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The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level

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States have undertaken an international obligation to investigate and prosecute individuals for serious human rights violations and grave breaches of international humanitarian law. However, compliance with that obligation is poor and prosecutions at the national level remain few. The mechanism for enforcement of that obligation is also limited. This article explores the way in which the International Court of Justice (ICJ) can play, and has played, a role in this respect. The jurisprudence of the Court is analysed with regard to three matters: (i) the obligation of states to investigate and prosecute serious crimes at the national level; (ii) national criminal jurisdiction with regard to prosecution of serious crimes, as well as immunities from that jurisdiction; and (iii) the obligation of states to cooperate in criminal matters with other jurisdictions. The Court has adjudicated on some key issues relating to national prosecutions. Some of its findings have, without doubt, enhanced the enforcement of prosecution at the national level, while others have undermined it. Recent cases before the ICJ show an increased willingness by states to use the Court as an avenue for enforcement and, at the same time, the Court has proved more willing to utilise its powers.

Keywords: International Court of Justice, serious crimes, prosecution, reparations, individual criminal responsibility, enforcement

1. Introduction

States have undertaken a number of international obligations to investigate and prosecute individuals for serious human rights violations and grave breaches of international humanitarian law. Even so, compliance with that obligation has always been problematic. States have been very reluctant to prosecute their own forces and officials, and the prosecution of non-nationals found on the territory and alleged to have committed crimes abroad has not been a priority.

While international criminal tribunals have enhanced the prosecution of serious crimes at the international level, they are able to deal with only a handful of cases. Because of the lack of jurisdiction and sources, international criminal tribunals will never replace the need for national prosecutions. Thus, enforcement of such proceedings at the national level remains a fundamental issue in the fight against impunity. The International Court of Justice (ICJ or the Court) can play an important role in enforcing national proceedings. Despite the recent proliferation of international courts and tribunals, it remains the only global court where the obligation of states to investigate and prosecute serious crimes can be adjudicated and enforced.

The ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have received a number of cases relating to international humanitarian law and gross violations of

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human rights.[1] This article considers only the Court's cases which are relevant to the duty of states to investigate and prosecute serious crimes at the national level and the serious crimes in focus are violations of the major international human rights treaties and the Geneva Conventions of 1949 and their Additional Protocols.[2] Furthermore, the discussion is limited to three issues. First, the Court's jurisprudence on the obligation of states to investigate and prosecute serious crimes will be analysed. The second issue to be considered is national criminal jurisdiction with regard to the prosecution of serious crimes, as well as immunities from that jurisdiction. Lastly, the jurisprudence of the Court with regard to the obligation of states to cooperate in criminal matters with other jurisdictions will be examined.

Without doubt, the Court's findings have had an impact on prosecutions of serious crimes at the national level. At the same time, one may be surprised to discover how few cases before the Court, despite the availability of opportunities, address the issue directly. The reason is twofold: states have not shown any great interest in including the duty to prosecute among their submissions to the Court and, even when it is included, the Court has not always addressed the issue, although in recent cases before the Court the matter has been brought more to the forefront.

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[1] These include *The Corfu Channel Case (United Kingdom v Albania)*, Judgment [1949] ICJ Rep 4; *Case concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment [1986] ICJ Rep 14; *Case concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226; and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136. A considerable number of writings exist on the general role of the ICJ with respect to the development and enforcement of human rights law and international humanitarian law: see Shiv RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart 2007); Rosemary Abi-Saab, 'The "General Principles" of Humanitarian Law According to the International Court of Justice' (1987) 27 *International Review of the Red Cross* 367–75; Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 *Leiden Journal of International Law* 349; Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 235; Fabián O Raimondo, 'The International Court of Justice as a Guardian of the Unity of Humanitarian Law (2007) 20 *Leiden Journal of International Law* 593–611; VS Mani, 'The International Court and the Humanitarian Law of Armed Conflict' (1999) 39 *The Indian Journal of International Law* 32–46; Stephen M Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law' (1994) 27 *New York University Journal of International Law & Politics* 731; Kenneth J Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 *International & Comparative Law Quarterly* 895.

[2] The Geneva Conventions of 12 August 1949 and Protocols additional to the conventions: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II or AP II); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (entered into force 14 January 2007) (2006) 45 *International Legal Materials* 558.

While some of the findings of the Court can be hailed as a triumph in the fight against impunity, others can be considered a major setback in that quest.

2. THE OBLIGATIONS OF STATES TO INVESTIGATE AND PROSECUTE SERIOUS CRIMES

International law imposes an independent duty on states to investigate and prosecute individuals for certain international crimes. This obligation arises in various treaties. Applying the terminology set out in the Draft Articles on State Responsibility,[3] the duty is a primary, as opposed to a secondary, obligation. The duty to investigate and prosecute as a secondary obligation has relevance with regard to reparations, in particular satisfaction.

2.1 THE OBLIGATION TO PROSECUTE INDIVIDUALS AS A PRIMARY OBLIGATION

The key example of the primary obligation of states to prosecute certain serious crimes is to be found in the Geneva Conventions of 1949 and their First Additional Protocol.[4] According to Article 146 of the Fourth Geneva Convention[5] and Article 85 of Additional Protocol I[6] each contracting party is under an obligation to search for persons who have committed grave breaches of the Convention and bring such persons, regardless of their nationality, before its own courts. The obligation to prosecute is also found in some international human rights conventions.[7] The

[3] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries [2001] UN Doc A/56/10.

