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# Germany v. Italy and the Limits of Horizontal Enforcement

Some Reflections from a United States Perspective

Chimène I. Keitner\*

## Abstract

*This contribution considers the implications of the decision of the International Court of Justice (ICJ) in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) for the evolution of structural norms relating to the immunity of foreign states in domestic courts, with a focus on the practice of the United States. It also considers whether the decision, which is explicitly limited to the question of state immunity, might nevertheless affect domestic courts' willingness to recognize the immunity of officials who act on behalf of foreign states. It concludes that the state-centric nature of Germany's challenge to Italy's exercise of jurisdiction underscores the conceptual and doctrinal distinction between foreign state immunity, on the one hand, and foreign official immunity, on the other. This distinction is critical to legitimizing the horizontal enforcement of those substantive rules of international law that are binding on individuals and designed to protect other individuals from harms inflicted under colour of state authority.*

## 1. Introduction

The decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* ('Germany v. Italy') represents a particularly interesting instance of international dispute resolution in which the parties asked the Court to identify and apply what might be called *structural* rather than *substantive* principles of customary

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international law. Germany and Italy, and Greece as an intervener, agreed that German forces committed egregious violations of international humanitarian law during the Second World War. The question was whether Italy violated customary international law by exercising its adjudicatory and enforcement jurisdiction to enable victims to seek compensation from Germany absent Germany's consent to waive its sovereign immunity. In other words, the ICJ was asked to determine whether Italy's attempt to enforce international law horizontally was itself unlawful.

Substantive rules of international law govern the conduct of individuals, and of states and other entities on behalf of which individuals act. In the field of international criminal law, states play a critical role as horizontal enforcers of substantive rules, whether they are accorded a primary enforcement role, as in the Rome Statute of the International Criminal Court (ICC), or a residual enforcement role, as in the United Nations Security Council resolutions creating the two ad hoc tribunals, the international criminal tribunals for the former Yugoslavia and for Rwanda. Structural principles of international law must balance the need to constrain the disruptive potential of unilateral action by states with the critical role of states in defining and applying substantive international legal rules. Structural rules, including jurisdictional immunities, allocate the authority to regulate conduct horizontally among states. I use the term 'horizontal enforcement' to denote the use of one state's judicial machinery to enforce international conduct-regulating rules binding on other states and their agents.

This contribution considers the implications of the ICJ's decision for the evolution of structural norms relating to the immunity of foreign states in domestic courts, with a focus on the practice of the United States. It also considers whether the decision, which is explicitly limited to the question of state immunity, might nevertheless affect domestic courts' willingness to recognize the immunity of officials who act on behalf of foreign states. It concludes that the state-centric nature of Germany's challenge to Italy's exercise of jurisdiction underscores the conceptual and doctrinal distinction between foreign state immunity, on the one hand, and foreign official immunity, on the other. This distinction is critical to legitimizing the horizontal enforcement of those substantive rules of international law that are binding on individuals and designed to protect other individuals from harms inflicted under colour of state authority.

## 2. A Note on Structural Principles

The process of contestation that defines the content of substantive rules of international law also shapes the structural principles that sovereign states observe in their mutual interactions. At the time of writing, the US Supreme Court was preparing to address the question whether United States courts should recognize a civil cause of action for violations of the law of nations

occurring in the territory of a sovereign other than the United States.<sup>1</sup> The defendant argued, among other things, that permitting such suits constitutes an internationally unlawful exercise of extraterritorial jurisdiction by the United States.<sup>2</sup> This argument invokes structural limitations on the ability of states to enforce substantive international law rules horizontally.

Jurisdictional principles allocate the authority to prescribe, adjudicate and enforce conduct regulating rules. Even if jurisdiction to adjudicate or enforce exists, immunities recognized by states as a matter of customary international law may constrain the exercise of this jurisdiction by national courts. The ICJ's judgment in *Germany v. Italy*, which found that Italy violated international law by allowing civil claims to proceed against Germany for war crimes committed in Italy or against Italians during the Second World War, articulates the rationale for state immunity from adjudicatory and enforcement jurisdiction in the context of resolving postwar reparations claims. Viewed more broadly, the majority's analysis provides an opportunity to explore two issues relevant to the enforcement of international law by US courts: the customary international law status of state immunity; and the relationship between state immunity and immunities that may be available to individuals who act on the state's behalf. This contribution addresses each of these issues in turn.

### 3. State Immunity as a Rule of Customary International Law

The ICJ's vertical authority to adjudicate the dispute between Germany and Italy depended on the question presented being governed by international law. The court noted that 'both Parties agree that immunity is governed by international law and is not a mere matter of comity'.<sup>3</sup> According to the Court, the principle of sovereign equality of states gives rise both to the

- 1 For a brief overview, see C.I. Keitner, 'The Reargument Order in *Kiobel v. Royal Dutch Petroleum* and Its Potential Implications for Transnational Human Rights Cases', 16 *American Society of International Law Insight*, 21 March 2012, available online at <http://www.asil.org/pdfs/insights/insight120321.pdf> (visited 20 July 2012).
- 2 The Executive Branch of the US government, represented by the Department of Justice, did not endorse the position that 'an extraterritorial private cause of action would violate international law in this case', but it advocated against creating such a cause of action 'solely [as an issue] of the allocation of responsibility among the Branches of the United States Government for creation of private rights of action under U.S. law'. See Supreme Court of the United States, Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, 10-1491, June 2012, at 14, available online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf> (visited 20 July 2012).
- 3 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, International Court of Justice (ICJ), Judgment of 3 February 2012, § 53, available online at <http://www.icj-cij.org/docket/files/143/16883.pdf> (visited 20 July 2012) ('Judgment').

