

Without (State) Immunity, No (Individual) Responsibility

Giovanni Boggero^{*}

Table of Contents

A. Introduction.....	376
B. Universal Civil Jurisdiction Is in Principle Admissible Only Against State Officials	379
C. Functional Immunity Is not Specification of State Immunity.....	382
D. Individual Responsibility of State Officials Differs Greatly From State Responsibility	388
E. Conclusion	397

* Ph.D Researcher in Public Law at the University of Eastern Piedmont “Amedeo Avogadro”. I would like to thank Professor Edoardo Greppi (University of Turin) and Professor Alberto Oddenino (University of Turin) for the constant support and advice they provided during the writing of this contribution. Any errors are of course my sole responsibility. Comments welcome: giovanni.boggero@jp.unipmn.it.

Abstract

The present article is a first attempt to add new theoretical arguments to the rationale of State immunity. The author tries to assert that upholding State immunity for human rights violations should not logically lead to the impunity of State officials acting on behalf of the State. On the contrary, the right to State immunity is an essential precondition for the individual perpetrators to be prosecuted and convicted. To come to this conclusion, the author first finds that universal jurisdiction is a tool to prosecute individuals and not States. On this basis, he argues that functional immunity *ratione materiae* and State immunity should be distinguished. This leads to the consequence that State officials' and State's responsibility are of different nature.

“There is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.”¹

A. Introduction

In its judgment *Jurisdictional Immunities of the State*, the International Court of Justice (ICJ) decided upon different submissions put forward by the Federal Republic of Germany against the Italian Republic.² In particular, the Court stated that: (1) customary international law still requires that “a State should be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict”;³ (2) customary international law provides that “a State cannot be deprived of immunity by reason of the fact that [its organs are] accused of serious violations of international human rights law or the international law of armed conflict”,⁴ i.e. no human rights exception to the rule of State immunity exists; (3) even violations of so-called *jus cogens* norms cannot lead to a denial of State immunity, since no *jus cogens* exception to the rule of State immunity exists under customary international law;⁵ (4) State immunity cannot be denied on the basis of a so-called ‘last resort argument’

¹ H. Lauterpacht, *International Law and Human Rights* (1950), 40.

² *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99 [Jurisdictional Immunities of the State, Judgment].

³ *Ibid.*, 135, para. 78.

⁴ *Ibid.*, 139, para. 91.

⁵ *Ibid.*, 142, para. 97.

either, that is on the basis of the fact that all victims' attempts to seek redress from Germany had previously failed, because whether a State is entitled to immunity is a question separate from "whether the international responsibility of that State is engaged and whether it has an obligation to make reparation".⁶

Despite the fact that the decision of the ICJ provides a partially correct reconstruction of the general international law with regard to the immunity of foreign States from jurisdiction, it nevertheless leaves itself quite open to criticism according to which this view would merely defend the *status quo* and does not offer any hope of a practical solution to the pressing demand for justice made by the relatives of victims;⁷ it is, in other words, a defense based exclusively on the risk that a possible denial of State immunity would set off a new diplomatic crisis between the nations of the international community, or lead to the risk of bankruptcy for the States against which jurisdiction has to be exercised for purposes of reparation.⁸

The Court limits itself to expressing "surprise [...] and regret" at the fact that "Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the grounds that prisoners of war were not entitled to compensation for forced labour"⁹ and then goes on to admit that it is not "unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned".¹⁰ Indeed, perhaps, it would have been sufficient if in its final *obiter dictum* the Court had asserted more firmly the need in any case for Germany to fulfill its obligations deriving from its acknowledged international responsibility, or that, as Judge Yusuf suggested in his *Dissenting Opinion*, it had specified, at the very least "an alternative remedy to the victims of the breaches to which it has admitted".¹¹ The Court, however, merely points out that certain categories of Italian victims are still entitled, even now, to some form of reparation, but it does not go so far as to indicate the forms and

⁶ *Ibid.*, 143, para. 100. Further on the judgment's reasoning, see G. Boggero, 'Senza Immunità (dello Stato), Niente Immunità (Dell'Individuo)', *Diritto Pubblico Comparato ed Europeo* (2013) 1, 383, 383-403.

⁷ For example, M. Payandeh, 'Staatenimmunität und Menschenrechte', *67 Juristenzeitung* (2012), 948, 958.

⁸ I. von Münch, *Rechtspolitik und Rechtskultur: Kommentare zum Zustand der Bunderepublik Deutschland* (2011), 31.

⁹ *Jurisdictional Immunities of the State*, Judgment, *supra* note 2, 142-143, para. 99.

¹⁰ *Ibid.*, 144, para. 104.

¹¹ Dissenting Opinion of Judge Yusuf, *Jurisdictional Immunities of the State*, Judgment, *supra* note 2, 291, 306, para. 53.

costs, as this would have amounted to issuing a positive response to the Italian counterclaim, which it had previously declared inadmissible.¹²

In the light of this act, which is both an expression of powerlessness and an implicit invitation to the two States to engage in negotiations,¹³ the international doctrine favorable to maintaining the principle of State immunity¹⁴ is called upon to organize a broader defense of it, capable of justifying its applicative consequences. Hereafter, this author will try to assert that upholding State immunity does not logically lead to the impunity of the perpetrators of human rights violations. On the contrary, the right to State immunity is an essential precondition for them to be prosecuted and eventually punished. To come to these conclusions it is necessary, whenever possible, to disentangle the individual organ of the State from the State itself. In section B., the article will argue that prudence of national courts in admitting universal civil jurisdiction against State officials is the consequence of a widespread belief according to which to admit universal civil jurisdiction against State officials cannot but lead to admitting universal civil jurisdiction against the State itself. In reality, universal jurisdiction, both criminal and civil, is not an institution established to exercise jurisdiction against States but only against individuals; the corollary principle of this false belief is to derive functional immunity of State officials directly from State immunity. In section C., the article will argue that the two concepts are different and should be distinguished. In terms of responsibility this means, as laid out in section D., that the State cannot be held responsible in the same way as individuals. The two types of responsibilities should also be distinguished.

¹² *Jurisdictional Immunities of the State (Germany v. Italy)*, Order of 6 July 2010, ICJ Reports 2010, 310, 321, para. 33.

¹³ Cf. Interview with J. Luther, 'Moralische Wiedergutmachung für italienische NS-Opfer', *Deutschlandradio* (9 May 2012), available at http://www.deutschlandradiokultur.de/moralische-wiedergutmachung-fuer-italienische-ns-opfer.954.de.html?dram:article_id=147228 (last visited 31 January 2014). Immediately after proclamation of the decision, the German Foreign Minister made a statement in which he stressed that Germany had already honored its commitments in the past. Cf. 'Außenminister Westerwelle zum IGH-Urteil in Sachen Deutschland/Italien', *Press Release of the German Federal Foreign Office* (3 February 2012), available at http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2012/120203-IGH_ITA.html (last visited 31 January 2014).

