

2011

The International Law of State Immunity and Its Development by National Institutions

Christian Tomuschat

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Recommended Citation

Christian Tomuschat, The International Law of State Immunity and Its Development by National Institutions, 44 *Vanderbilt Law Review* 1105 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol44/iss4/11>

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The International Law of State Immunity and Its Development by National Institutions

Christian Tomuschat*

ABSTRACT

The proceedings between Germany and Italy currently pending before the International Court of Justice have revived interest in the legal regime of jurisdictional immunity of states. Germany charges Italy with violating the basic rule of state immunity by entertaining reparation claims brought before its civil courts by victims of serious breaches of international humanitarian law committed by Nazi Germany during World War II. Jurisdictional immunity is not absolute, but it remains preserved for truly governmental acts like military operations. None of the generally recognized exceptions apply in the German-Italian dispute. Damages resulting from international armed conflict are not covered by the local tort clause included in most of the relevant instruments. Nor does the infringement of a jus cogens rule automatically confer jurisdiction to the domestic courts of an affected country. After World War II, a reparation scheme was established by the victorious Allied Powers that provided for reparations at the inter-state level. Granting additional reparation claims to every individual victim of unlawful conduct during armed hostilities would amount to double jeopardy, rendering any definitive peace settlement illusory.

* The author is Professor Emeritus of Humboldt University Berlin. From 1972 to 1995, he served at the Law Faculty of the University of Bonn. He was a member of the Human Rights Committee under the International Covenant on Civil and Political Rights from 1977 to 1986 and of the International Law Commission from 1985 to 1996 (Chairman in 1992). Currently, he is co-agent of the Federal Government in the proceedings *Germany v. Italy* before the ICJ.

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I. INTRODUCTORY OBSERVATIONS

The dispute between Germany and Italy, which is currently pending before the International Court of Justice (ICJ),¹ has once again brought to the forefront interest in the issue of state immunity. Inevitably, the judgment of the Court will serve as a precedent for similar configurations in the future. However, the Court may wish to limit the gist of its forthcoming pronouncement² *ratione temporis*. In fact, the root causes of the proceedings from which the dispute arose date back more than 66 years to World War II. Since international law is in a steady state of flux, one might assume that under present-day conditions more differentiated answers should be given. In any

1. Press Release, Int'l Court of Justice, Germany Institutes Proceedings Against Italy for Failing to Respect Its Jurisdictional Immunity as a Sovereign State (Dec. 23, 2008), available at <http://www.icj-cij.org/docket/files/143/14925.pdf>.

2. Delivery of the judgment is expected in December 2011 or January 2012. The oral arguments are scheduled to take place in September 2011. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, INT'L COURT OF JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=ai&p3=2> (last visited Oct. 1, 2011) (containing transcripts from oral hearings and other relevant documents from the case).

event, the judges may wish to reserve their position as far as disputes originating in the world of today are concerned. However, the present author firmly believes that state immunity has fully kept its *raison d'être* and should not be abandoned on account of narrow considerations which do not take into account the comprehensive structure of the rules and mechanisms of international law. The following observations are intended to demonstrate the legitimacy of a basic proposition that serves useful purposes in ensuring peaceful co-existence and cooperation among states.

II. THE HISTORICAL BACKGROUND OF THE DISPUTE BETWEEN GERMANY AND ITALY BEFORE THE ICJ

The facts underlying the dispute between Germany and Italy are fairly simple. During World War II, the German Reich committed many serious breaches of international humanitarian law (IHL) under its Nazi leadership, to the detriment of persons of Italian nationality. Italy was a close ally of Germany since 1936/1937.³ On June 10, 1940, it entered World War II on the side of Nazi Germany.⁴ A few months later, on September 27, 1940, Germany, Italy, and Japan signed the Tripartite Pact to form the so-called Axis.⁵ After suffering several military defeats during the following years, and realizing that Nazi Germany was about to lose an armed conflict with the great majority of the nations of the world, Italy left the Axis in September 1943 and joined the Anti-Hitler Coalition of the Allied Powers.⁶

The rupture of the alliance between Germany and Italy had many serious consequences. Predictably, Italy and the Italian people were henceforth considered to be enemies by German authorities, and

3. See, e.g., HANS WOLLER, *GESCHICHTE ITALIENS IM 20. JAHRHUNDERT* 163 (2010); Theodor Schieder, *Italien vom ersten zum zweiten Weltkrieg*, in *GESCHICHTE ITALIENS* 447, 484 (Michael Seidlmayer ed., 2d ed. 1989).

4. See F. W. DEAKIN, *THE BRUTAL FRIENDSHIP: MUSSOLINI, HITLER AND THE FALL OF ITALIAN FASCISM* 9–17 (1962) (explaining Fascist Italia's motives); Schieder, *supra* note 3, at 489.

5. *Tripartite Pact*, WIKIPEDIA, http://en.wikipedia.org/wiki/Tripartite_Pact (last modified Aug. 25, 2011).

6. See GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 597–99 (1994); Jens Petersen, *Sommer 1943*, in *ITALIEN UND DIE GROBMÄCHTE 1943–1949*, at 23–48 (Hans Woller ed., 1988) (providing a detailed account of the occurrences between Mussolini's fall on 25 July 1943 and Italy's capitulation on 8 September 1943); Gerhard Schreiber, *Das Ende des nordafrikanischen Feldzugs und der Krieg in Italien 1943–1945*, in *8 DAS DEUTSCHE REICH UND DER ZWEITE WELTKRIEG* 1100, 1116–18 (Karl-Heinz Frieser ed., 2007).

even worse, as traitors who deserved harsh treatment.⁷ Accordingly, the Nazi government felt that IHL need not be fully respected as required by the new circumstances. As a consequence, many grave breaches of applicable IHL were perpetrated. These breaches may be divided into three major groups of cases.

First, many Italian civilians were sent to Germany to perform forced labor. Since almost the entire male population of Germany was drafted to serve in the German *Wehrmacht* (the German armed forces), there was an urgent need for an alternative work force that could keep the economy afloat. Hence, Nazi authorities decided to fill the vacuum by deporting persons from all of the territories occupied by the *Wehrmacht* to Germany.⁸ Many of these forced laborers were assigned to the armaments industry, but others worked in civilian enterprises and in the farm industry. The majority of them were badly treated; others simply had to endure the same hardships as the civilian German population during war time.

The second group of cases involves Italian prisoners of war. After Italy's abandonment of the Axis, Italian soldiers under the control of German armed forces became prisoners of war, designated Italian Military Internees (IMIs), provided they did not join the forces of the northern part of Italy that temporarily remained under Mussolini's fascist rule (Republic of Salò).⁹ Unfortunately, Nazi Germany did not abide by the Geneva Convention of 1929,¹⁰ to which both Germany and Italy were parties. The prisoners were treated ignominiously, and the poor conditions of their detention caused many deaths among them. Additionally, by an arbitrary unilateral act, Nazi Germany

7. Schreiber, *supra* note 6, at 1123 (“[T]he German countermeasures developed in reality from their inception into a murderous act of revenge inspired by resentments and accentuated by racism.”). Many times political leaders spoke of treason. See Rüdiger Overmann, *Die Kriegsgefangenenpolitik des Deutschen Reiches 1939–1945*, in 9/2 DAS DEUTSCHE REICH UND DER ZWEITE WELTKRIEG 729, 829, 831, 837 (Jörg Echternkamp ed., 2005). In an interview given in 1969, Herbert Kappler, a German military commander convicted for the Fosse Ardeatine massacre, told his counterpart that “the Italians had to be considered as cowardly traitors to be persecuted and eliminated.” RENZO DI MARIO, ORRORE E PIETÀ: DAL REICH ALLE FOSSE ARDEATINE 233 (1999).

8. See Cass., sez. un., 11 marzo 2004, n. 5044 (It.), reprinted in 87 RIVISTA DI DIRITTO INTERNAZIONALE 53 (2004), translated in Ferrini v. Federal Republic of Germany, 128 I.L.R. 658, 659 (2004) (exemplifying these unlawful policies); MARK SPOERER, ZWANGSARBEIT UNTER DEM HAKENKREUZ: AUSLÄNDISCHE ZIVILARBEITER, KRIEGSGEFANGENE UND HÄFTLINGE IM DEUTSCHEN REICH UND IM BESETZTEN EUROPA 1939–1945 (2001); Jens Christian Wagner, *Zwangsarbeit im Nationalsozialismus—Ein Überblick*, in ZWANGSARBEIT: DIE DEUTSCHEN, DIE ZWANGSARBEIT UND DER KRIEG 180, 180–93 (Volkhard Knigge et al. eds., 2010).

9. See Overmann, *supra* note 7, at 825–38.

10. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021.

purported to deprive the prisoners of their status under international law, classifying them as ordinary civilian workers¹¹ and compelling most of them to perform hard labor in Germany, contrary to the stipulations of the 1929 Convention.¹²

After its rebirth as a sovereign state in 1955, the Federal Republic of Germany abstained from providing on its own initiative reparation for victims of war injuries, although it did allocate large amounts to Israel and to individual victims of specific racist measures of persecution.¹³ The Republic took the view that it had been compelled to provide huge amounts of reparation to the victorious Allied Powers pursuant to the Potsdam Agreement of 1945.¹⁴ These monies were then distributed among the western group of states in accordance with the Paris Reparation Agreement of January 14, 1946,¹⁵ from which Germany and Italy were both excluded.¹⁶ However, in 2000 Germany enacted a law for the compensation of former forced laborers,¹⁷ which did not include the IMIs pursuant to the general line of reasoning that reparation for general war damages should be postponed until the day of the conclusion of a peace treaty. Although the IMIs had been misused as forced laborers they had kept

11. CHRISTIAN TOMUSCHAT, LEISTUNGSBERECHTIGUNG DER ITALIENISCHEN MILITÄRINTERNIERTEN NACH DEM GESETZ ZUR ERRICHTUNG EINER STIFTUNG "ERINNERUNG, VERANTWORTUNG UND ZUKUNFT"? 4 (2001), available at <http://www.berliner-geschichtswerkstatt.de/zwangsarbeit/imi/imi-tomuschat-gutachten.pdf>.

