicted by *Letelier v Chile*, 488 F Supp 665, at 671 (DDC, 1980) (finding no such limitation with respect to US immunity law).

⁸ *McElhinney v Ireland* (2002) 34 EHRR 13; see also *McElhinney v Williams* (1995) 104 ILR 691 (Ireland, Supreme Court).

⁹ 1972 European Convention on State Immunity, CETS No. 074.

¹⁰ ILC (1991), *supra* note 6, at 46.

¹¹ See *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 13th meeting (A/C.6/59/SR.13), at 6, para. 36.

Singapore entirely exclude foreign armed forces. This does not necessarily mean that such forces are considered absolutely immune, only that they are not subject to the statutory immunity regime. This is even clearer from the national statutes of Canada, Australia and Israel, which exclude the conduct of armed forces, but only to the extent that they are covered by Status of Forces Agreements (SOFAs), which typically set out any immunity granted to foreign armed forces in the territory. The clear implication of this state practice is not that foreign armed forces are always immune, but that the immunity of foreign armed forces is governed by a more specific regime, where such a regime has been established. Indeed, it has long been accepted that foreign forces in the territory with permission of the local sovereign are granted immunity under something like an implied waiver of jurisdiction.¹²

But where foreign armed forces are not stationed in the territory with permission, there can be no such waiver and there is therefore no applicable alternative regime to deal with questions of state immunity. Where there is an international armed conflict, international humanitarian law would apply and provide for immunity from the territorial state's criminal jurisdiction for *individual* members of the armed forces, *insofar as their conduct was in compliance with international humanitarian law*, through the 'combatant's privilege'. But this has no effect on proceedings against the foreign *state* in respect of *torts* (also in breach of international humanitarian law) which are attributable to it.

The state practice examined by the Court (at paragraph 72), involving foreign troops stationed on or visiting the territory with permission, does not therefore justify a broader carve-out from the territorial tort exception for armed forces in general. And there is relatively little state practice concerning tort claims against members of foreign armed forces present in the territory of a state without its permission. The Court cited the Irish Supreme Court's *McElhinney* decision as one such case. In *McElhinney*, the Irish Supreme Court rejected the existence of a territorial tort exception to immunity generally, as a matter of customary international law. Doubt may be cast on the precedential value of the Irish Supreme Court's decision, however, because it did so having (quite wrongly) decided that domestic statutes "cannot be used as evidence of what international law is: statutes are evidence of the domestic law in the

¹² *The Schooner Exchange v McFadden*, 11 US 116, at 147 (1812): "[A] public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace ... must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country".

individual states and not evidence of international law generally.”¹³ In any event, the Supreme Court did not, in refusing to recognise a territorial tort exception to immunity, appear to consider the significance of the fact that although the Northern Irish military police officer had entered Irish territory without permission,¹⁴ he had done so clinging to a vehicle driven through a border checkpoint by the claimant (who alleged a subsequent assault by the officer). It may therefore be doubted whether the decision really stands for the proposition that “international law required that a foreign state be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State’s permission.”¹⁵

In support of its conclusions, the Court also noted several judgments of national supreme courts in France, Slovenia and Poland, in which the immunity of German Second World War occupying forces has been recognised. However, these decisions offer little by way of analysis of the territorial tort exception.¹⁶ Given the collective weakness of these cases in supporting the Court’s conclusion, they may be countered by the well-known *Letelier* case,¹⁷ in which a US court refused to recognise any immunity for agents of Chile who it determined had (admittedly *outside* the context of an armed conflict) assassinated a Chilean opposition leader and his assistant in Washington DC. The most that can be said here is that state practice is mixed—and that the Court’s selectivity in its examination of that state practice is potentially misleading.

So what should be the approach to the immunity of armed forces for territorial torts? Examined analytically, the issue might be framed as a question of regime interaction. Where the armed forces are present in the territory with consent, immunity is likely to be shaped by the terms of that consent rather than

¹³ *McElhinney v Williams*, *supra* note 8, at 701.

¹⁴ Hamilton CJ, writing for the Irish Supreme Court, was “not satisfied that it is a principle of public international law that the immunity granted to sovereign States should be restricted by making them liable in respect of tortious acts committed on their behalf by their servant or agent causing personal injuries to the person affected by such act or omission when such act or omission is committed *jure imperii* and I would dismiss the appeal on this point.” *McElhinney v Williams*, *supra* note 8, at 702–3.

