Farhad Malekian[1]

Conundrums of *Jus Cogens*: In Case Law (Part II)[2]

Summary. A well known recent case relating to the body of *jus cogens* and violations of international humanitarian law of armed conflict is the case relating to *Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening*. The case was given a sufficient amount of consideration because of its merit and the involvement of several countries. It became known not for dealing with the questions of *jus cogens* and its boundary of application, but the fact that the ICJ draws a line between the substantive law and procedural rules of public international law and thus, according to some, negating *jus cogens* values. Substantive law and procedural rules have not only a juridical nature, but are also greatly interwoven with issues of politics and economic agendas, which make the case much more complicated and controversial.

Keywords: *jus cogens*, immunity, judgment.

I. Variance between Substantive Law and Procedural Rules

A. Casing Jurisdictional Immunity

Concerning the nature of state immunity, there have been two forms of practice prevailing between states. One is the concept of absolute immunity, which prevents a nation from being questioned in foreign national courts. It originates from the doctrine of official state immunity and is mostly based on United States Supreme Court decisions. Nevertheless, besides this concept, there is another method, which constitutes a restrictive form of immunity. This concept developed in the Mediterranean and other states, including Belgium, Egypt, Greece, Italy, and in Western nations, including Australia, Canada, the United Kingdom, and the United States.

In the *Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening*- the ICJ mainly objected to the views presented by different internal Italian courts and their representatives under the procedures of the Court. According to the ICJ, the claim by Italy that the *jurisdictional immunity of a state* could not be invoked in cases where a violation of rules of a peremptory character had occurred was without sufficient legal basis. According to Italy, however, which was also protecting the rights of the citizens of Greece, a peremptory norm of general international law, such as the body of international humanitarian law of armed conflict, automatically displaces any hierarchically lower rule of a treaty or customary international law that would prevent the enforcement measures of *jus cogens* norms. As a result, one should not give precedence to the rules of immunity, which has a lower status compared with the high validity of the peremptory norms of international law.

However, the philosophy of the ICJ judgment was quite different from Italy's reasoning. According to the Court, the disagreement of the two

[1] Почесний візитуючий професор (Distinguished Visiting Professor) Фархад Малекян — один із провідних фахівців в сфері порівняльного міжнародного права і процесу. Автор дев'ятнадцяти книг та численних статей, які стали довіреними джерелами і рекомендованою до читання літературою в юридичних закладах від Європи до В'єтнаму. Фархад Малекян є засновником і директором Інституту міжнародного кримінального права (Уппсала, Швеція). Email: *f.malekian.in.crim.l@telia.com*.

[2] This article appears in two numbers of the Journal. // Дана стаття публікується в двох випусках.

states varied because of a conflict flanked by the rules of *jus cogens* and the rules of customary international law, which enforce certain duties on all states to respect the principle of immunity. The Court further believed that the existence of such a conflict was based on the fact that there were two different sets of rules of international law that did not necessarily have any connection with one another.

Italy objected to the majority of statements of the Court and felt the judgment of the Court was irrational and contributed to the humiliation of victim's rights and their integrity. The views of both parties in connection with the judgments of different courts and, in particular, the ICJ will be discussed in the remainder of this article, but it should be noted here that the judgment of the Court was not the first one to draw a distinct line between substantive law and procedural rules. In the *Arrest Warrant* case, the Court judged that while 'jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law' [1, p. 25 para. 60].

B. The Nature of Immunity

The leading question in the system of international law, in general, and public international law, in particular, is whether states are obliged to respect the immunity of a state that has seriously violated the system of international criminal law of *jus cogens*. Consequently, one may reason that immunity of a state may be waived when there are issues of systematic violation of international criminal law. This means a recourse to the system of absolute or restrictive immunity. The practices of *ad hoc* international criminal tribunals denote the waiving of immunity. In actual reality, however, some states do not accept foreign courts waiving their immunity. For instance, in the *Pinochet Ugarte* case, the United Kingdom neither returned him to the Spanish courts, nor prosecuted him for alleged violations of the system of international criminal law. The position was motivated by the concept of jurisdictional immunity of the relevant state [2, p. 68].