12. For a comprehensive monographic treatment of their fate, see GERHARD SCHREIBER, DIE ITALIENISCHEN MILITÄRINTERNIERTEN IM DEUTSCHEN MACHTBEREICH 1943 BIS 1945 (1990).

13. Thus, for instance, in 1961 a treaty was concluded with Italy for compensating victims of specific national-socialist measures of prosecution. Gesetz zu dem Vertrag vom 2. Juni 1961 [Agreement of 2 June 1961], Ger.-It., June 2, 1961, BGBl. II at 793.

14. Paris Reparation Agreement, Jan. 14, 1946, reprinted in DOKUMENTE DES GETEILTEN DEUTSCHLAND 32 (Ingo von Münch ed., 1968). For a general assessment of the Potsdam Agreement, see Jochen Abr. Frowein, *Potsdam Agreements on Germany (1945)*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1087, 1087–92 (Rudolf Bernhardt ed., 1997).

15. Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, 555 U.N.T.S. 69 [hereinafter Agreement on Reparation from Germany].

16. See KARL DOEHRING ET AL., JAHRHUNDERTSCHULD, JAHRHUNDERTSÜHNE: REPARATIONEN, WIEDERGUTMACHUNG, ENTSCHÄDIGUNG FÜR NATIONALSOZIALISTISCHES KRIEGS- UND VERFOLGUNGSUNRECHT (2001) (providing an overview of payments in actual money terms); Ignaz Seidl-Hohenveldern, *Reparations After World War II*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 180, 180–85 (Rudolf Bernhardt ed., 2000) (providing an overview of the legal mechanisms).

17. Zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Law on the Creation of a Foundation "Remembrance, Responsibility and the Future"] Aug. 2, 2000, BGBl. I at 1263, § 1 (Ger.).

their prisoner of war status. Indeed, international law provides that no state can unilaterally bring about a change in the legal status of a person when that status is protected by international law.¹⁸ This hard line provoked a high degree of resentment in Italy.

Lastly, German military units committed a considerable number of massacres against the Italian civilian population.¹⁹ When it became clear that Germany would eventually be defeated, resistance groups sprang up in those parts of Italy which were still under German occupation. In many instances, German military forces were attacked while withdrawing from the territory of its former ally. When such attacks by partisans caused serious casualties, German commanders often ordered retaliatory actions. In some villages, hostages were taken and killed mercilessly: generally women, children, and elderly men. Fosse Ardeatine (March 1944),²⁰ Civitella (June 1944),²¹ and Marzabotto (September and October 1944)²² witnessed the worst crimes, each producing hundreds of victims.²³ These massacres cast a deep shadow over German–Italian relations even today.

Germany has never denied that the actions of the Nazi authorities constituted grave violations of IHL. Germany has also acknowledged that it incurred responsibility for those actions.²⁴

18. This is the essence of international law as a body of rules generally based on consent in a society of equal members.

19. See, e.g., LUCIANO CASALI & DIANELLA GAGLIANI, *LA POLITICA DEL TERRORE: STRAGI E VIOLENZE NAZISTE E FASCISTE IN EMILIA ROMAGNA* (2008); GIANLUCA FULVETTI, *UCCIDERE I CIVILI: LE STRAGI NAZISTE IN TOSCANA (1943–1945)* (2009); JOACHIM STARON, *FOSSE ARDEATINE UND MARZABOTTO: DEUTSCHE KRIEGSVERBRECHEN UND RESISTENZA* (2002); Carlo Gentile, *Wehrmacht und Waffen-SS im Kampf gegen Resistenza und Zivilbevölkerung*, in *DIE 'ACHSE' IM KRIEG: POLITIK, IDEOLOGIE UND KRIEGFÜHRUNG 1939–1945*, at 492, 492–518 (Lutz Klinkhammer et al. eds., 2010).

20. STARON, *supra* note 19, at 50–59; *Ardeatine Massacre*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ardeatine_massacre (last modified Aug. 11, 2011).

21. *Civitella in Val di Chiana*, WIKIPEDIA, http://en.wikipedia.org/wiki/Civitella_in_Val_di_Chiana (last modified July 13, 2011).

22. STARON, *supra* note 19, at 88–101; *Marzabotto Massacre*, WIKIPEDIA, http://en.wikipedia.org/wiki/Marzabotto_massacre (last modified Aug. 13, 2011).

23. When confirming the conviction and sentencing of Max Josef Milde, a German military commander in World War II, responsible for the massacre perpetrated on 29 June 1944 in Civitella, the Corte di Cassazione, ordered at the same time Germany to pay considerable amounts of reparations to the next of kin of the victims. Cass., sez. un., 13 gennaio 2009, n. 1072 (It.), *reprinted in* 92 RIVISTA DI DIRITTO INTERNAZIONALE 618 (2009). For a critical comment on the Milde case, see Carlo Focarelli, *Diniego dell'immunità alla Germania per crimini internazionali: la suprema Corte si fonda su valutazioni "qualitative,"* 92 RIVISTA DI DIRITTO INTERNAZIONALE 363, 363–410 (2009).

24. See, e.g., Joint Declaration, Adopted on the Occasion of German–Italian Governmental Consultations in Trieste, 18 Nov., 2008, *reprinted in* Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, at 20 (Dec.

However, the German government has consistently expressed the view that it made amends for the damage caused, to the greatest conceivable degree. In fact, the Potsdam Agreement imposed harsh sanctions on Germany. Reparations were made in manifold forms (Part IV of the Agreement). A great deal of German industrial investment capital was transferred to the victorious Powers. All German foreign assets were confiscated. Lastly, the Allied Powers determined that Germany should be stripped of roughly one fourth of its territory. The Oder–Neisse border was not permanently fixed as the eastern border of Germany.²⁵ However, at the time of reunification in 1990, Germany had to accept the Potsdam Agreement as the definitive territorial regime with regard to its eastern neighbors.²⁶

As far as Germany's relationship with Italy is concerned, a number of specific instruments impacted the legal issues. First, in its Peace Treaty with the Allied Powers signed on February 10, 1947,²⁷ Italy had to accept a number of unfavorable stipulations because it previously was a staunch ally of Nazi Germany. In particular, the Allied Powers did not consider it necessary to provide Italy with rights of reparation against Germany, a country that lay in ruins and could not possibly compensate for all the harm it had inflicted upon other peoples.²⁸ For this reason, a waiver clause was inserted into the Peace Treaty (Article 77(4)):

Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of

23, 2008), available at <http://www3.icj-cij.org/docket/files/143/14923.pdf>; Jurisdictional Immunities of the State (Ger. v. It.), Order, para. 22 (July 6, 2010), available at <http://www.icj-cij.org/docket/files/143/16027.pdf> ("Whereas the Parties do not dispute the fact that Italian nationals were victims of serious violations of international humanitarian law committed by Nazi Germany between 1943 and 1945 . . .").

25. See Berlin (Potsdam) Conference, Protocol of the Proceedings, Part VIII(B), Aug. 2, 1945, 3 Bevens 1207 ("The three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement.").

26. See Agreement in Relation to Ratification of the Border Between Them, Ger.–Pol., Nov. 14, 1990, 31 I.L.M. 1292; Treaty on the Final Settlement with Respect to Germany art. 1, Sept. 12, 1990, 29 I.L.M. 1186.

27. Treaty of Peace with Italy art. 1, Feb. 10, 1947, 49 U.N.T.S. 1.

28. Italy itself was compelled to make reparation payments to the Allied Powers in an amount of USD 360 million. *Id.* art. 74

arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.²⁹

The German Federal Government has always held that this waiver clause expunged all claims against Germany within its scope of application *ratione materiae*.³⁰ However, currently Italy does not share this interpretation, arguing that Germany was not a party to the Peace Treaty.³¹ Accordingly, pursuant to the general rules of treaty law, the question arises of whether the parties intended to produce a true legal entitlement in favor of Germany. There is much support for that position. The waiver clause would have made no sense if, notwithstanding its gist, Italy and Italian citizens could have vindicated rights against Germany. The general context also supports this construction. Germany and Italy were allies in wars of aggression for many years. Apparently, the Allied Powers felt that neither of that unfortunate couple of wrongdoers should hold rights against the other with regard to the armed conflict. Indeed, the issue of reparations had been settled at Potsdam two years earlier. In that settlement, which was confirmed by the Paris Agreement signed January 14, 1946, Italy was not granted a share of the German assets distributed among the members of the victorious alliance.³² Additional reparation claims from Italy would have disturbed the careful balance reached at Potsdam.

However, in the 1960s, the German government decided that in order to normalize its relationship with a number of Western countries, Germany should offer certain amounts of compensation as a gesture of friendship and cooperation, without any recognition of a legal obligation. Accordingly, Germany and Italy signed two treaties in 1961 that were meant to bring a definitive end to the controversies regarding the financial settlement of World War II.³³ The first of these treaties regulated certain "property-law, economic and financial questions"³⁴ while the second provided for compensation for Italian

29. *Id.* art. 77.

30. See Jurisdictional Immunities of the State (Ger. v. It.), Order, para. 24 (July 6, 2010), available at <http://www.icj-cij.org/docket/files/143/16027.pdf> (noting the German government's belief that the waiver clause relieved Germany from any further reparation claims).

31. This inference is implied in the fact that during the proceedings Italy introduced a counter-claim against Germany, which the Court rejected by its Order of 6 July 2010. *Id.* para. 35.

32. Agreement on Reparation from Germany, *supra* note 15, art. 1.B.

33. The absence of a preamble in both treaties evinces a certain disagreement between the parties.

34. Gesetz zu dem Abkommenvom 2. Juni 1961 zwischen der Bundesrepublik Deutschland und der Italienischen Republik über die Regelung gewisser vermögensrechtlicher, wirtschaftlicher und finanzieller Fragen [Agreement of June 2,

nationals “who were subjected to National-Socialist measures of persecution.”³⁵ Both of these treaties contain explicit waiver clauses. The text of the relevant clause of the “economic” treaty (Article 2(1)) reads as follows:

The Italian Government declares all outstanding claims on the part of the Italian Government or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

Both treaties were implemented in accordance with their terms. In particular, the Federal Republic of Germany made the payments the treaties required. It was not the responsibility of the German government to monitor whether the monies allocated to victims of Nazi persecution effectively reached their addressees.³⁶ In any event, the issue of further reparations became moot as for many decades Italy did not make any representations to Germany concerning alleged unpaid war debts.

