Model Courts of Justice 2026

INTERNATIONAL COURT OF JUSTICE

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16 PEACE, JUSTICE AND STRONG INSTITUTIONS

LETTER FROM THE SECRETARY-GENERAL

Highly Esteemed Participants,

I welcome you all to the 14th Annual Edition of the Model Courts of Justice as the Secretary-General. My name is Rana Elif TAZE, and I am a junior law student at Ankara University.

The participants of the Model Courts of Justice 2026 will be focusing on the fields of international humanitarian law, customary international law, and most importantly, international public law specified on the jurisdictional immunities and sovereign equality of the states. The case that will be simulated this year is 'Jurisdictional Immunities of the State: Germany v. Italy (Greece Intervening)' In this regard, the participants will have the opportunity to practice their subjects and improve their written and oral skills in regard to the principles of sovereign immunity and the legal interplay between State jurisdictional privileges and serious violations of international humanitarian law, as well as the hierarchy of norms within public international law.

I would like to first express my great appreciation to the Under-Secretary-General responsible for the Court, Mr. Yusuf Kuzey VURMAZ. He concluded his work with great determination and enthusiasm. Despite all the challenges, he proudly prepared this very Study Guide. Second, I would like to thank Ms. Merve ARSLAN, the trainee for the Court her efforts to learn and her contributions. Lastly, I would like to express my greatest thanks to Ms.İlayda KARA, Director-General of the 14th Edition, to walk with me on this long journey. Without her dedicated work, this edition would never be possible. I am glad we were together in this.

Before attending the sessions, I highly recommend that all the participants read the Study Guideand Rules of Procedure and prepare the printed versions of these documents with them to refer to during the Conference. If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org.

Warm Regards,
Rana Elif TAZE
Secretary-General of the Model Courts of Justice 2026

LETTER FROM THE UNDER-SECRETARY-GENERAL

Esteemed Participants,

My name is Yusuf Kuzey Vurmaz, and it is an honor to welcome you all to MCJ'26, the leading international law conference in Turkey. As a junior year law student from Ankara University, it is a pleasure of mine to serve as the Under-Secretary-General responsible for the International Court of Justice.

This year, in the ICJ, we will be simulating the *Jurisdictional Immunities of the State* case, a judgment effects thereof are still felt today. Along with the principles enshrined in customary international law with regard to State immunity, which is the incarnation of the principle of sovereign equality in this context, this case emphasizes the gentle balance between the principle of protection of fundamental human rights and respecting sovereignty of foreign states. We will delve into the dispute at hand to find answers to questions international las is yet to answer.

In closing, I would like to extend my sincerest gratitude to every member of the team thanks to whom MCJ is back stronger than ever. I would like to further extend my appreciation to our Secretary-General and Director-General for their great efforts.

Yusuf Kuzey Vurmaz,
Under-Secretary-General for the International Court of Justice

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I. INTRODUCTION TO STATE IMMUNITY

1. State Responsibility

A state is a corporate entity and cannot carry out its functions without the involvement of others. Through attribution, international law establishes whether the conduct of a private or natural person could be deemed an 'Act of State', and therefore be capable of giving rise to state responsibility.[1] Attribution is of utmost importance to the law of state responsibility and an essential condition for its operation.[2] A state can only claim immunity on behalf of a person or of an entity over a conduct that it is deemed responsible of. *The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality*.[3] The general rules of attribution set out below can be displaced by a *lex specialis* under Article 55 of the ILC Articles on the responsibility of States for internationally wrongful acts (ARSIWA).[4] There are 7 bases of attribution under international law: Articles 4-11 of ARSIWA.[5]

A state is responsible for the conduct of any of its organs, regardless of their function in any specific case giving rise to the responsibility of its national-state, whether they are *de jure* or *de facto* organs.[6] In any case, A state is also responsible for the conduct of an entity or private person if

[1] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 129.

[2] *Ibid*.

[3] ILC, 'DARSIWA, With Commentaries' [2001] 2(2) YB ILC 26, pt I ch II commentary ¶4 ["**ARSIWA with commentaries**"].

[4] *Ibid*; *American Bureau of Shipping v Agent judiciaire de l'Etat* (Cass civ 1re, 17 April 2019) ECLI:FR:CCASS:2019:C100370 ["**American Bureau of Shipping**"].

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, [414].

[6] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) Yearbook of the International Law Commission 2001, Vol II (Part Two) art. 4 ["**ARSIWA**"].

they are administered and also exercise elements of governmental authority[7].[8] When a state grants the right of usage of one of its organs to another state, the actions of that organ are attributed to the receiving State, provided it is exercising the governmental authority of the receiving State.[9] A state is still responsible for the relevant conduct even if the actors acting on behalf of the State exceed their official authority or disobey instructions.[10] The actions of private individuals or groups are attributed to the State if they are acting on the direct *instructions, direction, and control* of that State.[11] When official authorities are absent or failing, the conduct of private individuals who fill in to take necessary steps to exercise the necessary governmental authority is also considered 'Act of State'.[12] If an insurrectional movement overthrows the government entirely or establishes a distinct new state, their past actions are retroactively attributed to the new state.[13] A state is also responsible for the conduct of an entity, of a person, or a group of persons if it acknowledges and adopts the conduct as its own.[14]

Among the above-mentioned entities, those cited under Article 2(1) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI)[15] are entitled to immunity on a *prima facie* basis. Though not every article of the Convention was envisaged to be codification of customary international law and undertook to resolve differences rather than reflect

[7] *Les prérogatives de la puissance publique* depend on 3 criteria as explained under *ARSIWA* art. 5 commentary ¶6; See also, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (Award) ICSID Case No ARB/09/02 (31 October 2012) [360].

[8] *ARSIWA* art. 5; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (Decision on Jurisdiction) [2001] 42 ILM 609 [29,35].

[9] *ARSIWA* art. 6.

[10] *ARSIWA* art. 7.

[11] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 113, 7

[12] *ARSIWA* art 9.

[13] *ARSIWA* art 10.

[14] *ARSIWA* art 11; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.

[15] UNCJISP (adopted 2 December 2004) UN Doc A/RES/59/38 ["**UNSCI**"].

settled practice,[16] the aforementioned Article reflects customary international law.[17] Under the Article, 'State' means:

a. the State and organs of government; constituent units of a federal State or political subdivisions of the State,
b. if they are entitled to perform acts in the exercise of sovereign/governmental authority, and are also acting in that capacity in the instance in question;
c. agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are also actually performing acts in the exercise of sovereign/governmental authority;
d. representatives of the State who are performing in that capacity.[18]

2. State Immunity

State immunity is principle of customary international law which aims to protect a state from being tried without its consent before domestic courts of a foreign state.[19] The concept's evolution is outlined by a transformation from an era of absolute immunity to the modern framework of restrictive immunity, induced first and foremost by practical necessity rather than conceptual advancements.[20]

In the broadest sense, State immunity exempts a state from any foreign authority, be it legislative, administrative, or judicial.[21] Gradually, this broad concept has been compartmentalized into separate branches of international law, for example: the law of international organizations, human rights accountability treaties, and the separate rules regulating diplomatic and consular missions.[22] However, it is currently understood as referring solely to immunity from foreign judicial

[16] ILC, *Draft Conclusions on Identification of Customary International Law with Commentaries* (2018) UN Doc, n.751 ["**ILC Conclusions with Commentaries**"]; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777 [32] ["**Benkharbouche**"].

[17] *Verschueren v The Holy See* (2016) 193 ILR 554 [3.2.5, 3.4].

[18] *UNSCI* art. 2.

[19] Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 1 ["**Yang**"].

[20] *Yang,* 5.

[21] *Yang*, 1.

[22] *Yang,* 2.

proceedings, which means that a state cannot be coerced into being a defendant before a foreign court without its express consent.[23]

During the 19th century, under the absolute immunity doctrine, States were immune from any and all proceedings, regardless of the activity they engaged in, be it commercial or sovereign. It sufficed that the entity or person(s) in question which is responsible for the conduct in question was deemed a State. However, even when the doctrine of absolute immunity prevailed, immunity was never actually absolute. Courts recognized certain exceptions from the very beginning:[24]

a. Waiver and Submission: States could willingly submit to local jurisdiction by explicitly waiving its immunity, appearing as a plaintiff, or not objecting to the jurisdiction of the local courts when appearing as a defendant.[25]

b. Immovable Property: Immovable property was always viewed as an integral part of the territory of the forum State and thus was subject to no other law than *lex rei sitae*.[26] For this very reason, territorial jurisdiction has always been asserted over immovable property throughout the history of State immunity; and further, this exception, the immovable property exception to immunity, has been preserved in current law.[27]

c. State-Owned Merchant Vessels: Given the limited nature of State trading activities at that time, it makes perfect sense that the earliest cases of State immunity involved State-owned vessels.[28] What is striking is that, despite the then-predominant stance in international law being the absolute immunity doctrine, specifically with the entry into force of the 1926 Brussels Convention,[29], the immunity of State-owned merchant vessels was now *subject to*

[23] *Västerås v Iceland* (1999) 128 ILR 705, 705. [“**Västerås**”].

[24] *Yang,* 10.

[25] *Ibid*.

[26] Law of the territory where the property is situated.

[27] *Yang,* 10.

[28] *Yang,* 469 n.22.

[29] *International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels* (signed 10 April 1926, entered into force 8 January 1937) 176 LNTS 199.

the same rules of liability and to the same obligations as those applicable to private vessels.[30]

After World War I, doubts arose as to the validity of the doctrine of absolute immunity.[31] The Soviet Union, a newcomer on the international stage, conducted trade activities through State undertakings, thus, it was immune from the jurisdiction of the local courts, even in the instances that the activity it engaged in was an overt commercial activity.[32] As a consequence, it felt *indument* to grant a privileged status to commercial activities of foreign States.[33] The great switch happened in 1952 when the US Department of State Legal Adviser affirmed in a letter of 19 May 1952 that,[34] when considering requisitions of foreign governments for a grant of state immunity, the Department would henceforth follow the restrictive theory, whereby states are only immune on the pre-condition that they conducted in a sovereign manner.[35]

This logic, which aligned with the established precedents of the Italian and Belgian courts,[36] also elicited a positive reaction in the case law of the German courts.[37] The *Bundesverfassungsgericht* joined the international consensus reflected in the Tate letter in a judgment of 30 April 1963 by stating that State immunity had to be limited to proceedings in which sovereign acts were in issue.[38]

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[30] *Yang,* 11

[31] *Case Concerning Jurisdictional Immunities of the State (Germany v Italy)* (Memorial of the Federal Republic of Germany) (12 June 2009) ¶49 [“**Germany Memorial**”].

[32] *Yang,* 11.

[33] *Ibid*.

[34] 'Tate letter' (19 May 1952) 26 Department of State Bulletin 984.

[35] *Germany Memorial,* ¶49.

[36] *Société anonyme Compagnie des chemins de fer Liégeois Limbourgeois v Etat Néerlandais* (1903) 31 JDIP 417, 427–29 (Belgium); *Morellet v Governo Danese* (1882) 26 AJIL Supp 481, 481–82, 596 (Italy).

[37] *Germany Memorial,* ¶50.

[38] *Claim against the Empire of Iran* (1963) 45 ILR 57 (BVerfG), 80 [**“Claim against the Empire of Iran”**].

Today, the absolute immunity doctrine is obsolete; almost every state with international standing applies the restrictive approach.[39] It should be noted that, in practically every instance where a court switched from the doctrine of absolute immunity to the doctrine of restrictive immunity, it did so as the foreign state's commercial activity had a direct territorial *nexus* to the forum state.[40] Territorial jurisdiction proved to be the strongest rationale for overcoming immunity.[41]

The International Law Commission (ILC) concluded in 1980 that the rule of State immunity had been *adopted as a general rule of customary international law, solidly rooted in the current practice of States.*[42] This conclusion is backed by an extensive survey of state practice, which is evidenced by the historical record of national legislation, judicial decisions, assertions of immunity rights, and the comments States made during the drafting of the UNSCI.[43] The international community operates on a mutual understanding: States claim a right to immunity for themselves under international law, while simultaneously recognizing a corresponding obligation to respect and give effect to the immunity of others.[44]

At its core, the customary rule of State immunity has a highly important position in international relations because it stems directly from the principle of *par in parem non habet imperium*.[45] As reiterated in Article 2, paragraph 1, of the United Nations Charter, this principle is the fundamental pillar of the international legal system.[46]

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[39] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 [59] ["**Jurisdictional Immunities**"].

[40] *Yang,* 18.

[41] *Yang,* 31.

[42] *Yearbook of the International Law Commission 1980* vol II, 147, ¶26.

[43] UNCJISP (adopted 2 December 2004) UN Doc A/RES/59/38.

[44] *Jurisdictional Immunities,* [56].

[45] *Jurisdictional Immunities,* [57]; Principle of sovereign equality, meaning equals do not have power over each other.

[46] *Ibid*.

State immunity is a predominantly judge-made law, as no universal convention regulated the subject; domestic judges had to ascertain international law by continuously examining and citing the rulings of other national courts.[47]

As a result, the proposition that domestic courts, in a way, nationalised international law is entirely reasonable.[48] In spite of numerous manners of implementations, in general, six accepted principles underpin modern practice:[49]

a. State immunity is a well-recognized principle of customary international law.[50]
b. Immunity serves as the general rule.[51] The plaintiff bears the burden of proving that the contrary is the case.[52] As a result, a non-appearance before the court by a State is not, in and of itself, a waiver; courts must evaluate whether an exception to State immunity is applicable before rendering a default judgment against the non-appearing foreign state.[53]
c. State immunity is granted for *acta jure imperii*[54] but denied for *acta jure gestionis* [55].[56]
d. Exceptions almost exclusively require that the underlying activity has a clear territorial *nexus* to the forum state.[57]
e. Immunity from suit is an entirely distinct concept from that from enforcement. A State losing a lawsuit does not directly strip its assets of their protection.[58]
f. A State may expressly waive its immunity, but distinct waivers are for both the adjudication and execution phases.[59]

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[47] *Yang,* 3.

[48] *Yang,* 27.

[49] *Yang,* 34.

[50] *Ibid*.

[51] *UNSCI* art. 5.

[52] *Yang,* 34.

[53] *Ibid*.

[54] Sovereign/non-commercial acts.

[55] Commercial acts.

[56] *Claim against the Empire of Iran,* 80.

[57] *Yang,* 34.

[58] *Ibid*.

[59] *Ibid*.