It is also of interest to emphasise that in the *Germany v. Italy: Greece Intervening* case, the German claim to immunity mostly relied on positivist approaches, while Italy's claim combined both positivist and naturalist theories. The ICJ also based its judgment mainly on a positive interpretation of the law, and issues of human rights law were not given any room. This means that some basic concepts of human rights law, including humanitarian law, such as the right to an effective remedy, the right to compensation for damages resulting from serious breaches of humanitarian law, or protection from the denial of justice were not considered essential for the redress in the case. The clearly mysterious conundrums of *jus cogens* law, which are neither accepted, nor rejected from a pragmatic point of view, are apparent. These discrepancies resulted from the fact that the ICJ could not see any basic reason for the examination of those principles because of the nature of the conflict and the different sets of rules under examination. Therefore, the Court found that the acts committed by Germany were the *public acts* of the government or *acta jure imperii* that could not come under the sovereignty of *jus cogens* norms.

According to the individual opinion of one of the judges in the *Germany v. Italy: Greece Intervening* case, the case plainly proves the extent to which

the matter of immunity of a state is intimately associated with admission by the state of its own breaches of provisions of the system of international law. In its examination of the system of customary international law, it was incumbent on the ICJ to note this trend and to foresee its impact on the corpus of the international legal system. It is therefore surprising to witness that few similar cases before domestic jurisdictions of states, also dealing with the protection of immunity, have had effect on overall judgment of the Court [3, p. 83 para 34]. However, neither the Court, nor Germany had any objection to the definition of the boundaries of the term *jus cogens*, and the crimes that had been committed against the victims remained without appropriate remedies. This was not the problem, but instead the very basic contradiction between the two different legal areas of international law that could not interfere in or invalidate the other side. Consequently, the main question was not compliance with the system of *jus cogens* law, but whether *interference* could constitute disregard for traditional immunity rules of the state in question.

C. Several Characteristic Facets of the Case Law

The *Germany v. Italy: Greece Intervening* case is a typical type of judgment that deals with several significant questions of international law at the same time [4, para 95]. The case has four different characteristics. These are *national*, *regional*, *international,* and — because Greece was allowed to intervene in the case on the side of Italy — also *inter-mutual* state characteristics. Intervening in this case as a non-party, Greece also submitted a written statement in which it emphasized, *inter alia*, the individual right to reparation in the event of grave violations of human rights law [4, para 34].

A rapid survey of the case may therefore be useful to elucidate the incongruence or *conundrums* that emerge from the proceedings of the case. Some victims of the Second World War in Italy and Greece wanted reparation and therefore submitted their case to the relevant domestic courts. In Italy, the case was not welcome at the time of its initiation, but was finally accepted by a higher court, the *Corte Suprema di Cassazione* in 2008. According to the Italian Court, a particular rule of customary law permitted an exception to the issue of immunity of jurisdiction of a state.

This exception occurs when a grave violation of the provisions of customary international law constitutes an integral part of *jus cogens*. The Italian Court also agreed to enforce a 1995 Greek court judgment in favour of plaintiffs of Greece, which had a similar nature. Enforcement of the judgment had been rejected to be enforced in Greece, and in Germany. Even the European Court of Human Rights refused to examine the case, based on the jurisdictional immunity of Germany. Finally, the *Corte Suprema di Cassazione* concluded that the victims had the right to compensation and therefore decided to enforce its judgment against the German property (*Villa Vigoni*).

D. Waiving or not Waiving the Jurisdictional Immunity of a State

In the Federal Republic of Germany, the judgment of the *Corte Suprema di Cassazione* of Italy for waiver of its immunity and its enforcement against the German property *Villa Vigoni* was not welcomed and caused Germany to submit a case against Italy to the ICJ.

According to the applicant, the Italian courts allowed civil claims based on violations of international humanitarian law by the German Reich during the Second World War (between September 1943 and May 1945) to be submitted against the Federal Republic of Germany. These events were contrary to the provisions of public international law and therefore constituted violations of the jurisdictional immunity of the Federal Republic of Germany under the same law [5, p. 17][1].