principle of territorial sovereignty and to the legal requirement of state immunity:

[T]he rule of State immunity... derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.<sup>4</sup>

The court did not cite Supreme Court Chief Justice John Marshall's 1812 opinion in *The Schooner Exchange v. M'Faddon*, which is often invoked to underscore the connection between sovereign equality and state immunity, but Germany cited this foundational US decision in its memorial.<sup>5</sup> However, Germany de-emphasized the discussion in *The Schooner Exchange* of the principle of territorial sovereignty, which Chief Justice Marshall found — and the ICJ agreed — flows equally from the principle of sovereign equality. The tension between territorial sovereignty and state immunity seems particularly acute where, as here, much of the wrongful conduct took place on the forum state's territory.<sup>6</sup>

*The Schooner Exchange* involved the exercise of *in rem* jurisdiction over a French public ship of war that docked in the port of Philadelphia in order to seek 'refreshments and repairs'.<sup>7</sup> Two Americans who claimed to be the ship's rightful owners sought to have the ship returned to them. In finding the ship immune from legal process, Chief Justice Marshall acknowledged that the US Supreme Court was 'exploring an unbeaten path, with few, if any, aids from precedents or written law, [making] it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this'.<sup>8</sup> The court was persuaded that the ship was entitled to immunity analogous to the *ratione personae* immunity granted to heads of state and foreign ministers, as well as the guarantee of safe conduct for the passage of friendly foreign troops (a precursor to today's status of forces agreements), both of which are based on the express or implied consent of the territorial sovereign.<sup>9</sup> The court was also doubtless influenced by the desire to avoid provoking a conflict with France just three months before the United States officially declared war against Great Britain, in a classic example of the deep influence of international relations on the elucidation of principles of international law.

4 *Ibid.*, § 57.

5 Memorial of the Federal Republic of Germany, *Germany v. Italy*, 12 June 2009, § 48, available online at <http://www.icj-cij.org/docket/files/143/16644.pdf> (visited 20 July 2012) ('Memorial of the Federal Republic of Germany').

6 See the contribution by Andrew Dickinson in this issue of the *Journal*.

7 *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812), 7 Cranch 116 ('*The Schooner Exchange*').

8 *Ibid.*, at 136.

9 *Ibid.*, at 137–141.

Two centuries later, Germany and Italy presented similar arguments to the ICJ based on 'general principles' and 'analogous' cases, in the shadow of concerns about the disruptive potential of affording legal sanction to unilateral judicial action by states in the aftermath of war. Consistent with its mandate, the ICJ set out to identify the applicable rule of customary international law, if any, created by the requisite uniformity of state practice and *opinio juris*. Italy argued that the egregious nature of Germany's conduct, combined with the fact that much of its conduct occurred on Italian soil, warranted the denial of state immunity in the circumstances; Germany countered that the context in which the conduct was performed required elevating the principle of immunity over the principle of territorial sovereignty,<sup>10</sup> and that no exceptions to state immunity for public acts (*acta jure imperii*) had achieved the status of customary international law.

The ICJ was persuaded by Germany's emphasis on the special circumstances of armed conflict, and on the characterization of Germany's conduct as *acta jure imperii* entitled, by definition, to state immunity. When *acta jure imperii* (public acts of the state) and *acta jure gestionis* (private or commercial acts of the state) are the only two available categories, it is difficult to avoid characterizing war crimes as anything other than *acta jure imperii*. The prevailing binary classification of acts performed by states thus determined the result of the ICJ's enquiry.<sup>11</sup> The majority observed:

The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy, in response to a question posed by a member of the Court, recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful.<sup>12</sup>

Because, in the majority's view, Germany's acts 'had to be' characterized in this manner, the burden shifted to Italy to demonstrate the existence of a customary international law norm denying state immunity for war crimes committed on the forum state's territory, which Italy proved unable to do.<sup>13</sup>

As Philippa Webb has suggested, Italy's failure to persuade the ICJ that such an exception to state immunity currently exists will likely impact the future

10 Memorial of the Federal Republic of Germany, § 71, arguing that the so-called 'territorial tort' exception was never intended to apply to situations of armed conflict.

11 Andrea Bianchi has argued against this binary categorization, proposing a *tertium genus* for grave human rights violations. See A. Bianchi, 'L'immunità des états et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international', 108 *Revue générale de droit international public* (2004) 63, at 72–73.

12 Judgment, § 60. Sir Hersch Lauterpacht noted in 1951 that 'the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*'. See H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Year Book of International Law* (1951) 220, at 224. Particularly in light of the evolution of the restrictive theory, the conclusion that all acts *jure imperii* necessarily benefit from absolute immunity appears somewhat tautological.

13 On the potentially decisive effect of framing in the context of immunity determinations, see C.I. Keitner, 'Foreign Official Immunity and the "Baseline" Problem', 80 *Fordham Law Review* (2011) 605.

development of customary international law, since it will have a ‘chilling effect’ on national courts that might otherwise have generated additional state practice and *opinio juris* narrowing the scope of foreign state immunity over time.<sup>14</sup> The ICJ’s decision will thus curtail the horizontal enforcement of certain substantive rules of international law where the defendant is a foreign state by making it more difficult (that is, less plausible in doctrinal terms and more costly in political terms) for domestic courts to deny assertions of state immunity.