However, as is the case with every other legal notion, this concept does not exist in a vacuum; it must be viewed with another fundamental rule: territorial sovereignty.[60] Every State possesses sovereignty over its own territory, which naturally grants it jurisdiction over the people and events within its borders.[61] When a State is granted immunity, it effectively represents a departure from the forum State's territorial sovereignty and the jurisdiction that flows from it.[62] *Vice versa*, creating exceptions to a State's immunity signifies a departure from the principle of sovereign equality.[63]

a. Immunity from Suit

Sovereign immunity is a fundamental pillar of the present day global legal system.[64] It is so well recognized that no lengthy demonstration is needed for its existence.[65] Sovereign immunity acts as a shield protecting a State against being forced into judicial proceedings before the domestic courts of a foreign State.[66] The currently accepted standard on the customary rule of State immunity is that a state is only immune on the precondition that it engages in sovereign acts.[67] Under international law, there is no obligation incumbent upon States to grant immunity to other States for commercial activities.[68] Although there is no common ground as to the method of differentiating between sovereign and commercial acts,[69] the acts of armed forces in the course of an armed conflict have always been viewed as sovereign worldwide.

i. Commercial activity

States, in the past times, enjoyed absolute immunity before foreign courts, whether they engaged in commercial or sovereign activities. In the 21st century, this started to change, most notably with

[60] *Jurisdictional Immunities,* [57].

[61] *Ibid*.

[62] *Ibid*.

[63] *Ibid*.

[64] *Germany Memorial,* ¶48.

[65] *Ibid*.

[66] *Germany Memorial,* ¶103.

[67] *Jurisdictional Immunities,* [64].

[68] *Ibid*.

[69] *J-P A v Kingdom of the Netherlands* (Cass 23 October 2015) C.14.0322.F [19]; *Västerås,* 705.

the Tate letter.[70] In the current stance of international law, states are only immune when they engage in sovereign acts.[71] The distinction between sovereign and commercial acts was also taken notice of by the ILC and then enshrined in Article 2(2) of the UNSCI.[72] However, this Article was only an attempt to find a common ground between States as to the test of making such a distinction but that was also met with resistance by the States in the Sixth Committee.[73] In any case it is an agreed point that acts of armed forces in the course of an armed conflict constitute *acta jure imperii*.[74]

ii. The Principle of Territorial Jurisdiction

The fundamental relationship between State immunity and territorial jurisdiction traces its roots back to a simple premise: the concept of immunity essentially presupposes that legal jurisdiction is already established.[75] If a court is not competent to hear a case in the first place, the question of whether a defendant is immune from judgment is entirely void.[76] Because the establishment of jurisdiction relies on territoriality as a *nexus*, the laws governing State immunity are deeply connected with private international law.[77]

Historically, the law of State immunity arose as a derogation from the territorial jurisdiction of the forum State.[78] In the early development of State immunity, courts only formulated rules for exemptions after establishing that the conduct occurred in the territory of the State.[79] Regardless of the question of whether a court adhered to the doctrine of absolute or restrictive immunity, the principle of territorial jurisdiction was always the foundation of these cases.[80]

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[70] *Supra* note 34.

[71] *Jurisdictional Immunities,* [64].

[72] *UNSCI* art. 2(2).

[73] *ILC, 'Report of the Working Group on jurisdictional immunities of States and their property' (1999) UN Doc A/CN.4/L.576,* ¶32.

[74] *Jurisdictional Immunities,* [64].

[75] *Yang,* 64.

[76] *Ibid*.

[77] *Ibid*.

[78] *Ibid*.

[79] *Ibid*.

[80] *Ibid*.

This is reflected in the very first case regarding State immunity, *The Schooner Exchange*, which involved a French warship seeking refuge from weather in a US port.[81] Chief Justice John Marshall declared that a jurisdiction of a nation within its own territory is *necessarily exclusive and absolute,* and any exceptions to this power must stem from the very own consent of the nation itself.[82]

In the shift from the absolute immunity to restrictive immunity, territorial jurisdiction became the primary justification for denying immunity to foreign States.[83] Lord Denning played a focal role in advocating for restrictive immunity using the principle of territorial jurisdiction.[84] In cases like *Rahimtoola*, *Thai-Europe*, and the landmark *Trendtex* case,[85] he argued that foreign states should not be granted immunity for commercial activities that occur within the territorial jurisdiction of the local courts.[86]

b. Immunity from Enforcement

Immunity from measures of constraint is a an additional chapter of jurisdictional immunity, even, for some, more important than immunity in judicial proceedings.[87] As a general rule, the property of a State, even when located in the territory of another State, cannot be seized or attached.[88] A fundamental difference should be highlighted: Immunity from enforcement and immunity from suit are not one.[89] Even in the case of lawful exercise of jurisdiction by the local courts against a foreign sovereign, the latter's property cannot be seized *proprio motu* in order to enforce the judgment.[90] In this context, Article 19 of the UNSCI is a great guidance as the Convention is

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[81] *The Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116 ["**The Schooner Exchange**"]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, Separate Opinion of Judge Keith, ¶5.

[82] *The Schooner Exchange v McFaddon*, 136-7.

[83] *Yang,* 65.

[84] *Yang,* 66.

[85] *Rahimtoola v. Nizam*, [1958] 24 ILR 175, 200; *Thai-Europe v. Pakistan, England*, [1975] 64 ILR 81, 85–86; *Trendtex v. Central Bank, England*, [1977] 64 ILR 111, 132.

[86] *Ibid*.

[87] *Germany Memorial,* ¶103.

[88] *Ibid*.

[89] *Jurisdictional Immunities,* [113,114,124].

[90] *Jurisdictional Immunities,* [116, 117].

viewed to be generally reflective of customary international law.[91] Nevertheless, this article was a point of long discussions in the drafting committee, and it is not certain whether it reflects customary international law.[92] In any case, it can be certainly said that there is at least one condition which has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be used for public purposes, or that the owner-State has expressly given its consent for the taking of the measure of constraint, or that the State in question has specifically allocated the property for the satisfaction of the judicial claim against it.[93]

II. INTRODUCTION TO THE INTERNATIONAL COURT OF JUSTICE

1. Introduction to the World Court

The International Court of Justice, also known as the World Court, is the principal judicial organ of the universal organization of United Nations (UN).[94] It is headquartered in the Hague, Netherlands. As the principle judicial organ of the Organization, it is interconnected with the latter three respects. [95]

The Statute of the ICJ was adopted *à la fois* with the Charter of the United Nations, also being incorporated[96] to the said Charter, thus being of the same judicial value.[97] By virtue of this, amendments to the Statute shall be effected using the same procedure as those to the UN Charter, subject to any provisions adopted by the General Assembly upon the recommendation of the Security Council.[98] Once accepted to the UN as a member by the UN Security Council (UNSC),

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[91] *Grosz v France* App no 14717/06 (ECtHR, 16 June 2009).

[92] *Jurisdictional Immunities,* [117].

[93] *Jurisdictional Immunities,* [118].

[94] Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 129 [**"Tanaka"**].

[95] *Ibid*.

[96] A process by which an agreement interspersed with a legal framework of a different, mostly bigger, entity.

[97] *Tanaka*, 129.

[98] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 69 [**"ICJ Statute"**].

every member State are *ipso facto*[99] parties to the Statute of the International Court of Justice.[100] The expenses of the organization are borne in a way decided by the UN General Assembly. [101]

The ICJ is not under any political, economic, or military *emprise*, is purely a judicial body whose decisions only reflect (or should only reflect) the judicial state of the world.[102] This way, it is useful to smaller states as a panel thereto they can apply to solve their problems with those having a greater political and economic hold worldwide.[103]

The principle of *stare decisis*[104] is of no importance to the World Court, although its decisions show *a sufficient degree of continuity and predictability in its jurisprudence*.[105] An example of this can be made with the *North Sea Continental Shelf* cases[106] and the *Continental Shelf* case[107].[108] In the latter, the Court was called upon to determine the demarcation of the maritime boundary between Libya and Tunisia.[109] It did this by massively referencing the former, more specifically, referencing the principles it established in that case.[110]

The decisions of the Court affect *the interpretation and application of the rules of international law* [111] though only binding on parties to the case before it.[112]

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[99] *Ipso facto* means by that very fact or act: as an inevitable result: 'Ipso Facto' <https://www.merriam-webster.com/dictionary/ipso%20facto> accessed 22 August 2025.

[100] *ICJ Statute* art. 93(1).

[101] *ICJ Statute* art. 33.

[102] *Tanaka*, 130.

[103] *Ibid*.

[104] Binding precedents.

[105] *Tanaka*, 130.

[106] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Rep 1969, p. 3 [**"North Sea Continental Shelf"**].

[107] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Rep 1982, p. 18.

[108] *Tanaka*, 143.

[109] *Ibid*.

[110] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Rep 1982, p. 18* [36-44].

[111] *Tanaka*, 130

[112] *ICJ Statute* arts. 59, 60.

Hence the appellation 'World Court', it is the only court with universal jurisdiction.[113] If its established that the Court has jurisdiction, it can adjudicate on any form of inter-State disputes.[114] We see it as the World Court in such cases where a so-called 'small' state can bring a military powerhouse before the Court, for instance in *South Africa v. Israel*[115], an independent judicial body applying *universal laws*[116].[117]

The Court is administered by four instruments: the United Nations Charter[118], its Statute, the Rules of Court, and Practice Decisions.[119] The Statute is of imperative nature as parties to the dispute before the Court cannot set aside the Statute.[120] The Rules of Court lays down articulated procedures of the Court.[121] The Practice Decisions, though not modifying the Rules of Procedure, are adapted in view of speeding up and simplifying the procedures of the court, constitutes a result of the analysis of the Court.[122]

The *creuset* of the World Court, the Permanent Court of International Justice, was provided for in the Covenant of the League of Nations.[123] It had its first session in 1922 and was later disorganized in 1946 following the end of the Second World War, which was a demonstration of its ineffectual

[113] *Tanaka*, 130.

[114] *Ibid.*

[115] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) ICJ GL No 192, Order of 26 January 2024.

[116] Laws whose enforcement interest all states.

[117] *Tanaka*, 130.

[118] Its Chapter 14 is devoted to the Court.

[119] *Tanaka*, 130.

[120] *Ibid*.

[121] The organization of the Court, the election of members, the formation of Registry….

[122] *Tanaka*, 131.

[123] *Tanaka*, 129 n.1.

nature as a court.[124] Its workings as the first international tribunal with universal jurisdiction elucidated a great number of facets of international law, thus contributed to its development.[125]

Being a party to the Court is subject to some conditions.[126] First, by nature, being a sovereign state,[127] only sovereign States can bring a claim before the court and be parties to a case.[128] To bring before the Court a claim, being a 'state' does not suffice; the latter also has to be a member of the UN[129] and further, has to have accepted the jurisdiction of the Court by one of the 4 ways possible.[130]

The Court is open to those who are parties to its Statute.[131] The conditions prescribed by the UNSC under which the Court is open to states apart from the ones mentioned above could not, in any case, oust the principle of equality of parties.[132] The monetary contribution of states that are not members of the UN but parties to a case will be fixed by the Court.[133] States that have not signed and ratified the UN Charter can also become parties to the statute, by virtue of Article 93(2) of the UN Charter.[134]

2. Organization of the Court

[124] *Tanaka*, 129.

[125] Permanent Court of International Justice website <https://www.icj-cij.org/pcij> accessed 22 August 2025.

[126] *Tanaka*, 131.

[127] Here, the term 'sovereign state' is used as a state that has an international legal personality, meaning it is a subject of international law.

[128] *ICJ Statute* art. 34(1); *Tanaka*, 131.

[129] Thus, also a party to the statute of the ICJ *ipso facto*.

[130] See Section 3 of the present Chapter.

[131] *Tanaka*, 131.

[132] *Tanaka*, 131, 181.

[133] *ICJ Statute* art. 35; *Tanaka*, 132.

[134] Charter of the United Nations, art. 93(2); *Tanaka*, 132. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

a. Judges of the Court

The Court comprises 15 members, all being of different nationalities for an equal representation of the world scene, as they will embody *the forms of civilization and of the principal legal systems of the world*.[135] This also renders the Court *the World Court*.[136] Judges are elected for 9 years, and they are reeligible. [137]Additionally, 5 of judges are re-elected every 3 years.[138] The point of this is to ensure there are always experienced judges that can guide newer members, and to prevent any sudden political pressures that can arrive with a mass election, any sudden shifts.[139]

The Court will comprise independent/impartial judges, chosen for their high moral character and legal competence in international law, not taken count of their nationality.[140] They must be qualified for the highest judicial positions in their home countries.[141] *The judges of the court can be considered independent as long as there is no external source of control or political influence which prevents them from acting in autonomous fashion.*[142] The independence of judges is imperative for lawful decisions. In addition, every member, including the Registrar, makes a formal declaration publicly in which he vows to *exercise his powers impartially and conscientiously.*[143]

The term 'impartial' is ambiguous by itself.[144] To clarify the term, we can examine Articles 16, 17, and 24 of the ICJ Statute on what impartiality reflects:[145]

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[135] *Tanaka*, 132.

[136] *Tanaka*, 133.

[137] *Tanaka*, 132.

[138] *Ibid*.

[139] *Ibid*.

[140] *Tanaka*, 132.

[141] *ICJ Statute* art. 2.

[142] C Brown, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 The Law and Practice of International Courts and Tribunals 75 and 84, as cited in Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 134.

[143] *ICJ Statute* art. 20.

[144] *Tanaka*, 134.

[145] *Tanaka*, 135.

a. The post of an ICJ judge is not compatible with another job or any other political role hold other jobs or political roles.
b. As used by the Government of South Africa in the Nambia Advisory Opinion,[146] judges cannot judge on disputes in which they were personally involved or had a judicial role.
c. Judges can choose not to participate in a certain case by informing the President of the Court. The President can demand that a judge does not sit in a specific case.
d. If a disagreement arises as to whether a judge should sit in a case, the Court will make the final decision.[147]

Au contre-sens of Article 24 of the ICJ Statute, parties to a dispute have challenged the authority of judges because of their relation to the subject matter of the case in the *Namibia* Advisory opinion.[148] In the latter, South Africa objected to the participation of several members of the Court in the proceedings because of their past involvement with the subject matter of the case in different posts.[149] The Court ruled in the opposite, indicating that it cannot postulate Article 17(2) of the ICJ Statute.[150]

In the case of the involuntary or voluntary absence of a judge, which is in consistency with the aforementioned procedures, the empty seats of the judges are not to be filled with other or *ad hoc*[151]

[146] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*) (Order of 26 January 1971) [1971] ICJ Rep 3; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Order of 26 January 1971) [1971] ICJ Rep 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Order of 26 January 1971) [1971] ICJ Rep 9.

[147] *ICJ Statute* arts. 16, 17, 24.

[148] *Supra* note 146.

[149] *Tanaka*, 135-6.

[150] *Ibid*.

