

## COMMENTARY

### State Immunity for International Crimes: The Case of Germany versus Italy before the ICJ

#### Jurisdictional Immunities of the State (Germany v. Italy)

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On 23 December 2008, the Federal Republic of Germany (“Germany”) instituted proceedings against the Italian Republic (“Italy”) before the International Court of Justice (“ICJ”). This recourse as stated by Germany in its application is “the only remedy available to Germany in its quest to put a halt to the unlawful practice of the Italian courts, which infringes its sovereign rights” by “repeatedly disregard[ing] the jurisdictional immunity of Germany as a sovereign State”.<sup>1</sup> The purpose of this commentary is to trace back the position of the Italian judicial bodies which lies at the heart of this recourse and to identify the main issues which are expected to be litigated before the ICJ.

#### 1. THE *FERRINI* AND *MILDE* CASES: THE OVERRIDING CHARACTER OF FUNDAMENTAL HUMAN RIGHTS OVER THE NOTION OF STATE IMMUNITY

As noted by Germany, the critical stage in the Italian jurisprudence was reached by the judgment of the Supreme Court of 11 March 2004 in the *Ferrini Case*.<sup>2</sup> In that case, the Italian Supreme Court (*Corte di Cassazione*) was seized of a civil claim brought against Germany by Mr. Ferrini, an Italian whom German armed forces during the Italian occupation, in the period between 1944 and 1945, deported

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<sup>1</sup> Jurisdictional Immunities of the State (Germany v. Italy) Application of the Federal Republic of Germany, 23 December 2008, p. 2, available at [t < http://www.haguejusticeportal.net/eCache/DEF/10/137.html >](http://www.haguejusticeportal.net/eCache/DEF/10/137.html).

<sup>2</sup> *Ferrini v. Repubblica Federale di Germania, Corte di Cassazione*, Joint Sections, Judgement 6 November 2003-11 March 2004, n. 5044 (“*Ferrini Case*”).

to Germany where he was subjected to forced labour. Mr. Ferrini asked for compensation for the civil damages caused by his deportation and forced labour. Both the Tribunal and the Court of Appeal dismissed the claim on the ground that Italian courts lacked jurisdiction over the actions undertaken by Germany as they were an “expression of its sovereign authority”. This finding was based on the premise that Germany should enjoy immunity from the jurisdiction of foreign courts for the acts *iure imperii* (acts of public power). The Supreme Court overturned this position. After a detailed review of the jurisprudence (including of the European and international courts and that of foreign courts), it held that, while customary law prescribes immunity from the jurisdiction of a foreign state for acts undertaken by a state as “expression of its sovereign authority”, such immunity cannot be accorded when similar acts amount to the commission of international crimes. In particular, the Court observed that the commission of international crimes constitutes a grave violation of fundamental human rights and encroaches upon universal values of the world community. These values are protected by peremptory or *ius cogens* norms, which are located at the top of the hierarchy of norms in the international legal order.<sup>3</sup> The nature of these peremptory norms underlying the prohibition of international crimes, in the Court’s view, entails, *inter alia*, that national courts possess universal jurisdiction over them in both criminal and civil proceedings.<sup>4</sup> Furthermore, they take precedent over conflicting customary or treaty law, in light of their superior hierarchical position.<sup>5</sup> In the case at hand, the Court found that there was an “antinomy” between two concurring principles: one, which is enshrined in the state immunity rule, is devoted to the protection of the sovereign authority of a state; the other, which is enshrined in peremptory norms proscribing international crimes, is devoted to the protection of fundamental human rights. Such antinomy or conflict had to be resolved, in the Court’s position, in favour of the latter.<sup>6</sup> In support of this conclusion, the Court cited several cases of both foreign and international courts. These include a judgement of the Supreme Court of Greece (“*Prefecture of Voiotia v. Germany*”<sup>7</sup>), the holdings in the *Furundžija* and *Kupreskic et al.* Judgements before the International Tribunal for the former Yugoslavia (“ICTY”) and the strong joint dissenting opinion of six judges in the case of *Al-Adsani v. United Kingdom* before the European Court of Human Rights.<sup>8</sup> In reviewing the international practice, the Court also encountered conflicting cases in which national courts upheld the immunity of a foreign state from the jurisdiction over international crimes allegedly committed by state agents. However, the Court clarified that this practice differs from the case at hand as it always concerned situations where the crimes were *not* committed in the forum state.<sup>9</sup> This remark

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<sup>3</sup> *Ferrini Case*, para. 9.