The inevitability of the outcome in *Germany v. Italy* should not be overstated. Dissenting Judge Cançado Trindade disagreed with the majority’s characterization of international crimes (*delicta imperii*) as acts *jure imperii*. In his view, ‘[s]uch crime is not an act *jure imperii* nor an act *jure gestionis*: it is an international crime, irrespective of whom committed it, engaging both State and individual responsibility.’<sup>15</sup> He asked: ‘How can war crimes be considered as acts *jure* — I repeat *jure* — *imperii*?’<sup>16</sup> For him, the focus on *imperii* obscures the concept of *jure* that lies at the centre of an international order designed to protect human beings, not just the interests of states.<sup>17</sup>

No doubt, denying immunity solely on the ground of unlawfulness makes little sense, because immunity exists in part to shield a defendant from determinations of lawfulness or lack thereof by certain categories of decision makers. However, although it may be true that, as the majority reasoned, denying immunity on the ground of the egregious nature of the alleged conduct could be problematic because of the risk of defeating immunity by ‘skilful construction of the claim’,<sup>18</sup> mechanisms such as limited jurisdictional discovery and heightened pleading standards can attenuate this risk.

Eliminating the possibility of horizontal enforcement through judicial channels will compel individuals who are harmed by the actions of foreign states to rely once again on diplomatic protection and the discretionary espousal and settlement of claims by their home state, in the absence of accessible vertical enforcement mechanisms.<sup>19</sup> Individuals who are harmed by the actions of their own state will have to rely on local remedies, in the absence of vertical alternatives.

From the perspective of the international system, if substantive rules of international law are intended to affect the behaviour of states, then

14 P. Webb, ‘The International Court of Justice’s Judgment in *Germany v. Italy*: A Chilling Effect?’ iLawyer: A Blog on International Justice, 17 March 2012, available online at <http://ilawyer-blog.com/the-international-court-of-justices-judgment-in-germany-v-italy-a-chilling-effect/> (visited 20 July 2012).

15 Dissenting Opinion of Judge Cançado Trindade, *Germany v. Italy*, Judgment of 3 February 2012, § 193, available online at <http://www.icj-cij.org/docket/files/143/16891.pdf> (visited 20 July 2012). See also *ibid.*, §§ 129, 354, 290, 306, rejecting this characterization.

16 *Ibid.*, § 80.

17 See *ibid.*, § 160, rejecting an approach ‘confined to the paradigm of inter-State relations’.

18 Judgment, § 82. See the contribution by Giuseppe Nesi in this issue of the *Journal*.

19 For a critique of the adequacy of diplomatic protection as an alternative means of settlement, see L. McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’, 18 *European Journal of International Law* (2009) 903, at 908–911.

categorically denying the possibility of horizontal enforcement seems incompatible with a desire to increase the probability of deterring and punishing non-compliance. The majority's reasoning fails to grapple with the systemic costs of state immunity (although it acknowledges the individual costs) and focuses instead on the disruptive potential of horizontal enforcement. The majority could have offered a more candid assessment of the inadequacy of existing mechanisms to deter and punish unlawful state behaviour, even if it ultimately reached the same conclusion regarding Germany's entitlement to immunity in the circumstances.

Unlike Italian (and Greek) courts, which evaluated Germany's claims to state immunity as a matter of customary international law, US courts are bound to apply the Foreign Sovereign Immunities Act of 1976 (FSIA). Under the FSIA, a US court cannot obtain either subject matter or personal jurisdiction over a foreign state unless a statutory exception to immunity applies.<sup>20</sup> Although the FSIA currently governs determinations of state immunity in US courts, Chief Justice Marshall's common law reasoning in *The Schooner Exchange* still figures in judicial opinions. For example, in its 2004 decision in *Republic of Austria v. Altmann*, the Supreme Court recalled Chief Justice Marshall's observation that US courts will recognize *ratione personae* immunity because 'as a matter of comity, members of the international community had implicitly agreed to waive the exercise of [their plenary territorial] jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign'.<sup>21</sup> This observation highlights the functional rationale for recognizing immunity in 'certain classes of cases' that might interfere with the conduct of foreign relations.

Both *Altmann* and *The Schooner Exchange* have been cited for the broader proposition that immunity is treated as a matter of 'comity' in US law. From the perspective of international law, the idea of 'comity' (a word that does not appear in Chief Justice Marshall's opinion, but that does appear in Justice Joseph Story's later opinion in *The Santissima Trinidad*)<sup>22</sup> has been contrasted with the idea of a binding legal obligation, as in the ICJ's admonition in *Germany v. Italy* that 'immunity ... is not a mere matter of comity'.<sup>23</sup> In US judicial opinions, however, the more pertinent contrast is between matters of comity and matters of constitutional law, since the former might be considered largely the province of the Executive Branch, whereas the latter fall squarely within the competence of courts.<sup>24</sup> The practice of the United States with regard to state immunity cannot be divorced entirely from a discussion of the evolving standards of customary international law in this area. It is thus

20 See *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989), at 435; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), at 485.

21 *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), at 688 ('*Republic of Austria v. Altmann*').

22 *The Santissima Trinidad*, 20 U.S. 283 (1822), at 353, discussed in D.L. Sloss, M.D. Ramsey and W.S. Dodge (eds), *International Law in the U.S. Supreme Court: Continuity and Change* (Cambridge University Press, 2011), at 40.