¹⁴ However, many authors have long proposed reconsidering and even abolishing it. Among these see, for example, H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Yearbook of International Law* (1951), 220, esp. 236-237.

B. Universal Civil Jurisdiction Is in Principle Admissible Only Against State Officials

One of the main assumptions on which the Italian defense based its claim of the existence of a *jus cogens* exception to the rule of State immunity under international law was the practical need of repressing grave violations of international humanitarian law and the law of human rights through the exercise of universal jurisdiction. The proposition that the exercise of universal jurisdiction for crimes against humanity and war crimes is a necessity lacks any analysis of the customary nature of the universality of jurisdiction in civil matters.

Universal jurisdiction is that institution founded on the co-operation among States which makes it possible to prosecute particularly odious crimes, regardless of where they occur and thus eliminating the nexus, considered fundamental until a short time ago, between the State of the jurisdiction and the State in which the crime in question effectively occurred. Overlooking, for the moment, the problems deriving from the choice of crimes effectively punishable by law,¹⁵ serious though they are, the difficulty of guaranteeing the exercise of jurisdiction in a truly universal manner¹⁶ and the risks inherent in interfering in the internal affairs of the State to which the individual charged belongs, it seems important to point out that any exercise of universal jurisdiction has always been ambivalent in nature, both criminal and individual at the same time. It is, in other words, a tool that, though differing in degree depending on the particular national legislation, is motivated by the need to prosecute persons who are socially dangerous for the international community (*hostes humani generis*), to ensure that certain acts will not happen again. It is not an

¹⁵ These include only grave breaches and serious violations of international humanitarian law and law of human rights. As is evident from Art. 40 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission (2001), Vol. II (2), 26, 29 [Draft Articles on State Responsibility], simple violations of *jus in bello* and human rights are excluded, unless they are *gross* and *systematic*. Cf. P. Stammer, *Der Anspruch von Kriegsoffizieren auf Schadensersatz: Eine Darstellung der völkerrechtlichen Grundlagen sowie der Praxis internationaler Organisationen und verschiedener Staaten zur Anerkennung individueller Wiedergutmachungsansprüche bei Verstößen gegen humanitäres Völkerrecht* (2009), 125. Critical on this distinction is K. Oellers-Frahm, 'Redress of War-Related Claims by Individuals: The Example of the Italian Courts', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 1055, 1066-1067.

¹⁶ L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2005), 220 *et seq.*

institution through which to put sovereign States on trial as these, according to international custom, cannot be held criminally liable, or, in the words of the well-known maxim, *societas delinquere non potest*.¹⁷

As regards individual officials of the State, it is important to bear in mind that the exercise of universal criminal jurisdiction against presumed criminals has only been possible, up to now, when they no longer held their official position in the State (as in the case of *Pinochet I*).¹⁸ In that case, State immunity from jurisdiction could not be challenged, insofar as immunity was denied in relation to *acta jure imperii* committed by a person no longer in office. That is, once the government functions cease, the exercise of jurisdiction against those who performed them is unable to endanger them, or to undermine the independence of the State of which the individual was an official.¹⁹ *Vice versa*, as

¹⁷ See *Prosecutor v. Tihomir Blaškić*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, IT-95-14-T, 18 July 1997, para. 49. Cf. J. Barboza, 'State Crimes: A Decaffeinated Coffee', in L. Boisson de Chazournes & V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 357, and J. Schaarschmidt, 'Die Reichweite des völkerrechtlichen Immunitätsschutz – Deutschland v. Italien vor dem IGH', *Beiträge zum Europa- und Völkerrecht der Universität Halle-Wittenberg No. 5* (2010), 30-31. On the opposition to the international law of the exercise of criminal jurisdiction against States, see H. Fox & P. Webb, *The Law of State Immunity*, 3rd ed. (2013), 89 and the *Draft Articles on State Responsibility*, Commentary to Chapter III, *supra* note 15, 110, 111 (paras 5-6). *Contra* J. Dugard, 'Criminal Responsibility of States', in M. Cherif Bassiouni (ed.), *International Criminal Law*, Vol. 1, 2nd ed. (1999), 239, 246; A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *European Journal of International Law* (1999) 2, 425, 433-434.

¹⁸ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex Parte Pinochet Ugarte*, United Kingdom House of Lords, Judgment of 25 November, 3 WLR 1456 (H.L. 1998) [Pinochet I]. The reasoning followed in *Pinochet I* was not applied again in *Jones v. Saudi Arabia*, United Kingdom House of Lords, Judgment of 14 June 2006, [2007] 1 AC 270 [Jones v. Saudi Arabia], as the denial of personal immunity for the former head of the Chilean government had to rely on a specific exception to compact law (contained in the *United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Punishments or Treatments*, 10 December 1984, 1465 UNTS 85 [Convention Against Torture]) and not as an ordinary exception of functional immunity.

¹⁹ Thus also Institute of International Law, 'Resolution on the Immunity From Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crime' (2009), Art. III (2), available at http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (last visited 31 January 2014), 2 [Institute of International Law, Resolution on the Immunity From Jurisdiction]: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases." *Contra* ILC, *Second Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/631, 10 June 2010, 19-20, para. 33 [Second Report on Immunity of

demonstrated in the *Arrest Warrant* case, immunity *ratione personae* continues to be guaranteed to individuals still in office.²⁰ The risk of an abuse of universal jurisdiction for matters of mere political rivalry between States is too great to make it possible for them to reach an *opinio juris* favorable to denial of immunity also for individual officials of the State still in office.

Even more uncertain is the exercise of universal civil jurisdiction which, at the level of international custom, has not been judged up to now as a fundamental corollary of criminal jurisdiction, due to the fact that it touches on different, though possibly related, interests with respect to the criminal case. Any convention on the subject of the repression of crimes against humanity, or any special statutory court, starting with the Court for former Yugoslavia or the Tribunal for Rwanda, fails to deal in any way with the problem of civil suits for reparation of damages²¹ and, even if it does, as in the case of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* of 1984,²² it does so in very generic terms,²³ which cannot be considered as expressing the unequivocal will to declare the exercise of universal civil jurisdiction toward the

State Officials]: “These acts do not cease to be acts of the State because the official ceased to be such and they therefore continue as before to be covered by immunity.” Thus also A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, 13 *European Journal of International Law* (2002) 4, 853, 863.