[151] A judge ad hoc is a judge appointed by a special procedure for a specific project, case, or period only—as opposed to, and in contrast to, a regular judge, appointed through a regular procedure for a regular period of time.

judges.[152] This is under the reserve of the floor having reached the quorum of 9 judges.[153] All 15 judges will sit if not expressly stated differently in the ICJ Statute.[154]

The procedure whereby the election of judges is carried out is written in the first chapter of the ICJ Statute, *Organization of the Court*.[155] As for the President and the Vice-President, they are elected for 3 years and are re-eligible; for the Registrar and *other officers*, the Court will assign the former, and for the latter, the Court will do the same if it deems necessary as other officers do not constitute an integral part of the Court.[156] The decisions are on a simple majority basis,[157] all questions are decided by the votes of judges present; if necessary, the President or the acting-president has the tie-breaking vote.[158]

b. Chambers of the Court

Legal proceedings are conducted by the full Court if there is no special request that the case be settled before a specific Chamber. There are 3 forms of Chambers as explained under Articles 26 and 29 of the ICJ Statute.[159] The Court may form chambers that consist of 3 or more judges for specific categories.[160] The exact number of judges will be determined by the Court, and with the acceptance by the parties to the specific case.[161] If the parties to a dispute request as such, the Court will form a chamber comprised of 5 judges that will *hear and determine cases by summary procedure.*[162]

<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1170.013.1170/law-mpeipro-e1170> accessed 21 August 2025.

[152] *Tanaka*, 136.

[153] *Ibid.*

[154] *Tanaka*, 139.

[155] *ICJ Statute* arts. 4-15; *Tanaka*, 132.

[156] *ICJ Statute* art. 21.

[157] Meaning the votes of %50 + 1 of the present judges are needed to reach a verdict.

[158] *ICJ Statute* art. 55.

[159] *ICJ Statute* arts. 26, 29.

[160] *Ibid*.

[161] *ICJ Statute* art. 26.

[162] *ICJ Statute* art. 29.

3. Jurisdiction Type

a. Contentious Jurisdiction

The term 'jurisdiction' that is and will be used throughout this document will refer to *the power, right, or authority to interpret and apply the law*.[163] In this case, it serves mostly as the authority that the ICJ exercises over the disputes submitted before it.[164] In the case of the jurisdiction of the ICJ, we find the principle of free choice of means, meaning its exercise can only be justified by the consent of states to be bound by the decision of the Court on the dispute.[165] Should a doubt arise as to whether the Court has jurisdiction concerning any dispute, the Court decides if it has the power to adjudicate on the dispute.[166] This principle is reiterated in the maxim *la compétence de la compétence*.[167] It means that should a dispute arises about the authority of a court in a matter, it is also the latter that decides upon it.[168] This does neither correlate to the presumption of the absolute or non-existence of the jurisdiction of the court nor means the jurisdiction has not been established.[169] There are 4 different ways a state can give its consent to be a party to a dispute before the Court and be bound by the decision, whatever it may be: an optional clause, a special agreement, a compromissory clause in an agreement, and *forum prorogatum*.[170]

i. Optional Clause

Of all the ways to consent, as mentioned above, to the Court's jurisdiction, the optional clause may be the most complicated and important one.[171] Article 36(2) of the ICJ Statute reads as follows:

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[163] *Merriam-Webster's Collegiate Dictionary*, 'jurisdiction' (online dictionary, 2024) https://www.merriam-webster.com/dictionary/jurisdiction accessed 28 August 2025.

[164] *Tanaka*, 141.

[165] *Ibid.*

[166] *Tanaka*, 141-2.

[167] The principle according to which every court has the competence to decide whether it has jurisdiction over the matter before it.

[168] *ICJ Statute* art. 36(6).

[169] *Tanaka*, 142.

[170] *Ibid.*

[171] *Tanaka*, 147.

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. *the interpretation of a treaty;*
b. *any question of international law;*
c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*
d. *the nature or extent of the reparation to be made for the breach of an international obligation.*[172]

The logic behind the optional clause is that if states are ready to accept the jurisdiction of the Court, they can do it themselves; there is no need to reunite with others to declare the acceptance of the jurisdiction of the Court.[173] The optional clause, in a way, is to accept *a priori* the jurisdiction unilaterally, mostly by being very specific on what the Court has jurisdiction over.[174] For example, this can come in the form of a declaration as seen in Article 36, paragraphs 3 to 5 of the ICJ Statute.[175]

Declarations in question may be made *unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.*[176] They are to be delivered to the United Nations Secretary-General (UNSG), who does the same to the Registry of the Court and the parties to the ICJ Statute. The valid declarations of the same nature made under Article 36 of the Statute of the PCIJ are deemed in force for the compulsory jurisdiction of the ICJ *for the period which they still have to run and in accordance with their terms.*[177]

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[172] *ICJ Statute* art. 36(2).

[173] *Tanaka*, 148.

[174] *Ibid*.

[175] *ICJ Statute* art. 36(3-5); *Tanaka*, 148-9.

[176] *ICJ Statute* art. 36(3).

[177] *ICJ Statute* art. 36.

Accordingly, two states having accepted the optional clause, the power to decide on the case of the Court is automatically formed, thus the only thing left to be done by the parties to bring the case forth is to unilaterally submit the dispute.[178] After the Court was seized of the case, the declaration made in relation to the consent given to it cannot be retracted.[179] There are numerous ways to qualify an optional clause: reservations *ratione personae*, *ratione temporis,* and *ratione materiae*.[180]

The reservation *ratione personae* comes in 3 different forms: that under non-existence of diplomatic relations, that under members of a certain group or region, or lastly, a reservation of a time element (not to be confused *with ratione temporis*).[181] An example for the reservation under the non-existence of diplomatic relations can be found in the declaration made by Djibouti in 2005, which does not allow for any claims against it to be made by states with which it does not have diplomatic relations or that it does not recognize.[182] The reservation under the members of a certain group or region is best seen in reservations excluding disputes with a member of the Commonwealth of Nations.[183] An example can be made with the declaration of Barbados made in 1980.[184] The last form of reservation *ratione personae* is created to evade *surprise applications*.[185] The latter happens when a state just submitted its declaration to consent to the jurisdiction of the Court is filed against. We can see this in practice in the preliminary objections of the *Right of Passage* case. [186]

[178] *Tanaka*, 148-9.

[179] *Tanaka*, 148.

[180] *Tanaka*, 150.

[181] *Tanaka*, 151.

[182] *Ibid*.

[183] *Tanaka*, 152.

[184] *Tanaka*, 151: 'Disputes with the Government of any other country which is a member of the Commonwealth of Nations, all of which disputes shall be settled in a manner as the parties have agreed or shall agree.'

[185] *Tanaka*, 151.

[186] *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6.

The reservation *ratione temporis* is to limit the *champ d'application* of the optional clause.[187] Three types exist.[188] First undertakes to confine the consent in relation to disputes arising after a certain date.[189] It can be seen in the declaration made by the Netherlands in 1956, limiting the consent to be bound by the jurisdiction of the court only for disputes arising after 5 August 1921.[190] The second form in which we see this reservation aims to evade the jurisdiction of the courts with regard to disputes relating to a certain era.[191] The last type is designed to allow for litigations to be be brought before the Court that have arisen after the date of the submission of the declaration qualified by the optional clause to the Secretary-General.[192] The reservation *ratione materiae* seeks to preclude the Court's jurisdiction in certain domains of disputes.[193]

ii. Special Agreement

The second method of consenting to the jurisdiction of the Court is a special agreement (a *Compromis*) that is concluded after the litigation in question has arisen.[194] The Court has jurisdiction over all cases that the parties refer to it *and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*[195] As written under Article 40(1) of the ICJ Statute: *Cases are brought before the Court, as the case may be, either by the notification of the special agreement.*[196] Within this agreement, there can be found specifications for the rules of procedure, parallel to how many written pleadings each party will claim, or the time given to the parties to prepare those. These modifications are subject to instruments governing the Court and the proceedings before it. Unless expressly stated in the agreement, the Court will apply the standard procedure.

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[187] *Tanaka*, 152.

[188] *Ibid*.

[189] *Ibid*.

[190] *Tanaka*, 152-3.

[191] *Tanaka*, 152.

[192] *Tanaka*, 153.

[193] *Tanaka*, 154.

[194] *Tanaka*, 142.

[195] *ICJ Statute* art. 36(1).

[196] *ICJ Statute* art. 40(1).

iii. Compromissory Clause in a Treaty

Compromissory clauses are those that provide that any possible dispute relating to the convention therein it is found can/will be submitted to the Court, they are found in more than 300 treaties.[197]

An example of this clause can be seen in the present case, wherein the basis for the jurisdiction to be established was Article 1 of the European Convention for the Peaceful Settlement of Disputes of 1957.[198]

iv. Forum Prorogatum

Forum prorogatum is a principle in international law where a state can accept the International Court of Justice's jurisdiction for a specific case, even if it has not already agreed to the Court's general jurisdiction.[199] This mechanism allows States that are yet to accept the general jurisdiction of the Court to be a parties to a specific dispute.[200] It is when the applicant State intends to bring a dispute before the court with a state whose *consent thereto yet to be given or manifested,* the application of the former is then transmitted to the latter.[201] No important action is taken before the *State against which such application is made* consents to the jurisdiction of the Court tacitly or expressly in a sure and sound manner. [202]

The most essential part of this system is that, in the end, like other methods of accepting the jurisdiction of the Court, the State having been filed against should consent to the jurisdiction.[203] This can come in different ways, shapes, or forms, such as tacitly: participating in the proceedings

[197] *Tanaka*, 144.

[198] *Jurisdictional Immunities,* [41].

[199] *Tanaka*, 144.

[200] *Tanaka*, 145.

[201] *Tanaka*, 145.

[202] Rules of Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978) art. 38(5) [**"Rules of Court of the International Court of Justice"**].

[203] *Tanaka*, 146.

as a party to the Case.[204] The submitter State must articulate the legal grounds of its claim on which it is in conviction that the other party will respond.[205] When *forum prorogatum* is invoked, attention must be paid to the intended scope of the consent of the State.[206] The responding state, therefore, can limit the jurisdiction of the Court by giving only partial consent when compared to the consent given in the claim by the submitter state.[207]

v. Proceedings in Contentious Cases

The official languages of the Court are English and French.[208] If an agreement cannot arise between the parties, then *each party may, in the pleadings, use the language which it prefers*.[209] The judgment will be given in both official languages, and the Court will indicate which is authoritative.[210] The Court, if demanded by parties to the dispute, will accept *a language other than French or English to be used by that party.*[211]

The cases are either brought to the Court by way of notification of a special agreement[212] between the parties as to the dispute or a written application which is directly sent to the Registrar.[213] The latter is vested with the duty to inform of this application; *(a) the Secretary-General of the United Nations; (b) the Members of the United Nations; (c) other States entitled to appear before the Court.*[214] Thus the States with a possibility to be affected in a certain way, know the nature of the application.[215] The parties to the dispute will be spoken for by agents and the possible assistance

[204] *Ibid*.

[205] *Tanaka*, 144-5.

[206] *Tanaka*, 146.

[207] *Tanaka*, 147.

[208] *Tanaka*, 178.

[209] *Tanaka*, 179.

[210] *ICJ Statute* art. 39(2).

[211] *ICJ Statute* art. 39.

[212] See section 3, sub-section a, sub-para i of the present chapter.

[213] *ICJ Statute* art. 40.

[214] Rules of Court of the International Court of Justice, art. 42.

[215] *Tanaka*, 180.

of counsel and advocates.[216] *All steps on behalf of the parties after proceedings have been instituted shall be taken by agents*.[217]

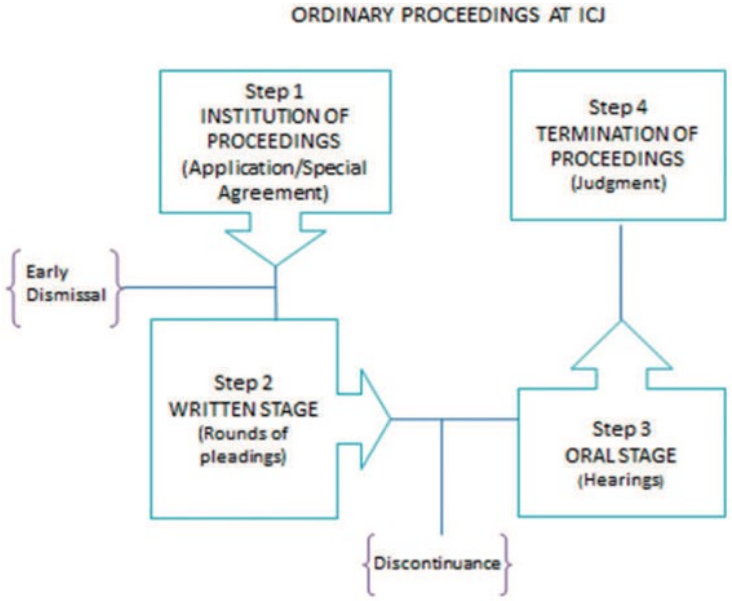

Figure 1: Ordinary Proceedings Before ICJ

Before the written proceedings, parties to the dispute can object to the case on certain subjects (i.e., *preliminary objections*),[218] and entitled States can apply to intervene in the case,[219] which will be delved into later. [220] In the case of bringing a dispute by way of a special agreement jointly addressed to the Court, the procedural aspects, other than those already established by the Court generally for all cases, *shall be governed by the provisions of the agreement, and unless the Court (...) decides otherwise*.[221] If, in the *compromis*, there is no such indication stating otherwise, each party will settle for a *Memorial* and a *Counter-Memorial,* under the same conditions and time-limits.[222]

[216] *Ibid*.

[217] Rules of Court of the International Court of Justice, art. 40(1).

[218] See section 3 of the present chapter.

[219] *Tanaka*, 179, 200, 205.

[220] See Chapter III, 6.

[221] *Tanaka*, 180.

[222] Rules of Court of the International Court of Justice, art. 46.

If the case were to be submitted unilaterally, then the applicant first deposits its *Memorial*, in response, the defendant State deposits its *Counter-memorial*, which can contain a *counterclaim* in itself, on top of demanding the dismissal of the principal claim of the applicant State.[223]

A counter-claim possesses a dual character that differentiates it from a mere defense on the merits.[224] While a defense is a shield employed to seek the dismissal of the opposing party's case, a counter-claim is an offensive sword which performs as a distinct legal act.[225] It is independent when examined from the point of view that it constitutes a distinct claim with its own specific objectives, although it remains linked to the principal proceedings as it reacts directly to the applicant's original filing.[226] In principle, the effect of a counter-claim is to widen the original subject-matter of the dispute, extending beyond the sole rejection of the applicant's claims and to pursue new findings and/or legal remedies.[227] Further, the defendant State can follow up with a *reply*, and this can be followed by a *rejoinder* by the defendant State.[228]

After the written pleadings, we come to the hearing,[229] which is at the heart of western model of dispute resolution[230].[231] It is expected that the oral pleadings are as brief as possible *within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing*.[232] This means that the parts of the dispute that shall be gone over in the oral pleadings will be those *that still divide the parties.*[233] At the end of the last statements, the parties, therefore, their agents,

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[223] *Tanaka*, 180.