¹⁵ *Germany v Italy*, *supra* note 1, para. 72. The Court finds further support for this proposition in the European Court of Human Rights decision in *McElhinney v Ireland*, *supra* note 8. Again, however, the European Court limited itself to the existence of a territorial tort exception to immunity generally, rather than the more limited question the Court is considering, namely whether any such exception applies to the conduct of armed forces.

¹⁶ See *Germany v Italy*, Dissenting Opinion of Judge *ad hoc* Gaja, at 6–7.

¹⁷ *Letelier v Chile*, *supra* note 7.

general rules. Where armed forces are present without consent, outside of an armed conflict, it is not clear whether there is any basis for claiming immunity, particularly if the presence of the armed forces is a violation of territorial sovereignty (as in *Letelier*, but not in *McElhinney*). But where armed forces are present without consent in an armed conflict, their conduct is regulated by the regime of international humanitarian law, and therefore ought to be taken outside the realm of domestic tort law and national courts. All this suggests that the Court's conclusion that no territorial tort exception applied in this case (concerning armed forces in an armed conflict) may have been correct, but the reasoning and analysis which led the Court to that conclusion leaves something to be desired.

3 The substance/procedure distinction

Having rejected the applicability of the 'territorial tort' exception for claimants alleging torts in Italian territory, the Court went on to consider a broader argument presented by Italy, which purported to justify the non-application of immunity in respect of claims both within and outside Italian territory. The argument was essentially that (1) the gravity of the alleged violations, combined with (2) the *ius cogens* status of the norms, and (3) the lack of alternative means of redress, cumulatively established an exception to state immunity. The Court rejected these arguments individually and also rejected the idea that they might work in conjunction. In rejecting the argument relating to the *ius cogens* status of the norms, the Court drew a fundamental distinction between questions of substance and procedure, finding that the *ius cogens* status of the norm (as a substantive matter) could have no impact on the question of state immunity (as a procedural matter). It thus held that:

The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.¹⁸

This analysis is curiously phrased; the issue was not whether immunity would bear on questions of substance, but whether questions of substance might bear on immunity. But the conclusion of the Court, that the two questions are

¹⁸ *Germany v Italy*, *supra* note 1, para. 93; see also paras. 58, 100.

unrelated, is clear. The Court's analysis here (at paragraph 95) drew expressly on its own previous jurisprudence—the finding in the *Arrest Warrant* case that the personal immunity of a Foreign Minister was not inconsistent with the *ius cogens* status of the norms he was alleged to have violated,¹⁹ and the finding in *DRC v Rwanda* that the Court's own jurisdiction could not be established based on the *ius cogens* status of the norm which was alleged to have been violated.²⁰ Neither of these precedents is, however, particularly apposite to the Court's conclusions in this case. The *Arrest Warrant* case dealt with the absolute immunity afforded to such high level officials as Heads of State and Foreign Ministers. For such immunity to satisfy its function (allowing such officials total freedom to travel and thus conduct diplomatic business) no exception can in any case be allowed. In *DRC v Rwanda*, the Court was considering an argument that the *ius cogens* status of the norm was effective to confer jurisdiction on the ICJ by invalidating a reservation against the compromissory clause in the Genocide Convention, which it rightly dismissed because of the consensual nature of the Court's jurisdiction. In *Germany v Italy*, the Court was faced with the very different question of whether the *ius cogens* status of the norms violated would provide an exception to state immunity, which is itself an exception to the usual jurisdiction which states enjoy within their territory.

Setting aside these questions over precedent, the Court's conclusion was in any case a clear rejection of the arguments presented by Italy. The Italian pleadings had sought to persuade the Court that the effect of a *ius cogens* norm should extend beyond overriding *directly* inconsistent obligations under international law, to also overriding obligations under international law which would reduce the *effectiveness* of the norm—in this case, state immunity for claims arising out of its breach. The distinction drawn by the Court between questions of substance and questions of procedure eliminates this possibility—only “substantive” conflicts may be affected by the *ius cogens* status of a norm; immunity is “procedural” and thus unaffected.

The formalism and strictness of the Court's distinction between matters of substance and matters of procedure was probably unsurprising to most international lawyers, but nevertheless would likely bemuse any thoughtful student of jurisprudence. In domestic legal systems, this distinction has long been the subject of critique which recognises that ‘procedural’ rules may go to the heart of substantive justice, in facilitating or denying a remedy to a claimant.

¹⁹ *Arrest Warrant* case, *supra* note 3, at 24.

²⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment, ICJ Reports 2006, p. 6, 31–2, 52.