23 Judgment, § 53.

24 See *Republic of Austria v. Altmann*, at 688–690.

curious that the ICJ cited national court decisions upholding immunity for international crimes (including decisions that applied relevant state immunity acts) from courts in Canada, France, Slovenia, New Zealand, Poland and the United Kingdom, but did not cite the US Supreme Court's decision in *Saudi Arabia v. Nelson*, which found state immunity under the FSIA for allegations of torture.<sup>25</sup>

When he wrote the Court's 1812 opinion in *The Schooner Exchange*, Chief Justice Marshall did not use the term 'law of nations', but he did place great weight on the 'usages' of the 'civilized world' and the 'faith' that such usages will be followed. He observed:

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.<sup>26</sup>

Germany's complaint against Italy resonates with Marshall's idea of a violation of 'faith', particularly since Germany argued that Italy had explicitly renounced further claims on behalf of Italian nationals in its 1947 peace treaty and two 1961 agreements with Germany.

In 1812, France benefited from the horizontal self-restraint of the US Supreme Court; when Italy failed to exercise self-restraint two centuries later, Germany invoked the vertical dispute resolution authority of the ICJ. The ICJ, in turn, referenced 'a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs'.<sup>27</sup> Viewed in this light, the ICJ's sharp contrast between 'international law' and 'mere comity' seems somewhat overstated; rather, like Chief Justice Marshall, the court relied in part on the long standing 'usages' of countries agreeing to post-war lump sum settlements to determine that Germany could 'justly [consider Italy] as violating its faith'. Both the Supreme Court in *The Schooner Exchange* and the ICJ in *Germany v. Italy* put great weight on their perception of the legitimate expectations of relevant actors, based on established patterns of behaviour. Their judicial opinions, in turn, helped crystallize these expectations into binding legal rules.

The ICJ's opinion emphasized the special nature of armed conflict in determining that Italian courts did not have authority to engage in the horizontal adjudication and enforcement of Germany's postwar obligations, although the question of reparations could appropriately form 'the subject of further

25 *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). In a string citation of national court decisions, the ICJ did not differentiate between the decisions of lower courts and supreme courts and left it unclear whether the cited decisions are meant to be illustrative or constitutive of customary international law. The citation was used to show that a number of national courts have rejected the argument that *jus cogens* norms are 'hierarchically' superior to norms of state or official immunity. Judgment, § 96.

26 *The Schooner Exchange*, at 137.

27 Judgment, § 94.

negotiation involving the two States concerned, with a view to resolving the issue.<sup>28</sup> The ICJ, the paradigmatic vertical enforcer of international law, re-directed Italy's efforts at dispute resolution from (unilateral) horizontal adjudication to (bilateral) diplomacy to determine the consequences of Germany's internationally unlawful conduct.<sup>29</sup>

Although Chief Justice Marshall's 1812 opinion remains talismanic, the United States does not always exercise restraint on questions of state immunity. This is perhaps why the ICJ chose not to cite US practice in this area, even when US practice supported the ICJ's conclusions. Notably, Italy referred in its submissions to a 1996 amendment to the FSIA that removes state immunity for certain acts committed by designated state sponsors of terrorism, to support its argument that state practice does not uniformly recognize state immunity for all non-commercial acts. The ICJ dismissed the relevance of the US legislation on the grounds that 'this amendment has no counterpart in the legislation of other States',<sup>30</sup> and because the amendment removes immunity on the basis of the identity of the defendant rather than 'on the grounds of the gravity of the acts alleged'.<sup>31</sup> The ICJ refrained, however, from commenting on the lawfulness of the state sponsors of terrorism exception, which denies immunity for certain acts *jure imperii* committed by particular states singled out as a matter of US foreign policy.

Judgments entered by US courts under the state sponsors of terrorism provision amount to hundreds of millions of dollars.<sup>32</sup> Although Germany is correct

28 *Ibid.*, § 104.

29 Because Italy did not advance arguments based on the commercial activity exception to state immunity, the ICJ did not engage the question of the appropriate contours of this exception. The point is not merely academic; much of the Holocaust litigation in US courts, which prompted a diplomatic settlement of claims, was brought against private corporations that did not benefit from state immunity. See e.g. A. Bianchi, 'Serious Violations of Human Rights and Foreign States' Accountability Before Municipal Courts', in L.C. Vohrah et al. (eds), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International, 2003) 149, at 180, noting the role of United States Holocaust litigation in motivating settlements. At the time of writing, the Seventh Circuit Court of Appeals was considering whether Holocaust victims could sue Hungarian State Railways under the expropriation exception to the United States Foreign Sovereign Immunities Act (FSIA), in an appeal of the decision in *Victims of the Hungarian Holocaust v. Hungarian State Railways* (798 F. Supp. 2d 934 (2011)). Some have advocated legislative action to permit such suits to proceed, following the dismissal of similar suits against the French SNCF. See A. Ramonas, 'Relentless Pursuit of Justice for Survivors: Undeterred by Setbacks in Court, Akin Gump Takes Holocaust Reparations to Congress', *The National Law Journal*, 2 January 2012, available online at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202537061485&slreturn=1> (visited 20 July 2012).

30 Judgment, § 88. In fact, Canada recently amended its State Immunity Act to provide a similar exception for state sponsors of terrorism. See 'An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act', 13 March 2012, available online at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759&File=53#8> (visited 20 July 2012).

31 Judgment, § 88.

32 For a recent example, see United States District Court for the District of Columbia, *Wultz v. Islamic Republic of Iran*, Judgment No. 08-cv-1460 (RCL), 14 May 2012, available online at <https://ecf.dcd.uscourts.gov/cgi-bin/showpublic.doc?2008cv1460-134> (visited 20 July 2012), in

that ‘a unilateral act of U.S. legislation is not capable of changing international law’,<sup>33</sup> this does not mean that customary international law can never change. For the time being, however, particularly in light of the ICJ’s decision, it seems that structural norms recognizing state immunity for public acts will endure, at least among friends.