Consequently, one of the most essential questions for the ICJ was whether to waive the jurisdictional immunity of the state of Germany or reject the alleged statements and the judgment of the Italian court. The question was not simple for the Court, and it was not simple for the parties either, even Germany itself. The spirit of Germany's complain is full of regret and repentance for the atrocities committed by the German troops against the Italian nationals. In addition, one can that Germany accepts its responsibility for grave violations of international law or the 'untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees.'[6] The ICJ manifests that 'it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them' [4, para 99].

What is here divisive is whether the national courts of a foreign state have the proper capacity to investigate a case against the jurisdictional immunity of another state. Likewise, if they maintain impartiality throughout the examination of a case, what part of the immunity should not be waived and what part may be waived and under what conditions? [7, pp. 996-997].

On the one hand, there is a concordance of theories among the doctrines of international law and a considerable number of provisions, formulations, and judgments listed in the recent practice of *ad hoc* international tribunals to the effect that no plea of immunity may be given in cases of grave violations of the basic values of international criminal law. On the other hand, the case law of national courts does not encourage waivers of jurisdictional immunity and addresses such cases with the wording *not acceptable*, *not having the capacity*, or *falls out of its jurisdiction*. In certain situations, most cases concern civil suits brought against the entities of a state, and they have mainly had legal permission for the waiving of its immunity.

This means that there exists not only a conundrum for the proper understanding of *jus cogens* law, but also a serious conundrum for the solving of immunity rules when there is a serious conflict between violations of humanitarian law and violations of immunity rules. It means waiving or not waiving the jurisdictional immunity of a state is not the core question of law, but the central question is whether there is a propensity to choose to do good for the victims or to do good for the international legal personality of the state. Here, we mean Germany. In other words, the issues of jurisdictional immunity, *jus cogens*, and *erga omens*,

[1] The case was submitted to the ICJ by Germany in December 23, 2008.

must be the object of careful scrutiny, as they may significantly define the role of national, regional, or international jurisdictions when implementing the applicable rules of international legal discipline. As one of the judges of the Court and the Vice-President of the ICJ illuminates, the scope of immunity has been contracting over the past century, as the body of international legal justice has shifted from a state-centred model to one that also shields the rights of human beings. Therefore, he believes that immunity has no an immutable value in the system of international law. [8] However, the majority of the judges of the ICJ held the contrary view.

E. Connotations on the Gavel of the Court

The ICJ, unlike the parties and individual judges, did not distinguish between substantive rules and procedural rules. However, the Court drew a distinction between substantive rules and substantive law, and it looked into the question of rules that were procedural in nature. Neither the ICJ, nor the Federal Republic of Germany meant to violate the *jus cogens* norms or degrade their peremptory nature, but they considered it necessary to emphasise that those substantive laws and procedural rules are not in essence identical[1].

One the one hand, the substantive norms of international law, even the substantive norms of *jus cogens* law, establish whether certain activities on the part of subjects of the law are correct and do not violate the given rules. This means that, according to the judgment of the ICJ, a state not only has a negative duty to respect the peremptory norms of international law, but also a positive duty to safeguard these norms and the character of jurisdictional immunity of a state, which constitutes an integral part of those duties. This type of debate stems mainly from a tension between state sovereign immunity and the respect of such immunity by foreign states. In other words, the concept of jurisdictional immunity of state is a settled principle and cannot be waived without the express consent of the state in question. Any divisive dilemma may be harmful to both, i.e., *jus cogen*s norms and immunity rules.

On the other hand, the system of international law has proven that the concept of immunity before domestic courts is not absolute and can be waived by the state itself or by the effect of its grave violations of immutable norms. As one of the judges of the Court and the Vice-President of the ICJ points out, there is a considerable divergence in the extent and scope of immunity in state practice. It is therefore necessary to work out a balance between the function of immunity and the realization of basic humanitarian law and human rights law [4, para 99]. A state may automatically waive its immunity by committing a serious, internationally wrongful act that is against the basic norms of *jus cogens* law. In such a situation, any reference to the concept of state immunity means the intention to escape prosecution and punishment [4, para 99]. One example is that of al-Bashir, the President of Sudan, who committed the act of genocide and escaped punishment under the conditions of state jurisdictional immunity.