[4] The Geneva Conventions and Additional Protocols (n 2) were among the first international instruments to stipulate the obligation of member states to prosecute crimes mentioned in the treaty. This was a major development in the enforcement of international obligations, as until that time it had been up to states to decide how to implement international treaties at the national level: Jean S Pictet and others, *Commentary on the Geneva Conventions of 12 August 1949, Vol I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Jean S. Pictet and International Committee of the Red Cross 1952) 353. Furthermore, the new obligation underscored the prosecution of war criminals by the state to which the perpetrators belong. Prior to this, prosecution of war crimes had largely been confined to prosecution through the injured state: see Rüdiger Wolfrum, 'Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995) 517, 523. The specific articles discussing the obligation to prosecute are GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; and AP I, art 85.

[5] GC IV (n 2) art 146.

[6] AP I (n 2) art 85.

[7] The obligation of states to investigate and prosecute crimes is also reinforced in the United Nations' work on the fight against impunity, the right to truth and the right to reparations. The updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity affirms the need for a comprehensive approach towards impunity, including undertaking investigations and prosecutions of those suspected of criminal responsibility. According to Principle 19, states shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished: Diane Orentlicher, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity – Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', 8 February 2005, UN Doc E/CN.4/2005/102/Add.1. Similarly, the duty to investigate and prosecute is listed in the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Torture Convention) (Articles 5 and 7),[8] and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention)[9] (Article 6), both have provisions that stipulate the obligation of states parties to prosecute violations of the Conventions. The International Covenant on Civil and Political Rights (ICCPR)[10] does not contain an explicit provision on this obligation.[11] However, the obligation to prosecute arises under that Convention with the right to an effective remedy (see Article 2(3) ICCPR), in conjunction with substantive duties found in other provisions, in particular in its provision on right to life and prohibition of torture.[12]

The obligation of states to prosecute serious crimes as a primary obligation has been included in submissions by states in a few cases before the Court. Some of these submissions have not been successful. In the *Case concerning United States Diplomatic and Consular Staff in Tehran*[13] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[14] the Court did not address these submissions, despite finding violations of international obligations.[15] In *Armed Activities on the Territory of Congo,* the Democratic Republic of the Congo (DRC) submitted that Uganda 'fail[ed] to punish persons under its jurisdiction or control having engaged in the above-mentioned acts', supported by a general reference to the Hague Regulations, Geneva Conventions and human rights treaties.[16] In its judgment the Court found Uganda to be in breach of these Conventions, but did not address the obligation to prosecute. The Court's silence on the issue is addressed in Judge Tomka's separate declaration:[17]

Rights Law and Serious Violations of International Humanitarian Law', 60/147(2005), 16 December 2005, UN Doc. A/RES/60/147 (2005), paras 3(b), 4 and 22(f).

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention).

[9] Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

[10] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[11] During the drafting of the Convention, some states wanted to strengthen the positive obligation on the part of governments to prosecute violations: see Naomi Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 24, 33.

[12] UN Human Rights Committee (HRC), CCPR General Comment 7, Article 7, 'Compilation of General Comments and General Recommendation adopted by Human Rights Treaty Bodies', 30 May 1982, UN Doc HRI/GEN/1/Rev1 at 7, para 1; UNHRC, General Comment 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2005, CCPR/C/21/Rev.1/Add.13, para 18. For corresponding case law, see *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v Uruguay*, Communication No 107/1981, 21 July 1983, UN Doc CCPR/C/19/D/107/1981, para 16 ('bring to justice any persons found to be responsible for her disappearance and ill treatment'); *Irene Bleier Lewenhoff and Rosa Valino de Bleier v Uruguay*, Communication No 30/1978, 29 March 1982, UN Doc CCPR/C/OP/1, para 15.

[13] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Judgment [1980] ICJ Rep 3.

[14] *Wall* (n 1).

[15] *Diplomatic Staff* (n 13) [8]; *Wall* (n 1) [145]–[146].

[16] *Armed Activities* (n 1) [25].

[17] ibid, Declaration of Judge Tomka [9].

> Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977, remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).

Among the submissions of Bosnia and Herzegovina in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was one claiming that Serbia had failed in its obligation under the Genocide Convention to punish acts of genocide. In interpreting the obligation stipulated in the Genocide Convention on the duty of states to punish the crime of genocide, the Court concluded that the obligation related only to states where genocide took place; other states were not obligated by the Convention to punish acts of genocide, not even those states of which the perpetrators were nationals. As the genocide took place outside Serbia, that state was not obligated by the Convention to prosecute. The territorial limit of the obligation to prosecute under the Convention is described by the Court as follows:[18]

> The substantive obligations arising from Articles I and III are not on their face limited to territory … The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction.