In his 1911 book 'A Treatise on the Modern Law of Evidence', for example, Chamberlayne famously remarked that "[t]he distinction between substantive and procedural law is artificial and illusory. In essence, there is none."²¹ It is therefore perhaps a little surprising that the Court should place such decisive weight on this distinction, without a hint of critical examination.

A more subtly reasoned approach had already been suggested in the Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans in the 2001 *Arrest Warrant* case, which argued that "[i]n view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions."²² Even before then, the House of Lords in *Pinochet* had concluded that, at least in the Torture Convention,²³ substance and procedure were linked. States had implicitly agreed that the substantive prohibition on torture entailed procedural consequences, including an exception to state immunity in respect of criminal prosecutions for torture.²⁴ It is obviously true that the ICJ need not link substance and procedure merely because states have done so in an international convention. But this does challenge the Court's insistence that the two are unconnected as a matter of *principle*. The Court dismissed (at paragraph 87) the relevance of the *Pinochet* decision because it dealt with questions of immunity in the context of criminal proceedings, but this dismissal rather begs the question. Both civil and criminal immunity are forms of state immunity; it may certainly be debated whether developments in the criminal context should or should not inform developments in the civil context, but it cannot be claimed or assumed that the two are conceptually independent. The reasoning in *Pinochet* was essentially based on a conflict between universal criminal jurisdiction in the Torture Convention and the availability of immunity. It is true that the Torture Convention is not considered by a number of states to establish universal *civil* jurisdiction²⁵ (although the Committee against Torture takes the opposite view²⁶). But the mere idea of universal jurisdiction suggests that

²¹ C.F. Chamberlayne, *A Treatise on the Modern Law of Evidence* (Bender, 1911), at 217.

²² *Arrest Warrant* case, *supra* note 3, at 24.

²³ 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85.

²⁴ *Ex parte Pinochet Ugarte* (No. 3), *supra* note 2, per Lord Browne-Wilkinson; confirmed as the ratio of the decision in *Jones v Saudi Arabia* [2006] UKHL 26.

²⁵ See, *inter alia*, *Jones v Saudi Arabia*, *ibid.*, paras. 20–5.

²⁶ Committee against Torture, *Conclusions and recommendations*, 34th Session, 2–20 May 2005, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, paras. 4(g) and 5(f).

the substance of certain norms has procedural implications: the availability of national courts as fora for the enforcement of those norms. Again, it is true that universal jurisdiction is controversial as a matter of customary international law, and in treaties reflects particular positive law-making by states. But even in its narrowest accepted form, universal jurisdiction draws clear links between questions of substance and questions of procedure. To suggest that there is no “inherent” link between the concept of *ius cogens* and its procedural implications simply avoids the central issue—whether there *ought* to be such a link—by preconceiving the scope of the norm as a purely substantive question, divorced from any questions of its means of implementation or effectiveness.

In *Germany v Italy*, the Court’s reassertion of the distinction between substance and procedure largely ignored a key argument made by Italy: the claim that an exception to immunity was the “last resort” for the Italian claimants. Although not presented in this form, the effect of this argument was to assert a link between substance and procedure—if the proceedings in Italian courts were indeed the last resort for the claimants, denial of procedure would mean denial of their substantive rights to compensation. The Court acknowledged this to some extent in noting (at paragraph 104) that it “is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress of the Italian nationals concerned”, but offered only the meagre solace of expressing (at paragraph 99) “surprise—and regret—that Germany decided to deny compensation”, and (at paragraph 104) encouraging “further negotiation between the two States concerned”. Although calling for further negotiations might be viewed as an implicit rejection of the claim that the Italian proceedings were a “last resort”, it may reasonably be argued that the Court failed to take full account of the cumulative nature of the Italian pleadings, namely the combination of the *ius cogens* status of the norm with the claim that the procedure was a last resort. A comparison might have been drawn here with the jurisdictional idea of a forum of necessity: the idea that, in the absence of any alternative forum, jurisdiction over civil proceedings may be asserted without a traditional basis for that claim, to give effect to the claimant’s rights of ‘access to justice’. Although this idea has not been widely adopted in the past, it has been included as part of proposals for a reformed Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in the EU.²⁷ Once again, this approach establishes

²⁷ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 14.12.2010, COM(2010) 748 final, p. 34 (proposed Art 26); available at <<http://ec.europa.eu>

a partial link between substance and procedure—the adaptation of procedural rules to ensure that substance is given effect.