It is relevant to mention that the issue of jurisdictional immunity of

[1] "The underlying legal responsibility however remains unaffected by the plea of immunity. Thus, immunity merely presents a procedural bar that precludes proceedings in front of foreign courts" [9, p.149].

Germany was seriously disregarded in the proceedings of the International Military Tribunal in Nuremberg, based on the fact that the grave violations of the norms of customary law were given priority over substantive law and even procedural rules. This means the waiving of jurisdictional immunity in particular circumstances is permitted within the system of international law. Similar conclusions can be drawn about the jurisdictional immunity of other states that have come under the auspices of *ad hoc* international criminal tribunals.

Nevertheless, the situation differs slightly here. This is because the *Germany v. Italy: Greece Intervening* case relates to a time of *peace* and *not war*. The tribunals in Nuremberg were established on the basis of consequences of wartime events and very complicated political relations. *Conversely*, it is a fact that thousands and thousands German women were raped by Russian soldiers and, in some instances, by the United States armed forces; these criminal acts could obviously constitute a violation of the *international legal personality* of the German state or its jurisdictional immunity, even though it had lost the war. Because of the political situation, however, rules were no longer a question of choice, but a question of imposed military force.

One may therefore present different arguments in certain sensitive cases, as to the way in which the defeated state victims were treated by the victorious states. Was the raping of members of the unarmed population *acta jure imperii* in the home state of the offenders or a form of superior order? Even the contemporary law on rape in international criminal law can be applied retroactively; when a law has good consequences, it is permitted to be used for the sake of victims. Obviously, the victims have the same right as the Italian and Greek victims (to bring their cases before German national courts or regional courts), but because of the political ramifications of the war, such idea is not only kept silent today, but is even politically sensitive. This means that the German rape victims have not received any compensation at all from the Soviet Union or the United States[1].

Although the ICJ dismissed the decisions of Italian courts, announced them invalid against *Villa Vigoni*, did not mitigate responsibility of Germany for international crimes, and concurred that Italy had seriously violated jurisdictional immunity of Germany, the conundrums of justice remained unsolved and the questions concerning *jus cogens*, human rights law, humanitarian law, *erga omnes*, and immunity even increased. And no less, the case established a legacy of non-reparation, which is not really the true nature of justice when one examines the heavy compensation awarded to Jewish and other victims to which the German government has given its full attention for the sake of satisfying the gavel of justice [10, pp. 27-43].

G. Does the Jurisdictional Immunity Judgment Encourage Impunity?

This is one of the serious questions that has been given great attention among international publicists as the secondary source of international law. The question may be answered differently, based on the fact that one cannot specify whether the judgment of the ICJ will augment impunity by

[1] I raised this position in a panel at the 70th anniversary of the establishment of the Nuremberg Tribunal in Nuremberg on 23 November 2015.

writing and speculating. This is why the title of this article refers to the conundrums of *jus cogens* and *erga omens* law in conjunction with the principle of *jurisdictional immunity of a state*. On the one hand, it is obvious that Germany did not intend to help the theory of impunity by submitting the case to the jurisdiction of the ICJ. On the other hand, the authors of the content of the judgment are not free from regret and even some judges who voted in favour of the judgment are not convinced of justice having been done. They are worried about the possibility of a wrongful deduction of the case and, consequently, the development of impunity.

For example, Mohamed Bennouna, one of the judges of the ICJ who cast a *positive* vote in the case comments that 'I cannot, however, endorse the approach adopted by the Court, or support the logic of its reasoning.' He goes further and clarifies that, in his view, 'rather than regarding this simply as a possible subject of negotiation, Germany should assume its international responsibility and, in consultation with Italy, supplement the measures it has taken since the Second World War, so as to cover the categories of victims excluded there from.'[3, paras 1, 14] This statement certainly indicates that the judgment is divided in its core substance and contradicts key issues of human rights law. It is also correctly reiterated in the individual opinion of the same judge in that a state 'is required at some point to open appropriate channels to reparation, in order to avoid ultimately being tried by foreign courts' [3, para 33].