#### 4. The Relationship Between State Immunity and Foreign Official Immunities

The ICJ’s decision in *Germany v. Italy* explicitly declines to address the question of individual immunities and ‘address[es] only the immunity of the State itself from the jurisdiction of the courts of other States’.<sup>34</sup> It thus solidifies the conceptual and doctrinal distinction between foreign state immunity and foreign official immunities. Both categories involve structural principles of international law, but the latter also involves the imposition of personal responsibility on individuals who commit egregious acts in the name of foreign states. The imposition of personal responsibility on individuals flows from the observation that, as famously proclaimed at Nuremberg, ‘[c]rimes against international law are committed by men [and women], not by abstract entities’.<sup>35</sup> Jurisdictional immunities do not absolve individual officials from such personal responsibility. As Judges Higgins, Kooijmans and Buergenthal, observed in their joint separate opinion in the *Arrest Warrant* case, ‘it is generally recognized that in the case of [serious international] crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility’.<sup>36</sup> Jurisdictional immunities allocate the authority to determine the existence of personal responsibility and to impose consequences on the wrongdoer.

The relatively greater tolerance for horizontal enforcement of substantive international law rules that assign personal responsibility to individuals (as opposed to states) can be seen, for example, in Germany’s apparent decision not to challenge Italy’s conviction *in absentia* of Max Josef Milde, a former

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which Judge Royce Lamberth wrote that ‘[w]hen a state chooses to use terror as a policy tool — as Iran and Syria continue to do — that state forfeits its sovereign immunity and deserves unadorned condemnation’. *Ibid.*, at 29.

33 Memorial of the Federal Republic of Germany, § 68.

34 See Judgment, § 91.

35 Judgment, *United States et al. v. Goering et al.*, International Military Tribunal, 30 September 1946, in 2 *Trial of the Major War Criminals Before the International Military Tribunal (1946–1947)*, available online at <http://www.uniset.ca/other/cs4/6FRD69.html> (visited 20 July 2012).

36 Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, § 74, available online at <http://www.icj-cij.org/docket/files/121/8136.pdf> (visited 20 July 2012) (‘Joint Separate Opinion’).

member of the so-called 'Hermann Göring' division, for a 1944 massacre in the Tuscan town of Civitella.<sup>37</sup> Distinguishing between state immunity, on the one hand, and conduct-based immunity for individual officials, on the other, opens up space for states to contemplate more robust forms of horizontal enforcement where the subject of legal proceedings is the responsible individual, rather than a foreign state.

Proceedings against individual officials are subject to important constraints. Notably, status-based immunities (*ratione personae*) shield certain incumbent officials from foreign jurisdiction in order to facilitate the conduct of international relations. These immunities bar both civil and criminal proceedings. Conduct-based immunities (*ratione materiae*) also shield certain governmental acts from judicial scrutiny in foreign courts. The parameters of conduct-based immunities remain contested. The International Law Commission's consideration of the topic to date has failed to produce a consensus view.<sup>38</sup> The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which is not yet in force, defines 'state' to include 'representatives of the state acting in that capacity', and would therefore shield individual officials from civil (but not criminal) liability for official acts.<sup>39</sup> Others have taken the position that international crimes can never constitute official acts for immunity purposes because, as Yoram Dinstein has explained, 'whatever the range of functions assigned to an office-holder by his or her State, they never included the commission of international crimes. Thus, the person concerned could not argue that his or her functional immunity covered the perpetration of international crimes.'<sup>40</sup> Embracing the latter approach, the *Institut de droit international* adopted a resolution in 2009 that, where the defendant in civil or criminal proceedings is a person who acted on behalf of a state, '[n]o immunity from jurisdiction other than personal [*ratione personae*] immunity

37 See A. Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War', 7 *Journal of International Criminal Justice* (2009) 597. Perhaps contemplating a similar distinction, the German Federal Constitutional Court held in a 1997 decision involving an arrest warrant for the former Ambassador of Syria that 'state immunity becomes effective only if a state "as such" is a party to a judicial dispute'. See *S. v. Berlin Court of Appeal and District Court of Berlin-Tiergarten*, 24 *Europäische Grundrechte-Zeitschrift* 436, 10 June 1997, at Section B II, § 3(a)(ee); and the case note in B. Fassbender, 92 *American Journal of International Law* (1998) 74, at 77.

38 See International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, Report of the Sixty-Third Session, U.N. Doc. A/66/10 (2011), at Chapter VII, available online at <http://untreaty.un.org/ilc/reports/2011/2011report.htm> (visited 20 July 2012).

39 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted 2 December 2004, GA Res. 59/38, 2 December 2004, annex, not yet in force. The Convention does not apply to criminal proceedings. See GA Res. 59/38, 16 December 2004.