As long ago as 1933, Walter Wheeler Cook demonstrated that the “substance/procedure” distinction has no “necessary” content—that there is no objective “line” which must be “discovered”, and indeed that different lines are drawn in different contexts.²⁸ The problem, he argued, is to decide in each case where the line *should* be drawn—a question which requires consideration of the purpose and effects of a proposed distinction. This would suggest that the substance/procedure distinction presented by the ICJ in *Germany v Italy* as a *reason* for rejecting the Italian arguments is in reality a *conclusion* reached by the Court. This is not to suggest that the Court’s decision is unjustifiable—various arguments might be and have been presented for preserving state immunity in this context. But to present the decision as the automatic consequence of a rigid *a priori* substance/procedure distinction, rather than the outcome of weighing competing values, seems to artificially obscure the normative dimensions of the Court’s reasoning.

4 Counter-measures—the elephant in the room?

Following the initiation of proceedings by Germany, Italy filed a counter-claim regarding the existence and scope of Germany’s obligation to make reparation to Italian victims of war crimes committed by the Third Reich between 1943 and 1945.²⁹ Germany disputed that the Court had jurisdiction *ratione temporis* over the counter-claim under the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (the only basis of jurisdiction in the case).³⁰ In its Order of 6 July 2010, the Court upheld Germany’s objection, qualifying the dispute as one regarding the effect of Italy’s 1947 Peace Treaty waiver of “all claims against Germany and German nationals outstanding on May 8, 1945”

/justice/policies/civil/docs/com_2010_748_en.pdf> [last accessed 11 April 2012].

²⁸ W.W. Cook, “Substance” and “Procedure” in the Conflict of Laws’, (1933) 42 *Yale Law Journal* 333, at 335–6.

²⁹ In its Counter-Memorial, Italy argued that “the source or real cause of the disputes submitted to the Court in the present case is to be found in the reparation regime established by the two 1961 Agreements between Germany and Italy” (Counter-Memorial of Italy, 22 December 2009, para 7.4), but did not identify precisely the nature and scope of that dispute. See also *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-Claim, Order of 6 July 2010, Joint Declaration of Judges Keith and Greenwood, para. 4.

³⁰ 1957 European Convention for the Peaceful Settlement of Disputes, CETS No. 023.

and therefore falling outside the temporal scope of the jurisdiction conferred on the Court by the European Convention.³¹

The Court's characterisation of the 1947 Peace Treaty waiver as the source of the reparations dispute between Italy and Germany, and the *ratione temporis* jurisdictional implications of that characterisation, are fairly straight forward and have invited relatively little academic comment. The real mystery lies in Italy's litigation strategy and its decision to frame the reparations dispute as a counter-claim, rather than a circumstance precluding wrongfulness on the merits. While the human rights community may well lament the Court's unwillingness to engage in progressive development in regard to state immunity, it seems that very few international law commentators were surprised by that unwillingness, and surely nor was Italy. Given this "certainty" of outcome,³² why did Italy not expressly argue that Germany's breach of its reparations obligations engaged Italy's right to adopt counter-measures in the form of non-respect for state immunity?

At the merits phase, Italy argued that the substance of its counter-claim regarding Germany's alleged outstanding reparations obligations could be re-incarnated as a "defence" (noted by the Court at paragraph 47), on the basis that "lifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims".³³ This argument comes close to framing the reparations issue as a circumstance precluding wrongfulness. But Italy never relied on the language of Chapter V (Circumstances Precluding Wrongfulness) of the ILC Articles on State Responsibility,³⁴ focusing instead on a form of estoppel argument against Germany. Although noting Italy's contention that "Germany stands deprived of the *right to invoke ... immunity*" (at paragraph 49, emphasis added), the Court subtly (re)framed the question for itself as whether the failure to perform a duty of reparation was capable of having "an effect, in law, on the *existence and scope* of that State's jurisdictional immunity before foreign courts" (at paragraph 50, emphasis added). In its presentation of the issue, the Court limited itself to the effect of the reparations

³¹ *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-claim, Order of 6 July 2010, paras. 27–30.

³² See A. Bianchi, 'On Certainty', *EJIL: Talk!*, 16 February 2012, available at <<http://www.ejiltalk.org/on-certainty/>> [last accessed 11 April 2012].

³³ *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-Memorial of Italy, 22 December 2009, para. 6.39.

³⁴ See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001/53 (II, Part Two) ILC *Ybk*, at 26.

dispute on the primary rules regarding state immunity, and ignored Italy's (very) implicit reference to circumstances precluding wrongfulness. This is not entirely consistent with past practice, in which the Court has raised counter-measures as a potential defence of its own motion³⁵—but is perhaps explained by the jurisdictional complications discussed below.