The case may or may not encourage impunity, but permanent members have wrongly used the banner of sovereign acts, *jure imperii*. For instance, an examination of the records of the history of international ratifications proves that the United States government has been reluctant to ratify most international conventions with a *jus cogens* character, such as the Convention on Genocide, the Convention on Torture, the Convention on the Rights of the Child, and the Statue of the International Criminal Court. The reason is simple: any ratification of an international convention means that the convention becomes an integral part of the constitution of the relevant state, and the question of the waiving of immunity may be raised in certain situations.

F. Ethical Balance in International Community Interests

One of the serious dilemmas emerges when the judgment of the ICJ concerning *Jurisdictional Immunities of the State* could be wrongly interpreted by states against the principle of equality and the responsibility of states for acts committed under their jurisdictions. According to the individual opinion of one of the judges who voted in favour of the judgement, 'the question of jurisdictional immunity raises fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure' [3, paras 8, 9].

Moreover, none of the judgments of international criminal courts have taken into account the jurisdictional immunity of a state in cases concerning grave violations of the system of humanitarian law of armed conflict [11, p. 75]. This is because almost none of the judgments of those courts differentiate between substantive norms and procedural rules. The result is that the judgments of the ICJ and the *ad hoc* tribunals

may or may not encourage impunity [12, p. 911]. Therefore, certain rights of sovereign immunity may be violated or may compete with peremptory norms, which have the aim of safeguarding the natural rights of human beings as a whole, whether by the principle of *jus cogens* or the principle of immunity [12, p. 911]. *Antônio Augusto Cançado Trindade, a judge of the ICJ, excellently concludes in his dissenting judgment that 'j*us cogens stands above the prerogative or privilege of State immunity. There is no State immunity for international crimes.' [13, para 316] The dissenting judge, however, confuses the value of the principle of balance, as all parties — including the Court — did. 'Balancing the potentially competing demands of stability and accountability remains an important challenge for both international and domestic courts' [14, p. 183].

The Italian Courts went too far with the implementation of their decision. They should have given power to their decision by intensive diplomatic negotiations and the involvement of the United Nations for assistance in order to convince Germany. Likewise, the ICJ should have been cautious in its decision for the sake of both parties. We can understand that *both parties* are different, yet the Court should arrange the judgment in such a way that they can feel a *balance between the means and the end. This means* the decision should ideally have shed light on the balance between immunity rules and *jus cogens* norms.

To maintain the *balance*, the Court did not need to present *both sides* of the argument equally, but did need to correctly direct Italian and German to take the right diplomatic decision. This means 'appropriate balance between avoiding international friction and vindicating core international interests' [15, p. 1099]. The judgment should have taken into account the merit of integrity of all parties and even the principle of immunity, including the hierarchical value of the *jus cogens* principle. Both sides, even the Court, lost the value of *balance* between immunity rules and humanitarian norms. Even the judges, including the dissenting judges and their separate judgments, unintentionally neglected the goal of *balance* in the substance of their interpretations.

II. Conclusion

The significant legacy of the norms of *jus cogens* must be realised by all governments, and it follows that they should submit themselves to the raw face of honesty when they have violated the provisions of such inevitable law. This also includes immunity rules, which belong to the international legal personality of any state. The simple principle is that the key norms of *jus cogens* are the strength of pure love for human beings' natural preservation on the whole, and the focus of immunity is to accept responsibility and not deny it. Similarly, the main duty of a state is not to breach the immunity of another state by various means when the target state has repeatedly been reluctant to submit itself to the jurisdiction of foreign courts. Balance should be the first principle of justice or proportionate means. Otherwise, we are reading the *jus cogens* norms and immunity the wrong way.