<sup>4</sup> *Ferrini Case*, para. 9.

<sup>5</sup> *Ferrini Case*, para. 9.1.

<sup>6</sup> *Ferrini Case*, para. 9.1.

<sup>7</sup> *Prefecture Voiotia v. Federal Republic of Germany*, No 11/2000 of 4 May 2000.

<sup>8</sup> *Al-Adsani v. United Kingdom*, 34 ECHR, 2002, 280.

<sup>9</sup> *Ferrini Case*, paras 10-11.

brought the Court to implicitly admit that, unlike the case under examination, if the international crimes were perpetrated in a state other than the forum state, the foreign state could plead its immunity from jurisdiction.<sup>10</sup>

Finally, the Court found support for its conclusion to remove the immunity from the jurisdiction claimed by Germany in the judicial practice related to the immunity of state officials. The Court added that such practice shows that the “functional immunity” of state agents is removed in case of state agents accused of international crimes. In the Court’s view, there would be no reason for removing the functional immunity of state agents accused of international crimes, while at the same time upholding state immunity for the same crimes.<sup>11</sup>

In conclusion, the Court dismissed the argument that Germany had immunity in relation to the civil claim alleged by Mr. Ferrini and found that he was entitled to compensation as victim of the war crime of forced labour between the period of 1944-1945.

Following this judgment more than two hundred claimants have introduced civil actions against Germany.<sup>12</sup> The subsequent jurisprudence of the Italian Supreme Court also reiterated the position held in the *Ferrini* case. In particular, the recent judgement of 21 October 2008 in the case against Josef Max Milde is worth mentioning.<sup>13</sup> That case concerned a civil action which arose from criminal proceedings brought against a German officer who was found guilty for his participation in the killing of 203 civilians (including women and children). The massacre was carried out on 29 June 1944 in the municipalities of Civitella, Cornia and S. Pancrazio, Italy. The Military Tribunal of La Spezia convicted Josef Max Milde and sentenced him to life imprisonment for the crime of murder provided for in Article 185 of the Military Italian penal code in time of war. It also upheld the complaints for compensation filed by the relatives of the victims against Germany. The Supreme Court upheld the Tribunal findings that the killing of 203 civilians amounted to a war crime and that no immunity from the proceedings could be accorded to Germany. In particular, the Court found that the exclusion of the state immunity in case of the commission of international crimes is now “a firm point” in its jurisprudence. According to the Court, it would be illogical to affirm the primacy of these fundamental human rights and then to deny the access to justice, thereby excluding the possibility to ensure the effective enforcement of those rights.<sup>14</sup> The Court also stated that it was aware of the existence of cases in which the immunity of a state was upheld even in situations where state officials were accused of international crimes. Nevertheless, the Court emphasised that

<sup>10</sup> As noted in literature, this however is in contrast with the conclusion held by the Court that *ius cogens* norms entail as legal effect the universal jurisdiction over the breach thereof, see, e.g., A. Cassese, *International Law*, 2006, p. 108. For a detailed analysis of this issue as well as of the other holdings of the Supreme Court in the *Ferrini* Case, see Pasquale De Sena and Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, EJIL, Vol. 16, 2005, pp 89-112.

<sup>11</sup> *Ferrini* Case, para. 11.

<sup>12</sup> See Application, para. 12.

<sup>13</sup> *Corte di Cassazione*- First Section, Judgement 21 October 2008-13 January 2009, n. 1072 (*Milde* Case).

<sup>14</sup> *Ibid*, paras 3-4.

the ascertainment in the judicial practice of the primacy of fundamental human rights over the rules protecting the sovereignty of a state cannot be resolved in a mere “arithmetic calculation” of the cases which affirmed such a primacy. The Court instead approached such practice with a holistic reading in which the relevance of each case as well as of the rules is not appreciated in isolation. In this regard, the Court observed that customary rules have to be analysed in their mutual interaction and position with respect to the hierarchy of values recognised in the international legal order.<sup>15</sup> In conclusion, the Court dismissed the defence of Germany on its immunity from the Italian jurisdiction and upheld the request of compensation (one million euros) in relation to nine relatives of two victims of the massacre in question who had been represented in that civil proceeding.