The obligation to prosecute under the Genocide Convention is also an issue in an ongoing case before the Court – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* – and, citing the above decision, Serbia claims that the Genocide Convention obliges contracting parties only to institute and exercise territorial criminal jurisdiction, in this case not over alleged acts of genocide committed in Croatia.[19]

The obligation of states to prosecute was the central issue in *Questions Relating to the Obligation to Prosecute or Extradite*.[20] In this case, Belgium instituted proceedings against Senegal regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hisséne Habré, or to extradite him to Belgium for the purposes of criminal proceedings. Belgium based its claim on the Torture Convention and customary international law. The judgment of the Court confined itself to an analysis of obligations under the Torture Convention, as it did not consider that it had jurisdiction over the latter claim.[21]

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[18] *Case concerning 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, [183]–[184], [439]–[450] (*Bosnian Genocide*).

[19] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment [2008] ICJ Rep 412, [21], [135] (*Croatian Genocide*).

[20] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment [2012] ICJ Rep 442.

[21] The Court concluded that, at the time of the filing of the application, the dispute between the parties did not relate to breaches of obligations under customary international law: ibid [55]. On the contested issue whether there is such an obligation under customary international law, see the work of the International Law

In its examination of the temporal scope of the Torture Convention, the Court stated that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[22] However, citing Article 28 of the Vienna Convention on the Law of Treaties,[23] and decisions of the Committee against Torture, the Court found that the obligation to prosecute under the Convention applies only to facts that occurred after its entry into force for the state concerned.[24] The Court emphasised that prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the state.[25]

The Court considered that the obligation to prosecute under the Torture Convention is linked to other obligations within the Convention – the obligations to adopt adequate domestic legislation and to make an inquiry into the facts. The Court considered these obligations to be 'elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility'.[26] As to the obligation of states to incorporate appropriate domestic legislation (Article 5(2) of the Convention), the Court held that it did not have jurisdiction over alleged violations of that article. Notwithstanding this, the Court considered the article as it reviewed the state's performance of its obligations to establish the universal jurisdiction of its courts over the crime of torture as a necessary condition for enabling a preliminary inquiry (Article 6(2)), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7(1)). The Court highlighted the importance of timely implementation of legislation to enable the criminalisation of torture and universal jurisdiction, as required by the Convention. It also highlighted the preventive character of such domestic legislation. As to obligations under Article 6(2) of the Torture Convention, regarding the obligation to make a preliminary inquiry into facts, the Court concluded that the Convention requires such steps to be taken as soon as a suspect is identified in the territory of the state.[27] The Court also underscored that when authorities are operating on the basis of universal jurisdiction, they must be as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question (see Article 7(2)).[28]

Turning to the issue of the obligation to prosecute, the Court considered that Article 7(1) of the Torture Convention requires the state concerned to submit the case to its authorities for prosecution. It is then for the competent authorities to decide whether to initiate proceedings in the same manner as they would for any alleged offence of a serious nature under the law of the state concerned.[29] The Court found that the proceedings should be undertaken without delay, and 'as

Commission (ILC) on the subject of the obligation to extradite or prosecute: eg Zdzislaw Galicki, Bases for Discussion in the Working Group on the Topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', 24 June 2010, UN Doc No A/CN.4/L.774.

[22] *Obligation to Prosecute* (n 20) [99].

[23] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331.

[24] *Obligation to Prosecute* (n 20) [100], [101].

[25] ibid [102], [119]–[121].

[26] ibid [91]. Judge Owada criticised the methodology in the judgment to be 'too formalistic and somewhat artificial', and failed to consider the Torture Convention as an organic whole: ibid, Declaration of Judge Owada, [11].

[27] ibid [86], referring to the Torture Convention (n 8) art 7(2).

[28] ibid [84].

[29] ibid [90], [94].

soon as possible'.[30] The Court considered that Senegal's reasons for delay – compliance with decisions of the Economic Community of West African States (ECOWAS) Court of Justice (which requested the establishment of an international tribunal) and financial difficulties – were not justifiable. Furthermore, citing Article 27 of the Vienna Convention on the Law of Treaties, the Court found that Senegal could not justify its breach of the obligation by invoking provisions of its domestic law and decisions rendered by its courts.[31] Finally, the obligation to submit the case to its authorities for prosecution is irrespective of the existence of a prior request for the extradition of the suspect.[32] However, if the state had received a request for extradition it could 'relieve itself of its obligation to prosecute by acceding to that request'.[33]

2.2 THE OBLIGATION TO PROSECUTE INDIVIDUALS AS A LEGAL CONSEQUENCE OF VIOLATIONS OF INTERNATIONAL OBLIGATIONS

The obligation on the part of states to investigate and prosecute crimes can also be regarded as a secondary obligation – that is, as a remedy. Prosecution has considerable relevance with respect to reparations, in particular satisfaction. According to Article 37 of the International Law Commission's (ILC) Draft Articles of Responsibility of States for Internationally Wrongful Acts (2001):[34]

> 1. The State responsible for an international wrongful act is under an obligation to give satisfaction for the injury caused by that act … as it cannot be made good by restitution or compensation.
> 2. Satisfaction may consist of an acknowledgement of the breach, and expression of regret, a formal apology or another appropriate modality.

