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Italian Judges' Point of View on Foreign States' Immunity

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ABSTRACT

The Article gives an account of the most recent Italian practice as regarding foreign states' immunity from the jurisdiction of the forum state. In the absence of domestic laws regulating the matter, Italian courts thus far have been directly applying international customary law, making recourse to a progressive interpretation of international rules. In the past, Italian judicial practice together with the Belgian one gave a great contribution to the consolidation of the restrictive immunity theory. In the last few years, Italian courts have lifted immunity with respect to acts of a foreign state qualified as acta iure imperii *in civil proceedings promoted by individuals who were victims of serious violations of humanitarian law and of fundamental human rights. According to Italian judges, the peremptory character of rules prohibiting such conducts would be impaired, and the right to compensation denied, should the violation remain unsanctioned because of the barrier of state immunity.*

I argue in this Article that the Italian judicial practice is not inconsistent with existing international law. I examine the relevant provisions of the codification conventions on state immunity, namely the Basle Convention and the New York Convention, and internal and international case law concerning the relationship between international crimes and rules on state immunity, especially the decisions of the European Court on Human Rights. In the same perspective, I also consider the work of the Institut de Droit International, *and the Resolution adopted in 2009 on International crimes and Immunities. In the light of the foregoing analysis, I conclude that the Italian judicial practice restricting the traditional immunity that foreign states enjoy with respect to* acta iure imperii *in order not to deprive victims of human rights violations amounting to*

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international crimes of the right to pecuniary compensation fits comfortably with recent developments which have occurred in international law concerning the protection of fundamental human rights. I also assert that Italian judges' decisions foster in that regard the consolidation of a trend that has recently emerged in international practice, at the same time giving a meaningful contribution to the clarification of some controversial issues of the new boundaries of state immunity that the New York Convention leaves unprejudiced.

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I. ITALIAN CASE LAW ON FOREIGN STATES' IMMUNITY. THE *JUS COGENS* EXCEPTION CONCERNING INTERNATIONAL CRIMES

Italy has never enacted specific legislation on foreign states' immunities. It does not take part in the 2004 UN Convention on Jurisdictional Immunities of States and their Property, nor is it a party to the 1972 European Convention on State Immunity (Basle Convention).[1] In the past, a legislative decree provided that measures

1. The United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities] originates in a set of Draft Articles adopted by the International Law Commission. Special Rapporteur, *Third Report on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/440 (July 19, 1991) (by Geatano Arangio-Ruiz), *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 1. The final text was prepared by an Ad Hoc Committee instituted by the General Assembly, Ad Hoc Comm. on Jurisdictional Immunities of States and Their Property, Draft Articles on

of constraint against foreign states' properties should be subject to prior authorization by the Ministry of Justice and to the condition of reciprocity. [2] However, the measure was "dismantled" by the Constitutional Court through two subsequent decisions in 1962 and 1993.[3] In the opinion of the Court, the legislative measure in question was contrary to Article 10 of the Constitution. By subordinating the adoption of a measure of constraint against foreign state properties to the discretionary appreciation of the Ministry of Justice, the measure could come into conflict with rules of general international law applicable to state's immunity from measures of constraint either for the purpose of enforcing judgment (post-judgment measures) or for the purpose of pre-judgment attachment.[4] As a matter of fact, Article 10 of the Constitution affirms the conformity of the internal legal order to the rules of international law generally recognized, thus "constitutionalizing" customary international law.[5] By virtue of Article 10 of the Constitution, international customary law (or better, general international law) always prevails over conflicting legislative measures: the latter are declared unconstitutional where they are in conflict with a rule of general international law.[6] With respect to

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Jurisdictional Immunities of States and Their Property, U.N. Doc. A/AC.262/L.4/Add.1 (Feb. 28, 2003), and the Committee adopted these articles on March 5, 2004. Rep. of the Ad Hoc Comm. on Jurisdictional Immunities of States and Their Property, 8th plen. mtg., Mar. 1–5, 2004, U.N. Doc. A/59/22; GAOR, 59th Sess., Supp. No. 22 (2004). The Convention was opened for signature in New York on 17 January 2005 and it is not yet in force. *Status: United Nations Convention on Jurisdictional Immunities*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en (last visited Nov. 1, 2011). The European Convention on State Immunity, *opened for signature* May 16, 1972, E.T.S. 74 (entered into force June 11, 1976), was concluded in Basle on May 16, 1972, under the auspices of the Council of Europe.