Following this jurisprudence, measures of constraints were also taken against German assets in Italy. In particular, a judicial mortgage was inscribed in the land register covering Villa Vigoni, the German-Italian cultural centre.<sup>16</sup>

## 2. THE GAMUT OF ISSUES BEFORE THE ICJ

The jurisprudence of the Italian courts brings into light several crucial questions which now need to be disentangled by the ICJ. These questions are summarised below.

### 2.1. THE NOTION OF IUS COGENS IN RELATION TO INTERNATIONAL CRIMES AND ITS LEGAL EFFECTS

Firstly, as a general point, the Italian jurisprudence took the firm conviction that the commission of international crimes (i.e. crimes against humanity and war crimes) violates peremptory norms which amount to *ius cogens*. This conclusion was reached in light of the fundamental human values which are protected by these norms and which lie at the peak of the international legal system. It is worth recalling that the notion of *ius cogens* originated in the treaty law in the late 1960s and its application to fundamental human rights was only held in more recent times when it appeared in two *obiter dicta* inserted by the Trial Chamber of the ICTY in the cases *Furunjia* and *Kupreskic et al.*. These *obiter dicta* were subsequently recalled by a few national courts in their judgements. The ICJ itself moved close to recognising the prominence of fundamental human rights principles, by affirming, for instance, in its advisory opinion on the legality of nuclear weapons that in the field of international humanitarian law the protection of the civilian population constitutes “intransgressible principles of international customary law” (*Nuclear Weapons Case*, para. 78). Yet, a definitive consecration by the ICJ of the peremptory character of the principles underlying the prohibition of international crimes is still yet to come.

Furthermore, the ICJ still has to pronounce on the legal effects which ensue when rules of *ius cogens* related to fundamental human rights are violated. In

<sup>15</sup> *Milde Case*, paras 4-6.

<sup>16</sup> Application, para. 11.

particular, the ICJ should make its determination as to whether the character of *ius cogens* of these provisions entails the universal jurisdiction over the violations thereof and, importantly, whether this jurisdiction also covers the requests of compensation for the victims of those crimes.

Over and above the foregoing remarks, in relation to the concrete circumstances of the Italian cases, the ICJ will also have to make the important finding as to *when*, if at any time, fundamental human rights underlying the prohibition to commit international crimes have been upgraded to the level of *ius cogens*. The ICJ might find that the notion of *ius cogens*, initially limited to the ambit of the law of treaties, has only been accepted and recognised by the international community as applicable to international criminal law in recent times. This would imply the difficult decision as to whether to retroactively apply the legal effects of *ius cogens* to violations which occurred during the Second World War, when such notion did not yet exist.

## 2.2. THE PURPORTED CONFLICT BETWEEN IUS COGENS AND STATE IMMUNITY

Secondly, the Italian Supreme Court found the existence of a normative conflict between these *ius cogens* norms and the norms of state immunity in the cited cases. Considering that the norms of state immunity constitute customary law, the Court affirmed the primacy of *ius cogens* over this law based on its hierarchically superior position. This position has also been, for instance, effectively described by the judges in the *Al-Adsani* case in their dissenting opinion:

it is not the nature of the proceedings which determines the effects that a *ius cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *ius cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere<sup>17</sup>

This conclusion appears strictly logical and formally correct from the perspective of the existing hierarchy of norms in the international legal orders and also finds echoes in the doctrine.<sup>18</sup>

However, at closer scrutiny, the issue of the interaction between peremptory norms in the field of human rights and state immunity appears much more complicated. Let us first start with the legal provisions. At the international level, the law of state immunity has been the subject of two conventions: in 1972 with the European Convention of State Immunity, within the Council of Europe and, more recently in 2004, with the United Nations Convention on the Jurisdictional Immunities of States and Their Property. Both conventions affirmed the principle of state immunity and listed the exception to such a principle, *i.e.* the conditions under which the immunity may be lifted. However, no mention is made of the *ius cogens* argument. Furthermore, the Report of the International Law Commission dealing with state responsibility provides at Article 41 that states should not

<sup>17</sup> Joint Dissenting Opinion, para. 4 in *Al-Adsani*, 34 ECHR (2002).