For good reason, counter-measures need not be “reciprocal”, in the sense that they need not be related to the prior breach of international law which has occasioned their adoption.³⁶ But where counter-measures can be related to the internationally wrongful act to which they respond, necessity and proportionality (as conditions for the adoption of legitimate counter-measures) are more easily made out.³⁷ In this particular case, the catalyst internationally wrongful act would be the breach of international humanitarian law committed by the German Third Reich during the Second World War, and Italy's adoption of counter-measures would be to “induce the responsible State to comply with its obligations under Part Two [of the ILC Articles on State Responsibility], namely ... to provide reparation to the injured State.”³⁸ There is a certain symmetry where a counter-measure directly minimises the impact of the wrongdoing state's failure to meet its secondary obligations. In this case (so the argument would have gone), the Italian breach of Germany's state immunity by way of a counter-measure would have pressured Germany to meet its secondary obligations of reparation and given some effect to those obligations at the same time. Indeed, an Italian breach of state immunity in the form of a counter-measure aligns itself with one of Italy's arguments on the substantive claim—that immunity gives way when there is otherwise a lack of alternative means of redress. This argument accounts for the fact that counter-measures should be a response of “later (if not final) resort”.³⁹ This idea of denying immunity as a form of counter-measure provides arguably the best explanation for the legality of the exceptions to immunity under US⁴⁰ and now Canadian⁴¹

³⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, at 127, paras. 248–9; *Gabčíkovo–Nagy-maros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997, p. 7, at 55–7, paras. 82–7.

³⁶ See ILC (2001), *supra* note 34, Commentary to Part Two, para. 5, at 129.

³⁷ *Ibid.*

³⁸ *Ibid.*, Commentary to Article 49, para. 1, at 130.

³⁹ See J. Crawford, ‘Overview of Part Three of the Articles on State Responsibility’, in J. Crawford, A. Pellet *et al.* (eds), *The Law of International Responsibility* (Oxford University Press, 2010), at 932.

⁴⁰ See the 1976 Foreign Sovereign Immunities Act, Terrorism Exception to the Jurisdictional Immunity of a Foreign State, 28 USC §1605A.

⁴¹ See the 2012 Justice for Victims of Terrorism Act, amending the 1985 State Immunity

law for claims against terrorist–sponsoring states.

Perhaps the reason Italy did not frame the reparations dispute as a circumstance precluding wrongfulness is the uncertainty as to whether the conditions for a legitimate counter–measure would have been met on the facts. States adopt counter–measures at their own risk. If the precipitating act is not in law wrongful (which is not the case on these facts, as Germany conceded the breaches of international humanitarian law during the Second World War), or if the secondary obligations that flow from the precipitating breach have been met (for instance if treaty waivers by Italy⁴² were determinative and fully extinguished any such obligations), then the responsive measure does not benefit from wrongfulness preclusion and is itself wrongful. It is also unclear whether Italy could have satisfied the procedural requirements of Article 52 of the ILC Articles on State Responsibility for the adoption of legitimate counter–measures. In particular, Italy would have had to call upon Germany to comply with its obligation of reparation and to notify Germany of its decision to take counter–measures.⁴³ Given that the denial of immunity was a judicial decision, and given Italy’s failure to clearly articulate the nature of its dispute with Germany regarding reparations, it is unlikely that either requirement was met.⁴⁴ There is equally an interesting issue as to whether a breach of state immunity by way of counter–measure is of a sufficiently temporary or provisional character. State immunity is intended to protect states not only from final judgments by the domestic courts of foreign states, but equally (as noted by the Court) “from being subjected to the trial process” at all.⁴⁵ Subjecting a state to such proceedings in breach of its immunity is a bell that cannot be entirely un–rung. That said, the consequences of breaching state immunity (for instance damages judgments and attachment) could be limited following the wrongdoing state’s compliance with its secondary obligation of reparation, and might on that basis be sufficiently reversible.⁴⁶ Nevertheless, given that Italy did not legislatively reverse the *fait accompli* presented by decisions of the Italian courts, and the

Act, RSC, 1985, c. S–18; see also J. Harrington, ‘If not torture, then how about terrorism—Canada amends its State Immunity Act’, *EJIL: Talk!*, 28 March 2012, available at <<http://www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act/>> [last accessed 11 April 2012].

⁴² *Germany v Italy*, *supra* note 1, paras. 24–5.