The list of forms of satisfaction listed in paragraph 2 is not exhaustive. Indeed, the Commentary on the Draft Articles lists the duty to prosecute as an example of satisfaction:[35]

> The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist, including … disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act.

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[30] ibid [117].
[31] ibid [111]–[117].
[32] ibid [94]. However, that might not necessarily lead to a prosecution, in light of all the evidence before them.
[33] ibid [95].
[34] Draft Articles (n 3).
[35] ibid [106]. In 2001 the ILC adopted its final Draft Rules on State Responsibility. The final draft article on satisfaction was amended in the final reading, moving prosecution of individuals from the list of examples in the main text of the article into the commentaries. However, the Commission made it clear that the list of different types of satisfaction in Article 37 was not exhaustive. The inclusion of this remedy was backed by a study on long diplomatic practice and punishment of individuals as a consequence of state violations: Gaetano Arangio-Ruiz, 'Second State Report on State Responsibility', 41st sess, UN Doc A/CN.4/425 & Corr 1 and Add 1 & Corr 1 (1989) 36–40.

Surprisingly the Court has never decided on prosecution at the national level as a secondary obligation. The main reason is that such submissions are very rare. In the *Armed Activities* case, the DRC included in its written submissions that, in light of Uganda's violation of international obligations, Uganda shall 'render satisfaction for the insults inflicted by it upon the [DRC], in the form of … and the prosecution of all those responsible'.[36] However, while the DRC included this submission in its memorial and reply, it was not included in its final submissions at the end of the oral proceedings. The final submission was much broader, namely that Uganda was under an obligation to 'make reparation for all injury caused', and 'that the nature, form and amount of the reparation [shall] be determined by the Court, failing agreement thereon between the Parties'.[37] Nothing in the case documentation explains this change of submission, and later development of the case did not include the issue. The ensuing negotiation between the parties focused on compensation rather than prosecution as a form of satisfaction. Nevertheless, now eight years later, the parties have still not reached an agreement, while at the same time the case has not been referred back to the Court.

The apparent reluctance on the part of states to include submissions on the obligation to prosecute, illustrated by the amended submission on reparations in the *Armed Activities* case, echoes the earlier practice of the Court. Declaratory judgments are common and the exact scope of reparations has largely been left to the parties to settle. By way of illustration, there are only two occasions on which the Court has awarded compensation.[38] At times, the Court has considered that its declaration of the breach 'constitutes appropriate satisfaction' and has denied claims for other forms of reparation.[39] Such a finding raised much criticism following the Court's judgment in *Application of the Convention for the Prevention and the Punishment of the Crime of Genocide*.[40]

The power of the Court to order specific performance of a mandatory term has even been questioned, or at least is not considered to be an appropriate judicial remedy.[41] However, there seems to be a development at the Court of less restriction in this respect. Several recent decisions have been quite specific with regard to performance, despite its implementation being carried out

[36] *Armed Activities* (n 1) [24].
[37] ibid [25(4)(d) and (e)].
[38] *Corfu Channel* (n 1); *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo* (Compensation owed by the DRC to the Republic of Guinea), Judgment [2012] ICJ Rep 2.
[39] This practice has been illustrated by some as an example of how the Court has been selective in relying on the work of the ILC on state responsibility: see Santiago Villalpando, 'Editorial: On the International Court of Justice and the Determination of the Rules of Law' (2013) 26 *Leiden Journal of International Law* 243, 250.
[40] *Bosnian Genocide* (n 18). The Court found that Serbia had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide. The Court found that its findings constituted appropriate satisfaction and denied an award of compensation. For a critique see, eg, Conor McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff 2009) 283.
[41] See, eg, the discussion in Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 209–11; Christine Gray, *Judicial Remedies in International Law* (Oxford University Press 1987) 98; and Malcolm N Shaw, 'A Practical Look at the International Court of Justice' in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998) 11, 13–16.

by 'means of [the state's] own choosing'. Examples include recent cases regarding remedies. In *Ahmadou Sadio Diallo* the Court 'recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter's injury'.[42] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court stated that reparations must be awarded to all natural and legal persons who had suffered loss by the state of Israel.[43] In other recent cases there is also de facto limited room for discretion in implementing the ICJ's orders, such as a stay of execution in *LaGrand* and *Avena and Other Mexican Nationals*,[44] the cancellation of an arrest warrant in *Arrest Warrant of 11 April 2000*,[45] the transfer of individuals to the International Criminal Tribunal for the former Yugoslavia (ICTY) and cooperation with that tribunal in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[46] and the requirement that decisions of national courts that infringe state immunity cease to have effect in *Jurisdictional Immunities of the State*.[47]

The Court has also become somewhat bolder with regard to the scope of its awarded remedies. In *LaGrand*, the President indicated the application of its remedy – the 'review and reconsideration' of convictions and sentences – in situations other than those at hand in the case.[48] This wide application was confirmed in *Avena and Other Mexican Nationals*, in which the Court re-emphasised the binding nature of the decision beyond the present case.[49]

This development by the Court is following the same path taken by other international courts and tribunals; for instance, decisions of regional human rights tribunals on reparations are increasingly departing from the more cautious approach that was previously applied to the issue.[50]

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[42] *Diallo* (n 38) [10] and [57]. Judge Trindade considered that the Court's judgment 'shows that its findings and reasoning have rightly gone well beyond the straightjacket of the strict interstate dimension'; ibid, Separate Opinion of Judge Cançado Trindade, [12].