40 J. Salmon, 'La résolution de Naples de l'Institut de droit international sur les immunités de juridiction de l'État et de ses agents en cas de crimes internationaux (10 Septembre 2009)', 152 *Revue belge de droit international* (2009) 316, at 329. When asked to vote on this proposition, 37 members of a commission of the *Institut de droit international* voted in favor, none voted against, and six abstained.

in accordance with international law applies with regard to international crimes.<sup>41</sup>

In practice, some domestic courts have denied *ratione materiae* (conduct-based) immunity from criminal proceedings for international crimes committed under colour of foreign law,<sup>42</sup> and some domestic courts have also denied conduct-based immunity from civil proceedings.<sup>43</sup> Consequently, countries whose officials might risk prosecution or suit in foreign courts have made more expansive claims to *ratione personae* (status-based) immunity, including 'special mission' immunity, for their officials, and they have also challenged the procedures by which prosecutions or suits are initiated.<sup>44</sup>

To the extent that conduct-based immunities serve to allocate adjudicatory authority horizontally among states, the form of the proceedings seems immaterial: the point is that one state's judicial machinery is being used to review conduct performed on behalf of another state. Moreover, some countries permit private parties to initiate criminal proceedings, and others allow private parties to claim damages in conjunction with criminal proceeding. These variations in national legal systems challenge the notion that one set of immunity rules applies in the criminal context, whereas another set applies in the civil context.

In the *Arrest Warrant Case*, the ICJ grounded its finding of *ratione personae* immunity for an incumbent foreign minister in a functional analysis, holding that the occupant of that office is entitled to protection 'against any act of

41 *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, September 2009, available online at <http://www.idi-ii.org/idiE/resolutionsE/2009.naples.01.en.pdf> (visited 20 July 2012).

42 See e.g. Swiss Federal Criminal Court, BB.20.11.140, Decision of 25 July 2012, available online at <http://www.trial-ch.org/fileadmin/user.upload/documents/affaires/algeria/BB.2011.140.pdf> (visited 20 July 2012), concerning the denial of immunity for war crimes in privately initiated criminal prosecution; United States Eleventh Circuit of Appeal, *United States v. Belfast* (611 F.3d 783 (2010)), at 793, 808, concerning denial of immunity for torture; United Kingdom House of Lords, *Ex parte Pinochet (No. 3)* [2000] 1 A.C. 147, an appeal taken from England concerning the denial of immunity for torture; see also C.A. Bradley and L.R. Helfer, 'International Law and the U.S. Common Law of Foreign Official Immunity', 2010 *Supreme Court Review* 213, at 238, indicating that 'a growing number of international and national courts have abrogated the conduct immunity of former heads of state as well as current and former lower-level officials from criminal investigations and prosecutions for *jus cogens* violations'.

43 On US practice, see B. Stephens, 'Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses', 44 *Vanderbilt Journal of Transnational Law (Vand. JTL)* (2011) 1163, at 1177; B. Stephens, 'The Modern Common Law of Foreign Official Immunity', 79 *Fordham Law Review* (2011) 2669, at 2680–2682. In contrast, the UK House of Lords found *ratione materiae* immunity from civil proceedings for torture under the United Kingdom State Immunity Act in a decision that is currently being challenged before the European Court of Human Rights (ECtHR). See ECtHR, *Jones v. United Kingdom*, Appl. Nos 34356/06 & 40528/06 (2009), at 1427. For more on *Jones* and cases that have followed its approach, see Keitner, *supra* note 13.

44 For example, the United Kingdom has recently modified the procedures for seeking arrest warrants in conjunction with private prosecutions. See Anonymous, 'International Law — Universal Jurisdiction — United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes', 125 *Harvard Law Review* (2012) 1554.

authority of another State which would hinder him or her in the performance of his or her duties.<sup>45</sup> Unlike *ratione materiae* immunity, *ratione personae* immunity from foreign legal processes must be absolute because '[t]he consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether ... the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity'.<sup>46</sup> The ICJ emphasized in *obiter dicta* that '[j]urisdictional immunity ... cannot exonerate the person to whom it applies from all criminal responsibility',<sup>47</sup> and that, for example, '[p]rovided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed ... during [his or her] period of office in a private capacity'.<sup>48</sup> However, the ICJ did not specify what it meant by 'private capacity', or whether the examples of the absence of applicable immunities were intended to be exhaustive. Jean Salmon has lamented the ICJ's use of the term 'private capacity' in the *Arrest Warrant* case, calling it 'l'éléphant dans le magasin de porcelain' [the elephant in the porcelain shop].<sup>49</sup> The systematic use of state violence does not naturally fall within what one might think of as an official's 'private capacity', yet the acceptance of criminal proceedings against individual officials for international crimes that involve the use of state power illustrates that official acts are not universally considered immune from horizontal enforcement. The ICJ was careful to bracket the question of individual official immunity in its *Germany v. Italy* judgment, emphasizing that 'the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case'.<sup>50</sup>

As indicated above, Germany apparently did not object to criminal proceedings in Italy against its former official Max Josef Milde for his involvement in the Civitella massacre. Germany did, however, object to Italy's imposition of joint and several liability on Germany as the *responsabile civile* for Milde's actions at the request of victims who intervened as civil parties in the criminal proceeding.<sup>51</sup> Germany's objection to being brought into the criminal proceeding is consistent with a line of decisions in civil suits in the 19th and early 20th century that found immunity where plaintiffs sought the assets of the state, even if the state was not the named defendant.<sup>52</sup> Consistent with this

45 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3, at 22.

46 *Ibid.*

47 *Ibid.*, at 25.

48 *Ibid.*

49 J. Salmon, 'Libres propos sur l'arrêt de la C.I.J. du 14 février 2002 dans l'affaire relative au mandat d'arrêt du 11 avril 2000 (R.D.C. c. Belgique)', 35 *Revue belge de droit international* (2002) 512, at 517.