2. Decreto Legge 30 agosto 1925, n. 1621, *amended by* Legge 15 luglio 1926, n. 1263 (It.) (requiring that the Ministry of Justice approve any executive actions against properties in those foreign states that allow reciprocity with Italy).

3. *See* Corte Cost., 15 luglio 1992, n. 329, at 7 (It.) (declaring the last part of the decree unconstitutional because it denies a party any recourse against the Ministry of Justice's discretion in determining whether or not reciprocity exists); Corte Cost., 13 luglio 1963, n. 135, at 7 (It.) (declaring the decree unconstitutional insofar as it gives the Ministry of Justice authority over executive actions in a way that conflicts with generally recognized international norms).

4. As the adoption of the measure of constraint is dependent upon a discretionary decision of the Ministry of Justice, the contrast between a national decision and the customary rule would eventually rise in any case, either if the customary rule applicable to the case authorizes the measure of constraint or if the international rule forbids such a measure in the given case. Corte Cost., 2 luglio 1992, n. 329 (It.).

5. The Italian Constitution reads as follows: "The Italian legal system conforms to the generally recognised rules of international law." Art. 10(1) Costituzione [Cost.] (It.).

6. The Italian Constitutional Court case law concerning the preeminence to be given, by Article 10 of the Constitution, to general international law rules over internal legislative measures is unambiguous and consistent. *See, e.g.*, Corte Cost., 15 maggio

international law's relationship with constitutional norms, the Constitutional Court concluded in the *Russel* case that general international law prevails as *lex specialis*, save when it conflicts with the fundamental principles of the internal legal order, which represent a threshold that external values cannot override without affecting the intimate coherence of the national system of law.[7] The recognition and respect for inviolable human rights, as expressed in Article 2 of the Constitution, including the right of access to justice for everyone, belong to those fundamental internal principles.[8]

In principle, Italian judges enjoy a broad discretion with regard to the interpretation of general international rules (i.e., the rule on state immunity as well as the immunity of state agents). Italian courts have proved to be both very sensible and very creative in how they exercise this power. For example, between the nineteenth and the twentieth centuries, a restrictive doctrine of the state immunity from civil jurisdiction based on the distinction between *acta jure imperii* (i.e., acts of government) and *acta jure gestionis* (i.e., acts of a commercial nature) resulted from both Italian and Belgian case law denying immunity from jurisdiction in respect to acts of a commercial nature.[9] Italian case law also paved the way for applying the restrictive immunity theory to the jurisdiction to execute.[10] In principle, Italian

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2001, n. 131, at 4 (It.) (outlining precedent making clear that the Italian judicial system conforms to generally recognized international norms); Corte Cost., 3 marzo 1997, n. 58 (It.) (also noting that, under Art. 10, internal rules automatically adapt to generally recognized international norms); Corte Cost., 17 giugno 1992, n. 278, at 3 (It.) (explaining, that in the context of drafting non-citizens into military service, Italian law conforms to generally recognized international norms via Article 10); Corte Cost., 7 maggio 1982, n. 96, at 3 (It.) (noting that Article 10 requires that a law to adapt to generally recognized international norms).

7. *See* Corte Cost., 15 luglio 1992, n. 329 (It.); Corte Cost., 18 giugno 1979, n. 48 (It.).

8. Article 2 of the Italian Constitution reads as follows: "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed." Art. 2 Cost. (It.). The right of access to justice is the object of paragraph 1 of Article 24 of the Constitution, according to which: "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law." Art. 24(1) Cost. (It.).

9. Insofar as Belgian case law is concerned, see Rau v. Duruty, Cour d'Appel [CA] [Court of Appeal] Gand, Mar. 14, 1879 (Belg.); Luxembourg v. Etat néderlandais (*Chemin de fer Liégeois*), Cour de Cassation [Cass.] [Court of Cassation], June 11, 1903 (Belg.). As for Italian case law, see Gutierres *ex parte* Bey di Tunisi v. Emilik, Cass. Firenze, 25 giuglio 1886, Annali, 1886, I, 349 (It.); Typaldos v. Manicomio di Aversa, Cass. Napoli, 25 febbraio 1886, Giur. it. 1886, I, 223 (It.). The attitude of Belgian and Italian judges was a reaction to the extension of state activity to the commercial field in the course of the nineteenth century. The phenomenon increased with the appearance of socialist states and the growing role of the public sector in national economies.