REFERENCES:

1. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, [2002] ICJ Rep. 3.
2. The High Court of Justice, Queen's Bench Division, Divisional Court, In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum. Re: Augusto Pinochet Duarte, 28 October, 1998, reproduced in 38 International Legal Materials (1999).
3. Germany v. Italy: Greece intervening, Opinion Individual De M. Le Mohammed Bennouna. [Electronic resource] Available at http://www.icj-cij.org/docket/files/143/16889.pdf (visited 20 August 2017).
4. Germany v. Italy: Greece intervening, Judgment of 3 February 2012. [Electronic resource] Available at http://www.icj-cij.org/docket/files/143/16883.pdf (visited 20 August 2017).
5. Germany v. Italy (International Court of Justice, General List No 143, 3 February 2012).
6. Joint Declaration of Germany and Italy, Trieste, 18 November 2008.
7. Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished', 25 *Leiden Journal of International Law* (2012), pp. 979–1002.
8. Germany v. Italy: Greece intervening, Dissenting Opinion of Judge Abdulqawi A. Yusuf. [Electronic resource] Available at http://www.icj-cij.org/docket/files/143/16893.pdf (visited 15 August 2017).
9. Daniel Scherr, 'Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening): A Case Note' 10 *New Zealand Yearbook of International Law* (2012), 139-151.
10. See also K. Kawasaki, 'A Brief Note on the Legal Effects of Jus Cogens in International Law, *Hitotsubashi Journal of Law and Politics,* (2006), Vol. 34, pp. 27-43.
11. R. Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012).
12. L. McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', 18 *European Journal of International Law* (2007), 903-919.
13. Germany v. Italy: Greece intervening, Dissenting Opinion of Judge *Antônio Augusto Cançado Trindade*. [Electronic resource] Available at http://www.icj-cij.org/docket/files/143/16891.pdf (visited 17 August 2017).
14. Chimene Keitner, 'Germany v. Italy and the Limits of Horizontal Enforcement Some Reflections from a United States Perspective', 11 *Journal of International Criminal Justice* (2013), 167-183.
15. Paul B. Stephan, 'The Political Economy of Jus Cogens', 44 Vanderbilt *Journal of Transnational Law* (2010), 1073-1104.

Фархад Малекян

Головоломки jus cogens: в міжнародному кримінальному праві (ч. 2).

Анотація. Відомою нещодавньою справою, пов'язаною із правом *jus cogens* та порушеннями міжнародного гуманітарного права збройних конфліктів є Справа про юрисдикційні імунітети держави: Німеччина проти Італії (*Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening*). Справі був приділений істотний обсяг уваги з огляду на її значущість та на участь в ній декількох країн. Вона стала відомою не через розгляд питань *jus cogens* та меж його застосування, а через той факт, що Міжнародний суд розмежував матеріальне право та процесуальні норми міжнародного публічного права і, таким чином, відповідно до певних точок зору, відкинув цінності jus cogens. Матеріальне та процесуальне право не тільки мають юридичну природу, але також суттєво переплітаються з політичними та економічними питаннями, що, в свою чергу, робить справу набагато складнішою та суперечливішою.

Ключові слова: *jus cogens*, імунітет, судове рішення.

Фархад Малекян

Головоломки *jus cogens*: в международном уголовном праве (ч. 2).

Аннотация. Известным недавним делом, связанным с правом *jus cogens* и нарушениями международного гуманитарного права вооруженных конфликтов, выступает Дело про юрисдикционные иммунитеты государства: Германия против Италии. (*Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening*). Делу был уделен существенный объем внимания вследствие его значимости и участия в нем нескольких стран. Оно стало известным не по причине рассмотрения вопросов jus cogens и рамок его применения, а ввиду того факта, что Международный суд разграничил материальное право и процессуальные нормы международного публичного права и, таким образом, согласно некоторым мнениям, отвергнул ценности *jus cogens*. Материальное и процессуальное право не только имеют юридическую природу, они также существенно переплетаются с политическими и экономическими вопросами, что, в свою очередь, придает делу значительно более сложный и спорный характер.

Ключевые слова: *jus cogens*, иммунитет, судебное решение.