50 Judgment, § 91.

51 See Ciampi, *supra* note 37, at 600.

52 These cases include: UK House of Lords, *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379, finding a suit that named the former High Commissioner of Pakistan as a defendant was barred by sovereign immunity because it involved determining Pakistan's entitlement to funds held in a London bank account; UK House of Lords, *Compania Naviera Vascongada v. Steamship Cristina*

reasoning, the US Supreme Court noted in its unanimous 2010 decision in *Samantar* that there might be instances in which the state is the ‘real party in interest’ in proceedings that are nominally brought against a state official.<sup>53</sup> Under US law, if the state is the real party in interest then the *state’s* immunity is governed by the FSIA, and it might turn out that there is simply no cause of action against the individual.<sup>54</sup> In *Samantar*, Somalia was not the real party in interest because the plaintiffs sued former Somali Defence Minister Mohamed Ali Samantar ‘in his personal capacity and s[ought] damages from his own pockets.’<sup>55</sup> The US State Department advised that Samantar did not benefit from *ratione materiae* immunity for torture in the circumstances,<sup>56</sup> and the trial court agreed.<sup>57</sup>

Unless the state’s assets are sought in the proceedings, thereby making the state the real party in interest, the issue in both criminal and civil proceedings

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[1938] A.C. 485, specifying, in a judgment by Lord Atkin, that courts will not seek ‘specific property or damages’ from a foreign sovereign, and will not ‘seize or detain property which is his, or of which he is in possession or control’; UK Court of Appeal, *Twycross v. Dreyfus* [1877] 5 Ch.D. 605, finding lack of jurisdiction over the plaintiffs’ claim to the proceeds of the sale of guano owned by the Republic of Peru because the Republic was a necessary party as the owner of the guano; United Kingdom House of Lords, *Duke of Brunswick v. King of Hanover* [1848] 9 E.R. 993, refusing to inquire into the legality of the appointment of a guardian for the management of the Duke of Brunswick’s property, under the laws of Brunswick and Hanover.

53 *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), at 2292 (‘*Samantar*’).

54 In cases involving commercial transactions, Lady Hazel Fox has observed that a court cannot exercise jurisdiction over a foreign official ‘not because the official is immune — there being no applicable immunity for this type of transaction — but because the law attributes responsibility to the State and not to the official’. See H. Fox, ‘Imputability and Immunity as Separate Concepts: The Removal of Immunity from Civil Proceedings Relating to the Commission of an International Crime’, in K.H. Kaikobad and M. Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice, Essays in Honour of Colin Warbrick* (Brill, 2009) 165, at 172–173.

55 *Samantar*, *supra* note 53, at 2292.

56 Statement of Interest of the United States of America, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), available online at <http://cja.org/downloads/StateDepon%20Samantar.pdf> (visited 20 July 2012).

57 In denying a motion for reconsideration of the order denying immunity, the trial judge indicated: ‘The Executive Branch has spoken on this issue and that they are entitled to a great deal of deference. They don’t control but they are entitled to deference in this case.’ Transcript of order denying motion for reconsideration, *Yousuf v. Samantar*, 1:04 CV 1360, 1 April 2011, available online at <http://www.cja.org/downloads/Samantar-Docket-Entry-158b---transcript-of-order-denying-MTN-for-reconsideration.pdf> (visited 20 July 2012). *Samantar* defaulted, and the district court entered a \$21 million judgment in favour of the plaintiffs. See Memorandum Opinion, *Yousuf v. Samantar*, 1:04 CV 1360, 28 August 2012, available online at <http://cja.org/downloads/Samantar%20Final%20Judgment.pdf> (visited 20 July 2012). As this contribution was going to press, the Fourth Circuit issued a decision affirming the denial of conduct-based immunity on the grounds that ‘under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.’ *Yousuf v. Samantar*, 4th Cir. Court of Appeals No. 11-1479, 2 November 2012, slip op. at 21–22, available online at <http://www.ca4.uscourts.gov/Opinions/Published/111479.P.pdf> (visited 20 November 2012).

is the legitimacy of a foreign state's assertion of authority over individual conduct that occurred under colour of foreign law. Unlike Italy, the United States does not generally permit the intervention of civil parties in criminal proceedings. Instead, victims of human rights and humanitarian law violations have filed civil suits in US courts against current and former foreign officials for acts performed under colour of state authority. In *Samantar*, the Supreme Court held that, where an immunity defence has been raised by the defendant and not waived by the foreign state, the common law will govern the defendant's entitlement to assert immunity where the foreign state is not an indispensable party or the real party in interest.<sup>58</sup>

In rejecting *Samantar's* argument that the FSIA entitled him to immunity from suit, the Supreme Court observed:

[*Samantar*] argues that because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity. But the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests, although we need not and do not resolve the dispute among the parties as to the precise scope of an official's immunity at common law.<sup>59</sup>

The Court continued, 'we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify that immunity in the FSIA.'<sup>60</sup> The Court maintained unanimity by declining to define the 'precise scope' of official immunity (since the question presented related only to the proper interpretation of the FSIA), leaving the interpretation and application of the common law of official immunity in the first instance to the lower courts.<sup>61</sup> The ICJ's decision does little to inform the common law of foreign official immunity following *Samantar*, but it does reinforce the *Samantar* court's distinction between the immunity of officials and the immunity of foreign states.

The US State Department, which claims that the Executive Branch has exclusive authority to make foreign official immunity determinations in proceedings brought in US courts, has taken the position that 'determinations of official immunity are derivative of, but not identical to, determinations of state immunity.'<sup>62</sup> The State Department's post-*Samantar* filings in civil suits include a suggestion of immunity *ratione personae* for sitting Sri Lankan head of state

58 See C.I. Keitner, 'Foreign Official Immunity After *Samantar*', 44 *Vand. JTL* (2011) 843.

59 *Samantar*, *supra* note 53, at 2290.