<sup>18</sup> *See*, for all, A.Cassese, *International Law*, Oxford, 2005, pp 105-107.

recognise as lawful the situation produced by the breach of *ius cogens*.<sup>19</sup> This position was also mentioned by the Italian jurisprudence to buttress its conclusion. However, it might be debatable *in abstracto* to argue that the acceptance of state immunity from jurisdiction is tantamount to recognition as lawful the situation produced by the breach of *ius cogens*.

Turning to judicial practice, the solution proposed by the Italian jurisprudence is far from consolidated in the case-law of national and regional judicial bodies. In particular, the judicial practice differs from the Italian jurisprudence on the analysis of its interaction with the customary rule establishing state immunity. Two different groups of cases may be distinguished. A group of cases either *conceptually* has denied that *ius cogens* prevails over non-peremptory norms or *empirically* came to the conclusion that the practice does not support the conclusion that the provision of state immunity is invalidated by conflicting peremptory norms. For instance, the House of Lords in the *Jones* case, while recognising that the prohibition of torture constitutes a peremptory norm, held the view that this does not automatically override all other rules of international law.<sup>20</sup> A similar position was also held, for instance, by a Canadian court in the case *Bouzari*.<sup>21</sup> Furthermore, the European Court of Human Rights, in deciding a case regarding civil complaints seeking compensation for alleged violations of fundamental rights by foreign states, has upheld, albeit with a thin majority, the principle of state immunity from jurisdiction over those civil suits (*Al-Adsani v. United Kingdom*).<sup>22</sup>

Another group of national cases, instead, restricted the application of the rule on state immunity. Still, the solution found was other than the purported prevalence of peremptory norms over state immunity.

In this regard, in the case of *Prefecture Voiotia v. Federal Republic of Germany* which concerned atrocities committed by Germany during its occupation in Southern Greece during the Second World War, the Supreme Court in Greece upheld the argument that violation of peremptory norms would have the legal effect of implicitly waiving the jurisdictional immunity.<sup>23</sup>

Another example is constituted by the practice of the courts of the United States based on the so-called “tort exception” to sovereign immunity recognised by the Foreign Sovereign Immunities Act (Section 1605, para. 5) (“FSIA”). According to that law, immunity is excluded when “damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign

<sup>19</sup> ILC, Article 41 on State Responsibility, *Report of the International Law Commission*, 2001, Official Records of the General Assembly, Fifty-sixth session Supp. No. 10 (A/56/10).

<sup>20</sup> *Jones v. Ministry of Interior Al-Mamlaka Al-Arabyia AS Saudiya* (The Kingdom of Saudi Arabia), 2006, UKHL (“Jones”).

<sup>21</sup> *Bouzari v. Islamic Republic of Iran* (Ontario Superior Court of Justice), 2002 OJ No. 1624, Court file No. 00-CV-201372 (“Bouzari”).

<sup>22</sup> For a detailed analysis of these cases and for a discussion of the issue of the interaction between state immunity and fundamental human rights, see A. Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lord Got it Wrong*, in *EJIL*, Vol. 18, n. 5, 2008, pp 955-970.

<sup>23</sup> *Prefecture Voiotia v. Federal Republic of Germany*, No 11/2000 of 4 May 2000 at 200.

State or of any official or employee of that foreign State while acting within the scope of his office or employment”.<sup>24</sup> A famous example of a case where the state immunity was lifted according to “the tort exception” is the *Letelier v. Republic of Chile* case in which the assassination by a foreign government agent of a former Chilean ambassador and his secretary on United States’ territory was not considered by United States courts as covered by state immunity.<sup>25</sup>

### 2.3. THE INTERPLAY BETWEEN IMMUNITY OF STATE AGENTS AND STATE IMMUNITY

Finally, a further question deserves particular attention, namely whether any guidance or indication in resolving the purported conflict between the protection of human rights and state immunity can be found in the practice developed in relation to the immunity of state officials who are alleged to have committed international crimes. The Italian Supreme Court, as already noted, held that “functional immunity” (*i.e.* the immunity enjoyed by state officials for acts performed in their official capacity) does not apply when state officials commit international crimes. It follows, in the Court’s view, that there would be no reason to lift the functional immunity in relation to state officials who commit international crimes and to retain the same immunity in relation to the state to which the officials belong.