⁴³ See ILC (2001), *supra* note 34, Art 52.

⁴⁴ See *Germany v Italy*, Joint Declaration of Judges Keith and Greenwood, *supra* note 29, para. 6.

⁴⁵ *Germany v Italy*, *supra* note 1, para. 82.

⁴⁶ The requirement under Art 49(3) of the ILC Articles on State Responsibility that a counter–measure be reversible is not absolute, as indicated by the phrase “as far as possible”. See ILC (2001), *supra* note 34, Commentary to Article 49, para. 9, at 131.

virtual certainty of the Court's decision that there is (currently) no exception to immunity for claims arising out of breaches of *ius cogens* norms, Italy's failure to frame its breach of Germany's state immunity as a responsive and legitimate counter-measure is surprising.

It is, however, possible that such a counter-measure argument would have been as jurisdictionally doomed as Italy's counter-claim. Italy had argued (as noted by the Court at paragraph 47) that the jurisdictional limitations which prevented it from pursuing its counter-claim did not prevent it "from using the arguments on which it based that counter-claim in its defence against Germany's claims" and that the "Court's jurisdiction to take cognizance of it incidentally is thus indisputable." Germany argued in response (as noted by the Court at paragraph 46) that the *ratione temporis* jurisdictional limitations which applied to the counter-claim would apply to any other form which the reparations dispute might take.

Unlike in specialist dispute settlement mechanisms (like the WTO⁴⁷), there would have been no inherent subject matter restrictions which would have limited the ability of the Court to address Germany's breach of its secondary obligation to make reparation for violations of international humanitarian law. The Court has, in past cases, exercised jurisdiction over a breach of international law that did not form the subject matter of the dispute before it, in order to decide whether that breach justified the adoption of counter-measures. It thereby recognised the possibility that such a breach might preclude the wrongfulness of the internationally wrongful act that did form the subject matter of the dispute. In those cases, however, the Court's jurisdiction was either unrestricted with regard to questions of customary international law (in reliance on Article 36(2) of the ICJ Statute)⁴⁸ or the counter-measure was precisely reciprocal (in that it breached the same treaty which formed the subject matter of the dispute and over which the Court exercised jurisdiction).⁴⁹ Whether the Court would examine conduct that fell *outside* its temporally restricted jurisdiction, in order to decide whether breach of the obligation over which it *did* exercise jurisdiction was a legitimate counter-measure, is a separate issue, and not one which the Court has encountered.

There is of course the concern that wrongdoing states might rely on any such incidental jurisdiction over a prior breach (for the purposes of establishing

⁴⁷ See K. Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011), Chapter 5.

⁴⁸ *Nicaragua case*, *supra* note 35, at 127, paras. 248–9.

⁴⁹ *Gabčíkovo–Nagymaros case*, *supra* note 35, at 55–7, paras. 82–7.

the legitimacy of a counter-measure) to enlarge the scope of the Court's jurisdiction. But where the prior breach is genuinely being raised as the catalyst for responsive measures that form the subject matter of a dispute over which the Court has jurisdiction, incidental jurisdiction could be the vehicle for stemming fragmentation and giving the Court the opportunity to make its orders effective. An inability to address a circumstance precluding wrongfulness for lack of jurisdiction over the prior breach would result in a judgment that makes a finding of unlawfulness that is divorced from the legal complexities of the relationship between the disputants and invites non-compliance with any Court order by the measure adopting state. Had a good case been made that Italian non-respect for Germany's state immunity constituted a counter-measure, a conservative approach to its own jurisdiction would not have served well the Court's cause of comprehensive dispute settlement. As Italy did not raise the reparations dispute in terms of a circumstance precluding wrongfulness, and the Court did not do so of its own motion, this interesting jurisdictional question remains open.

5 Conclusions

It is hard not to feel a certain sympathy for the judges of the International Court of Justice in this case. Confronted with what has been a greatly contested issue of law and policy, they faced the dilemma of choosing between judicial activism, perilous to the Court's consensual jurisdiction, or conservative positivism, risking reinforcing the *status quo* and stultifying development of the law. The fact that the Court so overwhelmingly chose the latter should not itself be a cause of surprise, or even necessarily regret. But the fact that the Court did so through reasoning which obscured the complexity of so many of the issues with which it was faced is indeed disappointing. The International Court of Justice hears cases on state immunity so rarely, it might have been hoped that the Court would take this opportunity to shed new light on the development of this area of the law. Instead, the Court's judgment sails over the smooth surface of the issues, leaving the depths unexplored.