²⁰ Thus also relative to the former Chief of the Libyan State Muammar El Gaddafi, whose incrimination was requested for acts of terrorism, before the French courts. The request to exercise criminal jurisdiction was dismissed in 2001 by the Court of Cassation. Cf. French Court of Cassation, Case No. 1414, Decision of 13 March 2000, 105 *Revue Générale de Droit International Public* (2001) 2, 473.

²¹ Although some progress has been made (see *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 75, 2187 UNTS 3, 134-135), “it cannot be claimed with certainty that according to the international law in force there is absolute correspondence between the obligation of States to prosecute the perpetrators of international crimes and their obligation to guarantee the rights of the victims to seek redress under their respective legislation”. M. Frulli, *Immunità e Crimini Internazionali: L'Esercizio Della Giurisdizione Penale e Civile nei Confronti Degli Organi Statali Sospettati di Gravi Crimini Internazionali* (2007), 147 (translation by the author).

²² *Convention Against Torture*, Art. 14, *supra* note 18, 116. See, however, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada*, UN Doc CAT/C/CR/34/CAN, 7 July 2005, 3 & 4, paras 4 (g) & 5 (f).

²³ Never doubting the existence of the principle of the universality of civil jurisdiction is the Trial Chamber of the First Instance of the International Criminal Tribunal for former Yugoslavia in the decision *Prosecutor v. Furundzija*, which states that “the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia*

individual, much less toward the State.²⁴ Only the United States, on the basis of the *Alien Tort Statute* of 1789, recognizes the exercise of universal jurisdiction on civil matters, although this is exclusively toward officials of the State and not against the State itself.²⁵

The extreme prudence of the national courts in admitting universal civil jurisdiction against individuals, which – as Conforti claims – would be the natural *pendant* of criminal jurisdiction,²⁶ is based on the strong belief that the civil responsibility of the individual official of the State always and inevitably also implies a civil responsibility of the State.²⁷ This conclusion derives from the idea that functional immunity of State officials is specification of State immunity (section C.) and that State officials' responsibility in criminal and civil matters overlaps with State responsibility (section D.).

C. Functional Immunity Is not Specification of State Immunity

The exact relationship between the immunity of States and the functional immunity of the individual officials of the State is, in this current stage of international law, still up for debate. In its *Milde* decision, the First Criminal Section of the Italian Supreme Court of Cassation accepted the majority theory

to disregard the legal value of the national authorising act". *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998, 59-60, para. 155.

²⁴ Thus also C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position Under General International Law', in A. Randelzhofer & C. Tomuschat (eds), *State Responsibility and the Individual* (1999), 1, 11.

²⁵ *Alien Tort Claims Act 1789*, 28 USC § 1350. On the limits of the exercise of universal civil jurisdiction through the ATS see, among others A. Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?', 24 *Leiden Journal of International Law* (2011) 1, 173, 186 and J. von Bernstorff, M. Jacob & J. Dingfelder Stone, 'The Alien Tort Statute Before the US Supreme Court in the Kiobel Case: Does International Law Prohibit US Courts to Exercise Extraterritorial Civil Jurisdiction Over Human Rights Abuses Committed Outside of the US?', 72 *Heidelberg Journal of International Law* (2012), 579.

²⁶ B. Conforti, *Diritto Internazionale*, 8th ed. (2010), 211. The same opinion is also expressed by R. van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials', 59 *Netherlands International Law Review* (2012) 1, 5, 21. Cf. Concurring Opinion of Judge Breyer, *Sosa v. Alvarez-Machain and Others*, Supreme Court of the United States, Judgment of 29 June 2004, Case No. 03-339, (2004) 542 U.S. 692, 760, 763: "Universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."

²⁷ Critical of this position also Stammer, *supra* note 15, 124-125.

in doctrine, sustained previously by that same court also in the *Ferrini* and *Lozano* cases, according to which

“functional immunity [...] is the specification of what is the pertinence of the states, as it responds to the need to prevent the prohibition of charging foreign States from being overridden by acting against the person through whom the activity is implemented. [...] [O]ne must, then, agree with those who claim that if functional immunity cannot find application, because the act committed is considered an international crime, there is no valid reason to maintain the immunity of the State.”²⁸

It seems that this is a theory that, despite having the support of authoritative experts in doctrine²⁹ and being shared in case law,³⁰ reveals shortcomings on many levels. Above all, the theory whereby not granting immunity to the officials of the State would be a way of getting around the prohibition to exercise jurisdiction against the State is a logical *non sequitur*. This is shown by the fact that, in practice, the States themselves have many times waived immunity for individual officials, thereby implicitly admitting that the two immunities differ in nature.³¹

As suggested also by De Sena³² and Ballardore Pallieri³³, the error thus lies in wanting to establish, as a general rule, an almost mathematical equation

²⁸ *Milde*, Italian Supreme Court of Cassation, Case No. 1072, Decision of 21 October 2008, 92 *Rivista di Diritto Internazionale* (2009) 2, 618, 626 [*Milde*, Italian Supreme Court of Cassation]. In this sense also the *Second Report on Immunity of State Officials*, *supra* note 19, 58, para. 94 (b), which says: “State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself.”

²⁹ Thus, among others, also Fox & Webb, *supra* note 17, 269-271 and B. Conforti, ‘In Tema di Immunità Funzionale Degli Organi Statali Stranieri’, 93 *Rivista di Diritto Internazionale* (2010) 1, 5, 13.

³⁰ Not last is the case of *Jones v. Saudi Arabia* (*supra* note 18). Cf. Opinion of Lord Hoffmann in this decision (*ibid.*, 291-306, paras 36-102).

³¹ For diplomatic agents other rules of immunity apply. Cf. van Alebeek, *supra* note 26, 12-13.