The issue of reparations for war damages was resuscitated by a proceeding in Greece where the families of a massacre by a military unit of the German *Wehrmacht* sought compensation through a suit brought against Germany.³⁷ German troops were attacked by a group of resistance fighters and they suffered a number of casualties. As a reprisal, the German military commander decided to execute the entire population of the village of Distomo, located a short distance from the place of the attack. Two hundred and twelve people were massacred, mostly women and children. In the first instance, on October 30, 1997, a court in the Greek town of Livadia rejected Germany’s preliminary objection of lack of jurisdiction and ordered Germany to pay considerable sums of compensation.³⁸ Germany filed an unsuccessful appeal with the *Areios Pagos*, the highest Greek court in civil matters. On May 4, 2000, the *Areios Pagos* delivered a

1961 Between the Federal Republic of Germany and the Italian Republic Governing Certain Property-Law, Economic and Financial Questions] Ger.-It., June 2, 1961, BGBl. II at 668.

35. Agreement of 2 June 1961, *supra* note 13, at 793.

36. For a judicial determination on whether individual victims had an entitlement to receive a share of the funds provided by Germany to Italy for the performance of the relevant Agreement, see Cass., sez. un., 2 marzo 1987, n. 2184 (It.) and Cass., sez. un., 30 ottobre 1986, n. 738 (It.).

37. For a detailed account of the *Distomo* case, see Stelios Perrakis, *De la réparation des victimes des violations du droit international humanitaire et l'affaire des “réparations de guerre allemandes” en Grèce: Essai de synthèse et quelques considérations*, in PEACE IN LIBERTY: FESTSCHRIFT FÜR MICHAEL BOTHE 523, 539 (Andreas Fischer-Lescano et al. eds., 2008).

38. The judgment has been published only in the Greek language.

judgment³⁹ which shared the Livadia court's reasoning: because of the level of atrocity of the massacre, classified as a crime against humanity, Germany was estopped from invoking its jurisdictional immunity.⁴⁰

Legal obstacles arose when the claimants sought to execute the judgment of the trial judge. According to Article 923 of the Greek Code of Civil Procedure, the authorization of the Minister of Justice is required where measures of enforcement against assets of a foreign government are envisaged. The claimants were unable to obtain such authorization. The courts before which they challenged the negative decision of the Minister confirmed that his conduct was unobjectionable since he had acted with the intention of averting a disturbance in the relationship between Greece and Germany. Ultimately, the claimants brought their grievances to the European Court of Human Rights (ECtHR), contending that their right to access to justice under Article 6 of the European Convention on Human Rights (ECHR) was violated. Again, they failed to convince the judges of their stance.⁴¹ The ECtHR found that the right to access to a judge was not absolute. In particular, the right must be read in consonance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides that in the interpretation of treaty provisions, the interpreting body must take into account "any relevant rules of international law applicable in the relations between the parties." Thus, the ECHR, including Article 6, cannot be interpreted in a vacuum. The Court had to be mindful of the Convention's special character as a human rights treaty, but also had to take the relevant rules of international law into account. One of those rules involved jurisdictional immunity of states before the civil courts of another country. As of yet, there is no customary rule denying such immunity in instances of crimes against humanity.

Thus, enforcement of the Livadia judgment remained blocked in Greece. The claimants then requested an *exequatur* (authorization to enforce the judgment abroad) in Italy, hoping to obtain satisfaction through measures of constraint outside their home country. They were successful in this endeavor; a part of the Livadia judgment, namely the decision on the costs of the proceedings, was declared enforceable in Italy.⁴² The first successful move was the inscription of

39. Areios Pagos [A.P.] [Supreme Court] 11/2000, p. 201-04 (Greece), translated in Prefecture of Voiotia v. Federal Republic of Germany, 129 I.L.R. 514; Bernard H. Oxman et al., Prefecture of Voiotia v. Federal Republic of Germany, 95 AM. J. INT'L L. 198, 201-04 (2001).

40. Oxman, *supra* note 39, at 200.

41. Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415.

42. Cass., sez. un., 2 maggio 2005, n. 16351 (It.).

a judicial mortgage on a plot of land owned by Germany⁴³ where Villa Vigoni is established, a cultural center designed to facilitate cultural exchanges between the two countries.⁴⁴ One year later, the Court of Appeal of Florence also declared the enforceability of the judicial order directing Germany to pay the amounts allocated to the claimants on the merits by the Greek regional court of Livadia.⁴⁵

At the same time, the proceedings in Greece stimulated Italian victims of Nazi authority to sue Germany before Italian civil courts. The case of Luigi Ferrini, born May 12, 1926, broke new ground. Ferrini was captured by German forces in the province of Arezzo on August 4, 1944, and subsequently deported to Germany, where he was compelled to perform work as a forced laborer in the armaments industry. Ferrini filed an application on September 23, 1998, instituting proceedings before the *Tribunale di Arezzo*. He claimed reparations, to an equitable extent, for the injury suffered during the time he spent on German soil until his liberation in May 1945. The *Tribunale di Arezzo* dismissed the claim on November 2, 2000, holding that it lacked jurisdiction since Germany acted in the exercise of its sovereign powers and was accordingly protected by the customary rule of state immunity.

Although the Florence Court of Appeal dismissed the appeal interjected by Ferrini, the *Corte di Cassazione* departed from the grounds upon which the two lower courts founded their decisions.⁴⁶ The *Corte di Cassazione* emphasized that deportation for the purpose of forced labor constituted a grave breach of IHL.⁴⁷ Given the gravity of this violation, and given the fact that the breach occurred on Italian soil, Germany was barred from invoking the defense of sovereign immunity.⁴⁸ In subsequent decisions, the *Corte di Cassazione* has consistently upheld the *Ferrini* precedent,⁴⁹ notwithstanding numerous reminders by the *Avvocatura Generale dello Stato* and the *Procura Generale della Repubblica presso la Corte di Cassazione* to review this line of reasoning since it

43. This happened on June 7, 2007.

44. See *Napolitano and Wulff at Villa Vigoni*, VILLA VIGONI (July 8, 2011), <http://www.villavigoni.it/index.php?id=55&L=2>.

45. App. Firenze, 13 giugno 2006 (It.).

46. Cass., sez. un., 11 marzo 2004, n. 5044 (It.), reprinted in 87 RIVISTA DI DIRITTO INTERNAZIONALE 53 (2004), translated in *Ferrini v. Federal Republic of Germany*, 128 I.L.R. 658, 659.

47. *Id.* at 666.

48. *Id.* at 669.

49. Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others. Order No. 14201, Italian Court of Cassation, May 29, 2008 (Plenary Session)*, 103 AM. J. INT'L L. 122, 122–23 (2009); see also Cass., sez. un., 13 gennaio 2009, n. 1072 (It.), reprinted in 92 RIVISTA DI DIRITTO INTERNAZIONALE 618 (2009).

did not correspond with the legal position under customary international law. Currently, hundreds of proceedings are pending before Italian courts at different stages of litigation. Since the ICJ will soon make a definitive determination on the issue, most of these proceedings are not advancing, although they are not officially stayed. However, in 2010 the government issued a decree suspending all enforcement proceedings until the ICJ delivers its judgment.⁵⁰

Germany brought its case before the ICJ because it had no other way to address the issue. On the one hand, the *Corte di Cassazione* confirmed its *Ferrini* jurisprudence by issuing further judgments that similarly deny Germany's jurisdictional immunity with respect to the unlawful occurrences that date back to the time between September 1943 and May 1945. On the other hand, the Italian government lacks any power to correct jurisprudence which some of its organs have criticized as not conforming to international law. Thus, it appears that only a judgment of the ICJ can bring about the requisite clarification of the legal position. It may be difficult for the Italian government to find the appropriate formula for dealing with decisions which have already acquired the force of *res judicata*. However, this apparent difficulty is not a valid argument under international law. No departure from internationally binding obligations can be justified by invoking rules provided in the domestic legal order.⁵¹ It can be expected that, once the judgment of the ICJ is delivered, the Gordian knot will be disentangled by a legislative enactment.

III. THE MEANING AND SCOPE OF JURISDICTIONAL IMMUNITY OF STATES: THE PRINCIPLE

State immunity is a rule firmly anchored in customary international law. Some nations, the United States in particular, argue that the rule pertains essentially to international comity and does not constitute truly binding law.⁵² In a number of decisions, the

50. Decreto Legge 28 aprile 2010, n. 63 (It.) (codified into law by Legge 23 giugno 2010, n. 98); see Elena Sciso, *L'immunità degli Stati esteri dalla giurisdizione dopo la conversione del decreto-legge 28 aprile 2010 n. 64*, 93 RIVISTA DI DIRITTO INTERNAZIONALE 802-09 (2010).

51. The rule, enshrined in Article 27 of the Vienna Convention on the Law of Treaties, applies also, *mutatis mutandis*, to conflicts between customary rules of international law and domestic law. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

52. See Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 751 (2003) (discussing Justice Marshall's statement that all exceptions to the full and complete

U.S. Supreme Court removed the rule of state immunity from the realm of the legal order. In the leading case of *Verlinden B.V. v. Central Bank of Nigeria*, the Court stated that the granting of immunity is “a matter of grace and comity on the part of the United States.”⁵³ Similar language is also found in later decisions.⁵⁴ In *Altmann*, the Supreme Court held again that the practice of barring suits against foreign governments on jurisdictional grounds was “a matter of comity.”⁵⁵ This is not a persuasive argument since immunity is derived from the basic principle of sovereign immunity of states, a proposition that belongs to the ground axioms of the entire edifice of international law and is also reflected in Article 2(1) of the UN Charter. States are duty-bound to respect one another. No member of the international community is authorized to sit in judgment over another sovereign member; *par in parem non habet imperium*. Accordingly, most writers view jurisdictional immunity of states as a genuine rule of positive customary law.⁵⁶ When the United States enacted the Foreign Sovereign Immunities Act (FSIA),⁵⁷ the Report of the Committee of the Judiciary of the House of Representatives stated explicitly that “[s]overeign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.”⁵⁸

Persuasive evidence is also found in the *Restatement of the Foreign Relations Law of the United States*. Section 451 details sovereign immunity in the same way as a binding proposition under international law.⁵⁹ Lastly, the adoption of the UN Convention on

power of a nation within its own territories, must be traced to the consent of the nation itself).

53. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). It should be noted that the phrase according to which sovereign immunity is a matter of “grace and comity” does not appear in the ground-breaking judgment *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), but is the result of an inference that is by no means conclusive.

54. See *Dole Food v. Patrickson*, 538 U.S. 468, 479 (2003) (citing *Verlinden*, 461 U.S. at 486) (noting that a grant of immunity is “a gesture of comity”).

55. *Republic of Austria v. Altmann*, 541 U.S. 677, 694 (2004).

56. See, e.g., JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 151–59 (2d ed. 2003) (discussing generally the recognition of sovereign immunity in international law); HAZEL FOX, *THE LAW OF STATE IMMUNITY* 13 (2d ed. 2008) (same); ROBERT JENNINGS & ARTHUR WATTS, 1 *OPPENHEIM’S INTERNATIONAL LAW* 343 (9th ed. 2002).

57. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2006)).

58. H.R. REP. NO. 94-1487, at 3 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6622–23.

59. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987).

Jurisdictional Immunities of States and Their Property⁶⁰ is a further sign of a universal consensus in respect of the truly legal quality of state immunity.

Since its first appearance as a rule implying absolute immunity from any legal claims, the scope *ratione materiae* of jurisdictional immunity has shrunk to some extent, particularly with regard to commercial activities. But its continued applicability to activities *jure imperii* remains unchallenged. The Tate letter of 1952 was groundbreaking.⁶¹ In that letter, the Legal Adviser of the Department of State announced that the United States would henceforth depart from the former doctrine of absolute immunity, restricting demands of foreign governments for granting immunity through a suggestion to the courts charged with the matter, to disputes involving truly sovereign acts, accordingly excluding any business activities. Many years later, this new approach was confirmed by the Foreign Sovereign Immunities Act of 1976 (FSIA).⁶² Section 1604 states the general rule, while section 1605(a)(2) determines that immunity cannot be claimed for commercial activities. In the Federal Republic of Germany, the Constitutional Court (which holds power to clarify the existence *vel non* of general rules of international law) followed the trend with a judgment on April 30, 1963, finding that the absolute doctrine of immunity lost its general applicability as a universal norm and was to be replaced by the restrictive theory.⁶³ Many states followed suit by enacting legislation that closely resembles the FSIA, the first of these being the British State Immunity Act of 1978.⁶⁴ Eventually, the restrictive theory became the centerpiece of the UN Convention on Jurisdictional Immunities of States and Their Property of December 2, 2004.⁶⁵ The Convention maintains the general rule of immunity (Article 5), but provides for a certain number of exceptions (Articles 10 to 17). The Convention has

60. United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc.A/RES/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities] (convention not yet in force).

61. See Current Theories Re Immunity from the Jurisdiction, 6 Whiteman DIGEST § 20, at 553, 569 (noting that the Tate letter announced the Department of State's policy of adhering to the so-called "restrictive theory" of sovereign immunity).

62. Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1601–1611 (2006).

63. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 30, 1963, 16 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 27, translated in 1 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT: INTERNATIONAL LAW AND LAW OF THE EUROPEAN COMMUNITIES 1952–1989, at 150 (1992).

64. State Immunity Act, 1978, c. 33 (U.K.).

65. UN Convention on Jurisdictional Immunities, *supra* note 60.

yet to enter into force,⁶⁶ but there is general agreement that as a reflection of the restrictive theory of state immunity its provisions reflect current customary international law.⁶⁷

IV. JURISDICTIONAL IMMUNITY IN CASES OF GRAVE VIOLATIONS OF HUMAN RIGHTS: EXCEPTIONS

A. General Considerations

It is the essence of all codifications of state immunity, both at international level and in domestic settings, that jurisdictional immunity is recognized as the rule from which departures are allowed under specific, accurately and narrowly defined circumstances. It may be sufficient to refer to Article 5 of the UN Convention and to section 1604 of the FSIA. This approach corresponds to the historical development of state immunity during the twentieth century. Originally, absolute immunity was dominant and only Belgian as well as Italian courts steered a divergent course with respect to commercial matters. As already indicated, the scope *ratione materiae* of jurisdictional immunity progressively shrank during the second half of the last century, but it is still the rule that has suffered only a certain narrowing through a limited number of exceptions. As far as grave violations of human rights are concerned, everything depends on whether one of the recognized exceptions to the rule of immunity applies.

From the outset, it should be noted that a clear distinction must be drawn between the immunity *ratione functionis* or *ratione personae* of individual human beings, charged with having committed grave breaches of international law, and the jurisdictional immunity that protects states as collective entities. Undeniably, the Nuremberg and Tokyo trials opened up the door for holding accountable anyone who allegedly perpetrated a crime punishable under international law, irrespective of his or her position in the official hierarchy of the

66. *Status: United Nations Convention on Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en (last visited Oct. 1, 2011) (providing that the Convention has twenty-eight signatories and thirteen parties).

67. See, e.g., Hazel Fox, *In Defence of State Immunity: Why the UN Convention on State Immunity Is Important*, 55 INT'L & COMP. L.Q. 399, 405 (2006) (arguing that state immunity is a necessary principle at the present stage of development of international law); Richard Gardiner, *UN Convention on State Immunity: Form and Function*, 55 INT'L & COMP. L.Q. 407, 407-09 (2006) (viewing the Convention as a necessary means of consolidating existing legal positions).

state.⁶⁸ The prosecution of individual offenders resonates of justice and equality: that all persons shall be equal before the law. At the same time, individual criminal responsibility also serves as a significant instrument of deterrence. Individuals aware that infringing upon the minimal standards of humanity may expose him or her to serious sanctions will think twice before taking such reprehensible actions. On the other hand, the immunity of the state is justified by many considerations that go beyond the effect the rule of sovereign equality, particularly with respect to injuries caused by armed hostilities. Criminal prosecutions target persons who bear personal responsibility for the offenses. In the case of state immunity, the issue is not the responsibility of an abstract entity, but the responsibility of a nation or a people, most of whose members are blameless for the criminal conduct. From a practical standpoint, individual remedies are highly inappropriate to redress situations of mass injustice where evidence is frequently scarce and unreliable. In this regard, the traditional mechanisms of settling reparations issues within an inter-state context have proven to provide more suitable answers. It is therefore shortsighted to argue, based on the “value orientation” of modern international law, that the progressive reduction of the scope of individual immunity must be accompanied by a similar development with regard to state immunity.⁶⁹ Many authors and courts have made this mistake, in particular the Italian *Corte di Cassazione* in its *Ferrini* judgment.

It may be that in individual cases, where an internationally wrongful act appears to be an accident, reparation claims brought by the private victims themselves against the responsible state can be accommodated without any major difficulties within the existing international legal order. However, when situations of mass injustice

68. Memorandum, U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, at 4–5, U.N. Doc. A/CN.4/5 (1949) (“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.”).

69. See MICHAEL BOTHE, *THE QUESTION OF STATE IMMUNITY BEFORE NATIONAL COURTS IN CASES OF MASSIVE VIOLATIONS OF HUMAN RIGHTS AND OF INTERNATIONAL HUMANITARIAN LAW* (2011) (legal opinion written for Amnesty International) (on file with the author) (arguing it is shortsighted to argue based on the “value orientation” of modern international law that the progressive reduction of the scope of individual immunity must be accompanied by a similar development with regard to state immunity); see also Andrea Bianchi, *L’immunità des Etats et les violations graves des droits de l’homme*, 108 REVUE GÉNÉRALE DE DROIT DE INTERNATIONAL PUBLIC 63, 91 (2004); Christopher Keith Hall, *U.N. Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT’L & COMP. L.Q. 411 (2006) (arguing the United Kingdom should not ratify the Convention until language is added that protects private victims of human rights violations).

must be redressed, the privatization and individualization of the requisite financial settlement leads to a deadlock. Armed hostilities cause immense damage to all sides. In the midst of the ruins of war, nobody can hope to obtain full compensation for any loss sustained. When attempting to secure the survival of the debtor country, a difficult balancing process must take place when determining the reparations to be made.⁷⁰ In particular, efforts must be undertaken to harmonize collective reparations on an inter-state level with individual reparations for the benefit of the persons directly affected by the hostilities. The measures required to achieve that purpose cannot be gained from assessing the legal position exclusively from the human rights perspective. Traditional international law, with its specific mechanisms at the inter-state level, provides the instruments best suited to resolve the dilemma.

B. *Serious Violations of IHL and HRL as Acts Outside the Authority of the State*

A first attempt to pierce the veil of state immunity can be made by contending that grave breaches of human rights law (HRL) or international humanitarian law (IHL) can no longer be attributed to the state, but must be considered acts outside the authority of the state.⁷¹ Inevitably, however, such acts then take the color of *private conduct* of the acting persons. The approach suggested clashes with the realities of the situation and entails dangerous consequences. If the armed forces of a given country deliberately engage in evil law-breaking abuses while operating within the territory of another state, their actions are clearly coordinated and controlled from above; their criminal conduct is not a mosaic of individual acts. The same holds true if prison torture is practiced: the local environment demonstrates that the authority of the state stands behind the attacks on the

70. The first draft of the Articles on Responsibility of States for Internationally Wrongful Acts (ARS), produced by the International Law Commission (ILC) in 1996, contained Article 42(3) that stated: "In no case shall reparation result in depriving the population of a State of its own means of subsistence." Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n 57, 63, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2). Unfortunately, this rule was deleted from the 2001 version of the ARS. According to James Crawford, such considerations are nonetheless to be taken into account when determining the amount of reparation due. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 212 (2002).