10. As to the rationale that justifies a restriction to the general principles of absolute immunity, immunity of states from measures of constraint consequent upon the exercise of jurisdiction goes parallel to immunity from civil jurisdiction (even though the former has evolved more slowly). Nevertheless, as the Convention highlights, the distinction between "immunity from jurisdiction" and "immunity from

jurisprudence seems to be in line with the principles and solutions put forward by the UN Convention on State Immunity as indicated below.

In fact, with regard to immunity from cognitive jurisdiction, and in order to qualify state activities either as *jure imperii* or as *jure gestionis,* Italian judges have expressed their preference for the criterion of the nature, rather than the purpose, of the act, in line with the indications emerging from the UN Convention (Article 2).[11] For instance, the Court of Appeals of Genoa denied immunity to Iraq in a proceeding concerning a contract with an Italian corporation for the supply of warships, despite the fact that the contract was concluded by Iraq for public purposes.[12] In a similar perspective, in cases concerning Argentinean bonds, Italian judges usually granted immunity to Argentina in civil suits initiated by Italian citizens who purchased Argentinean bonds and did not receive the expected repayments after the default of the state, even though the issuance of bonds has to be considered an activity of a private nature and not an act of government. In such a case, in fact, the activity taken into account by the judges in order to affirm Argentinean immunity was not the issuance of the bonds, but the legislative measure taken by Argentina to freeze the repayment of its financial obligations.[13]

With respect to employment disputes, the Italian courts generally deny immunity to a foreign state whenever the employee does not perform duties connected with the exercise of sovereign functions of the foreign state. The courts will also deny immunity

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execution" has to be kept firm and clear due to the particular sensitivity of states in face of measures of constraint against their assets and properties. *See* UN Convention on Jurisdictional Immunities, *supra* note 1, art. 20. It follows that, in the legal conviction of state, "the relative character of immunity from jurisdiction has emerged in contrast to the tendency of States to view immunity from execution as being absolute in nature." *See* Corte Cost. 329/1992 (It.). Nevertheless, state's practice shows a strong consideration of principle in favour of exercising enforcement jurisdiction once the competence of municipal legal system in order to exercise jurisdiction and to render a judgment is affirmed. *See* Giamahiria araba libica popolare socialista v. Rossbeton Officine Meccanische, Cass., sez. un., 25 maggio 1989, n. 2502 (It.) (holding that all state activities are not of a public function and are measured against the concept of restrictive immunity).

11. "In determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction." UN Convention on Jurisdictional Immunities, *supra* note 1, art. 2.

12. *See* Fincantieri-Cantieri Navali S.p.A. v. Ministry of Defence, Armament & Gen. Directorate of Iraq, App. Genova, 7 maggio 1994, Giur. Civ. Commentata 1995, I, 667 (It.).

13. Cass., sez. un., 27 maggio 2005, n. 6532 (It.). For a similar perspective, see Cass., sez. un., 17 luglio 2008, n. 19601, at 4 (It.) (explaining that the question at hand turned on the *nature* of the legislative measure).

when the judicial *petitum* (i.e., the object of the request introduced by the employee) has an exclusively economic character not involving, by its nature, interference by the forum judge within the exercise of sovereign powers by a foreign state.[14] The employee's nationality seems to have no particular relevance in the Italian case law.[15] In that respect, the emerging Italian jurisprudence is likely to be a bit less conservative than customary international law as reflected by Article 11 of the UN Convention on State Immunity, which grants immunity whenever the employee is a national of the employer state.[16]

As far as state immunity from executive measures is concerned, Italian case law does not seem to be significantly different from international practice, as confirmed by the 2004 UN Convention on Jurisdictional Immunities, granting execution only with respect to foreign state property used for private commercial purposes.[17] Moreover, Italian judges have so far been confirming the general principle that immunity from execution must be granted if state immunity from cognitive jurisdiction is recognized.[18] A significant expression of this trend is the way in which Italian judges managed the question of Argentinean bonds. Recognizing the *jure imperi* character of the Argentinean measure enjoining the freezing of the bonds' repayments, Italian judges rejected requests by the purchasers for pre-judgment measures of constraint against Argentinean

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14. *See, e.g.*, Consolato Britannico in Milano v. Papa, Cass., sez. un., 27 maggio 1999, n. 313 (It.); Cass., sez. lavoro, 20 giugno 2005, n. 13175, at 4 (It.) (explaining that recent jurisprudence regarding jurisdiction in such cases focuses not on the nature of the employee's functions, but rather on the pecuniary nature of the controversy); Consolato generale dell'Ecuador v. Marchetti, Cass., sez. un., 1 febbraio 1999, n. 18, Giust Civ. 1999, 216 (It.); Cass., sez. un., 15 maggio 1989, n. 2329, Foro. It. I 1989, 2464 (It.) (holding that immunity may be excluded when the issue is purely financial); Kuna-Kuwait News Agency v. Gitan Musa, Cass., sez. un., 12 giugno 1999, n. 331 (It.); Ambasciata Emirati Arabi v. Montanari, Cass., sez. un., 12 febbraio 1999 n. 59 (It.).