³² P. De Sena, *Diritto Internazionale e Immunità Funzionale Degli Organi Statali* (1996), 35 *et seq.*

³³ V. Ballardore Pallieri, *Diritto Internazionale Pubblico*, 8th ed. (1962), 371.

between the actions performed as an official and the actions of the State.³⁴ As Frulli has shown, the intellectual framework of a similar concept of ‘collective responsibility’ has a Kelsenian imprint: the actions of the official are not attributable to the individual as such, but to the individual as an organ of the State.³⁵ The individual’s behavior should therefore generally be attributed to the State and only as an exception, to the individual as well. This is a conclusion that is also reached in the *Third Report on Immunity of State Officials From Foreign Criminal Jurisdiction* of the International Law Commission (ILC), which, citing the Condorelli brief of appearance in *Djibouti v. France*, claims that “[s]uch acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ”.³⁶ This explains the aforementioned extreme caution used by the courts in admitting civil jurisdiction against the individual State official, as it could automatically imply the exercise of jurisdiction against the State on behalf of which that official is acting. It is interesting to note how organicistic this interpretation is. Even if it is obvious, in a general way, that “[a]ll rational action is in the first place individual action. Only the individual thinks. Only the individual reasons. Only the individual acts”³⁷ and that therefore “States can only act by and through their agents and representatives”,³⁸ in the scenario just described, the individual disappears and everything is attributed only to the State.³⁹

³⁴ The Supreme Court of the United States in the case of *Yousuf v. Samantar and Others*, Decision of 1 June 2010, (2010) 130 S. Ct. 2278, 2292, recognized the inapplicability of the rules of the *Foreign Sovereign Immunities Act* (90 Stat. 2891) to the individual officials of the State. This is an important step in view of a distinction between the two types of immunity.

³⁵ H. Kelsen, *Principles of International Law*, 2nd ed. (rev. & ed. by R. W. Tucker) (1967), 207.

³⁶ ILC, *Third Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/646, 24 May 2011, 32-33, para. 58 (note 126) [ILC, Third Report on Immunity of State Officials]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Verbatim Record of the Public Sitting held on Tuesday 22 January 2008, Doc CR 2008/3, 22 January 2008, 9, para. 23.

³⁷ L. von Mises, *Socialism: An Economic and Sociological Analysis* [1932] (1981), 97.

³⁸ *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, Advisory Opinion, PCIJ Series B, No. 6 (1923), 22.

³⁹ These concerns are also shared by B. Stephens, ‘Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses’, 44 *Vanderbilt Journal of Transnational Law* (2011) 5, 1163, 1179.

The well-known case of *Princz v. Federal Republic of Germany* is a good example in which the perspective of individual responsibility is entirely overlooked and replaced by the holistic paradigm of collective guilt. In particular, in the *Dissenting Opinion* in the second degree judgment, Judge Wald supports the theory of the implied waiver of immunity by Germany, claiming that ‘Nazi Germany’ could have realized that “it might one day be held *accountable for its heinous actions* by any *other state*, including the United States”.⁴⁰ Almost as if those “heinous acts” had not been the work of several commanding individuals and their various executors, but of an imaginary ‘Nazi Germany’ conceived as a physical person capable of weighing the future consequences of its actions!

According to Hannah Arendt, the defense of Adolf Eichmann, for whom immunity was denied, *ratione materiae*, by the Israeli Supreme Court, promptly tried to prove the innocence of the defendant on an argument that we could define as exquisitely Kelsenian, i.e. that Eichmann was nothing but a “tiny cog” of the *Third Reich*.⁴¹ Eichmann was the incarnation of the subordinate bureaucrat, a mere executor of orders from above, convinced that he did not have to answer to himself and to others for his actions. It is the State – claimed the defense – that ordered certain actions, and only it can be held responsible. Now, equating functional immunity and State immunity, on the one hand, and superimposing criminal and civil responsibility on the individual with the international liability of the State, on the other, has the effect of legitimizing, without realizing it, reasonings of this kind. The celebrated *McLeod* case is a textbook example of this proposition: “[w]hether the process be criminal or civil”, said Secretary of State Webster, clarifying the position of the United States in the controversy,

⁴⁰ Dissenting Opinion of Judge Wald, *Hugo Princz v. Republic of Germany*, United States Court of Appeals, District of Columbia Circuit, Judgment of 1 July 1994, (1994) 26 F.3d 1166, 33 ILM 1483, 1494, 1502 (para. 88) (emphasis by the author).

⁴¹ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* [1965] (1975), 289. Vasilij Grossman, in his novel ‘Everything Flows’, a ferocious testimony and an implacable denunciation of Stalinism, had Soviet informers on trial speak these words: “Why on earth do you want to accuse little fish like us? Start with the State, judge it. After all, our guilt belongs to it, so judge it.” V. Grossman, *Tutto Scorre* (1987), 79 (cited in accordance with the Italian edition; translation by the author).

“the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of government, and even from the operations of public war”.⁴²

Along the lines of the historic *McLeod* case is the judgment, harshly criticized by Cassese,⁴³ on the *Lozano* case, in which the U.S. soldier responsible for the death of the agent Nicola Calipari and wounding of the Italian journalist Giuliana Sgrena at a checkpoint in Iraq, was not subject to criminal trial, also on the basis of the qualification of the soldier’s act as coming within the terms of *acta jure imperii*:

“[t]he rule of functional immunity is the natural corollary of the principle, also customarily recognized, of the ‘restricted’ immunity of the States of foreign jurisdiction for civil liability deriving from activities of an official nature, *jure imperii*, materially performed by its officials.”⁴⁴

As Trapp clarifies, the ‘*McLeod* principle’ is thus “one of non-concurrence of responsibility to the effect that when a State is responsible for conduct, the

⁴² Cf. *McLeod*, 20 November 1854, FO 83. See *Letter of Mr. Daniel Webster to Mr. Crittenden*, 15 March 1841, 29 *British and Foreign State Papers* (1840-1841), 1139, 1141. During the rebellion against the British in Ontario in 1837, the Canadian rebels occupied an island on the Niagara river, where they were aided by the Americans. To stop the Americans from continuing to give aid to the rebels, the British invaded American territory to destroy the ship (*Caroline*), they had been using to transport supplies and munitions. A few years later, in 1840, an Englishman who had participated in that raid, by the name of *McLeod*, was arrested while on a visit to New York. By explicit admission of the American Secretary of State, “after the avowal of the transaction [...] authorized and undertaken by the British Authorities, individuals concerned in it ought not [...] to be holden personally responsible in the ordinary tribunals [...] for their participation in it”. See *Letter of Mr. Webster to Mr. Fox*, 24 April 1841, 29 *British and Foreign State Papers* (1840-1841), 1129, 1131.

⁴³ A. Cassese, ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case’, 6 *Journal of International Criminal Justice* (2008) 5, 1077, 1087-1089.