[43] *Wall* (n 1) [152]–[153], [163]. Following the decision, the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory was established, UN Res ES-10/17 (2007), 24 January 2007, UN Doc No A/RES/ES-10/17.

[44] *LaGrand Case (Germany v United States of America)*, Provisional Measures [1999] ICJ Rep 9 [29]; *Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, Provisional Measures [2003] ICJ Rep 77 [59].

[45] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment [2002] ICJ Rep 3.

[46] *Bosnian Genocide* (n 18) [471(8)].

[47] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening*), Judgment [2012] ICJ Rep 99, [139(4)].

[48] *LaGrand* (n 44) [517].

[49] *Avena* (n 44) [151].

[50] See Christian Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals', in Hans-Joachim Cremer, Thomas Giegerich, Dagmar Richter and Andreas Zimmermann (eds), *Tradition und Weltoffenheit des Rechts: Festschrift fur Helmut Steinberger* (2002) 315, 319–22. See also the following decisions of the European Court of Human Rights: *Assanidze v Georgia*, App No 71503/01 (ECtHR, 8 April 2004), paras 202–203; *Ilaşcu and Others* v *Moldova and Russia*, App No 48787/99 (ECtHR, 8 July 2004), para 490; *Papamichalopoulos and Others* v *Greece*, App No 14556/89 (ECtHR, 24 June 1993), paras 34–39; and *Sejdovic* v *Italy*, App No 56581/00 (ECtHR, 1 March 2006), paras 135–138.

3. THE EXTRATERRITORIAL JURISDICTION OF NATIONAL COURTS OVER SERIOUS CRIMES – IMMUNITIES

3.1 EXTRATERRITORIAL JURISDICTION

The prosecution of serious crimes at the national level is often associated with extraterritorial jurisdiction, such as universal jurisdiction. Some of the major treaties that impose obligations on states to prosecute serious crimes also require them to establish and exercise universal jurisdiction – for example, Article 146 of the Fourth Geneva Convention,[51] and Article 5 of the Torture Convention.[52]

The issue of extraterritorial jurisdiction in relation to criminal acts was soon to enter the docket of the Court. According to one of the most cited cases of the PCIJ, *Case of the SS 'Lotus'*, a state was not able to exercise its power outside its frontiers in the absence of a permissive rule of international law. However, this did not mean that 'international law prohibits a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law … it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[53]

The ICJ has firmly underscored the obligation of states parties to implement immediately a treaty obligation on universal jurisdiction and application. As discussed above, in *Questions Relating to the Obligation to Prosecute or Extradite* the Court strongly emphasised the obligation of states parties under the Torture Convention to bestow its national courts with universal jurisdiction, criminalise the acts, and investigate and prosecute when an alleged offender is found on its territory.[54] According to the Court:[55]

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate

[51] Geneva Conventions and Protocols (n 2).
[52] Torture Convention (n 8).
[53] *The Case of the SS 'Lotus'*, Judgment (1927) PCIJ Rep (Ser A, No 10) 19. The PCIJ's finding has led to extensive academic writings up to the present day, and recent commentators are convinced that the emphasis lies in the former finding – that of restrictive jurisdiction. See, eg, Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 656. See also Roger S Clark, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and The Lotus' (2011) 22 *Criminal Law Forum* 519–30.
[54] The Court did not address whether Belgium was entitled to exercise jurisdiction. Three judges criticised the Court's 'reluctance to face the issue': see *Obligation to Prosecute* (n 20), Declaration of Judge Owada, Separate Opinion of Judge Skotnikow, and Dissenting Opinion of Judge Xue.
[55] *Obligation to Prosecute* (n 20) [75].

> any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

The Court has not adjudicated directly on the issue of universal jurisdiction in criminal matters outside conventional relations. It came close to it in *Arrest Warrant of 11 April 2000*. In this case, the DRC argued in its application that the universal jurisdiction exercised by Belgium contravened the international jurisprudence established by the judgment in *The 'Lotus'*.[56] However, the DRC did not include this claim in its final submission; therefore the Court considered that the *non ultra petita* rule precluded it from addressing that issue in its operative part, while the rule did not preclude it from dealing with certain aspects of that question in its reasoning, should it deem this necessary or desirable.[57] The reasoning in the judgment did not do so, while several judges commented on the issue of universal jurisdiction in their separate and dissenting opinions.[58] The issue of universal jurisdiction was pivotal in *Certain Criminal Proceedings in France*, but the case was later removed from the docket of the Court.[59]

At the same time, the Court has given an indication on the correct application of extraterritorial jurisdiction in some cases, but not to what extent. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court found that Article VI of the Genocide Convention required states parties only to institute and exercise territorial criminal jurisdiction:[60]