71. See Alexander Orakhelashvili, *State Immunity and International Public Order*, 45 GER. Y.B. INT'L L. 227, 236 (2002) (arguing that grave breaches of human rights law or international humanitarian law must be considered acts outside the authority of the state).

physical integrity of the victims. Classifying such conduct as non-attributable to the entity of the state produces results contrary to the intentions underlying the suggestion to deny attributability to the state. The state concerned will be exonerated. Yet it stands to reason that no state can, or should be able to, evade responsibility for the most egregious crimes committed by its agents. Accordingly, the doctrine of private conduct does not provide any assistance in instances where the aim is to hold the state itself accountable. It may become an appropriate legal device where an attempt is made to overcome the personal immunity of high-ranking governmental officers in criminal cases—the proceedings against General Pinochet stand out as the most prominent example⁷²—as well as in civil cases, where the recent judgment of the U.S. Supreme Court in *Samantar v. Yousuf*⁷³ has shed further light on the issue.

C. Implicit Waiver of Immunity

State immunity can be *renounced* by the government of any state. Waiver, or renunciation, is a legal concept encompassed by the more general concept of consent, which constitutes one of the basic pillars of the international law system.⁷⁴ In principle, sovereign states are free to frame their conduct as they see fit, even submitting to the jurisdiction of another state if they choose to do so. Immunity does not belong to the class of *jus cogens* rules, which require full and unrestricted respect. Thus, section 1605(a)(1) of the FSIA explicitly provides that immunity may be waived. Similarly the UN Convention provides for “express” consent as ground for excluding immunity in Article 7. In the case of *Princz v. Federal Republic of Germany*, Judge Wald of the U.S. court of appeals wrote that a state committing grave violations of human rights thereby implicitly renounces its immunity.⁷⁵ Likewise, a group of U.S. scholars took the same view:

The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity. Thus, in recognizing a group of peremptory norms,

72. For the last decision in that entangled proceeding, see *R v. Bartle ex parte Pinochet*, [1998] UKHL 41 (appeal taken from Eng.) (U.K.).

73. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2286 (2010).

74. Treaties are based on consent, and the maxim *volenti non fit injuria* applies also in the law of state responsibility. Rep. of the Int'l Law Comm'n, 48th Sess., *supra* note 70, art. 29.

75. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1178 (D.C. Cir. 1994) (Wald, J., dissenting).

states are implicitly consenting to waive their immunity when they violate one of these norms.⁷⁶

Again, this line of reasoning is hardly persuasive. Waiver is a deliberate manifestation of will to accept specific legal consequences.⁷⁷ To view the commission of an international crime as waiver modifies the facts in an attempt to limit the scope of immunity from a viewpoint of ethics and morality, sidelining the state concerned contrary to the object and purpose of the concept of waiver. Therefore, a reading of implicit waiver amounts to a construction of forfeiture. However, forfeiture is not a recognized legal concept under international law, although some voices have suggested that, specifically in cases of grave violations of human rights, immunity should be denied on such grounds.⁷⁸ In particular, forfeiture as a kind of punishment presupposes a well-regulated procedure under which all of the arguments could be heard and the alleged wrongdoer is given an opportunity to assert his or her defenses. In the international society of equal and sovereign states, no single member is entitled to arrogate to itself the power to make binding determinations on another's conduct. In the settlement of international disputes, consent is and has always been the key principle. However, consent must be real and not fictitious. The UN Convention requires that consent must be "express."⁷⁹

D. *The Territorial Clause*

At first glance, the *territorial clause* (or *local tort rule*) in the relevant pieces of legislation seems to provide backing for attempts to pierce the protective fortress of immunity. In fact, in accordance with the section 1605(a)(5) of the FSIA, Article 12 of the UN Convention asserts that immunity cannot be claimed: "[I]f the act or omission

76. Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 394 (1989).

77. See BLACK'S LAW DICTIONARY 1580 (6th ed. 1990) (defining "waiver" to mean "[T]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right . . .").

78. See Juliane Kokott, *Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 135, 148 (Beyerlin et al. eds., 1995). Juliane Kokott is now one of the Advocates General with the Court of Justice of the European Union.

79. In its official Commentary on Draft Article 7, the ILC stated that "[t]here is . . . no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner . . ." Rep. of the Int'l Law Comm'n, 43d Sess., 29 Apr.–19 July, 1991, ¶ 8, U.N. Doc A/46/10, GAOR 46th Sess., Supp. No. 10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 27, U.N. Doc. A/CN.4/SER.A/1991/Add.1.

occurred in whole or in part in the territory of that other state and if the author of that act or omission was present in that territory at the time of the act or omission.”

A similar clause is also contained in the European Convention on State Immunity at Article 11.⁸⁰ It was clearly meant to cover only cases of insurable risks, particularly traffic accidents.⁸¹ The clause has never been read to provide a remedy for instances where harm is caused as a consequence of armed conflict. The operation of armed forces on the territory of another country was specifically excluded from the scope *ratione materiae* by the Convention (Article 31).⁸² The Commentary of the International Law Commission made the same observation:

The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals.⁸³

However, the Commentary also mentioned that in some instances the territorial clause was used to additionally claim jurisdiction in cases of infliction of “intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.”⁸⁴ This language is an explicit reference to the case of *De Letelier v. Chile*, which involved the assassination of the former Chilean Defense Minister of the Allende government in the heart of Washington. The family of the victim brought a reparation action before a U.S. court. The judges found the action to be within their jurisdiction pursuant to the territorial clause of the FSIA.⁸⁵ However, this was an isolated case

80. European Convention on State Immunity art. 11, May 16, 1972, 1495 U.N.T.S. 182, 185.

81. See Council of Europe, *Explanatory Report on the European Convention on State Immunity*, para. 49 (1972) (arguing that immunity should be denied on such grounds).

82. European Convention on State Immunity, *supra* note 80, art. 31 (“Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”).

83. Rep. of the Int’l Law Comm’n, 43d Sess., *supra* note 79, at 12, 45.

84. *Id.*

85. *De Letelier v. Chile*, 488 F. Supp. 665, 672–74 (D.D.C. 1980); *see also* *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (holding that wrongful death case was

that did not touch upon the general issue of jurisdiction over disputes related to armed hostilities of armed forces in the territory of another country.

During the deliberations on the International Law Commission (ILC) draft in the Sixth Committee of the General Assembly, the question of whether military operations during armed conflict should be covered by the territorial clause did not escape the attention of the national delegations. Many governments advocated the insertion of an explicit clarification clause following the model of Article 31 of the European Convention. However, no agreement on this proposal was reached. Gerhard Hafner of Austria, the Chairman of the Working Group specifically established to review the remaining points of dissent, was authorized to make a statement introducing the report of the Ad Hoc Committee⁸⁶ in the General Assembly on October 25, 2004. In that statement, Hafner explained that military operations on foreign soil did not come within the scope *ratione materiae* of Article 12: “[o]ne of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not.”⁸⁷

The interpretation of an international treaty starts with elucidating the meaning of the text. The declaration in question is not contained within the text of the 2004 Convention. However, the declaration was explicitly referenced in the last preambular paragraph of General Assembly Resolution 59/38, which adopted the Convention: “*Taking into account* the statement of the Chairman of the Ad Hoc Committee introducing the report of the Ad Hoc Committee.” The statement therefore constitutes an important instrument in the sense contemplated by Article 31(2)(b) of the Vienna Convention on the Law of Treaties, and must be taken into account in that capacity.⁸⁸ Although doubts have arisen regarding the precise contours of the territorial clause,⁸⁹ Hafner’s statement is suited to dismiss any extensive reading of Article 12.

not barred by “acts of state doctrine” in case of alleged murder authorized by former director of China’s Defense Intelligence Bureau).

86. Rep. of the Ad Hoc Comm. on Jurisdictional Immunities of States and Their Property, Mar. 1–5, 2004, U.N. Doc. A/59/22; GAOR, 58th Sess., Supp. No. 22 (2004).

87. U.N. GAOR, 59th Sess., 13th mtg at 6 para. 36, U.N. Doc. A/C.6/59/SR.13 (Oct. 25, 2004).

88. A contrary view is expressed by Andrew Dickinson. Andrew Dickinson, *Status of Forces Under the UN Convention on State Immunity*, 55 INT’L & COMP. L.Q. 427, 428 (2006).

89. See, e.g., Hazel Fox, *The Merits and Defects of the 2004 UN Convention on State Immunity: Gerhard Hafner’s Contribution to Its Adoption by the United Nations*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 413, 419 (Isabelle Buffard et al. eds., 2008) (noting the Convention’s failure to clearly define the

Following the example of the European Convention, many national statutes contain specific clauses clarifying that disputes arising from military operations shall not be covered.⁹⁰ In this sense, it is interesting that the U.S. legislation does not allow for any judicial action seeking reparations for the activities of U.S. forces abroad.⁹¹ It should also be noted that, according to the available evidence, no victim of alleged breaches of IHL or HRL has ever attempted to bring a suit against the United States, the United Kingdom, or Germany before the courts of Iraq or Afghanistan. This silence is telling. The potential claimants rightly assume that no judgment delivered by any of their domestic courts could ever be enforced against the home states of the military forces deployed on their soil. Injuries caused by military operations cannot be measured against the same yardstick as injuries which occur as a result of accidents in peacetime. Although redress should be provided to any victim, individual reparation claims are not the appropriate remedy for the settlement of such claims.⁹²

E. Impact of the U.S. Legislative Practice

U.S. legislation has sought to enlarge the field of jurisdiction open to the U.S. judiciary through the Antiterrorism and Effective Death Penalty Act of 1996.⁹³ According to this statute, foreign states may be denied immunity when allegations are made that the foreign state committed an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provided material support for such an act, if the state in question is officially designated as a sponsor of terrorism. Although this statute departs from the traditional rule of

outer limits of applicability); David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 201-02 (2005) (describing the uncertainty surrounding the scope of Article 12).