⁴⁴ *Lozano Case*, Italian Supreme Court of Cassation, Case No. 31171, Decision of 24 July 2008, 91 *Rivista di Diritto Internazionale* (2008) 4, 1223, 1232 (translation by the author).

individual acting on behalf of the State will not be”.⁴⁵

In this connection, it is also important to clarify that the interpretation offered by a certain part of the doctrine and case law,⁴⁶ claiming that the functional immunity of the individual official should be denied and the individual subject to criminal proceedings (as well as civil, if necessary), on the basis of the qualification of grave violations of human rights as *ultra vires* acts is equally unacceptable. This qualification, rejected by the predominant case law⁴⁷ and also by Italy in the controversy on the *Jurisdictional Immunities of the State*, lends itself to the objection on the basis of which rarely can acts of this nature be committed ‘in a private capacity’. Rather, the use of an *escamotage* of this kind seems useful as an indication or symptom of increasing sensitivity favorable to the identification of the personal responsibility of the individual official, separate and different from that of the State,⁴⁸ also in case of the ‘official’ nature of the

⁴⁵ K. N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (2011), 96. As the *Lozano* case shows, and in contrast with Trapp’s premise, “the movement away from the exclusive responsibility of states” (*ibid.*, 99) is far from complete. Cf. *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 October 1997, 110 ILR 607, 707-708, para. 38.

⁴⁶ Cf. Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 63, 88-89, para. 85.

⁴⁷ “It is [...] difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity.” *Jones v. Saudi Arabia*, *supra* note 18, 286, para. 19.

⁴⁸ See, e.g., *Charter of the International Military Tribunal*, 8 August 1945, Art. 7, 82 UNTS 279, 288: “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” This provision was later taken up in the Statutes of all the international tribunals established during the 20th century. In one decision, the Tribunal of Nurnberg, quoting Art. 228 of the *Versailles Treaty* and an *obiter dictum* in the case *Ex Parte Quirin and Others*, Supreme Court of the United States, Judgment of 31 July 1942, (1942) 317 U.S. 1, reiterated that “[t]he authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”. *In Re Goering and Others*, International Military Tribunal (Nuremberg), Judgment of 1 October 1946, published in *Trial of Major War Criminals* (1947), Vol. I, 171, 223 [In Re Goering and Others, International Military Tribunal]. For a criticism, C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 98-105. In the *Eichmann* case, the Israeli Supreme Court denied the functional immunity of the defendant insofar as “those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission”. *Attorney-General of the Government of Israel v. Eichmann*, Israel Supreme Court, Judgment of 29 May 1962, 36 ILR 277, 308, 309-310, para. 14. Cf.

actions committed.⁴⁹

The question is not, in this case, in what capacity, official or otherwise, the individual committed a certain criminal action, but simply whether he, given a moral choice, decided to perform a grave violation of international humanitarian law or human rights law. In following the doctrine criticized here, Frulli thus suggests guaranteeing, in any case, immunity for acts *intra vires*.⁵⁰ The risk of such a position is to partially identify individual-official activity with State activity, in the fear that one could violate the doctrine of the *Act of State*. Actually, for any type of criminal act, there is never a complete overlap between the State's activity and the activity carried out by the individual, considering that judgment impinges, so to speak, on individual's adherence to the act of State and not on the act of State itself, and thus the exercise of jurisdiction against the individual for *jure imperii intra vires* cannot be seen as an improper interference in the internal affairs of the State, exactly as it is not in the case of exercising jurisdiction against an individual for *acta jure imperii ultra vires*.

D. Individual Responsibility of State Officials Differs Greatly From State Responsibility

It should be in the specific interest of those who appeal to an ethics of principles and claim a greater role of the individual in international society to reject the aforementioned abstractions of 'specification' and 'collective guilt', holding the individual responsible for his actions even when he acts in the role of State agent. To say it in the words of Cassese,

also the statement by Prof. C. Tomuschat at a hearing held on 12 September 2011 in the case *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Verbatim Record of the Public Sitting held on Monday 12 September 2011, Doc CR 2011/17, 27 (para. 12). [ICJ, *Jurisdictional Immunities of the State*, Verbatim Record of the Public Sitting held on 12 September 2011].

⁴⁹ As Akande and Shah point out: "Whether or not acts of state officials are regarded as official acts does not depend on the legality, in international or domestic law, of those acts. Rather, whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done and the means through which the official carried them out." D. Akande & S. Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 21 *European Journal of International Law* (2010) 4, 815, 832.

⁵⁰ Frulli, *supra* note 21, 57-58.

“trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, not all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators. Victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have paid for their crimes.”⁵¹

This is not dissimilar from the reasoning of the judges of the International Court of Justice (ICJ) Shi and Vereschetin in their *Joint Declaration* on the case of *Bosnia Herzegovina v. Yugoslavia*: “[t]here can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs”.⁵² *Vice versa*, recognition of a criminal or civil responsibility of the State *under international law* exposes States to the risk that the court will merely ‘use’ a defendant – for whom, after the final condemnation, it does not even request or obtain extradition⁵³ – so that the indemnity is effectively paid exclusively by the State of which he is a citizen.⁵⁴

Pointing to the potential parallel between the responsibility of the State and the criminal or civil responsibility of the juridical person, in particular the *corporation*, typical of internal legal orders, serves no purpose.⁵⁵ In this connection, Posner and Sykes submit, indeed, that the international responsibility of the State, in particular when aggravated by grave human rights

⁵¹ A. Cassese, ‘Reflections on International Criminal Justice’, 61 *Modern Law Review* (1998) 1, 1, 6.

⁵² Joint Declaration of Judges Shi & Vereshchetin, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 1996, 595, 631, 632; H. Shawcross, ‘Let the Tribunal Do its Job’, *The New York Times* (22 May 1996), A17.

⁵³ Seventeen defendants sentenced to life imprisonment for Nazi massacres have never been extradited, including Milde. Germany has, in fact, refused repeatedly to arrest them. Cf. N.N., ‘Stragi Naziste: 17 Ergastolani non Scontano la Pena’, *La Stampa* (29 May 2011), available at <http://www.lastampa.it/2011/05/29/esteri/stragi-naziste-ergastolaninon-scontano-la-pena-HV3Vvy6wzKK5igbqDg5tNL/pagina.html> (last visited 31 January 2014).

⁵⁴ Likewise, Gattini, *supra* note 25, 191: “It would be inequitable to make the prospect of gaining civil damages from a foreign state dependent upon whether or not the individual defendant still happens to be alive.”