> While it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

While the case cites jurisdiction based on nationality as a primary example, the phrase 'in particular' still leaves room for other jurisdictions, including universal jurisdiction. As discussed above, in *Questions Relating to the Obligation to Prosecute or Extradite* the Court concluded that Senegal's obligation to prosecute pursuant to Article 7(1) of the Torture Convention did not apply to acts alleged to have been committed prior to Senegal's ratification of the Convention. Noticeably, the Court adds that '[a]lthough Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987 [the date on which the Convention entered into force for Senegal], nothing in that instrument

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[56] *The 'Lotus'* (n 53) [11]–[12].
[57] *Arrest Warrant* (n 45) [43].
[58] ibid, Separate Opinion of President Guillaume, Dissenting Opinion of Judge Oda, Declaration of Judge Ranjeva, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Separate Opinion of Judge Rezek, Separate opinion of Judge Bula-Bula, and Dissenting Opinion of Judge Van Den Wynaert.
[59] *Case concerning Certain Criminal Proceedings in France (Republic of Congo v France)*, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d2&case=129&code=cof&p3=0; the case was removed from the Court's list on 17 November 2010 at the request of Congo.
[60] *Bosnian Genocide* (n 18) [442].

prevents it from doing so'.[61] This dictum is of great relevance as, in light of the facts of the case, it could only be referring to, and thereby confirming, passive personality jurisdiction or universal jurisdiction.[62]

3.2 LIMITATION ON JURISDICTION – IMMUNITIES

Immunity as a limitation on extraterritorial jurisdiction has been a major issue in the prosecution of serious crimes. The ICJ addressed this issue in *Arrest Warrant of 11 April 2000*.[63] The DRC brought the case before the Court and claimed, among others, that Belgium violated its sovereignty and the diplomatic immunity of its Minister of Foreign Affairs as Belgium had issued an international arrest warrant for the Minister, charging him with grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. The Court held that, while abroad, the Minister enjoyed full immunity from criminal jurisdiction and inviolability before the national courts.[64] It also rejected Belgium's claim that such immunity did not apply to these serious crimes. The Court considered that it is:[65]

> unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court also specifically addressed conflicting obligations: on the one hand, to fulfil a treaty obligation to exercise jurisdiction; on the other hand, to respect immunities of heads of states and others. In this case, the Minister was charged with grave breaches of the Geneva Conventions of 1949 and Additional Protocols I and II – crimes which states parties are obligated to investigate and prosecute when a suspect is found on their territory. While the accused in the case was not found in Belgian territory, and hence there was no treaty obligation under which he could be prosecuted, the Court still decided the issue. It concluded that full immunity also applied when states extend their jurisdiction as a result of obligations under international conventions of prosecution or extradition:[66]

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[61] *Obligation to Prosecute* (n 20) [102].
[62] Belgium argued it that it had standing in the case as it was exercising passive personal jurisdiction in its national proceedings. The Court did not consider it necessary to address this issue as it considered Belgium to have standing as a mere state party to the Torture Convention: ibid [65], [70].
[63] *Arrest Warrant* (n 45) [35].
[64] ibid [54]–[55]. Two judges dissented strongly from this part of the judgment and considered that the prosecution of serious crimes and personal accountability represented higher norms than the rules on immunity, and they should therefore prevail: see Dissenting Opinion of Awn Al-Khasawneh, [7], and Dissenting Opinion of Judge Van den Wyngaert. Several scholars have also criticised the judgment: see J Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks' (2003) 16 *Leiden Journal of International Law* 253, 263. Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 853, 855.
[65] *Arrest Warrant* (n 45) [58]–[59].
[66] *Arrest Warrant* (n 45) [59].

> Such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

The Court made its often quoted observation that immunity from jurisdiction does not mean impunity, and that a distinction needs to be made between immunity from criminal jurisdiction and individual criminal responsibility. The Court set out a list of circumstances in which the Minister of Foreign Affairs would not enjoy immunity: (i) prosecution before his or her own courts; (ii) prosecution before other states if when the state which they represent or have represented decides to waive that immunity; (iii) after the person ceases to hold office, he or she will enjoy immunity only for official acts; and (iv) prosecution before international criminal tribunals.[67] With regard to point (iii), the majority did not qualify what constitute 'official acts'. In the Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal it is stated that:[68]

> serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform … that State-related motives are not the proper test for determining what constitutes public State acts.

In *Certain Questions of Mutual Assistance in Criminal Matters* the Court applied the test set out in the *Arrest Warrant* case, finding that invitations or service of a summons addressed to a head of state to appear as a witness in a criminal case were not associated with measures of constraint and were therefore not violations of his immunity.[69]

The Court returned to the issue of immunities in *Jurisdictional Immunities of the State*. As in the *Arrest Warrant* case, this case dealt with serious international crimes, and the primary issue was whether *jus cogens* crimes trump state immunity before foreign courts. Unlike the *Arrest Warrant* case, this was a civil remedy case. However, in the same manner as before, and by citing state practice and decisions of the European Court of Human Rights, the Court considered that it had still not accepted that states no longer enjoy immunity in cases of serious violations of international law.[70] Citing its decision in the *Arrest Warrant* case, the Court considered that even though proceedings in national courts involved violations of the *jus cogens* rule, the applicability of the customary international rule on state immunity was not affected.[71] The Court cited its earlier decisions regarding the issue that state immunity is a matter of procedural law and must be distinguished from the substantive law which determines whether the conduct is lawful or unlawful.[72] In that context, the Court pointed out that whether a state is entitled to immunity before the