[224] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Counterclaims, Order of 17 December 1997, ICJ Rep 1997 p 256, [27].

[225] *Ibid.*

[226] *Ibid*.

[227] *Ibid.*

[228] *Tanaka*, 180.

[229] Oral proceedings.

[230] The western model of law is based on adversary jurisdiction as opposed to the asian conciliatory model seen in China, deriving from Confucius's philosophy.

[231] *Tanaka*, 180.

[232] Rules of Court of the International Court of Justice, art. 60(1).

[233] *Ibid*.

will read their *final submissions*.[234] Copies of these will be submitted to the Registrar and to each agent.[235]

The parties to a dispute, under no circumstances, can change the nature of the case, neither by way of making statements contrary to the subject-matter of the case, nor with their counterclaims.[236]

Deriving from the principle that in judicial proceedings the parties are equal, equal rights and opportunities must be given to the parties, such as procedural equality; the same number of written pleadings, the same amount of time given to the parties in which they prepare for the hearing.[237] Should the applicant State decide to write a *Request*, the defendant State obtains the right to write, in response, a *Rejoinder.*

Onus probandi incumbit actori ou ei qui dicit, non qui negat.[238] By way of example, in French civil law, there are 3 stages wherein we see the application of the so-called burden of proof. The *charge de l'allégation*[239] is the first step, the party who alleges simply shows the facts founding the basis for its claim. The *charge de la preuve*[240] -and the stage after this are conditional upon the facts being disputed by the opposing party- is when a party to a case contests the facts on which the other party has based its claim. The latter must convince the judge of the validity of the facts. If the party that alleges cannot back its claims with the necessary facts, it comes vis-à-vis with the *risque de la prevue*,[241] meaning it risks losing on that specific issue and depending on the importance of the claim in the subject matter of the case, losing the latter entirely.

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[234] Rules of Court of the International Court of Justice, art. 60(2)

[235] *Ibid.*

[236] *Tanaka*, 181. This is because the jurisdiction of the ICJ is established specifically for the dispute brought before it, rendering it a wholly different dispute would overturn its jurisdiction

[237] *Tanaka*, 181.

[238] *Tanaka*, 181. The burden of proof lies with the person making the claim, not with the person denying it.

[239] This is known as the burden of pleading or burden of production in English common law.

[240] Burden of proof, though occasionally called burden of persuasion.

[241] Risk of proof, of non-persuasion or of losing the case.

In the proceedings before the World Court, we will come across five categories of experts providing the Court with their knowledge in different ways according to their specific titles as experts.[242] First, *court-appointed experts*:[243] The ICJ can confer upon any *individual, body, bureau, commission, or other organization* the duty of providing it with an inspection and its analysis, or an expertise in general.[244]

While not being bound by the reports provided by the experts, the Court previously explained that it pays attention to the opinions of these experts whose reports are impartial,[245] and correct to their knowledge.[246] Secondly, party-appointed *experts*: The parties, before the initiation of oral proceedings, communicate the Registrar the necessary information of the experts they seek to call, *with indications in general terms of the point or points to which their evidence will be directed.*[247] The copy communicated to the Registrar will also be transmitted to the other party.[248]

In addition to these two, we see expert counsel, phantom experts and assessors.[249] The Court previously stated that individuals furnishing evidence based on scientific or technical knowledge *should testify before the Court as experts, witnesses or in some cases in both capacities, rather than as counsel, so that they may be submitted to questioning by the other party as well as by the Court*.[250] The recourse to *phantom experts* may create a problem as to the openness and transparency of the Court, as their conclusions would never be public.[251] However, the need for information, no matter how it is obtained, can prevail over the transparency in certain situations.[252]

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[242] *Tanaka*, 183.

[243] *Ibid*.

[244] *ICJ Statute* art. 50.

[245] *Corfu Channel case, Merits* (UK v Albania) ICJ Rep 1949, 4, 21.

[246] *Tanaka*, 183.

[247] *Tanaka*, 184.

[248] Rules of Court of the International Court of Justice, art. 57.

[249] *Tanaka*, 183-4.

[250] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Rep 2010, 14, 72 [167].

[251] *Tanaka*, 184.

[252] Joint Dissenting Opinion of Judges Simma and Al-Khazawneh, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) ICJ Rep 2010, 14, 114 [14].

Lastly, the Court may, by its own initiative or after requested by parties, appoint assessors them to sit in, *sans* the right to participate in the voting.[253]

b. Advisory Jurisdiction

As a purely judicial body, the ICJ fulfills its mandate not only through contentious cases: but also by way of *avis consultatifs*. In the latter, the Court provides fundamental legal guidance on questions of utmost importance to international law.[254] This is entirely apart from its duty as the universal arbitrator.[255] Advisory opinions are essentially non-binding in nature, however, they are of paramount importance to the requesting entities.[256]

The Court can be asked upon giving an advisory opinion by the UNSC, the UNGA, and other organizations authorized by the UNGA.[257] The written request of advisory opinion submitted before the Court must be *an exact statement of the question* contain all information thereby it can arrive on a conclusion.[258]

The procedure bears some similarities to those of contentious cases but with some sharp cuts.[259] The process commences with a clearly articulated written request to the Registrar of the Court.[260] The Registrar subsequently informs all parties that are entitled to appear before the Court, the latter can invite these parties to take part in it.[261] Normally, States and organizations having been duly notified will provide the Court only with written statements, unless the Court deems it necessary that public hearings must take place in order to obtain all necessary information on the situation.[262]

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[253] *Tanaka*, 184.

[254] *Tanaka*, 164.

[255] *Ibid*.

[256] *Tanaka*, 170.

[257] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 96 [**"UN Charter"**].

[258] *ICJ Statute* art. 65.

[259] *Tanaka*, 166-7.

[260] *Tanaka*, 166. The Request phase of the advisory jurisdiction.

[261] *Tanaka*, 166. The Notification phase of the advisory jurisdiction.

[262] *Tanaka*, 166. The Written and Oral Statements phase of the advisory jurisdiction.

Following the parts above, the Court issues an *avis consultatif* in a public sitting after a private deliberation. [263]

4. Applicable Law in Cases

In Article 38(1) of the ICJ Statute, are listed the applicable forms of law norms:

a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
b. *international custom, as evidence of a general practice accepted as law;*
c. *the general principles of law recognized by civilized nations;*
d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Though in the second paragraph of Article 38 of the ICJ Statute, it is stated that the Court can decide a case *ex aequo et bono* on the conditions that the parties agree thereto, it has never been applied.[264] The term *ex aequo et bono* can be defined as *according to what is equitable and good*.[265] In this context, the decision maker is the compass leading the parties to the equitable decision. This ambiguousness, granting the judge a great *marge de manoeuvre*, was the very reasoning behind the wording of Article 38(1)(c):[266] the words 'recognized by civilized nations' were added to bar the ICJ judge to apply any maxim it deems equitable, only those that were adopted by civilized nations, now understood as community of nations,[267] could be brought before the Court and also applied by the latter.

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[263] International Court of Justice, 'Advisory Proceedings' <https://www.icj-cij.org/advisory-proceedings> accessed 24 August 2025: The Deliberations and Opinion phase of the advisory jurisdiction.

[264] *Tanaka*, 166-7.

[265] D Duthie, 'Ex aequo et bono: The Justice Route in the International Court of Justice', Cambridge Core Blog (21 January 2025) <https://www.cambridge.org/core/blog/2025/01/21/ex-aequo-et-bono-the-justice-route-in-the-international-court-of-justice/> accessed 24 August 2025.

[266] Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, with Annexes* (Van Langenhuysen Bros 1920) 314–335.

[267] *North Sea Continental Shelf*, Separate Opinion of Judge Ammoun, pp. 134−135.

The *dictum* is normally that only *lex lata* (i.e. positive law) can be applied to *litiges* before the ICJ.[268] The latter is a pure judicial organ; consequently, it applies the law that already exists, does not make or alter it.[269]

Although *lex ferenda* (i.e. future law, embryonic law), as explained previously, cannot be applied; some situations merit being delved into. It is a well-known fact that law is of a dynamic nature; it changes and evolves.[270] A crossroad awaits us when we are *vis-à-vis* with the question of what to apply when an already consolidated customary law is being replaced by an emerging customary law (i.e. *lex ferenda*).[271] The first path leads to being *conservative* and *formaliste*,[272] the other entails the risk of crossing the overt provisions in the ICJ Statute.

In the *Fishery Jurisdiction*[273] case, the Court tried to answer the question above.[274] Iceland argued that the 12-*mile*[275] limit for an exclusive fisheries zone (EFZ) had been overcome by time since many States had already started to extend their EFZ beyond this old limit and claimed a 50-mile EFZ.[276] The United Kingdom (UK) stressed that this claim is contrary to what has already existed for years, constituted an established law, and is based on an emerging law.[277] A similar conversation was being had at the Third United Nations Conference on the Law of the Sea (UNCLOS III), where the concept of a 200-nautical-mile Exclusive Economic Zone (EEZ) was being argued.[278] In this

[268] *Tanaka*, 176.

[269] *South West Africa (Liberia v South Africa), Second Phase* ICJ Rep 1966, 6, 48 [89].

[270] *Tanaka*, 177.

[271] *Ibid.*

[272] Almeida PW, 'L'affaire des immunités juridictionnelles de l'Etat (Allemagne c. Italie): la Cour Internationale de Justice à contre-sens de l'évolution du droit international' (2018) 11 Anuario Colombiano de Derecho Internacional 50, 27.

[273] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, I.C.J. Reports 1974, p. 3.

[274] *Tanaka*, 177.

[275] Nautical mile, calculated differently than a mile.

[276] *Tanaka*, 177.

[277] *Ibid.*

[278] *Ibid.*

case, the Court rejected the direct application of *lex ferenda;* nevertheless, this does not mean the latter was ignored entirely.[279]

In the above mentioned case the Court that claims of Iceland were not opposable to the UK, did not rule on the legality of it.[280] This point of view the Court had taken shows us it did not automatically apply the *lex lata*, recognizing that a rigid application would be ineffective.[281] Thus, it tried to mitigate the strict application of existing law by fusing concepts of developing law.[282]

5. Preliminary Objections

A preliminary objection is a question that is asked after the establishment of the jurisdiction of the Court over the case, concerning the jurisdiction of the Court or the admissibility of the application.[283] With the reception of the objection in cause, the case on the merits is suspended.[284]

Two main categories of *exceptions préliminaires* can be found in the ICJ Statute: questions concerning the jurisdiction, and those concerning the admissibility of the application.[285] The first will lead to an examination of the jurisdiction on the date of the claim launching the proceedings.[286] The second situation is where the jurisdiction of the Court is well-established, and the facts of the case do seem correct, there is still a legal ground on which the Court should not continue to an examination on the merits: These legal grounds include *l'épuisement des voies de recours internes*,[287] *legal interest of a third State*[288]…[289] It should be noted that it may be difficult to

[279] *Ibid*.

[280] *Tanaka*, 178.

[281] *Ibid.*

[282] *Ibid*.

[283] *Tanaka*, 200-1.

[284] *Tanaka*, 201.

[285] *ICJ Statute* art. 79.

[286] *Tanaka*, 201.

[287] The exhaustion of local remedies.

[288] An interest of legal nature will be demanded for interventions as party under Article 62. Thus rendering them a part to the case, meaning the case was incomplete without their intervention.

[289] *Tanaka*, 201.

differentiate between the categories of preliminary objections.[290] With the reception of the objection in cause, the proceedings on the merits are suspended.[291]

Usually,[292] it will be the respondent who files the objection. *Where the Court so decides, the parties shall submit pleadings concerning jurisdiction or admissibility within the time-limits fixed* (not later than three months after the memorial)*, and in the order determined, by the Court.*[293] The Court's ruling on the preliminary objection is in the form of a judgment, therefore, renders the non-compliance with the latter would work in favor of the other party as to the actability of this of the UNSC.[294] If the Court's response to the objection is neither upholding nor rejecting it but rather declaring that it does not have preliminary character, when proceeding to the merits, it does not leave the door closed.[295] This means even in the merits of the case; the Court can uphold the objection as it is not crystal-clear in practice to ascertain if the objection is of an exclusive preliminary character.[296]

As a judicial organ, the Court should and can only delve into judicial problems.[297] As a consequence of this, some believe litigious cases that comprise highly political issues must be rejected directly upon the receipt of the filing act instituting the proceedings.[298] But the Court's duty is not to intervene in political disputes, but rather to solve the judicial *litiges*, although they can be found together, interconnected in some manner.[299] However, this must never translate into

[290] *Ibid*.

[291] *Ibid*.

[292] With the exception of: *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question)* [1954] ICJ Rep 19.

[293] *ICJ Statute* art. 79(2).

[294] *Tanaka*, 201.

[295] *Ibid*.

[296] *Ibid.*

[297] *Tanaka*, 201.

[298] *Tanaka*, 204.

[299] *Tanaka*, 205.

a *dicastocratie*[300] as there is an inclination to submit to the Court disputes of essentially political nature as an attempt to lay the groundwork for judicial legislation. [301]

6. Decisions of the Court

The decision of the Court has no binding force except between the parties and in respect of that particular case.[302] By 'except between the parties' the Statute points out that neither the finding of fact nor the rationale in *law*[303] used in previous disputes, has any coercive effect on the Court afterwards.[304] This does not take us to the conclusion that past decisions of the Court are meaningless, but rather the law is not static, and it can differ in the way it is applied to situations, or the exigencies of the situations can lead it elsewhere. Nevertheless, the Court will try and provide *a sufficient degree of continuity and predictability of its jurisprudence*.[305]

The judgment is final and without appeal,[306] as a result, the Court is unable to deliver conditional judgments or adjudicate on the same dispute more than once. A 'dispute' consists of 3 elements thanks to which the Court can differentiate them: The claim (the act that launched the proceedings), the cause of it, and the people effected.[307] Arising from Articles 59 and 60 of the ICJ Statute, the *res judicata* effect to decisions of the Court appears,[308] it means that the parties to a dispute cannot submit the same *différend* and try and reopen the case.

[300] Government of judges.

[301] *Ibid*.

[302] *ICJ Statute* art. 59.

[303] See applicable law, present chapter section 5.

[304] *Tanaka*, 213.

[305] H Thirlway, *The International Court of Justice* (OUP 2016) 138, as cited in Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 213.

[306] *ICJ Statute* art. 60.

[307] *Petitum, causa pretendi, persona;* in that order.

[308] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [50].