⁵⁵ Of a ‘legal person’ mention is made, for example, by J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), 30. Cf. Barboza, *supra* note 17, esp. 365.

violations,⁵⁶ resembles the *vicarious responsibility* of the *corporation*, by virtue of the fact that the individual officials of the State, like the employees or workers of the company, “will not bear the costs [...] and their personal assets may be far smaller than the harm that they have caused”;⁵⁷ moreover “[e]ven though a bureaucratic entity does not maximize profit, it will often face a budget constraint and will prefer not to waste resources”.⁵⁸ Basically, what Posner and Sykes are saying is that the institution of civil liability of the State is an efficient mechanism for the prevention of international crimes because, on the one hand, it is able to absorb the costs of the reparations (of war and other events) more easily and, on the other, because it will force the democratic State that does not want to dissipate resources *publicis usibus destinata* to exercise greater control over its agents.⁵⁹ These are theoretical analyses that do not take adequately into consideration the fact that the incentives for a State to avoid expenditures to which its taxpayers object may differ depending on the political class in each case, as well as on the historical era. The same can be said for the real ability of the democratic State to control its subjects effectively in order to prevent the commission of international crimes. The authors themselves are skeptical of the fact that “a prospect of reparations after the end of conflict will necessarily discipline states during conflict”.⁶⁰ A mechanism based on the civil liability of the State as a life preserver in case of the insufficiency of private assets would risk producing a *moral hazard* in the individual officials of the State who, aware of being called upon to respond – in the worst cases jointly with the State of which they are citizens and in the best (according to the ‘*McLeod* principle’) of not having to respond at all – will actually have an incentive to commit violations of international humanitarian or human rights law.⁶¹

Aside from these observations concerning the different nature of the State as a subject of international law, with respect to the corporation, it should be said that international law, and therefore also State responsibility, is neither civil nor criminal, but *sui generis*, and this is made clear in the *First Report on State Responsibility* of the ILC, mentioning Kelsen himself: “the law of international

⁵⁶ Cf. B. I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (2009), 17.

⁵⁷ E. A. Posner & A. O. Sykes, ‘Economic Analysis of State and Individual Responsibility Under International Law’, 9 *American Law and Economics Review* (2007) 1, 72, 87.

⁵⁸ *Ibid.*, 89.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 100.

⁶¹ Similar considerations are found in F. Rosenfeld, ‘Individual Civil Responsibility for the Crime of Aggression’, 10 *Journal of International Criminal Justice* (2012) 1, 249, 261.

responsibility is neither civil nor criminal, and that it is purely and simply international".⁶² The distinction between individual responsibility and State responsibility is particularly clear if one considers that "the element of *faute* is not a necessary condition to determine liability of a State under contemporary international law"⁶³ and that "the defenses for the law of individual responsibility generally are wider".⁶⁴ This means that a State is sometimes responsible to another under international law, even in the absence of a finding of the elements of guilt or malice of the agent who is the author of the act,⁶⁵ or in other words, as Nollkaemper writes, "[t]he conduct of a State as a legal person is assessed against an objective standard".⁶⁶ This discrepancy in the test of the two liabilities is explained precisely in the light of the fact that under international law, the responsibility of the State has an entirely different nature and is independent of individual criminal and civil responsibility,⁶⁷ because "[t]he State is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to acts of the private person".⁶⁸ Thus, "[t]he law of State responsibility belongs to a separate branch of international law and does not depend on nor imply the legal responsibility of

⁶² ILC, *First Report on State Responsibility*, UN Doc A/CN.4/490/Add.1, 1 May 1998, 7-8, para. 53. See also Kelsen, *supra* note 35, 196.

⁶³ P. Dumberry, 'The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice', 49 *German Yearbook of International Law* (2006), 413, 418. Cf. also A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003) 3, 615, 630.

⁶⁴ Nollkaemper, *supra* note 63, 635.

⁶⁵ *Selmouni v. France*, ECtHR Application No. 25803/94, Judgment of 28 July 1999, 26-27, para. 87.

⁶⁶ Nollkaemper, *supra* note 63, 617.

⁶⁷ Thus also Stephens, *supra* note 39, 1180-1181. Cf. Opinion of Lord Hutton, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Others*, United Kingdom House of Lords, Judgment of 24 March 1999, 38 ILM 581, 627, 640 [Pinochet III]: "This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in Article 4 and the commentary thereon in the 1996 draft Report of the International Law Commission." The report mentioned here is the *Draft Code of Crimes Against Peace and Security of Mankind*, Yearbook of the International Law Commission, Vol. II (2) (1996), 17, para. 50. Similar conclusions are found in the *Draft Articles on State Responsibility*, Art. 58, *supra* note 15, 30.

⁶⁸ R. Jennings & A. Watts, *Oppenheim's International Law*, Vol. 1, 9th ed. (1992), 501 (note 13).

individuals”.⁶⁹

There is no intention here to propose doing away with the international responsibility of the State for the commission of *acta jure imperii* in violation of imperative norms,⁷⁰ but only to stress the impossibility of superimposing or juxtaposing⁷¹ two different types of responsibility, individual criminal and civil responsibility, on the one hand, and the international responsibility of the State, on the other. The latter remains firmly in place even in the absence of the exercise of jurisdiction by a court.⁷² Indeed, on a closer look, determination of the international responsibility of a State is not even one of the tasks of the national courts⁷³ which, on the basis of international law, are called upon to judge only on the responsibility of a criminal and civil nature of individuals. This, however, does not mean that starting from the same wrongful act it may not be possible to postulate, in accordance with the provisions of the ILC,⁷⁴

⁶⁹ E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 5.

⁷⁰ Rather, as pointed out also in the *Draft Articles on State Responsibility*, Art. 7, *supra* note 15, 26, “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions”. Thus also *Convention Respecting the Laws and Customs of War on Land*, 18 December 1907, Art. 3, 36 Stat. 2277, 2290, whereby “[a State] shall be responsible for all acts committed by persons forming part of its armed forces”. Only in the measure in which it is proven that the act committed by the official agent of the State has a private nature or is committed by a subject in his position as a private citizen, then it will not be possible to attribute the responsibility to the State to which that individual belongs. *Draft Articles on State Responsibility*, Commentary to Art. 7, *supra* note 15, 46-47, paras 7-9. The occurrence of such a condition is unlikely in case of war. Cf. Stammeler, *supra* note 15, 44.

⁷¹ *Contra* Borsari, according to whom “the ontological jumble” between the responsibility of the individual and the responsibility of the state would be “inevitable”. R. Borsari, *Diritto Punitivo Sovranazionale Come Sistema* (2007), 444 (translation by the author).

⁷² Similarly Frulli, *supra* note 21, 160 who states: “We have to reiterate that, even if we think the state cannot be brought to judgment before a civil court on the internal plan, it is responsible for the actions performed by its organs acting *ultra vires* in violation of international law” (translation by the author).

⁷³ The *Draft Articles on State Responsibility* (*supra* note 15) do not clarify who has jurisdiction. In general, we can say that the International Court of Justice (ICJ) can decide for the cases in which it has jurisdiction, or otherwise other international courts that the State has authorized by means of an agreement to resolve disputes on this subject.