The ICJ dealt with the issue of whether senior state officials might be tried for international crimes in the *Case Concerning the Arrest Warrant of 11 April 2000 (“Congo v. Belgium”)* delivered in 2002. In that case, the ICJ found that state officials might be prosecuted (after leaving office) for international crimes perpetrated while in office only if such crimes are qualified as acts committed in their “private capacity”.<sup>26</sup> However, the ICJ, unlike the Italian Court, did not refer to the argument of functional immunity in spelling out the conditions under which a state agent may be prosecuted for international crimes.<sup>27</sup> Rather, it preferred to allude to the distinction between acts committed by the state agent in “official” and “private” capacity. The question is whether the ICJ intends to introduce the same distinction in relation to state immunity. If this would be the case, this approach might be exposed to serious misgivings as it would give room to the application of state immunity every time the commission of international crime would be considered an act committed by a state official in his or her “private capacity”.

<sup>24</sup> FSIA, Section 1605, para. 5.

<sup>25</sup> *Letelier v. Chile*, 488 F Supp 665 (DDC 1980), 63 ILR (1982) 378.

<sup>26</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judgement, 14 February 2002, para. 61.

<sup>27</sup> The absence in the ICJ’s Judgement of the distinction between “personal” and “functional” immunity has been strongly criticised in literature: see, e.g., Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EJIL, 2002, Vol. 13 No. 4, pp 853-875.

### 3. CONCLUSION: *QUO VADIS* ?

In conclusion, as shown by the rather heterogeneous practice, the ICJ has a spectrum of different approaches to the interaction between immunity and the access to justice of victims of international crime. As Italy itself has recognised, “the ICJ’s ruling on state immunity will help to clarify this complex matter”.<sup>28</sup> A more substantive approach which places emphasis on the increasing protection of fundamental human rights *versus* the gradual erosion of state sovereignty would be welcomed by human rights advocates. However, the ICJ might also take a more cautious approach, as it was done in the case of *Congo v. Belgium*.

In that case, in dealing with the immunity of a senior state official from international crimes, the ICJ did not perceive the relationship between immunity and protection of human rights as “an antinomy”. The ICJ clarified that the legal regime of immunity is procedural in nature and does not exonerate a person from his or her individual criminal responsibility.<sup>29</sup> Therefore, the ICJ instead of affirming an unconditional prominence of peremptory norms protecting fundamental human rights over the immunity of state officials, preferred to balance the two set of rules by setting the conditions under which the immunities of state officials may be lifted. One may wonder whether the two competing norms, immunity and protection of fundamental human rights, may also be balanced and reconciled in the field of state responsibility. This would also depend on the specific circumstances of the case. The ICJ may for instance rule that state immunity from jurisdiction in civil proceedings should be accorded when the victim has access to other effective civil remedies (either in the same forum or in another). Arguably, the same immunity should however be lifted when it would represent the only way to guarantee access to justice of a victim of international crime.<sup>30</sup> Finally, the solution adopted by the ICJ might also be a formalistic one, avoiding the conceptual argument based on the prominence of the *ius cogens* over non-peremptory norms. This solution would be, for instance, that of limiting the lifting of the immunity only when both the foreign and the forum states are bound by a legal provision such as the one providing for “tort exception” which is included in the UN Convention on Immunities. It is difficult to guess which path the ICJ could follow. Only the future will tell us. What appears certain is that the ICJ would need to trace back the development of human rights norms in international law and the position held by these norms among the sources of law. This is sufficient in itself to make the litigation before the ICJ extremely interesting for international lawyer and everyone who is interested in the promotion of human rights.

<sup>28</sup> Application, p. 13.

<sup>29</sup> Judgement *Congo v. Belgium*, para. 60.

<sup>30</sup> For a thorough analysis of the right of access to justice for victims in international law in relation also to the issue of state immunity, see Francioni, *The Right to Access to Justice in International Customary Law*, in *Access to Justice as a Human Right*, Oxford 2007, pp. 47-51.