In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.[309] If the judgment is ambiguous in its certain elements, for instance, in its *dispositif*,[310] the parties may ask the Court for an interpretation of its judgment.[311] This way of interpretation should not be used to trick the Court into changing the *dispositif* of the judgment by requesting the Court to judge on new matters in the same decision.[312] Five requirements for establishing jurisdiction over the request for interpretation will be explained hereafter.[313]

First, there should be a dispute, but not in the way that Statute indicates; the dispute here points to the differing views of the parties in relation to the meaning or the extent of the decision in question.[314] Second, the dispute must be in connection to the *dispositif* of the judgment and cannot concern the reasons for the judgment. An exception can be made to this rule when the reasoning and the dispositive are inextricably linked.[315] Third, *the request for interpretation can be made at any time*.[316] Fourth, the Court, as presently constituted, construes the judgment; it does not matter if the judges who rendered the decision no longer serve on the bench.[317] Finally, no further basis of jurisdiction is needed for the parties to a dispute to request an interpretation other than them being parties to a dispute having been adjudicated on by the Court.[318]

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[309] *ICJ Statute* art. 60.

[310] The operative part of the judgment, the disposition.

[311] *Tanaka*, 216.

[312] *Ibid*.

[313] A Zimmermann and T Thienel, 'Article 60' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019), 1476–8, as cited in Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 216.

[314] *Ibid*.

[315] *Ibid*.

[316] J Koib, *The International Court of Justice* (2001) 781, as cited in Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 217.

[317] *Tanaka*, 217.

[318] *Ibid*.

The members of the UN pledge to abide by all decisions of the Court, of course, if they are included in the *persona* of the dispute.[319] In the event of a non-compliance with a decision, only the other party or other parties may bring this issue before the UNSC.[320] The sole provision in force that reprehends the non-execution of an ICJ judgment is paragraph 2 of Article 94 of the UN Charter.[321] In the said paragraph, the word judgment is used.[322] This directly means only the final judgments that end a dispute before the Court are counted in.[323] Non-compliance with other decisions that the Court delivers is of little importance, such as non-implementation of provisional measures. However, some argue that the explained procedure may be applicable also in situations that fall out of the scope of the term 'judgments', this view is yet to be tested.[324] In addition, only States that are parties to a dispute can take a matter to the UNSC, even though the non-execution of an ICJ judgment might threaten international peace.[325] In any case, the UNSC is not under any obligation to execute a request.

III. KEY CONCEPTS

1. Violations of International Humanitarian Law (IHL)

Violations of (IHL) occur when parties involved in a war breach the international rules designed to limit the effects of armed conflict.[326] The core purpose of IHL, which is primarily governed by the the Geneva Conventions,[327] is to protect individuals who are no longer participating in

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[319] *Ibid*.

[320] *ICJ Statute* art. 84.

[321] UN Charter art. 94(2).

[322] *Ibid*.

[323] *Tanaka*, 222.

[324] *Ibid*.

[325] A third party can actually take the non-execution of an ICJ judgment to the UNSC but by virtue of Chapter VI, not art. 94(2) of the *ICJ Statute*.

[326] Diakonia International Humanitarian Law Centre, 'Enforcement of IHL' https://www.diakonia.se/ihl/resources/international-humanitarian-law/enforcement-ihl/ accessed 2 March 2026.

[327] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (*adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted 12

hostilities, and to limit the means and methods of warfare.[328] In the context of the present case, IHL violations refer to serious breaches of the international law of armed conflict, which amount to war crimes and crimes against humanity.[329] Specifically, the violations perpetrated by the German armed forces between 1943 and 1945 included the large-scale killing and massacre of civilians in occupied territory, the deportation of members of the civilian population to be used as slave labor, and the denial of prisoner-of-war status to captured military personnel who were also deported and used as forced laborer.[330] Germany has previously recognized and formally apologized for the *untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees*.[331] The relevant acts can only be described as showing an outright disregard for the elementary considerations of humanity.[332]

One group of cases involved the large-scale killing of civilians in occupied territory, displayed by the massacres committed on 29 June 1944 in Civitella, Cornia, and San Pancrazio by the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier.[333]

Another group involved civilians who, like Mr. Luigi Ferrini, were deported from Italy to Germany for what amounted to slave labor.

August 1949, entered into force 21 October 1950) 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 [‘**Geneva Convention III**’].

[328] European Commission, 'International Humanitarian Law' https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/international-humanitarian-law_en accessed 2 March 2026.

[329] *Jurisdictional Immunities*, [52].

[330] *Ibid*.

[331] *Joint Declaration of Germany and Italy* (adopted 18 November 2008).

[332] *Corfu Channel (United Kingdom v Albania)*, Merits, Judgment, ICJ Reports 1949, 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, 112.

[333] *Max Josef Milde* (Military Court of La Spezia, 10 October 2006).

The third consisted of the denial of the status of prisoner of war of the Italian armed forces, together with the protections which that status entailed, to which they were entitled, and who were similarly used as forced laborers.[334] There is no doubt as to this being a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 (b) of the Charter of the International Military Tribunal, 8 August 1945, convened at Nuremberg, reiterated as war crimes *murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory*, also *murder or ill-treatment of prisoners of war*.[335] The list of crimes against humanity in Article 6 (c) of the Charter included *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.*[336] The principles of the Nuremberg Charter were reiterated by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.[337]

a. War crimes

When horrors committed by men shake the conscience of the international community, the terms 'crimes against humanity' and 'war crimes' are often used conversely. However, in international law, they serve different purposes and represent distinct legal categories. The definitive framework in this subject is the Rome Statute of the International Criminal Court.[338] The Drafting Committee of the Rome Statute was heavily influenced by the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind.[339] Article 8 of the Rome Statute distinguishes between two types of war crimes: Serious breaches of the 1949 Geneva Conventions and other serious violations.[340] War crimes englobe acts such as the murder, ill-treatment, or deportation to slave labor of a civilian

[334] *Ibid*.

[335] *Ibid*.

[336] *Ibid*.

[337] UNGA Res 95 (I) (11 December 1946) UN Doc A/RES/95(I).

[338] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ['**Rome Statute**'].

[339] International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) UN Doc A/51/10.

[340] *Rome Statute*, art. 8.

population within or from an occupied territory. It also explicitly includes the murder or ill-treatment of prisoners of war.[341]

b. Crimes Against Humanity

Legislated under Article 7 of the Rome Statute, crimes against humanity circles around the organization, the range and; if there is, the civilian nature of those affected by the conduct in question.[342] In order for an act to be deemed a crime against humanity, it must be perpetrated as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[343] This category includes murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, regardless of when they occur.[344]

2. *Exequatur* Proceedings

Exequatur proceedings are legal requests to have a judgment rendered by a foreign court enforceable in another State. Therefore, if the judgment which is the subject of the request is rendered against a foreign sovereign, a national court examining it must respect the jurisdictional immunity of a foreign state, because if the judgment is accepted to be enforceable, it would have the same effects as a national decision.[345] The original court rendering the decision is not responsible for the effects that the judgment may or may not cause if the exequatur request is accepted.[346]

Thus, a national court reviewing an *exequatur* application must ask itself this hypothetical question: If this court were asked to hear the actual merits of the dispute before it, would it be under an obligation under international law to grant the foreign State immunity?[347]

[341] *Jurisdictional Immunities*, [53].

[342] *Rome Statute*, art. 7(1)

[343] *Ibid*.

[344] *Rome Statute*, art. 7; *Jurisdictional Immunities*, [53].

[345] *Jurisdictional Immunities*, [128].

[346] *Jurisdictional Immunities*, [132].

[347] *Jurisdictional Immunities*, [130].

3. Prisoner of war (POW)

A POW is a combatant who is captured and held by an enemy power during or after an armed conflict.[348] The primary rationale of taking POWs is not to punish them, but rather to remove them from the battleground; consequently, they would not continue to participate in the war against the troops of the capturing state.

The treatment, rights, and status of POWs are governed by IHL, most importantly by the Third Geneva Convention of 1949.[349] This convention outlines the universal standards for how captives must be treated.

a. The Recipients of the Legal Status of POW

According to the Geneva Conventions, POW status is primarily granted to:

1. Military personnel relating to a party involved in the conflict.[350]
2. Organized resistance movements, in the case of culmination of specific criteria, which are: having a clear chain of command, wearing a fixed distinctive sign visible from a distance, carring arms openly, and conducting operations in accordance with the laws of war.[351]
3. War correspondents, supply contractors, or civilian crew members of military aircraft, if they are authorized by the armed forces they are accompanying.[352]
4. Inhabitants of a territory who bear arms to resist invading forces, only if they bear arms openly and conduct in accordance with the laws of war.[353]

b. Core Rights of a POW

Under international law, a capturing State must treat POWs humanely. Their *inviolable* rights comprise:

[348] ICRC, 'Prisoners of war: what you need to know' https://www.icrc.org/en/document/prisoners-war-what-you-need-know accessed 2 March 2026.

[349] *Geneva Convention III*.

[350] *Geneva Convention III*, art. 4(A)(1).

[351] *Geneva Convention III*, art. 4(A)(2).

[352] *Geneva Convention III*, art. 4(A)(4).

[353] *Geneva Convention III*, art. 4(A)(6).

i. They are to be protected against all acts of violence.[354]
ii. Their vital needs must be taken care of, they must be provided with adequate food, water, clothing, shelter, and medical care, proportinate to what the capturing State's own armed forces obtain.[355]
iii. A POW is only obliged to provide *his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.*[356]
iv. They cannot be tortured, threatened, or forced into giving military intelligence.[357]
v. They can send and receive letters from their close ones and accept *relief packages*. [358]
vi. They must be repatriated without delay after the *cessation of active hostilities*.[359]

4. Intervention before the ICJ

In the statue of the ICJ, two foundational avenues for the intervention by States before the ICJ are articulated, respectively in the Articles 62 and 63 of the Statute.[360] States that have ratified the Statute of the Court have therefore accepted that the Court is also apt to rule on the eligibility of and if it prefers, allow interventions through Articles 62 and 63 of the Statute.[361]

If a state considers that it has an interest of a legal nature that may be affected by the decision of the Court, it may apply to intervene in the case. [362] The Court will rule on the eligibility of the application to intervene by checking its conformity to the conditions laid down in Article 62, though it does not possess any general discretion to reject applications under the name of simply 'policy'. Their *marge de manoeuvre* is limited if the application is made in order to be a non-party to the case. In the context of Article 62, the Court is of the view that opposition by the parties to

[354] *Geneva Convention III*, art. 13.
[355] *Geneva Convention III*, Part III, Sec II.
[356] *Geneva Convention III*, art. 17.
[357] *Ibid*.
[358] *Geneva Convention III*, Part III, Sec V.
[359] *Geneva Convention III*, art. 118.
[360] *ICJ Statute* arts. 62, 63.
[361] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Application for Permission to Intervene) [1990] ICJ Rep 92* [96] ['**Land, Island and Maritime Frontier Dispute**'].
[362] *ICJ Statute* art. 62.

an application to intervene is, while being important, *no more than one element to be taken into account*.[363] Only 8 percent of the cases before the ICJ has seen the application to intervene under Article 62, totaling 14 States, though only 3 of those applications having been accepted.[364]

A state can also apply to intervene if the construction of a convention thereto it is a party is in question. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.[365] In addition, a State considering itself a party to a convention whose construction is concerned in a case, despite not having been notified by the Court's registrar, is also fit to file a declaration, as with the notified States, to avail of the right arising from the said Article.[366] Only 3 percent of cases have seen the said application, 2 of them being admissible.[367]

IV. CASE REPORT: JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY V. ITALY: GREECE INTERVENING) CASE

1. Overview of the case

The dispute can be split into two different problems, making way for the main dispute. One of the issues was the clash between the decisions of Italian and Greek civil courts (recognized in Italy by *exequatur*) condemning Germany for compensation of injuries caused by *international law violations*[368] committed by the *III. Reich* during the Second World War and the alleged State immunity of Germany, the other issue is borne by the measures of constraint taken by the Italian Administration against a German state property, Villa Vagoni.

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[363] *Supra note* 361.

[364] Nicaragua in *Land, Island and Maritime Frontier Dispute* (1990); Equatorial Guinea in *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v Cameroon)* [1999] ICJ Rep 31; Greece in *Jurisdictional Immunities* (2011).

[365] *ICJ Statute* art. 63.

[366] Rules of Court, art. 82 (1), (3).

[367] *Haya de la Torre (Colombia v Peru)* [1951] ICJ Rep 71; *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226.

[368] Including civil massacres, deportation of civils and military personnel to force them to work in the III. Reich and its occupied territories throughout Europe.

2. The Facts of the Case

Italy initially entered the Second World War in June 1940 as a part of Axis Powers[369], an ally of the III. Reich.[370] After Mussolini was ousted, Italy surrendered to the Allies in September 1943 and right after, declared war on Germany.[371] German forces then occupied much of Italian territory, and between October 1943 and May 1945, committed severe atrocities that could only be described as a complete disregard for the e*lementary considerations of humanity*.[372] These acts included:

1. Massacres of Civilians: As part of a retaliation policy, German forces carried out large-scale killings. For example, on June 29, 1944, members of the 'Hermann Göring' division killed 203 civilian hostages in Civitella, Cornia, and San Pancrazio after partisan forces had killed four German soldiers.[373]
2. Civilian Deportation: A great number of civilians, such as Mr. Luigi Ferrini, were deported to Germany for, what is in substance, slave labour.[374]
3. Italian Military Internees: Captured members of the Italian armed forces were not granted the status of POW and the protections it entailed.[375] They were deported to Germany and occupied territories and exploited as forced labor.[376]

After the war had ended, a long series of inter-State agreements and domestic laws undertook to address reparations:

1. The 1947 Peace Treaty: The Allied Powers concluded a Peace Treaty with Italy on February 10, 1947.[377] Most importantly, under Article 77(4) of the Treaty, Italy waived, on its own

[369] Germany, Italy, and Japan.

[370] *Jurisdictional Immunities*, [53].

[371] *Ibid*.

[372] *Jurisdictional Immunities*, [52].

[373] *Jurisdictional Immunities*, [51].

[374] *Jurisdictional Immunities*, [27,51].

[375] *Jurisdictional Immunities*, [21].

[376] *Ibid*.

[377] *Treaty of Peace with Italy* (signed 10 February 1947, entered into force 15 September 1947) 49 UNTS 3 ["**Treaty of Peace with Italy**"]; *Jurisdictional Immunities*, [22];

behalf and also on behalf of all Italians, all claims against Germany arising during the war.[378]

2. 1953 Federal Compensation Law (BEG): Germany enacted this Law to redress victims of Nazi persecution, but many Italian victims failed to qualify because they were not considered as persecuted under the Law's specific definitions and/ or lacked a German domicile.[379] The law was revised in 1965 in an attempt to cover those who were persecuted for their nationality or for their ethnicity, but the now-modified Law required claimants to have held refugee status by the first of October 1953.[380] This further resulted in a dismissal of Italian claims by German courts.