⁷⁴ ILC, *Third Report on Immunity of State Officials*, *supra* note 36, 32-33, para. 58: “[A] ttributing to the State actions performed by an official in an official capacity does not mean that they cease to be attributed to that official.”

a dual responsibility or, better to say, a “dual attribution of responsibility”.⁷⁵ Rather, the same international custom shows that “a limited number of acts can lead both to State and individual responsibility”.⁷⁶ The point is not, actually, whether the State should or should not be charged with any responsibility, but what type of responsibility should be attributed to it, or, whether it is acceptable that an international custom should develop favorable to the recognition of the criminal and civil responsibility of the State for international crimes.

This ontological jumble of different types of responsibilities⁷⁷ derives from an excessively holistic approach to reality and produces paradoxical consequences. If, for example, Chile were effectively responsible for the atrocities against the opposers of the regime, why the decision to try General August Pinochet and why not sue the Chilean State for damages? Perhaps because, aside from the fact that State immunity would probably have been recognized,⁷⁸ it would have seemed sinful more than twenty years after the wrongful deeds to demand reparation from the Chilean taxpayers who, from the standpoint of criminal law could not be said to be responsible for the crimes committed by the government of General August Pinochet.⁷⁹ The danger, in short, is that of a paradoxical redistributive effect, or “churning”, as the Hungarian philosopher Anthony de Jasay⁸⁰ calls it, whereby in this particular case, those relatives of the tortured victims who had not taken their case to court might in theory

⁷⁵ Nollkaemper, *supra* note 63, 620.

⁷⁶ *Ibid.*, 618-619.

⁷⁷ In ILC, *Preliminary Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/654, 31 May 2012, 5, para. 17, the different nature of the two responsibilities is not made clear, claiming that “there could scarcely be objective grounds for asserting that one and the same act of a an official was, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, was not attributed as such and was considered to be only the act of an official”.

⁷⁸ Cf. Opinion of Lord Hutton, *Pinochet III*, *supra* note 67, 640: “Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom.”

⁷⁹ Lord Hoffmann also grasps this contradiction in *Jones v. Saudi Arabia* observing that: “It would be strange to say [...] that the torture ordered by General Pinochet was attributable to him personally for the purposes of criminal liability but only to the State of Chile for the purposes of civil liability.” Opinion of Lord Hoffmann, *Jones v. Saudi Arabia*, *supra* notes 18 & 30, 299, para 68.

⁸⁰ A. de Jasay, *The State* (1998), 254-266. Cf. the statement of Prof. Christian Tomuschat at the hearing of 12 September 2011: “When talking about the responsibility of a State, one really talks about the responsibility of a people, many members of which may also have been the victims of the same régime that caused injury through breaches of international

have been required to indemnify, as taxpayers of the Chilean State, the victims who had.⁸¹ As Barboza neatly sums it up: “[c]reating State Crimes would mean to introduce a type of responsibility where the innocent are punished together with the guilty”.⁸² Even Nollkaemper is aware of the problem and, for the cases of international crimes committed “by a small group of leaders of a State”, he wonders whether it is “still useful to strive for separate responsibility of the state”.⁸³ Actually, the manner in which Nollkaemper poses the question is not entirely correct, if it is true that he himself, shortly after, says that “it would be odd [...] to consider that a president of a state should have to be imprisoned for many years, whilst leaving in place the structures that made possible and facilitated his acts”.⁸⁴ The international responsibility of the State remains secure even in this case, therefore, until it has guaranteed a reparation which, in a case like this, will consist of stopping the wrongful acts or in eliminating the norms that authorize or facilitate those acts. What will be lacking, however, by reason of the recognition of the principle of immunity, will be a civil or criminal responsibility of the State.

In this connection, the words written by Hannah Arendt in 1963 still apply today, that is

“a thing called collective guilt does not exist and much less is there a thing called collective innocence. If this were not so, no one would be guilty or innocent. Naturally this is not to deny that there is such a thing as political responsibility. This, however, is independent from that which can be done by an individual who belongs to the

law.” ICJ, *Jurisdictional Immunities of the State*, Verbatim Record of the Public Sitting held on 12 September 2011, *supra* note 48, 27 (para. 12).

⁸¹ The potential clash between the person who commits the misdeed and the person who is effectively called to respond in monetary and patrimonial terms is amplified, among other things, following the succession between States, as in the case of the *Third Reich* and the *Bundesrepublik*. This led to the proposal by Stern, to cut the cord of succession in case of violations of the rules of *jus cogens*. B. Stern, ‘Responsabilité Internationale et Succession d’Etats’, in Boisson de Chazournes & Gowlland-Debbas, *supra* note 17, 327, 353 *et seq.* Actually “the solution depends on the different factors and circumstances involved [...] on the type of succession of States”. Dumberry, *supra* note 63, 419-420.

⁸² Barboza, *supra* note 17, 369.

⁸³ Nollkaemper, *supra* note 63, 625.

⁸⁴ *Ibid.*

group, and therefore cannot be judged in moral terms, or subjected to the scrutiny of a criminal court”.⁸⁵

The responsibility of the State *under international law* will never be either civil or criminal, but simply international. Even the International Military Tribunal of Nuremberg was clear on this point, stating that “[c]rimes are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁸⁶ And in criminal procedures with civilians bringing charges, in which a State is the defendant, it cannot be said that the substance changes.⁸⁷ Quite the contrary, sometimes the civil reparation is ideally transformed into a sort of fine, a ‘punishment’ to inflict on the State to which the official/executor belonged.⁸⁸

Following Nollkaemper’s reasoning, the exercise of jurisdiction against a single individual may then serve also as a form of reparation to the victims, as occurred, for example, in the *Rainbow Warrior* case.⁸⁹ In this connection, the International Court of Justice (ICJ) could, therefore, have ordered Germany to

⁸⁵ Arendt, *supra* note 41, 297-298.

⁸⁶ *In Re Goering and Others*, International Military Tribunal, *supra* note 48, 223.

⁸⁷ Thus also Posner, & Sykes, *supra* note 57, 96, according to which “the distinction between ‘civil’ and ‘criminal’ penalties for corporations and states is a meaningless one”.