[67] ibid [61].
[68] ibid, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [85].
[69] *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment [2008] ICJ Rep 177, [170]–[171].
[70] *Jurisdictional Immunities* (n 47) [81]–[91].
[71] ibid [95] [97].
[72] ibid [100].

courts of another state is a question that is entirely separate from whether the international responsibility of that state is engaged and whether it has an obligation to make reparation.[73]

4. The Obligation of States to Cooperate with Other Jurisdictions and Courts

Conventions that require state parties to prosecute serious crimes require them also to cooperate with other jurisdictions. These requirements frequently take the form of an obligation to prosecute or extradite (*aut dedere aut judicare),* as stipulated in the Geneva Conventions[74] (for instance Article 146 of the Fourth Geneva Convention), and in Article 7 of the Torture Convention.[75] States parties to the Convention on the Prevention and Punishment of the Crime of Genocide 'pledge themselves … to grant extradition in accordance with their laws and treaties in force', as mentioned in Article 7, and according to Article 6 of the Convention:[76]

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

In its case law the ICJ has emphasised the need for cooperation in fighting the crime of genocide. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the Court considered genocide to be a crime under customary law which requires cooperation to eradicate it:[77]

> The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, the Court analysed Serbia's obligation under Article 6 of the Genocide Convention. The Court decided that Serbia was under an obligation to transfer individuals accused of genocide or any of those other acts for trial by the ICTY,

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[73] ibid.
[74] Geneva Conventions and Protocols (n 2).
[75] Torture Convention (n 8) art 7. For a detailed study of the duty to cooperate, see the International Law Commission's reports on the topic of obligation to extradite or prosecute: Galicki (n 21). On the obligation in general, see Zdzislaw Galicki, 'Fourth Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', 31 May 2011, UN Doc A/CN.4/648.
[76] Torture Convention (n 8) arts 6 and 7.
[77] *Reservations to the Convention on Genocide*, Advisory Opinion [1951] ICJ Rep 15, [23].

and to cooperate fully with that Tribunal. The Court concluded in its judgment that once an 'international penal tribunal' has been established, it is certain that Article VI obliges the contracting parties 'which have accepted its jurisdiction' to cooperate with it. The Court continued that the obligation to cooperate with the Tribunal implies that the contracting parties will 'arrest persons accused of genocide who are in their territory'.[78] The Court specifically noted that even if the crime of which the person was accused was committed outside the state territory, the contracting parties are under an obligation to arrest that person if they are within the state territory. The Court also concluded that Article VI implies that, failing prosecution of that person in the parties' own courts, the state will hand them over for trial by the competent international tribunal.[79] The Court found that the ICTY constitutes an 'international penal tribunal' and Serbia was obliged to cooperate with it from the time it had accepted its jurisdiction.[80] In a case pending before the Court, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, it is debated whether Serbia is obliged under the Genocide Convention to hand over to Croatia persons who have allegedly committed acts of genocide.[81]

In *Questions Relating to the Obligation to Prosecute or Extradite* the Court considered the obligation to cooperate to be less far-reaching than it had in its judgment in the *Bosnian Genocide* case.[82] The Court found that the duty to extradite under the Torture Convention was a mere option offered to the state by the Convention, which did not entail any state responsibility if not accepted:[83]

> It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

At the same time the Court found that Senegal could relieve itself of the duty to prosecute by acceding to an extradition request.[84]

In *Questions of Mutual Assistance* the Court examined the extent of judicial cooperation set out in general bilateral cooperation treaties between the parties. The Court concluded that judicial cooperation in criminal matters could not be the subject of the general obligation of cooperation in the parties' Treaty of Friendship and Cooperation, as it was not mentioned specifically.[85] The parties' obligation in this respect was the subject of a bilateral Treaty on Mutual Assistance in Criminal Matters, and the Court applied a strict literal interpretation to its provisions.[86]

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[78] *Bosnian Genocide* (n 18) [443].
[79] ibid.
[80] ibid [445]–[449].
[81] *Croatian Genocide* (n 19) [134]–[135].
[82] *Mutual Assistance* (n 69).
[83] *Obligation to Prosecute* (n 20) [95].
[84] ibid.
[85] *Mutual Assistance* (n 69) [105].
[86] ibid [119], [123]–[124], [145], [147].

5. CONCLUSIONS

The ICJ has received several cases concerning serious crimes. At the same time, the cases demonstrate a reluctance by states to use the ICJ as a channel to enforce the obligations of states to prosecute at the national level. This is evident in their submissions, which hardly ever include the duty of a state to prosecute, even as a primary obligation, much less than as a secondary obligation as a form of reparation. This was particularly evident in the *Armed Activities* case, forcing one judge to address this issue in a separate decision. In some case the Court has also been cautious in addressing the matter. This practice is very surprising given the nature of these cases, the clear international obligation undertaken by states to prosecute, and the undisputed obligation of states to give satisfaction for the injury caused, which includes penal action against the individuals whose conduct caused the internationally wrongful act. The missed opportunity in these cases is regrettable, particularly in light of the lack of enforcement of the obligation at the international level. Recent cases such as *Questions Relating to the Obligation to Prosecute or Extradite*, in which the primary submission is the obligation to prosecute, will hopefully break this pattern. Furthermore, recent submissions by states in some cases (although relating to different areas of international law) that require states to take far-reaching measures at the national level, and the Court's award of such measures, may also overcome the myth that submissions that include the international obligation to prosecute are somewhat improper, or even a violation of state sovereignty. The major interest of other actors in the enforcement of this duty, including individuals, and increased acknowledgement of their rights, including by the ICJ, may also encourage more cases in this area.