3. The 1961 Bilateral Agreements: Germany and Italy concluded two agreements on June 2, 1961.[381] The first agreement resolved pending financial disputes, Italy formally declared that all claims from 1939 to 1945 were settled and also agreed to indemnify Germany against any legal action that may be by Italian nationals in the future.[382] It was stated in the second agreement that Germany will provide 40 million Deutsche marks explicitly for Italians who were persecuted specifically on the basis of their races, faiths, or ideologies.[383]

4. The 2000 Federal Law: Germany adopted a new federal law founding the 'Remembrance, Responsibility and Future' Foundation to redress victims of forced labor, distributing funds

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[378] Treaty of Peace with Italy art. 77(4).

[379] Federal Compensation Law (*Bundesentschädigungsgesetz*) of 18 September 1953, BGBl I, 1387 ["**Federal Compensation Law**"]; *Jurisdictional Immunities*, [23].

[380] Federal Law on the Final Settlement of Compensation (*Bundesentschädigungsschlussgesetz*) of 14 September 1965, BGBl I, 1315 ['**Federal Compensation Law as amended in 1965**']; *Jurisdictional Immunities*, [23].

[381] *Agreement between the Federal Republic of Germany and the Italian Republic on the Settlement of Certain Property-Related, Economic and Financial Questions* (signed 2 June 1961, entered into force 16 September 1963) ["**First Agreement**"]; *Agreement between the Federal Republic of Germany and the Italian Republic on Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution* (signed 2 June 1961, entered into force 31 July 1963) ["**Second Agreement**"].

[382] *Jurisdictional Immunities*, [24].

[383] *Ibid*.

through organizations like the International Organization for Migration in Geneva.[384] Article 11 of the Law explicitly precluded from the scope of the Law individuals who had held POW status, operating on the premise that under international law , the capturing state is allowed to put POWs to work.[385] When a great number of former Italian military internees applied, German authorities rejected their application, stressing that the III. Reich could not unilaterally change their status during the war, meaning legally they remained POWs.[386] This means that although Italian military internees did not enjoy the protections that the legal status of POW entails, this does not change the fact that they were POWs, and the latter group is precluded from the scope of application of this Law. The *Bundesverfassungsgericht* upheld this exclusion, stating it did not violate equality rights on June 28, 2004.[387] The European Court of Human Rights (ECtHR) ruled that an application by 275 Italian internees (Associazione Nazionale Reduci) was inadmissible, sided with the German Court's judgment.[388]

When victims failed to secure compensation elsewhere, they turned to Italian courts:

1. The *Ferrini* Case: Mr. Ferrini was arrested in August 1944 and then deported to a German factory, sued Germany in the *Tribunale di Arezzo* on September 23, 1998.[389] The *Corte di Cassazione* reversed the ruling of the below Court which rejected the appeal citing State immunity, held that immunity did not apply when the acts constitute international crimes.[390]

[384] *Jurisdictional Immunities*, [26].

[385] Law on the Creation of a Foundation 'Remembrance, Responsibility and Future' (*Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'*) of 2 August 2000, BGBl I, 1263, art. 11 ["**The 2000 Federal Law**"].

[386] *Jurisdictional Immunities*, [26].

[387] *Ibid*.

[388] Associazione Nazionale Reduci and 275 Others v. Germany, decision of 4 September 2007, application No. 45563/04).

[389] *Jurisdictional Immunities*, [27].

[390] *Jurisdictional Immunities*, [28].

2. *Mantelli* and *Maietta*: Following the *Ferrini* ruling, further claims were filed. Germany filed interlocutory appeals requesting *regolamento preventivo di giurisdizione*[391].[392] By two orders, the The *Corte di Cassazione* confirmed the jurisdiction of Italian courts over the matter on May 29, 2008. [393]

3. The *Milde* Case: The *Tribunale Militare di La Spezia* sentenced Max Josef Milde *in absentia*[394] for the 1944 massacres and ruled that him and Germany were obligated to compensate the victims' estate on October 10, 2006. Germany's subsequent appeals were rejected. [395]

A similar situation was unfolding in Greece, with Greek nationals regarding a June 10, 1944 massacre by German forces in the village of Distomo. The victims 'successors sued Germany for compensation in 1995. The Greek Court of First Instance of Livadia awarded damages.[396] The Greek Supreme Court dismissed Germany's appeal and sided with the below Court.[397] Under Greek law, it was required that the Greek Minister for Justice authorizes a judgment for it to be enforceable if it is rendered against a foreign sovereign.[398] The authorization was not given by the Minister. [399] The claimants then took the matter before the ECtHR which rejected the application, citing State immunity.[400] The claimants then took the matter before the *Bundesgerichtshof*, which did not enforce the judgment in Germany, also citing State immunity. The claimants thereupon sought exequatur in Italy.[401] The *Corte di Appello di Firenze* accepted the request and ordered

[391] Declarations of lack of jurisdiction.

[392] *Jurisdictional Immunities*, [28].

[393] *Jurisdictional Immunities*, [28].

[394] *Jurisdictional Immunities*, [29].

[395] *Ibid*.

[396] *Jurisdictional Immunities*, [30].

[397] *Ibid*.

[398] Code of Civil Procedure (*Kodikis Politikis Dikonomias*) (Greece) Presidential Decree 503/1985, Government Gazette (*Efimeris tis Kyverniseos*) A 182/1985, art. 923.

[399] *Jurisdictional Immunities*, [30].

[400] Kalogeropou-lou and Others v. Greece and Germany, application No. 59021/00

[401] *Jurisdictional Immunities*, [23].

Germany to redress the Greek victims and also declared the Greek award of legal costs enforceable on May 2, 2005.[402]

Strikingly, in regard to a separate 1944 massacre in Lidoriki, The Greek Supreme Court formally asked the Greek Special Supreme Court if Germany was entitled to immunity in the current stance of international law.[403] The Special Court ruled under Article 100 of the Greek Constitution, that Germany was to be granted immunity, repealing the Greek Supreme Court's former rationale in *Distomo*.[404] Legitimized by the *Corte di Appello di Firenze' exequatur* of the *Distomo* judgment, the Greek claimants registered an *ipoteca giudiziale*[405] against Villa Vigoni, a German State property serving as a cultural research center operating under a state-to-state agreement. Presently, the Italian government suspended the legal charge, pending the Court's ruling on the matter; however, the legal charge was never cancelled.

3. Claims of the Case

Germany applies to the Court on the grounds of Article 1 of the European Convention for the Peaceful Settlement of Disputes which creates a binding agreement between parties to the dispute to authorize the ICJ resolve their legal conflicts[406]. Especially, it grants the Court the authority to rule on how treaties should be interpreted, broad questions of international law, the determination of whether an international obligation was violated, and the appropriate type and/ or amount of compensation owed for such a breach.[407]

The same Convention also limits the scope of that instrument *ratione temporis* by stipulating that it would not apply to the *disputes relating to facts or situations prior to the entry into force of this*

[402] *Ibid*.

[403] *Jurisdictional Immunities*, [36].

[404] Margellos v. Federal Republic of Germany, case No. 6/2002, ILR, Vol. 129, p. 525.

[405] A mortgage.

[406] *Jurisdictional Immunities*, [41]; European Convention for the Peaceful Settlement of Disputes (adopted 29 April 1957, entered into force 30 April 1958) 25 ETS 5, art. 1 ["**European Convention for the Peaceful Settlement of Disputes**"].

[407] *Ibid*.

Convention as between the parties to the dispute.[408] The Convention has been in force between Germany and Italy since 18 April 1961.[409] The claims relate to *international legal disputes* within the meaning of Article 1.[410]

Though the facts in the cases which constitutes the focal point of the dispute before the court were caused by actions of the German armed forces in 1943-1945, those decisions and measures were adopted between 2004 and 2011.[411] Consequently, after the European Convention for the Peaceful Settlement of Disputes entered into force as between the Parties.[412] Indeed the subject-matter of the dispute to which the judicial proceedings in question is in relation to the reparation for the injury caused by German armed forces in 1943-1945.[413] Germany's objection is not about the treatment of the subject-matter in the Italian ruling; but rather the non-recognition of its alleged immunity in these proceedings.[414] Undoubtedly, this dispute relates to *facts or situations* occurring after the entry into force of the Convention as between the Parties.[415]

The subject matter of a dispute brought before the ICJ is confined to the claims submitted by the parties.[416] It is regarding those claims that the Court will determine whether it has jurisdiction over the matter. [417]

a. Claims of Germany

Germany requests the Court to find Italy in breach of its international obligation to recognize its jurisdictional immunities which it enjoys under international law as:

1. Italy allowed compensation suits to be brought against it,

[408] *European Convention for the Peaceful Settlement of* Disputes art. 27.

[409] *Ibid*.

[410] *European Convention for the Peaceful Settlement of* Disputes art. 1; *Jurisdictional Immunities*, [43].

[411] *Jurisdictional Immunities*, [44].

[412] *Ibid*.

[413] *Ibid*.

[414] *Ibid*.

[415] *Ibid.*

[416] *Jurisdictional Immunities*, [39].

[417] *Ibid*.

2. Italy also took measures of constraint against *Villa Vagoni*, a German state property used for public purposes.[418]

Germany argued that in the current stance of customary international law, there is no exception to State immunity regarding sovereign acts of a state.[419] Consequently, Germany requests the Court to declare that Italy has committed an internationally wrongful act and to order Italy to take steps by way of reparation. [420]

b. Claims of Italy

Italy requests the Court to reject Germany's claims, however, it added that it has would not object to the Court ordering the measures of constraint to an end.[421] Italy stressed that immunity for sovereign acts is not absolute; it enumerated 3 exceptions, and also their combined effect, to State immunity which are applicable in the current situation:[422]

1. The territorial tort exception to state immunity;
2. The exception according to which a State is not entitled to immunity as when it commits jus cogens violations, it tacitly waives it entitlement to immunity before domestic courts of another state;
3. When a state does not provide with effective remedies to those it is responsible to compensate, as a last resort, its immunity should be lifted to provide redress to victims;
4. In any case, Italy argued that the combined effect of the foregoing is a further indicator that Germany 'entitlement to immunity is baseless.

Italy also did not object to the jurisdiction of the Court over the matter brought by Germany. Nonetheless, the Court always has to be satisfied that it has jurisdiction.[423]

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[418] *Jurisdictional Immunities*, [37].

[419] *Jurisdictional Immunities*, [64].

[420] *Ibid*.

[421] *Jurisdictional Immunities*, [38].

[422] *Jurisdictional Immunities*, [62, 80, 92, 98, 105.].

[423] Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972, p. 52, [44].

c. Intervention of Greece

Greece intervened in the case between Germany and Italy by virtue of Article 62 of the ICJ Statute according to which, if a State has an interest of a legal nature, it can intervene in a dispute.[424] Most importantly, in its application, Greece explicitly stated that it did not intend to become a party to the case.[425] The parties did not object to the application of intervention by Greece, thus, it was not required to have a separate hearing on whether to grant the permission.[426]

The Court delivered an Order officially enabling Greece to intervene as a non-party n July 4, 2011.[427] However, the Court strictly confined the scope of this intervention: Greece was only authorized to intervene in connection to the decisions of Greek courts that Italian courts had declared enforceable in Italy.[428] Greece took part in both the written and oral phases of the proceedings, filed a written statement.[429] Germany filed written observations in response to Greece's statement, whilst Italy preferred to reserve its comments for the oral proceedings.[430]

Greece substantiated its intervention by circling around the profound impact the Court's decision would have on its jurisprudence, most especially in this specific matter.[431] In its written statement and oral observations, Greece argued that the Court's ruling on the scope a state is immune would be of significant importance not just to parties to the case, but also to the Hellenic legal order.[432] Most importantly, Greece indicated that the Court's judgment regarding how State immunity interacts with jus cogens rules would serve as a guide for Hellenic courts.[433] Greece further argued

[424] *ICJ Statute* art. 62; *Jurisdictional Immunities*, [5, 6].

[425] *Ibid.*

[426] *Jurisdictional Immunities*, [8,9].

[427] *Jurisdictional Immunities of the State (Germany v Italy), Application for Permission to Intervene* (Order) [2011] ICJ Rep 494, [29].

[428] *Jurisdictional Immunities*, [10].

[429] *Jurisdictional Immunities*, [10-3].

[430] *Jurisdictional Immunities*, [11].

[431] *Jurisdictional Immunities*, [18-20].

[432] *Ibid.*

[433] *Jurisdictional Immunities*, [18].

that the ruling would inescapably result in having an important effect on pending and any potential lawsuits brought by individuals.[434]

4. Established Agenda of the Court
    a. Does customary international law deprive a State of its entitlement to immunity for torts occasioning death, personal injury, or damage to property? If so, is the same exception applicable to acts committed by armed forces of a State on the territory of another State during an armed conflict?
    b. Is there a conflict between *jus cogens* norms and the procedural rules of State immunity? If there is, do the former rules displace immunity?
    c. Does a State lose its entitlement to immunity if the victims have been denied all other forms of redress, making the exercise of domestic jurisdiction a matter of 'last resort'?
    d. Did Italy itself violate Germany's immunity from enforcement by taking measures of constraint against *Villa Vigoni*?
    e. Did the 1947 Peace Treaty or the 1961 Agreements amount to a binding waiver of the Italian claims?
    f. When a judge grants immunity regarding a *jus cogens* violation, does it also nor *render aid or assistance in maintaining that situation* in the sense of Article 42 of ARSIWA?

V. APPLICABLE LAW

1. International Law
    a. The Peace Treaty of 1947

After the war had ended, on 10 February 1947, the Allied Powers concluded a Peace Treaty, thereof Article 77 stipulates:

[434] *Jurisdictional Immunities*, [19].

'*1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.*

2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.

3. The restoration and restitution of Italian property in Germany shall be enactected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all intergovernmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.'[435]

b. The 1961 Agreements

Germany and Italy concluded 2 Agreements on 2 June 1961.[436] The first Agreement was based on the *settlement of certain property-related, economic and financial questions*.[437] Under Article 1 of that Agreement, Germany paid compensation to Italy for *outstanding questions of an economic nature*.[438] Article 2 of the Agreement reads as follows:

'(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or

[435] Treaty of Peace with Italy art. 77(4); *Jurisdictional Immunities*, [22].

[436] *Jurisdictional Immunities*, [24].

[437] *First Agreement*, art. 1.

[438] *Ibid*.

legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

(2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the above-mentioned claims.'[439]

The second Agreement, regulated the redress for Italian victims of Nazi persecution.[440] Germany agreed to pay Italy forty million Deutsche marks under Article 1 of that treaty:

'*for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures*.'[441]

Article 3 of that Agreement reads as follows:
'*Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty*.'[442]

c. Customary rule of state immunity

Between Germany and Italy, any claim to immunity can be based on customary international law, rather than treaty.[443] Although Germany is a party to the European Convention on State Immunity

[439] *First Agreement*, art. 2.

[440] *Jurisdictional Immunities*, [25].

[441] *Second Agreement*, art. 1.

[442] *First Agreement*, art. 3.

[443] *Jurisdictional Immunities*, [54].

of 16 May 1972[444] (ECSI), Italy is not. Neither Parties is a signatory to the UNSCI, which is also not yet in force in any case.