⁸⁸ As emphasized also by Chiavario: “Behind the apparent battle ‘for damages’ demands of authentic justice in broader terms often, and almost inevitably, make an appearance and there may even be more or less admitted pressure to obtain revenge through the public hand: while the former are perfectly understandable, the latter are certainly not to be condoned.” M. Chiavario, *Diritto Processuale Penale, Profilo Istituzionale* (2007), 197 (translation by the author). On the undoubtedly more effective nature of the civil procedure, rather than the criminal, toward a State, see Fox & Webb, *supra* note 17, 93. Even the Military Court of Appeals of Rome, in its decision condemning Max-Josef Milde, highlights the unquestionably “afflictive character” of the reparation imposed on Germany. *Milde*, Military Court of Appeals of Rome, Decision No. 72/2007 (copy on file with author). And effectively, the Italian Constitutional Court in its Decision of 14 July 1986, Case No. 184, *Informazione Previdenziale* 1987, 664 states that “it is impossible to deny or consider unreasonable the fact that civil liability for an illicit act is able to provide not only for the restoration of the property of the damaged party, but among other things, at times, also and at least in part and additionally, may serve to prevent and punish the illicit act, as it does in the case of reparation for damages unrelated to property resulting from a crime. Alongside criminal responsibility, civil responsibility can very well fulfill a preventive and sanctioning role” (translation by the author).

⁸⁹ Nollkaemper, *supra* note 63, 636 and thereafter *contra* see ILC, *Fifth Report on State Responsibility*, UN Doc A/CN.4/291 and Add 1 & 2, Yearbook of the International Law Commission (1976), Vol. II (1), 3, 33, para 101.

fulfill its obligation as identified by the primary rules of international law, to punish the individual officials of the State, authors of war crimes and crimes against humanity against Italian civilians and military personnel, in particular by making their extradition to Italy possible.⁹⁰ In the past, in fact, there had been some pronouncements by national and international tribunals with which the principle of State immunity was saved while, at the same time, the exercise of criminal jurisdiction and, in the United States, civil jurisdiction as well,⁹¹ was guaranteed against the guilty parties. In this way, for example, it occurred for the much-criticized *Al-Adsani* case to be heard, where immunity was recognized for the State (Kuwait), but not *ratione materiae* for the individual officials of the State, guilty of torture of the plaintiff in the suit. The English Courts gave the applicant leave to serve the proceedings on the individual defendants.⁹² This is justified on the basis of the fact that international custom does not envisage the obligation to recognize the functional immunity from civil jurisdiction of the individual State officials for grave violations of human rights.⁹³

⁹⁰ Nollkaemper, *supra* note 63, 638.

⁹¹ Stephens mentions a single case outside the United States, in which civil jurisdiction was exercised against an individual official of the State, specifically in the *Milde* case. In it, however, this choice seemed due more than anything else to the need to oblige the Federal Republic of Germany to respond jointly with the defendant. After the charge relative to the order of reparation by Germany following the decision of the ICJ had fallen, it could be said that the decision of the Italian judges was *a fortiori* innovative. Cf. Stephens, *supra* note 39, 1177 and on the *Milde* criminal case see also G. Boggero, 'Giustizia per i Crimini Internazionali di Guerra Nella Strage di Civitella?', in Procura Generale Militare Presso la Corte di Cassazione (ed.), *Casi e Materiali di Diritto Penale Militare* (2013), 277.

⁹² *Al Adsani v. United Kingdom*, ECtHR Application No. 35763/97, Judgment of 21 November 2001, 4, paras 14-15. Quite surprisingly, in the case *Jones and Other vs. United Kingdom* the European Court of Human Rights decided – it is not clear how deliberately – not to take into account what the English courts had held in the *Al-Adsani Case* and applied the rationale of State immunity also to immunity *ratione materiae*. See *Jones and Others vs. United Kingdom*, ECtHR Application No. 34356/2006 & 40528/2006, Judgment of 14 January 2014, paras 199-215. See also P. Webb, 'Jones v. UK: The Re-Integration of State and Official Immunity', *EJIL: Talk!* (14 January 2014), available at <http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/> (last visited 31 January 2014).

⁹³ Stephens, *supra* note 39, 1175 and Institute of International Law, 'Resolution on the Immunity From Jurisdiction', Art. III (1), *supra* note 19, 2. According to Focarelli there appears to be a tendency in act "to transplant the legal regime of functional immunity operating in [...] [international tribunals] to the domestic sphere". C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (2012), 388-389.

E. Conclusion

The safeguard of fundamental human rights, in times of war as in times of peace, cannot but pass through an exercise of universal jurisdiction, both criminal and civil, against those really responsible for their violation: individuals. *De lege ferenda*, therefore, the applicability of functional immunity for the individual – aside from temporary immunity *ratione personae* and provisions of exception to conventional rules – should not be recognized, whatever the act committed by the accused and/or defendant, including *acta jure imperii*. The *puissance publique* of the State would effectively remain immune and inappellable at the jurisdictional level, while only the single commission of the ‘act of dominion’ by the individual would be subject to jurisdiction and judgment of criminal and/or civil responsibility.⁹⁴ Since there can be no superimposition between the organ of the State and the State to which it belongs, there can thus also be no application *ex officio* of immunity for the individual-organ as there is for the State.⁹⁵ Only the awareness that “a person and his conduct cannot be split from each other” and that the latter “cannot be transferred to another person, whether physical or moral”⁹⁶ can persuade doctrine and jurisprudence of the logical necessity to exercise criminal and civil jurisdiction for grave violations of international humanitarian law and human rights law exclusively against individuals while, however, holding firm to the right of immunity for States.⁹⁷

⁹⁴ Of the same opinion also Stephens, *supra* note 39, 1179: “Both the state and the official can be held responsible for an act committed in the exercise of state authority, and an official can be denied immunity even if the state is deemed to be immune.” And also: “And in both situations, a decision to deny immunity to the individual is separate from whether the State itself is immune—a distinction that reflects the different policy issues underlying state and official immunity.” *Ibid.*, 1182.

⁹⁵ Thus also Frulli, *supra* note 21, 60.

⁹⁶ Barboza, *supra* note 17, 364.

⁹⁷ Also sharing the ratio of a choice of this kind would seem to be the case of C. I. Keitner, ‘Officially Immune?: A Response to Bradley and Goldsmith’, 36 *Yale Journal of International Law Online* (2010), 1, 12: “National courts can, in appropriate circumstances, impose legal consequences for such conduct. This is true even though the State might also bear responsibility, and even though the State itself might be immune from suit in a foreign court.” Similar conclusions appear also to be reached by the Rapporteur of the Netherlands Society of International Law. Cf. M. M. T. A. Brus, ‘No Functional Immunity of State Officials for International Crimes: A Principled Choice With Pragmatic Restrictions’, *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* [Announcements of the Dutch Society of International Law] No. 138 (2011), 37, esp. 64-65. See van Alebeek, *supra* note 26, 34 (note 147) and Institute of International Law, ‘Resolution on the Immunity From Jurisdiction’, Art. IV, *supra* note 19, 2, according to which the denial

of functional immunity is not of any effective prejudice “to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State”.