90. See, e.g., State Immunity Act, 1978, c. 33, § 16(2) (U.K.) (stating that the Act does "not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom"); State Immunity Act, § 19(2) (Act No. 19/1979) (1985) (Sing.) (stating that the Act does not apply to "proceedings relating to anything done by or in relation to the armed forces of a State while present in Singapore"); State Immunity Ordinance § 17(2)(a) (1981) (Pak.), translated in 20 U.N. LEG. SERV. 20, 26-27 (1982).

91. See 28 U.S.C. § 2680(j)-(k) (2006) (excluding application to claims arising out of combat activities during war and in a foreign country).

92. Dickinson admits that in the practice of states the territorial clause relating to personal injuries and damage to property is not applied to armed conflict situations. Dickinson, *supra* note 88, at 432.

93. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. §§ 1605, 1610 (2006)).

immunity, it provides a number of caveats. Congress deliberately excluded any kind of automaticity.⁹⁴ Furthermore, it stands to reason that an individual piece of U.S. legislation is not able to change international customary law, notwithstanding the fact that U.S. approaches to contentious international issues often provide guidance to the development of the law. Lastly, the Act of 1996 is crafted in fairly restrictive terms as far as its application *ratione materiae* is concerned. It does not mention unlawful acts of warfare perpetrated in violation of IHL, but focuses exclusively on a specific number of particularly heinous acts as already pointed out.

F. Jus Cogens

The most promising avenue seems to rely on *jus cogens*, arguing that when a *jus cogens* rule is infringed, effective means of sanctioning such an infringement must be available. There is no mystery as to why the Italian *Corte di Cassazione*, in the famous *Ferrini* case,⁹⁵ based its reasoning essentially on *jus cogens* without mentioning this concept explicitly. Its holdings are quite simple. Considering the magnitude of the atrocities committed, justice must prevail.⁹⁶ In briefs submitted by the Italian government to the ICJ, a shorthand formula is used: immunity should not lead to impunity. This implies an assumption of the collective guilt of the German people and equates reparations for serious violations of IHL and HRL with a criminal sanction.

There is an obvious need to clarify the meaning and scope of *jus cogens*. The invocation of this specific class of legal rules cannot be a panacea. As is well known, *jus cogens* made its official entry onto the stage of international law in 1969, when a clause was inserted into the Vienna Convention on the Law of Treaties to the effect that a treaty concluded in contravention of a peremptory norm of international law was “void” (Articles 53 and 64). Prior to the Vienna Convention, from time to time scholars had suggested that states should not be capable of agreeing on objectives and measures at variance with the fundamental values of the international community. Particularly, in the German-speaking world of lawyers,

94. The foreign state must have been designated by the Executive specifically as a state “sponsor of terrorism.” 28 U.S.C. § 1605(a)(7) (1976), *repealed by* Pub. L. No 110-181, §1803(b)(1)(A)(iii), 122 Stat. 341 (Jan. 29, 2008).

95. SPOERER, *supra* note 8.

96. See Cass., sez. un., 11 marzo 2004, n. 5044 (It.), *reprinted in* 87 RIVISTA DI DIRITTO INTERNAZIONALE 53 (2004), *translated in* 128 I.L.M. 659, 669 (2004) (“[G]rave violations entail, even in respect of States, a response which, in qualitative terms, is different and more severe than that reserved for other illegal acts.”).

treaties that violated basic values of the international community were deemed invalid. Thus, in August 1844, Wilhelm Heffter wrote that treaties required a permissible “*causa*” so that, for instance, the “introduction or maintenance of slavery could never be validly pledged.”⁹⁷ The list of impermissible clauses was extended by J. Caspar Bluntschli, who also mentioned “persecution on grounds of religious faith.”⁹⁸ The ideas advanced by Heffter and Bluntschli were followed by Alfred Verdross, a member of the ILC when the body adopted the draft of the Vienna Convention on the Law of Treaties in 1966.⁹⁹ However, initially these voices were not heard and did not constitute customary practice. States did not want to be deprived of their right to conduct treaty practice as they saw fit; in particular, they were afraid that any mention of *jus cogens* might jeopardize the reliability of treaties—the “sanctity” of treaties—as an instrument of international cooperation.¹⁰⁰ For that reason, France has not ratified the Vienna Convention to this day.¹⁰¹ The United States has likewise refrained, but for reasons of a different nature.¹⁰² Notwithstanding such lacunae in the circle of states parties to the Vienna Convention, the concept of *jus cogens* has received quasi-universal recognition.¹⁰³ In a note posted on the internet, the U.S. Department of State

97. AUGUST WILHELM HEFFTER, DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART 148 (1844).

98. J. C. BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN 235 (1878).

99. ALFRED VERDROSS, VÖLKERRECHT 87 (5th ed. 1964).

100. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 667 (2009) (discussing margin note 3 to Article 53).

101. See HELENE RUIZ FABRI, LA FRANCE ET LA CONVENTION DE VIENNE SUR LE DROIT DES TRAITES: ELEMENTS DE REFLEXION POUR UNE EVENTUELLE RATIFICATION 137–67 (Cahin et al. eds., 2007) (describing grounds for this refusal).

102. See Robert E. Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States*, 78 AM. SOC'Y INT'L PROC. 276, 276 (1984). Dalton has reported that in the Senate Committee on Foreign Relations disagreement arose over the impact of Article 46 on the validity of executive agreements in light of the irrelevance of constitutional requirements for treaty-making. Apparently, these disagreements have not been overcome, the United States considering, furthermore, that not being subject to the Convention provides many advantages. See Robert E. Dalton, *International Agreements in the Revised Restatement*, 25 VA. J. INT'L L. 153–68 (1984).

103. See Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, para. 161 (Feb. 26) (signifying that in recent judgments the ICJ no longer shies away from directly using the term *jus cogens*); Application of Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, para. 64 (Feb. 3); see, e.g., Thomas Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, in THE FUNDAMENTAL NORMS OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 203, 205 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

expresses the view that “many of the provisions of the Vienna Convention on the Law of Treaties . . . constitute customary international law.”¹⁰⁴ The American Law Institute likewise accepts the Vienna Convention as, “in general, constituting a codification of the customary international law governing international agreements.”¹⁰⁵

What does *jus cogens* purport to achieve? Its essential objective does not give cause for doubts. *Jus cogens* seeks to prevent evil acts and decisions from acquiring legal validity. This becomes plain when reviewing the relevant clauses of the Vienna Convention (Articles 53, 64). Treaties intended to legally consolidate aims and purposes in flagrant violation of the basic purposes and principles of the UN Charter and thereby of the entire international community must be a legal *nullum*; they must not be enforceable. If states agree on persecuting, or even murdering an ethnic minority, such agreements must remain a pure factual phenomenon to be combated by the UN Security Council and, with means not reaching the threshold of force, by the entire international community. The same must be true of treaties providing for the partitioning of a third country—a fate that befell Poland several times in the course of its history.¹⁰⁶ The provisions of the Potsdam Agreement which provided for the expulsion of twelve million Germans from the eastern territories of Germany, a decision to be classified as ethnic cleansing according to current standards, could not be considered valid today.¹⁰⁷

Similar considerations apply to unilateral decisions and measures taken by a state, such as the unlawful annexation of territory. In this regard, the response of the international community takes the form of a duty incumbent on third-party states not to recognize the acquisition brought about in violation of the ground norm of non-use of force.¹⁰⁸ Again, the primary objective of the rule is

104. *Frequently Asked Questions About Vienna Convention on Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Oct. 1, 2011).

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at 145 (1987).

106. *See generally* Jerzy Lukowski, THE PARTITIONS OF POLAND 1771, 1793, 1795 (1999) (offering political history of Polish revolutions).

107. *See, e.g.*, Christian Tomuschat, *Die Vertreibung der Sudetendeutschen*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 65 (1996) (showing that it was unlawful even under applicable 1945 international law standards).

108. Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc A/RES/56/83; GAOR, 56th Sess., Supp. No. 10 (Dec. 12, 2001). An application of this rule was made by the ICJ in its advisory opinion on Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 202 ¶ D (July 9).

to prevent the unlawful situation from consolidating itself as an unobjectionable *de jure* position. This duty to deny recognition is the only additional specific consequence that the Articles on Responsibility of States for Internationally Wrongful Acts (ARS) provide in cases of a breach of a peremptory norm of international law.

The secondary rules governing the legal consequences of a breach of a *jus cogens* rule require careful consideration. At this point, the injustice has already been committed and the evil cannot be averted any more. There is no obvious solution, nor is there an automatic link between a *jus cogens* breach and specific legal consequences.¹⁰⁹ Should the wrongdoing state be submitted to a harsh regime of sanctions which derogates from the ordinary rules as they have been framed by the ILC in the ARS? Presumptively, the general rules apply. Like any other instance of a breach of a norm of international law, the wrongdoing state is under an obligation to make "full reparation for the injury caused" (Article 34 ARS). But does international law provide for any other specific sanctions? *Jus cogens* is not a steamroller which requires the international legal order to be reshaped or reinvented *de novo* each time one of its rules is in issue.¹¹⁰ The question of what the appropriate response is in a situation where, because of the serious breach, the injury cannot be absolved and only remedial measures can be envisaged, has yet to be answered. International law has changed its fundamental character over the last few decades by becoming more "value-oriented,"¹¹¹ but this does not resolve any of the hard issues when consideration is given to finding the right answers as to the suitable secondary rules.¹¹²

109. See Focarelli, *supra* note 49, at 126; Giegerich, *supra* note 103, at 212–16; Thilo Rensmann, *Impact on the Immunity of States and Their Officials*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 151, 166 (Menno T. Kamminga & Martin Scheinin eds., 1999) (arguing that jurisdiction instead would have to be resolved in accordance with the established rules of international law); Christian Tomuschat, *L'immunité des Etats en cas de violations graves des droits de l'homme*, 109 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 51–74 (2005).

110. See Bianchi, *supra* note 69, at 91; Isabelle Pingel, *L'immunité des Etats*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES*, *supra* note 103 at 239, 243–45. See generally ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* (2006) (offering this as an inherent underlying premise).

111. See Bianchi, *supra* note 69, at 247; Bothe, *supra* note 69.

112. See Christian Tomuschat, *Moralizing International Law*, in *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 281, 281–87 (Christian Tomuschat ed., 2005). The *Festschrift* which was awarded to the author in 2006 was given the title: *Common Values in International Law*.