The Court's findings in *Questions Relating to the Obligation to Prosecute or Extradite* on the substance of the obligation to prosecute under the Torture Convention are firm and well-founded. The linked elements of a conventional mechanism were highlighted, all equally necessary to facilitate prosecution. Since ratification of the Torture Convention, states parties are under a duty to implement the treaty properly, including criminalising acts and giving their national courts universal jurisdiction. They are required to investigate alleged crimes as soon as the alleged offender is on their territory, and subsequently hand the case to the prosecution authorities. No excuses for delays will be accepted, either of a substantive or a practical nature. The findings have underscored the clear and extensive obligations undertaken by states parties to the Torture Convention, which are different from those contained in the Genocide Convention, which the Court concluded had a territorial limit to the obligation of states parties to prosecute, as mentioned in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[87]

The solid conventional base for extraterritorial jurisdiction of the Torture Convention was highlighted in the Court's judgment in *Questions Relating to the Obligation to Prosecute or Extradite.* The finding is welcome, particularly in light of the Court's reluctance to address the

[87] *Bosnian Genocide* (n 18) [183]–[184].

issue of universal jurisdiction in earlier cases. However, the extent of extraterritorial jurisdiction outside conventional relations remains unsettled. Arguments could be made that the Court supports this jurisdiction for certain serious crimes. Interestingly, the judgments in both *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and *Questions Relating to the Obligation to Prosecute or Extradite* include dicta to the effect that states parties are allowed to establish broader jurisdiction than that required by the treaties, leaving ample room for interpretation.[88] The Court's continual findings on principles of the *jus cogens* character and *erga omnes* obligations in international law also support such extraterritorial jurisdiction for serious crimes.

While the Court's judgment in *Questions Relating to the Obligation to Prosecute or Extradite* may be hailed as a triumph in the fight against impunity, its recent judgment in *Jurisdictional Immunities of the State* will certainly not achieve that accolade.[89] An almost unified Court extended its reasoning in *Arrest Warrant of 11 April 2000,* by building on its finding of full immunity from national criminal proceedings for foreign heads of state, to now provide immunity also to states in civil law cases in foreign national courts. In both cases the Court rejected the argument that *jus cogens* violations trump state immunity.[90] The Court offered the consolation that state immunity is a matter of procedural law, and must be distinguished from the substantive law which determines whether the conduct is lawful or unlawful. At the same time, the Court has acknowledged that it has taken this approach 'notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable'.[91]

The cooperation of states with other jurisdictions prosecuting serious crimes is crucial in the fight against impunity. Conventions relating to serious crimes commonly include the obligation to prosecute or extradite. In *Obligation to Prosecute* the Court interpreted the Torture Convention to the effect that states parties are not required to extradite, it being a mere option offered to them, while a state party could relieve itself of the duty to prosecute by acceding to an extradition request.[92] On the contrary, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court gave a broad interpretation to Article 6 of the Genocide Convention, requiring a state to cooperate extensively with an international criminal court.[93] This is the second time the Court has given strong support to prosecutions at the international level; the first occasion was in *Arrest Warrant of 11 April 2000* by denying immunity to heads of state before international criminal courts, while upholding it before national courts.[94]

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[88] See nn 60 and 61.
[89] On the other hand, some commentators hailed it as 'a victory to traditional conceptions of international law and a setback to an effort to privilege international human rights over other aspects of the international legal system': see Benjamin Wittes, 'Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v Italy)', *Lawfare*, 5 February 2012, http://www.lawfareblog.com/2012/02/paul-stephan-on-icj-decision-in-jurisdictional-immunities-of-the-state-germany-v-italy-2/#.UsxHBfQW30c.
[90] *Obligation to Prosecute* (n 20) [96]–[105]; *Arrest Warrant* (n 45) [58]–[61].
[91] *Jurisdictional Immunities* (n 47) [95].
[92] ibid 11.
[93] *Bosnian Genocide* (n 18) [439]–[450].
[94] ibid 35.

As has been illustrated, the ICJ handles a number of cases concerning serious crimes. Yet its role with regard to enforcing the obligation of states to investigate and prosecute serious crimes at the national level has been marginal. A further step towards enhancing the role of the ICJ in realising the goals of international criminal justice rests both with states parties and the Court itself. The Court is at the mercy of states parties to confer upon it jurisdiction. At the same time, when it is bestowed with jurisdiction the Court needs to accept its responsibility and tackle the matter determinedly. In recent cases the Court has shown its potential to be a vital enforcement mechanism in the fight against impunity. In the near future, it may fill the lacuna in the current state of affairs.