Consequently, the Court must determine, in accordance with Article 38 (1)(b) of its Statute, the scope and extent of the customary rule of immunity.[445] To do this, it must apply the criteria for identifying a customary rule in international law. In particular, the existence of a rule of customary international law requires that there be a settled practice together with the understanding that the rule is binding upon states, *opinio juris*.[446]

The Parties agree that a State enjoys a *prima facie* immunity*, in respect of itself and its property, from the jurisdiction of the courts of another State* as codified in Article 5 of the UNSCI.[447] They however differ on to the scope and extent of the rule of State immunity.[448] Germany argues that immunity is applicable and that there is no exception to state immunity in regard to sovereign acts.[449] Italy, on the other hand, maintains that Germany cannot be granted immunity in respect of the cases before the Italian courts for two reasons: first, that there is a tort exception to state immunity, and, secondly, that, irrespective of the *locus* of the relevant acts, because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available.[450]

i. The Territorial Tort exception to State Immunity

The territorial tort exception is a concept in international law which dictates that a foreign State cannot claim immunity before the courts of another State in civil proceedings seeking financial

[444] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181.

[445] *Jurisdictional Immunities*, [55].

[446] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, [77].

[447] *UNSCI* art. 5.

[448] *Jurisdictional Immunities*, [59].

[449] *Ibid*.

[450] *Ibid*.

compensation for death, personal injury, or damage to tangible property.[451] For this exception to apply, two conditions must be met: the act or omission causing the harm must have occurred, in whole or in part, on the territory of the forum State, and the author of the act must have been present in that territory at the time.[452]

Article 12 of the UNSCI stipulates 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.[453]

Article 11 of the ECSI, in a similar vein, reads as follows:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.[454]

These requirements are enshrined in Article 12 of the UNSCI and Article 11 of the ECSI, though the requirement that the author being also present at the time of the occurrence of the acts/omissions is not backed by state practice.[455]

The Conventions wherein these Articles are found are generally viewed to be reflective of customary international law.[456]

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[451] *Jurisdictional Immunities*, [64].

[452] *Jurisdictional Immunities*, [69].

[453] *UNSCI* art. 12.

[454] ECSI art. 11.

[455] Richard Garnett, 'Foreign State Immunity and Harassment of Dissidents' (2023) 24 MJIL 284, 290-291.

[456] *Benkharbouche*, [32]; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, 1992) 341–63.

The UK State Immunity Act (SIA) section 5, a provision largely replicated in other jurisdictions, stipulates:

A State is not immune as respects proceedings in respect of—

(a)death or personal injury; or

(b)damage to or loss of tangible property,

caused by an act or omission in the United Kingdom. [457]

The concept was initially developed to allow local courts to handle civil compensation claims against foreign state representatives, when the claim was caused by state representatives in road traffic accidents and other insurable risks.[458] The principle is widely recognized in global legal frameworks. Furthermore, it should not be disregarded that, except for Pakistan,[459] all States that have enacted specific domestic legislation governing State immunity have also included a territorial tort exception section.[460] However, in the absence of a State immunity legislation, tort exception is hardly applied.[461]

The major international conventions and numerous national statutes that enshrine the territorial tort exception to state immunity deliberately chose not to explicitly restrict the exception based on whether the act in question was a sovereign or a commercial one.[462]

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[457] *State Immunity Act 1978 (United Kingdom) s 5*; For similar provisions, see, eg, *Foreign States Immunities Act 1981 (South Africa) s 6; State Immunity Act (Cap 313) (Singapore) s 7*; *Foreign State Immunity Law 2008 (Israel) s 5 ('tort committed in Israel')*; *Immunity of Foreign States from the Jurisdiction of the Argentinian Courts 1995 (Argentina) s 2(e)*.

[458] *McElhinney v Ireland* (2002) 34 EHRR 13 ¶38 [‘**McElhinney v Ireland**’].

[459] State Immunity Ordinance 1981

[460] *Jurisdictional Immunities*, [70].

[461] Code of Civil Procedure of Bulgaria (SG No. 59/2007) art. 18(2); *McElhinney v Ireland*, ¶15; *American Bureau of Shipping*, [4].

[462] *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*, [2002] Supreme Court Reports (SCR), Vol. 3, p. 269, [33-36].

While the general territorial tort exception allows a foreign State to be sued in local courts for everyday civil liabilities, a great number of States also recognize that immunity in regard to military conduct is still intact.[463]

Article 31 of the ECSI stipulates:

Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.[464]

The Explanatory Report of ECSI reads as follows:

For example, when a vehicle belonging to a State is involved in a traffic accident, then, provided the driver of the vehicle was present, the State as owner or possessor of the vehicle may be sued, even though the plaintiff does not seek to establish the personal liability of the driver. [465]

This may be read as to indicating that the authors of the Convention did not intend to lay down a rule that would deal with the consequences of armed conflict.

In a similar vein, while the UNSCI contains a tort exception in Article 12, the ILC explicitly noted in the commentaries to Article 12: …*Neither does it affect the question of diplomatic immunities, as provided in article 3, nor does it apply to situations involving armed conflicts*.[466] Furthermore, in the absence of a State immunity legislation, no national court has ever applied the tort exception to strip immunity from a foreign military acting in an armed conflict.[467]

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[463] The United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Section 19 (2) (a); Canada State Immunity Act 1985, Section 16; Australia Foreign States Immunities Act 1985, Section 6; Israel Foreign State Immunity Law 2008, Section 22; the South African Foreign Sovereign Immunity Act (1981) Section 6; *Jurisdictional Immunities*, [71].

[464] ECSI art. 31.

[465] Council of Europe, *Explanatory Report to the European Convention on State Immunity* (1972) 21.

[466] Yearbook of the International Law Commission, 1991, Vol. II (2), [46/10].

[467] *Jurisdictional Immunities*, [72].

However, the conduct of all State organs is equally attributed to the State, as reiterated in Article 4 of ARSIWA.[468] There is no legal ground to make a distinction between an action taken by the military and any other organ of the same State.[469] Moreover, when the forum State consents to the presence of foreign troops on its territory, a specific, and also more favourable regime of immunities is logical.[470] Such matters are generally governed by a mutual agreement between the pertinent States.[471] It is more difficult to understand why would there be a favourable regime for a hostile State which would triumph over the sovereign right of the forum State to exercise its territorial jurisdiction concerning conduct occurring on its territory.[472]

Furthermore, how a specific provision is understood by those that apply it is also important for the purposes of its status in international law.[473] For instance, Switzerland is of the view that:

Article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to developments in international law in this regard.[474]

ii. *Jus cogens* Violations

Also known as peremptory norms, these are rules that are so deeply embedded and universally accepted by the international community that no derogation is ever permitted.[475] They are also reiterated in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as: *a norm*

[468] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) (Dissenting Opinion of Judge *ad hoc* Gaja) [2012] ICJ Rep 307, 318.

[469] *Ibid*.

[470] *United States of America v Public Service Alliance of Canada* [1992] 2 SCR 50, 58; Agreement Concerning Leased Bases in Newfoundland (adopted 27 March 1941, entered into force 27 March 1941) [1952] Can TS No 14.

[471] *Ibid*.

[472] *Supra* note 468.

[473] *ILC Conclusions with Commentaries*, [8/5].

[474] Switzerland's Interpretative Declaration Concerning Article 12, 16 April 2010, available at http://treaties.un.org.

[475] Peace Palace Library, 'Start Your Research: (6) Peremptory Norms of International Law (Jus Cogens)' <https://peacepalacelibrary.nl/start-your-research-6-peremptory-norms-international-law-jus-cogens> accessed 2 March 2026.

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[476]

The very concept of a hierarchical international legal order, where certain norms take precedence, was officially accepted in 1969 with the Vienna Convention on the Law of Treaties.[477] Under Articles 53 and 64 of the afore-mentioned Convention, any legal act that contravenes a *jus cogens* norm is void.[478] Nevertheless, the application of these norms is bound by the principle of non-retroactivity; the latter meaning conduct must be legally appraised by the standards in force at the time it was carried out. [479]

In the very first paragraph of commentaries to ARSIWA, it is stated that there is a certain divide between substantive rules, wherein also the *jus cogens* violations are also found, and the secondary rules (rules on state responsibility) that dictate the procedures and consequences thereof.[480] In addition, the Court has previously stated that immunity is procedural in nature, it has no relation to the legality of the conduct.[481] There is also another principle at play, the fundamental principle that a foreign or an international court's jurisdiction strictly depends on the consent of the involved parties.[482] For this reason, it can be inferred that there is no automatic link between the procedural and substantive rules.

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[476] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 53 ["**VCLT**"].

[477] *Germany Memorial,* ¶85.

[478] *VCLT* arts. 53, 64.

[479] *Germany Memorial,* ¶85.

[480] *ARSIWA with commentaries,* [31/1].

[481] *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, I.C.J. Reports 2002, p. 25, [60] ["**Arrest Warrant**"].

[482] *Germany Memorial,* ¶88.

On the contrary, *jus cogens* norms are not like any other international norm: They are not solely a list of prohibited behaviors.[483] Breach of a *jus cogens* radically alters a state's legal protections.[484] The ILC, also in the commentaries to ARSIWA, stated that *there are certain consequences flowing from the basic concepts of peremptory norms of international law and obligations to the international community as a whole within the field of State responsibility*.[485]

Article 40 of ARSIWA reads as follows:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation[486].

Article 41 of ARSIWA stipulates:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.[487]

There are no clauses in international treaties indicating that a state loses its immunity in the case of a violation on their part of a *jus cogens* norm.[488] However, it might be concluded that under specific circumstances, the denial of immunity can be viewed as a natural consequence of Article 41(2) of the ILC's Articles which lays down the obligation *not to recognize violations of*

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[483] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Counter-Memorial of Italy) [2009] ICJ Pleadings, ¶4.10 ["**Counter-Memorial of Italy**"].

[484] *Ibid*.

[485] *ARSIWA with commentaries,* [117/7].

[486] *ARSIWA* art. 40.

[487] *ARSIWA* art. 41.

[488] *Counter-Memorial of Italy*, ¶4.12.

peremptory rules and not to assist in maintaining the situation arising from such violations.[489] Paragraph 3 of the Article also provides that it is without prejudice to any possible *consequence referred to in this Part* (Serious Breaches of Obligations Under Peremptory Norms Of General International Law) *and to such further consequences that a breach to which this Chapter applies may entail under international law*.[490]

This paragraph is of utmost importance to the present case as it can be argued that it is somewhat possible under Article 41 of ARSIWA which states that points to the existence of possible additional consequences arising from the concept of *jus cogens* rules.[491] This has also been stated by the ILC in the following terms:

'*Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40.*[492] *The fact that such further consequences are not expressly referred to in Chapter III does not prejudice their recognition in present-day international law, or to their further development*.'[493]

Law is dynamic in nature, consequently, the law of state immunity is also dynamic and more specifically, it is currently in a *state of flux*.[494] The ILC feeling the need to include a non-prejudice clause regarding additional consequences arising from the concept of *jus cogens* is not surprising.[495] The ILC's Working Group on Jurisdictional Immunities of States and Their Property had deemed it essential to draw the attention of the Sixth Committee to a:

'*…recent development in State practice and legislation* regarding *the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts*

[489] *Ibid*; *ARSIWA* art. 41(2).

[490] *ARSIWA* art. 41(3); *Counter-Memorial of Italy*, ¶4.12.

[491] *Counter-Memorial of Italy*, ¶4.12.

[492] *ARSIWA with commentaries,* [116/14].

[493] *Ibid.*

[494] *Counter-Memorial of Italy*, ¶4.18.

[495] *Counter-Memorial of Italy*, ¶4.13.

of a State in violation of human rights norms having the character of jus cogens, particularly the prohibition of torture.'[496]

There is little to no doubt that the serious violations of IHL perpetrated by Germany, that led to the compensation claims against the latter brought before Italian courts are to be characterized as violations of jus cogens rules.[497] Germany does not dispute the illegality egregious violations of international humanitarian law that were perpetrated by the III. Reich against Italians.[498] The question is, does breaching obligations which derive from a *jus cogens* norm derive a state from its jurisdictional immunities before a domestic court of a foreign sovereign in the current stance of international law?

iii. Immunity and Effective Remedies

It should be noted that immunity may bar the exercise of jurisdiction in a particular case, and being immune does not alter the applicability of the substantive rules of international law.[499] In this context, whether a State is to be granted immunity before the courts of a foreign State is an entirely separate question from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.[500]

Indeed, past German legislation on the subject were of no help to Italian victims 'estate.[501] Italy emphasized that, despite previous agreements, also left large numbers of Italian victims without compensation.[502] Germany also stated recently that it recognized *its responsibility in this regard*.[503] Italy thus emphasized that when governmental discussions and any other remedies were not

[496] *Ibid*; Yearbook of the International Law Commission, 1999, vol. II, Part 2, 172.

[497] *Counter-Memorial of Italy*, ¶4.9.

[498] *Joint Declaration of Germany and Italy* (adopted 18 November 2008).

[499] *Arrest Warrant*, [60]; Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 244, [196].

[500] *Jurisdictional Immunities*, [53].

[501] *Jurisdictional Immunities*, [23-26].

[502] *Jurisdictional Immunities*, [97, 98].

[503] *Joint Declaration of Germany and Italy* (adopted 18 November 2008).

effective, the only option left to compensate the victims is not to recognize immunity of Germany and order the latter to compensate.[504]

On the contrary, if immunity were legally dependent on the lack of redress, it would be particularly difficult for national courts to apply in practice.[505] For instance, a national court would have to somehow determine if intergovernmental discussions lost all prospect of success.[506]

2. Domestic Law

a. The Federal Compensation Law concerning Victims of National Socialist Persecution (Bundesentschädigungsgesetz (BEG))

In 1953, Germany enacted BEG to compensate certain categories of victims of Nazi persecution.[507] Many Italian Claims were unsuccessful as either the said victims were not considered by Germany as victims of national Socialist persecution within the definition of that Law, or because they had no domicile or permanent residence in Germany.[508]

b. The Federal Compensation Law (as amended in 1965)

The Law was amended to include in the scope of the Law those who were persecuted because of their nationality, or their membership in a non-German ethnic group.[509] But the Law still required that the claimants have had refugee status before 1 October 1953.[510] This modification was of no help as many Italian victims did not have refugee status.[511] As a consequence of the specific wording of the Law, claims brought by victims and their estate that had foreign nationalities were

[504] *Jurisdictional Immunities*, [97, 98].

[505] *Ibid*.

[506] *Ibid*.

[507] *Jurisdictional Immunities*, [23].

[508] *Ibid*.

[509] *Ibid*.

[510] *Ibid*.

[511] *Ibid*.

Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were largely dismissed by the German courts. [512]

c. Remembrance, Responsibility and Future (the '2000 Federal Law)

This federal law was adopted in Germany for the purposes of making funds available to individuals who had been subjected to forced labor and any other injustices by the Nazi regime.[513] This foundation did not directly compensate victims but rather through *partner organizations*, such as the International Organization for Migration.[514] Article 11 excluded from the right to compensation the prisoners of war if they were not detained in concentration camps or if they were in specific categories.[515] One effect of this provision was to exclude from the right to compensation those who had had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories.[516] The reasoning given by the draftsmen of the Law was that POWs could be, under international law, be put to work by the capturing State.[517] Consequently, former Italian military internees who were denied that status applied to be compensated.[518] German authorities contended that, quite ironically, the German Reich could not, by themselves, change the status of Italian military internees from prisoners of war to civilian workers.[519] Accordingly, they took the view that Italian military internees were always prisoners of war, and therefore, they were to be excluded from the scope of compensation laid out by Law.[520]

VI. CASE LAW

[512] *Ibid*.

[513] *Jurisdictional Immunities*, [26].

[514] *Ibid*.

[515] *The 2000 Federal Law* art. 11.

[516] *Jurisdictional Immunities*, [26].

[517] The 2000 Federal Law.

[518] *Jurisdictional Immunities*, [26].

[519] *Ibid*.

[520] *Ibid*.

1. Cour de Cassation, Chambre civile 1, du 3 janvier 2006, 04-47.504

This judgment is one of the sources used by the Court in the *Jurisdictional Immunities of the State* to determine whether the claims of Italy had merit.[521] In this case, similar to the present case, Mr. X was arrested in France and then transferred to Germany where he was subjected to forced labor from 1943 to 1945.[522] In light of this, he engaged in a civil compensation suit against the Republic of Germany.[523] The *Cour de Cassation* was of the view that as the activity in question was not one of *gestion*, but one that was in pursuance of foreign politics with public powers in question, a civil suit against another sovereign cannot be engaged in French courts.[524]

2. *McElhinney v. Williams*, 15 December 1995, [1995] ILR, Vol. 104

This judgment is also one of the sources used by the Court in the *Jurisdictional Immunities* to determine whether the claims of Italy had merit.[525] In this case, an off-duty police officer shot at a moving car when the latter crossed from Northern Ireland into Ireland at a United Kingdom permanent vehicle checkpoint.[526] The driver (the applicant) drove his private car into the checkpoint barrier, which was manned by armed British soldiers.[527] One soldier approached the applicant after the accident, and it is contended by the Irish Government (the respondent) that the applicant ignored the soldier.[528] The applicant contends that he did stop and waived him on.[529] In any case, it appears that the soldier came close to the vehicle and was hit by the vehicle being towed.[530] He was then thrown forward onto the towbar and dragged for some time until he could

[521] *Jurisdictional Immunities*, [73].

[522] Cour de Cassation, Chambre civile 1, du 3 janvier 2006, 04-47.504, Inédit.

[523] *Ibid*.

[524] *Ibid*.

[525] *Jurisdictional Immunities*, [72].

[526] M*cElhinney v Ireland*, ¶7.

[527] *Ibid*.

[528] *Ibid*.

[529] *Ibid*.

[530] *Ibid*.

pull himself up into a standing position on the towbar.[531] The applicant alleges that he was not aware of the position of the soldier. [532]

In the Irish Police Report (1991) of the incident, it is stated that the soldier fired six shots, some of them hitting the moving vehicle.[533] The applicant, in his defense, wanted to continue driving until he reached a police station as he feared he was faced with a terrorist attack; he carried on for 2 miles, then stopped in the village of Muff. [534]At this stage, the soldier, described by the witnesses as in a panic state, ordered the applicant and the 2 passengers to get off-board and stand against the wall with their hands in the air. [535]After this, it is alleged by the applicant that the soldier, when the former turned to face the latter, trying to explain the misunderstanding and that he was a police officer, the soldier pulled the trigger twice, but the gun jammed.[536]

Irish police were notified of the incident and then arrived at Muff. The applicant was arrested on suspicion of driving under the influence, but he refused to provide blood and urine samples.[537] 71 witnesses were interviewed, and the investigating officer concluded that the applicant showed '*a regrettable degree of recklessness.*'[538] The investigating officer continued to state that the incident could have resulted in a more serious outcome; the only reason that would prompt the applicant to leave the scene is that he was intoxicated.[539] The applicant contends that he went through post-traumatic shock because of the incident and initiated a suit against the individual soldier and also the British High Secretary of State for Northern Ireland.[540] He pursued financial redress for his allegation that the soldier, knowingly, pointed a loaded gun at him and pulled the trigger, resulting

[531] *Ibid*.

[532] *Ibid*.

[533] *Ibid*.

[534] *Ibid*.

[535] *Ibid*.

[536] *Ibid*.

[537] *McElhinney v Ireland*, ¶8.

[538] *Ibid.*

[539] *McElhinney v Ireland*, ¶9.

[540] *McElhinney v Ireland*, ¶10.

in an assault.[541] The UK had pleaded immunity from jurisdiction on the basis of the doctrine of state immunity.[542]

The High Court of Ireland granted immunity to the UK on the basis that the applicant cannot bring a suit before the Irish courts against a member of a foreign sovereign government.[543] The applicant appealed to the Irish Supreme Court, stressing that States are no longer immune when their acts and omissions result in torts in the forum state's territory; principles of reciprocity should apply as the State Immunity Act of the UK would not grant immunity to Ireland; his constitutional right of bodily integrity was violated, therefore, the doctrine of sovereign immunity should yield even if applicable.[544] The Irish Supreme Court rejected the appeal, stating that, in the current state of the doctrine of state immunity, States are still immune from suit before foreign courts regarding their sovereign acts.[545]

3. *Ferrini v Germany*, Court of Cassation, 11 March 2004, no 5044/4, ILDC 19 (IT 2004)

On August 4, 1944, Mr. Ferrini was captured by German armed forces.[546] He was then deported to Germany and was subjected to forced labor in an extermination camp in Kahla, where he was obligated to work as *non-voluntary* labor for Reimagh Werke and Messerschmitt.[547]

This incident happened after the September 1943 armistice, the date after which a great number of Italians were deported to Germany. Germany deemed them as Italian Military Internees (IMI), consciously changing their status from prisoners of war to *civilian workers* to circumvent protections that the status of POW entailed under the 1929 Geneva Convention, that would have otherwise barred forced labor.[548]

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[541] *Ibid*.

[542] *McElhinney v Ireland*, ¶11.

[543] *McElhinney v Ireland*, ¶13.

[544] *McElhinney v Ireland*, ¶14.

[545] *McElhinney v Ireland*, ¶15.

[546] *Ferrini v Germany, Court of Cassation,* 11 March 2004, no 5044/4, ILDC 19 (IT 2004) F1 ['**Ferrini**'].

[547] German arms and aviation companies.

[548] *Ferrini* F2.

When Germany established the Remembrance, Responsibility and Future Foundation, to redress the victims of the III. Reich, German government refused to compensate around 117,000 IMIs.[549] They based this refusal on the fact that the IMIs maintained POW status and the german reich could not unilaterally change their status, thus, their status under international law they were still POWs.[550] As a consequence of failures of political and bilateral treaty resolutions between Italy and Germany as to the compensation for these specific victims, individuals like Mr. Ferrini turned to domestic courts.[551]

Mr. Ferrini engaged in a civil compensation suit against Germany in the Arezzo Tribunal, he seeked redress for the material and moral injuries he endured by cause his capture, deportation, and forced labor.[552]After many appeals, the matter came before the Italian Court of Cassation. [553]

Firstly, the Italian Court ruled that the matter was out of the scope of application of the Brussels Convention thereof Article 1 directly states that the Convention is not applicable when public powers are exercised, therefore, not commercial.[554] Then, it ruled that the conduct of Germany in question, deportation and forced labor, are unequivocally classified as war crimes and international crimes.[555] It further declared that such international crimes violate universal values which eclipse the interests of states.[556] It was of the view that the principle of protection of basic human rights is a preremptory rule of international law, ranking above every other norm.[557] In light of the foregoing, the Court ruled that these norms and the obligations flowing from them are also above

[549] *Ibid*.

[550] *The 2000 Federal Law* art. 11.

[551] *Ferrini,* F3.

[552] *Ferrini,* F1.

[553] *Ferrini,* F4, F5.

[554] *Ferrini,* H1; Case C-641/18 *LG and Others v Rina SpA and Ente Registro Italiano Navale* [2020] ECLI:EU:C:2020:349, [33].

[555] *Ferrini,* H4

[556] *Ferrini,* [7].

[557] *Ferrini,* [8.3].

the the customary rules of state immunity.[558] The Court stated that granting immunity to a state which is responsible for such atrocities would hinder the principle of protection of basic human rights.[559]

The Court, observing that international crimes were subject to universal jurisdiction and also prosecutable regardless of the *locus* of these acts, the same logic should, by way of analogy, be applicable in civil suits seeking damages for those same crimes.[560] Also, the Court noted that state officials can no longer claim *rationae materiae* immunity[561] for international crimes, citing as examples the Pinocher and Eichmann cases.[562] The Court reasoned that if functional immunity cannot be claimed in the case of international crimes, there should then be also no reason to allow the State to retain immunity for those same acts.[563] In furtherence, it highlighted that as part of the conduct (the abduction of Mr. Ferrini) occurred in Italy, the Italian courts were competent through the territorial tort exception, citing the US, Canada and UK State immunity practices.[564]

The Italian Court concluded that the protection of basic human rights and *jus cogens* norms are above the State immunity of a State and their violations bar its application.[565] As a result, it ruled that Germany was not immune from proceedings against it for the international crimes committed against Luigi Ferrini.[566]

4. *Prefecture of Voiotia v Federal Republic of Germany* (2000) 129 ILR 513

In 1995, the estate of the victims of the massacre that occurred in the Greek village of Distomo on June 10, 1944, engaged in a civil suit against Germany for compensation for *loss of life and*

[558] *Ibid*.

[559] *Ferrini,* [9.1].

[560] *Ferrini,* H6.

[561] Functional immunity.

[562] *Ferrini,* [10, 11].

[563] *Ferrini,* [11].

[564] *Ferrini,* H9.

[565] *Ferrini,* [12].

[566] *Ferrini,* H13.

property.[567] German armed forces perpetrated a massacre, killing more than 300 civilians in the Greek village of Distomo as part of a retaliation policy.[568] Germany appealed a lower court's ruling which held Germany liable, arguing it was protected by State immunity.[569] By a 7-4 majority, the Hellenic Court of Cassation rejected Germany's appeal, stated that Greek courts had jurisdiction to hear the civil claims for compensation in this regard.[570] The Court had 3 reasoning:

a. Territorial Tort Exception: The Hellenic Court observed that under customary international law, State immunity only applied to sovereign acts.[571] Moreover, relying on principles enshrined in the ECSI, the Hellenic Court recognized that the territorial tort exception enshrined in Article 11 was of customary character and also applicable in the present case.[572]
b. Crimes Against Humanity Exception: Whilst the Hellenic Court acknowledged that immunity applies in the case of standard military conflicts, it ruled that immunity does not apply to crimes against humanity that specifically target innocent civilians which served no military objective.[573]
c. Jus Cogens Exception: The Hellenic Court further ruled that in any case, by conducting in a manner which is in violation of peremptory norms of international law, a foreign State tacitly waives its right to jurisdictional immunity.[574]

5. *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL)

The appellant, Dr. Holland, is a US citizen and works at Troy State University. Under an agreement with the US Government, the University provided LLM courses for american military personnel

[567] *Jurisdictional Immunities*, [30].

[568] *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre Case)* (2000) 129 ILR 513, 513 ["**Distomo**"].

[569] *Ibid*.

[570] *Distomo*, 514.

[571] *Distomo*, 516-7.

[572] *Distomo*, 517, 519.

[573] *Distomo*, 515, 522, 523, 524.

[574] *Distomo*, 521.

at US bases in the UK, including the R.A.F. Menwith Hill base in North Yorkshire, UK where Dr. Holland was seconded to teach.[575]

The respondent, Mr. Lampen-Wolfe, is a US citizen, an employee of the US Department of Defense, the education services officer at Menwith Hill.[576] Mr. Lampen-Wolfe wrote a memorandum to the University's regional office in Germany wherein he cited severe criticisms from students as to Dr. Holland's performance.[577] Mr. Lampen-Wolfe questioned her competence, her performance, and demanded that she be replaced. Dr. Holland subsequently brought the matter before UK Courts claimed that the memorandum was defamatory.[578]

Dr. Holland relied on Section 3 of the UK State Immunitiy Act (SIA),[579] which strips a foreign state of immunity in proceedings relating to commercial transactions or contracts performed in the UK. This exception is first is laid down in Part I of the SIA where every exception to state immunity under the present Act (including the tort exception) is found. The second regime is that under the common law. It applies to all disputes that are outside the scope of Part I of the SIA. It should be noted that section 16(2) of the SIA disapplies Part I of that Act. It reads as follows:

This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom.[580]

The English House of Lords were in agreement that the case was governed by Section 16(2), meaning the Part I of the SIA was disapplied, including every exception to state immunity, and the case had to be resolved under common law.[581] The Lords ruled that serving as an education services officer and training to military personnel at a US military base was part (admittedly a loose one)

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[575] *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) (Lord Millet) ["**Holland**"].

[576] *Ibid*.

[577] *Ibid*.

[578] *Ibid*.

[579] *State Immunity Act (1978) (United Kingdom) s 3*.

[580] *State Immunity Act (1978) (United Kingdom) s 16(2)*.

[581] *Holland*, 1573, 1577, 1578–1579, 1580, 1581, 1586, 1587.

of a State's sovereign function and thus, this connection sufficed for the non-application of the exceptions found in Part I of the SIA.[582]

This judgment was in furtherance of a previous House of Lords judgment, *Littrell (No. 2)*, where it was held that the operation of a military hospital, which requires relatively the same set of skills as the operation of a regular/civilian hospital, was a recognized military activity.[583]

VII. CONCLUSION

In conclusion, it can be stated that the subject-matter of the case is the decisions of Italian domestic courts allowing civil compensation claims to be brought against the Federal Germany regarding its serious violations of the IHL between 1943 and 1945. This process brought with it many questions to be answered. For instance; Does the territorial tort exception apply to acts of foreign armed forces during an armed conflict, or is it a customary rule in the first place, and Can a state claim immunity for sovereign acts regarding grave violations of international humanitarian law. More importantly, how the procedural rules of State immunity and substantive *jus cogens* norms interacts should be, along with the distinction between immunity from suit and immunity from enforcement. Through this critical dispute, the Court will examine the conflict between evolving human rights doctrines and the long-standing principle of *par in parem non habet imperium*. The Court will clarify the extent to which a State can claim immunity when accused of crimes, committed in the territory of the forum State, under international law.

[582] *Ibid*.

[583] *Littrell v. USA (No. 2)*, England, 1993, [1995] 1 WLR 82, 91, 95, 96.

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