As far as jurisdiction for international disputes is concerned, the first question is whether in such instances the ICJ is more easily accessible. Here, the ICJ has given clear answers. Even in cases of genocide or aggression, the provisions of the Statute of the ICJ apply rigorously.¹¹³ The consent of the alleged tortfeasor is required pursuant to Article 36(1) of the Statute. This is a clear signal. The ICJ believes that a sovereign state that has committed, or is alleged to have committed, grave violations of the rules with which it is bound to comply still remains a sovereign state with all of its attributes. It does not forfeit its sovereign rights through such conduct. Only the Security Council is vested with the power to impose all kinds of sanctions upon states against their will. It might even instruct a state to grant its consent to a proceeding before the ICJ so that the circumstances and consequences of a breach of a *jus cogens* rule might be clarified.¹¹⁴

Should national judges then fill in the vacuum left by the inaccessibility of the ICJ? First of all, it must be noted that the *Ferrini* jurisprudence of the Italian *Corte di Cassazione* remains isolated. No other foreign courts have followed the Italian example. This will be shown in a later section of this contribution. Thus, if one takes seriously the requirement established in Article 38(1)(b) of the ICJ Statute that customary law arises from “a general practice accepted as law,” it would appear inconceivable that a new customary rule has arisen pushing aside the traditional rule of immunity. And there are indeed grounds which sway against the enforcement of the *Ferrini* course. The national judges of a victim country are generally ill-suited to administer justice in an impartial and objective way. These judges will always be under hard pressure from their own population. This statement is not meant to generally denounce judicial independence and objectivity as a fiction. However, no lawyer may close his or her eyes to certain political and emotional realities.

Additionally, in the case of mass injustices after armed hostilities between two countries, the courts would have great difficulty trying to cope with hundreds, thousands, or perhaps even millions of private claims. The resolution of such configurations by way of privatizing the reparations process is not only impracticable,

113. Application of International Convention on Elimination of all Forms of Racial Discrimination (*Geor. v. Russ.*), Provisional Measures, 2008 I.C.J. 353, para. 84 (Oct. 15); Application of Armed Activities on Territory of the Congo (*Dem. Rep. Congo v. Rwanda*), 2006 I.C.J. 6, para. 64 (Feb. 3).

114. See Matthias Ruffert, *Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* *supra* note 103 at 295, 307–310.

but outright impossible. Even after decades of reparations, proceedings could still be instituted, as was the case in *Ferrini*, the lead case that triggered the dispute between Germany and Italy currently pending before the ICJ. The international legal order could be improved in this regard. The regulation of the war damages caused by Iraq through its invasion of Kuwait is a good example of how a viable mechanism might be established. Indeed, a mechanism like the UN Compensation Commission¹¹⁵ permits centralization and coordination of all reparation claims, making it possible to satisfy all asserted demands within the limits of the available assets and on a basis of equality. Permitting individual actions to be instituted against the wrongdoer would unleash a race that only the quickest and most powerful could win, while those in dire need might be confined to the losing end.

Any convincing proposals that would suggest how the different levels of reparations could be coordinated are conspicuously lacking. There is no doubt that the common rules of inter-state responsibility should apply in any event. On the other hand, it is also clear that a state cannot be held responsible twice; once according to the traditional rules, and a second time on the basis of private claims brought against it by the individual victims. After World War II, Germany was held accountable as a state in particular through the Potsdam Agreement.¹¹⁶ As already indicated, the German nation lost almost a quarter of its territory. Germany then independently established additional reparation schemes for many of the victims of the Nazi regime and also provided important amounts of financial assistance to the State of Israel. The two treaties of 1961 between Germany and Italy were meant to bring about a final settlement on the issue of reparations and were understood as such by Italy for many decades until the non-inclusion of the IMIs in the Law on the Creation of a Foundation "Remembrance, Responsibility and the Future" in 2000¹¹⁷ prompted the Italian government to change its stance.

115. S.C. Res. 692, ¶ 3, U.N. Doc. S/RES/2987 (May 20, 1991); see Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT'L L. 161, 181 (2002); Nobert Wühler, *The United Nations Compensation Commission, in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* 213, 213–29 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

116. See sources cited *supra* notes 14, 25 (discussing Germany's reparations obligations under the Potsdam Agreement).

117. See Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Law on the Creation of a Foundation "Remembrance, Responsibility and the Future"], Aug. 2, 2000, BGBl. I at 1263, § 1 (Ger.).

V. A NEW RULE OF INTERNATIONAL CUSTOMARY LAW?

Advocates of denying state immunity often argue that under the new “value orientation” of international law, a new rule of customary law has arisen permitting individuals to sue foreign sovereigns before the courts of another country even with respect to acts *jure imperii*.¹¹⁸ The contention is that the traditional rule has been weakened to such an extent that the *opinio juris*, essential for the existence of a rule of customary international law, is eroded, no longer meeting the requirements specified by the ICJ in the *North Sea Continental Shelf* case.¹¹⁹ Recently, some assert that jurisdictional immunity of states is no more than a guiding principle, as opposed to a rule, that is freely shaped by states within a large margin of discretion.¹²⁰ A closer look at the real world, outside of articles and books written by human rights activists, shows a different picture.

First, the new trend finds its only anchor point in the *Ferrini* judgment of the Italian *Corte di Cassazione* and the ensuing jurisprudence of that same Court. The *Distomo* judgment of the Greek *Areios Pagos* was delegitimized in Greece by the later judgment in *Germany v. Margellos* of the Special Highest Court under Article 100 of the Greek Constitution, which held that state immunity continued to apply without exception with regard to alleged violations of human rights.¹²¹ Since the Special Court holds the highest rank in the hierarchy of the Greek judiciary, discharging the functions of a constitutional court and being specifically entrusted with ruling authoritatively on any issue of general international law, the judgment of the *Areios Pagos* has lost any precedential value.

No court in any another country follows the *Ferrini* precedent.¹²² Thus, the *Corte di Cassazione* stands in splendid isolation, without any support outside of Italy.¹²³ In order to bring these considerations to a close, a short overview of the most important judicial decisions

118. This is the gist of the decisions in *Distomo* and *Ferrini*, dogmatized by Bianchi, *supra* note 69, and Orakhelashvili, *supra* note 71.

119. *North Sea Continental Shelf* (Ger. v. Den.), 1969 I.C.J. 3, para. 31 (Feb. 20).

120. E.g., Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L. L. 853 (2010).

121. Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), translated in *Germany v. Margellos*, 129 I.L.R. 526 (2002).

122. We leave aside the case law evolved in the United States on the basis of specific legislative acts that seek to combat terrorist activities.

123. But see Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, 54 INT'L & COMP. L.Q. 951, 957 (2005) (stressing that the judicial practice cannot be discarded “by simply inferring a generic and all-purpose *jus cogens* character . . . from some practice existing in other fields of international law”).

which all confirm the continued existence of jurisdictional immunity in respect of acts *jure imperii* should be reviewed. Given the facts of the current proceedings between Germany and Italy, cases which have their backdrop in World War II and violations of IHL by German troops are certainly the most illuminating precedents.

In a case against Germany (*Bucheron*), the issue was French jurisdiction over a claim derived from the plaintiff's deportation to Germany for purposes of forced labor. The *Cour de cassation* held¹²⁴ that the facts

consistant à contraindre des personnes requises au titre du service du travail obligatoire, à travailler en pays ennemi, avaient été accomplis à titre de puissance publique occupante par le Troisième Reich, dont la RFA est successeur . . . n'étaient pas de nature à faire échec au principe de l'immunité juridictionnelle de la RFA selon la pratique judiciaire française¹²⁵

The *Cour de cassation* does not provide reasons for its decision. As the citation demonstrates, the judges confine themselves to referring to the French judicial practice. The *Ministère public* (Public Prosecutor) found it sufficient to devote half a sentence to the claimant's argument that a violation of international humanitarian law leads to forfeiture of jurisdictional immunity:

. . . [T]ant par les moyens mis en œuvre que par la finalité poursuivie, les opérations critiquées ont été entreprises par l'Etat allemand dans le cadre de ses prérogatives de puissance publique et dans l'intérêt de son service public (quel que puisse être par ailleurs le jugement à porter au plan moral sur la légitimité d'une telle action).¹²⁶

A note written by Florence Poirat¹²⁷ articulates some more general considerations. Beforehand, the *Cour d'Appel de Paris* expressed itself in a slightly more substantial manner:

124. *Cour de cassation* [Cass.] [supreme court for civil and criminal matters] 1e civ., Dec. 16, 2003, Bull. Civ. I, No. 258 (Fr.), summarized by Florence Poirat, *Jurisprudence française en matière de droit international public*, 108 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 259, 260 (2004).

125. *Id.* The Court says in its excerpt that the imposition of forced labour was effected by the Third Reich under governmental authority and did not, according to French judicial practice, affect Germany's jurisdictional immunity (summary translation provided by author).

126. *Cour d'appel* [CA] [regional court of appeal] Paris, 10e ch., Sep. 9, 2002, Gaz. Pal. 2002, 6, 1773. In this excerpt, the Public Prosecutor confines himself to stating that the controversial operations were executed by the German state within the scope of its sovereign powers in the interest of its public service, whatever judgment may be passed on the moral plane on the legitimacy of its action (summary translation provided by author).