60 *Ibid.*, at 2290–2291.

61 This was the approach urged by professors of public international law and comparative law as *amici curiae*, whom I represented. See C.I. Keitner, 'Annotated Brief of Professors of Public International Law and Comparative Law as Amici Curiae in Support of Respondents in *Samantar v. Yousuf*', 15 *Lewis & Clark Law Review* (2011) 609.

62 See H.H. Koh, 'Foreign Official Immunity After *Samantar*: A United States Government Perspective', 44 *Vand. JTL* (2011) 1141, at 1148.

Mahinda Rajapaksa,<sup>63</sup> a suggestion of immunity *ratione personae* for sitting Rwandan head of state Paul Kagame,<sup>64</sup> a statement of interest and suggestion of immunity from a third-party deposition subpoena for former Colombian President Alvaro Uribe,<sup>65</sup> and a suggestion of immunity *ratione materiae* for former Mexican President Ernesto Zedillo.<sup>66</sup> The principles underlying the State Department's suggestions of *ratione materiae* immunity (or lack thereof) to date remain somewhat opaque, underscoring the difficulty of combining a principled approach to the imposition of personal responsibility with the pragmatic necessity of conducting international relations.<sup>67</sup>

## 5. Concluding Remarks

It would be expedient to adopt the position advocated by some that individuals who act on behalf of states are always entitled to the state's immunity from civil and criminal proceedings, absent an explicit waiver by the foreign state. This is not, however, the current position of the US government, and it does not reflect the current state of customary international law. That said, uncertainty about the parameters of conduct-based immunity persists.

The view that it cannot be within the scope of an official's functions to commit an international crime is normatively appealing, but it does not address the question whether one state should be able to adjudicate the lawfulness of conduct performed by another state's official. From the perspective of developing structural rules of international law, the challenge is to identify principles that will minimize the risk of unwarranted or politically motivated proceedings while at the same time preserving the ability to deter and punish violations.

The ICC cannot be the sole institution responsible for imposing personal responsibility for serious international law violations where an official's home

63 Suggestion of Immunity Submitted by the United States, *Manoharan v. Rajapaksa*, Civil Action No. 11-235 (CKK), 13 January 2012, available online at <http://www.tamilnet.com/img/publish/2012/01/SUGGESTION.OF.IMMUNITY.SUBMITTED.BY.THE.UNITED.STATES.OF.AMERICA.pdf> (visited 20 July 2012).

64 Suggestion of Immunity Submitted by the United States, *Habyarimana v. Kagame*, Civil Action No. 10-437-W, 29 August 2011, available online at <http://www.lawfareblog.com/wp-content/uploads/2011/10/Kagame-suggestion-of-immunity1.pdf> (visited 20 July 2012).

65 Statement of Interest and Suggestion of Immunity of and by the United States of America Regarding the Deposition of Former President Uribe, *Giraldo v. Drummond Co.*, Civil Action No. 1:10 MC 00764 (JDB), 31 March 2011, available online at <http://www.derechos.org/nizkor/colombia/doc/reuribel.html> (visited 20 July 2012).

66 Suggestion of Immunity Submitted by the United States of America, *Doe v. Zedillo*, No. 3:11-cv-01433-AWT, 7 September 2012, available online at <http://www.lawfareblog.com/wp-content/uploads/2012/09/Suggestion-of-Immunity-2.pdf> (visited 10 October 2012).

67 For a critique, see D.P. Stewart, 'Samantar and the Future of Foreign Official Immunity', 15 *Lewis & Clark Law Review* (2011) 633, at 662–663, arguing that 'from the perspective of the orderly and principled development of the international law of foreign official immunity, a clear understanding of the U.S. government's position would be beneficial'.

state is unwilling or unable to do so. Some possibility of horizontal enforcement is needed, as recognized by the idea of universal jurisdiction. Horizontal enforcement by states with some connection or nexus to the underlying conduct may seem more legitimate than so-called 'foreign cubed' cases (when a foreign plaintiff brings a claim against a foreign defendant relating to foreign conduct); however, too much of a connection can lead to accusations of political trials or victor's justice. *Ratione materiae* immunity can do some, but certainly not all, of the work allocating adjudicatory authority in the midst of such varied interests.

Further judicial analyses of jurisdictional immunities by national and regional courts and other bodies will shape their interpretation and evolution over time. Andrea Bianchi has observed with regard to legal interpretation that '[I]l'ambiguïté ne concerne alors pas seulement la fonction de l'interprète, mais aussi les buts de l'ordre juridique qu'il est censé interpréter' [the ambiguity does not only concern the role of the interpreter, but also the goals of the juridical order that the interpreter is meant to interpret].<sup>68</sup> The ICJ's task is complicated by the competing goals it may be asked to serve. Judges Higgins, Kooijmans and Buergenthal observed in their joint separate opinion in the *Arrest Warrant* case that '[t]he difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations'.<sup>69</sup> Balancing the potentially competing demands of stability and accountability remains an important challenge for both international and domestic courts.

In *Germany v. Italy*, the ICJ saw its primary role as the guardian of postwar stability. It thus cut short the period of experimentation of national courts in the area of state immunity, in the name of international stability. In contrast, some experimentation in the area of foreign official immunity ought to be allowed to continue, so that the structural rules governing horizontal enforcement can evolve in response to the needs for both order and justice at the national and international levels.

68 See Bianchi, *supra* note 11, at 99.

69 Joint Separate Opinion, § 5.