127. Poirat, *supra* note 124, at 260.

Les États étrangers bénéficient de l'immunité de juridiction lorsque l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public . . . [T]ant par les moyens mis en œuvre que par la finalité poursuivie, les faits dont le requérant a été la victime s'intègrent dans un ensemble d'opérations entreprises par l'État allemand dans le cadre de ses prérogatives de puissance publique. En l'état du droit international, ces faits, quelle qu'en soit la gravité, ne sont pas, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, de nature à faire échec au principe de l'immunité de juridiction des États étrangers.¹²⁸

A second case from Poland was brought by a victim of a 1944 raid by German troops on a village in southeastern Poland. The victim, Natoniewski, suffered heavy burns that left permanent scars on his face and caused partial limb disability. His claim was dismissed by the regional court and the court of appeals. Eventually, on October 29, 2010, the Supreme Court of Poland held that state immunity was a bar to the jurisdiction of the Polish courts.¹²⁹ The Court observed that an armed conflict involving victims, damages, and suffering on a large scale could not be reduced to a relationship between a wrongdoing state and the individual victims. The armed conflict took place first and foremost between states and it was for the states to decide on a comprehensive solution for mutual claims in a treaty after the termination of hostilities. Jurisdictional immunity ensures that a settlement is brought about in that way and that the reestablished peaceful inter-state relations will not be disturbed by a series of domestic court proceedings.¹³⁰

In Israel, a lower court also acknowledged the defense of sovereign immunity in a case where survivors of the holocaust attempted to sue Germany for compensation. Without commenting at length on the issue, the court declared that it lacked jurisdiction to adjudicate the claim.¹³¹ Lastly, there was a Brazilian case arising from German submarines that sunk a fishing boat during World War II with the attendant loss of human lives. Without any hesitation, the

128. Gaz. Pal. 2002, at 1774 (Fr.). In this excerpt, the court reiterates the views expressed at lower level, observing that indeed the actions concerned had been carried out under public authority so that jurisdictional immunity must be granted (summary translation provided by author).

129. IV CSK 465/09 (Pol.), available at <http://www.sn.pl>.

130. Tomasz Milej, *The Position of General Rules of Public International Law in the Polish Legal Order*, in *LES PRATIQUES COMPARÉES DU DROIT INTERNATIONAL EN FRANCE ET EN ALLEMAGNE* (Charles Leben et al. eds., 2011); see also Marcin Kaldunski, *State Immunity and War Crimes: The Polish Supreme Court on the Natoniewski Case*, 30 *POL. Y.B. INT'L L.* 235, 247 (2010) (noting that the goal of eliminating judicial remedies in such circumstances is the normalization of relations between states).

131. CA (TA) 2134/07 Irit Tzemach v. Germany [2009] (Isr.).

federal court in Rio de Janeiro dismissed the action because it lacked jurisdiction.¹³²

Other cases decided by high-level courts are less intimately related to the problems addressed in the case currently pending before the ICJ. However, all courts are unanimous in holding that suits brought against foreign states that vindicate reparation for the injurious consequences of genuinely governmental acts should be dismissed for lack of jurisdiction. In *Bouzari v. Iran*, a decision issued by the Court of Appeals of Ontario on June 30, 2004,¹³³ an Iranian, having been accepted by Canada as a “landed immigrant,” wished to sue Iran for acts of torture to which he was subjected while residing in his home country. One of Bouzari’s primary arguments was that any state is under an obligation to provide victims of torture with a civil remedy, irrespective of the venue of the crime, even if the crime was perpetrated outside the forum state. The court of appeals rejected that argument. In its conclusion, the court cited a statement by the lower court, the Ontario Superior Court of Justice:

An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to jus cogens. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.¹³⁴

The claim was rejected for this reason. The Supreme Court of Canada also denied the application for leave to appeal.¹³⁵

Similar facts underlie an action brought in the United Kingdom by a plaintiff who was allegedly subjected to “severe, systematic and injurious” torture in Saudi Arabia, and wished to obtain compensation by suing the Arab Kingdom (the *Jones* case).¹³⁶ After a careful review of the legal grounds submitted by the claimant, the House of Lords came to the unanimous conclusion that the British courts lacked jurisdiction, both under the UK Act of 1978 and under general international law. In particular, the judges appraised the reasons given by the *Corte di Cassazione* in *Ferrini*. According to the

132. Arraci Barreto v. Germany, 9.7.2008 (Braz.)

133. Bouzari v. Islamic Republic of Iran, [2004] 243 D.L.R. 4th 406 (Can. Ont. C.A. 2004).

134. *Id.* para. 88.

135. Noah Benjamin Novogrodsky, *Immunity from Torture: Lessons from Bouzari v. Iran*, 18 EUR. J. INT’L. L. 939, 942 (2008).

136. Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) 270–71 (appeal taken from Eng.) (U.K.).

words of Lord Bingham of Cornhill, “[t]he *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law.”¹³⁷

In other words, the House of Lords rightly took the view that a single judge in one country out of the 193 states that make up the international community cannot impose its views on all the other nations. Although international law evolves in a creeping process similar to the growth of common law, where judges take new directions and open up new horizons, they are invariably required to act *lege artis* in the (sometimes erroneous) belief that the rule applied was developed in a constructive effort to synthesize elements in force as component parts of the legal order. Judges are not called upon to act with the explicit intention to create new law. If they do so, they fail in their professional duties.

State immunity has also appeared in the jurisprudence of the ECtHR. In the two judgments of *Al-Adsani v. United Kingdom* and *McElhinney v. Ireland*, the Court confirmed the existence of the rule of state immunity under customary international law, holding:

[S]overeign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.¹³⁸

Accordingly, the Court found that to deny access to justice in such instances did not amount to a violation of Article 6 of the ECHR. However, the claimants argued that in their respective cases an exception to the general rule should be acknowledged. In *Al-Adsani*, where the claimant was allegedly tortured and, as a consequence, a breach of a *jus cogens* rule was at issue, the Court observed that no change of the law in force had occurred:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.¹³⁹

137. *Id.* para. 22.

138. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 99 para. 54; *accord McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, para. 35.

139. *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 101 para. 61.

It is true that this decision was obtained by a slim majority of nine against eight. The dissenting opinion is frequently invoked as evidence of a gradual process of change.¹⁴⁰ However, a close reading of that opinion yields disappointing results. The judges assume that a conflict exists between a *jus cogens* rule and a “hierarchically lower rule” of public international law.¹⁴¹ As shown above, this alleged conflict does not exist. The only rule having a *jus cogens* character is the rule banning torture, the primary rule prescribing the conduct to be observed or from which to desist. No inference can be drawn from that rule as to the specificities of the secondary rules to be applied where torture has occurred. *Jus cogens* does not require specific answers as far as procedural remedies are concerned. Corroboration of this conclusion can be found in the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,¹⁴² the specialized instrument regulating the procedures aiming to combat the practice of torture. No state is under an obligation to make a declaration under Article 21 (providing for interstate communications) or under Article 22 (providing for individual communications), nor is any state required to ratify the Optional Protocol to the Convention¹⁴³ which has established an investigation mechanism. Given this reluctance of states to accept remedies at the international level, it seems almost preposterous to contend that the existing gap may be filled in by suits brought to the cognizance of domestic judges.

In *McElhinney*, the territorial clause was invoked by the applicants when a British soldier from a unit deployed in Northern Ireland caused injury, under strange circumstances, near the border of the Republic of Ireland. The refusal of Irish courts to assume jurisdiction over the case was accepted as lawful under the ECHR by the Strasbourg Court.¹⁴⁴ The judges confirmed the construction of the territorial clause suggested above in the sense that its essential meaning was to carve out an exception for insurable risks, holding:

The Court observes that . . . there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears . . . that the trend may primarily refer to “insurable” personal

140. See, e.g., Bianchi, *supra* note 69, at 95; Orakhelashvili, *supra* note 71, at 261; Pingel, *supra* note 110, at 244.

141. *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 112–13 para. 4 (Rozakis & Caflisch, JJ., dissenting).

142. G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

143. G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002).

144. For a precise account of the underlying facts, see *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, 41–44.

injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.¹⁴⁵

It should be noted that the ECtHR has not departed from this jurisprudence,¹⁴⁶ which it apparently considers crucial to ensuring proper coordination between the ECHR and general international law.

As far as other practice is concerned, actions brought against a foreign state on account of acts *jure imperii* are normally summarily dismissed at the lowest level of the judicial hierarchy. Such judgments are normally not included in international law reports. The practice is absolutely consistent; there is not a single case outside of Greece and Italy where Germany was ordered by the courts of another country to make reparation payments for damages caused by military operations during World War II. As explained above, reparation was effected in the stipulations in the Potsdam Agreement and its further elaboration, and through unilateral acts of German legislation.

Lastly, it cannot go unnoticed that the 2004 UN Convention refrained from supplementing its list of exceptions from immunity by a clause that would allow claims to be brought against foreign states if the plaintiff alleges that he or she is the victim of grave violations of human rights. This was not an oversight, as the issue was discussed by the ILC. In 1999, the ILC even established a working group mandated with examining whether it might be advisable to lay down such an additional departure from the principle of immunity.¹⁴⁷ The working group noted that some lower judicial instances had shown sympathy for claims that could be founded on *jus cogens* rules.¹⁴⁸ Eventually, however, its deliberations were inconclusive and no decision was taken to amend the existing draft articles.¹⁴⁹ The summary of the deliberations was even relegated to an "Appendix" of

145. *Id.* at 46–47 para. 38.

146. From the more recent past, see *Cudak v. Lithuania*, App. No. 15869/02, Eur. Ct. H.R. (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (confirming no jurisdictional immunity exceptions for functions closely related to the exercise of governmental authority).

147. Rep. of the Int'l Law Comm'n, 43d Sess., 3 May–23 July, 1999, at 155 para. 9, U.N. Doc A/54/10; GAOR 46th Sess., Supp. No. 10 (1991), reprinted in [1999] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2).

148. *Id.* at 172 paras. 3–4.

149. *Id.* at 172 para. 13.

the report.¹⁵⁰ This reluctance amounted to a flat rejection of the proposals.

VI. CONCLUDING OBSERVATIONS

Pleas for discarding state immunity in cases of grave violations of human rights are mostly based on fully understandable emotional reasons, but generally fail to take into account the full scope of the regime of state responsibility. Before inventing a new wheel, one should carefully examine the functionality of the old wheel. The traditional mechanisms for the settlement of damages in cases of massive injustices, particularly war damages resulting from noncompliance with rules of IHL, are certainly not without any flaw or defect. However, to replace this system with an uncoordinated clutter of individual suits is the worst of all possible solutions. A viable mechanism requires the guiding hand of an international organization able to balance the interests at stake in a thorough manner. This should become a project of progressive development of the law.

150. *Id.* at 171.