15. *See, e.g.*, Arabia Saudita v. Al Bayati Khalil, Cass., sez. un., 15 luglio 1999, n. 395 (It.). Usually, Italian judges do not take into consideration the employee's nationality, giving relevance to the elements: (a) the nature of the activity performed by the employee and (b) the object of the request introduced by the employee.

16. A state can invoke immunity when "the employee is a national of the employer State at the time when the proceeding is instituted." UN Convention on Jurisdictional Immunities, *supra* note 1, art. 11(2)(e). The nationality criterion is avoided if "*this person has the permanent residence* in the State of the forum . . . ." *Id.* (emphasis added). In light of the last sentence, the distance between Italian case law and the UN Convention seems not to be particularly relevant, considering that, as a matter of fact, the employee has often his or her permanent residence in the state where the contract of employment has to be performed, that is, in the forum state.

17. Pre-judgment and post-judgment measures of constraints against property of a foreign state can only be taken if the state has expressly consented to such measures and if the property is specifically in use or intended for use by the state for other than government non-commercial purposes and is in the territory of the forum state. *Id.* arts. 18–19.

18. *See supra* note 10.

properties in Italy.[19] The one exception to this, a judgment of a first instance Rome Tribunal, [20] was later dismissed by the Court of Cassation.

A possible new perspective seems to have emerged in the last few years with respect to a *jus cogens* exception. Italian courts recently lifted immunity with respect to acts of the foreign state qualified as *acta jure imperii* in civil proceedings promoted by individuals who are victims of serious violations of humanitarian law and of fundamental human rights.[21] According to Italian judges, the peremptory character of the rule prohibiting such conduct would be hampered should the violation remain unsanctioned because of the barrier of the immunity of the responsible state. [22] The starting point of this now well-established case law is the 2004 *Ferrini* case before the Italian Court of Cassation.[23] In *Ferrini,* the civil action was initiated against Germany by a civilian who was forcibly deported to Germany during the Nazi occupation of Italy and subjected to forced labour in a concentration camp until the end of the conflict.[24]

This line of thought has been confirmed by several subsequent decisions rendered by both the first instance tribunals and the Court of Cassation up to the *Milde* decision in 2009.[25] In the *Milde* decision,

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19. *See* Gallo v. Repubblica Argentina, Trib. Roma, 31 marzo 2003 (It.); Calorosi v. Repubblica Argentina, Trib. Roma, 19 giugno 2003 (It.); Goldoni v. Repubblica Argentina, Trib. Milano, 19 giugno 2003 (It.); Bennati v. Repubblica Argentina, Trib. Roma, 16 luglio 2003 (It.); Rubin v. Repubblica Argentina, Trib. Vicenza, 11 dicembre 2003 (It.), *all in* 41 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 2005, at 1102.

20. *See* Mauri v. Repubblica Argentina, Trib. Roma, 22 luglio 2002, *in* 39 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 2003, at 174 (It.).

21. *See* cases cited *infra* notes 23–27 (limiting immunity from jurisdiction in the context of potentially significant human rights violations).

22. *See infra* notes 23, 27, 40, 50.

23. Cass., sez. un., 11 marzo 2004, n. 5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE 2004, at 53 (It.) (stating that immunity may no longer be pleaded when the conduct of the state amounts to an international crime that infringes universal values of the international community as a whole and rules of *jus cogens*). Consequently, in case of conflict between one of these peremptory norms and the customary rule on state immunity, the former should prevail. *Id.*

24. *Id.* In 1998, Mr. Ferrini submitted a claim for compensation against Germany before the Tribunal of Arezzo, concerning patrimonial and non-patrimonial damages suffered as a consequence of his deportation to Germany. *Id.* para. 1. The Tribunal of Arezzo, with a decision rendered on November 3, 2000, rejected the request because of lack of jurisdiction, recognizing Germany's immunity from suit. The Florence Court of Appeals affirmed that decision. *Id.* The Court of Cassation annulled the Court of Appeals' judgment and the case was remanded to the Tribunal of Arezzo. *Id.* para. 12. The Tribunal of Arezzo rejected the claim for compensation introduced by Mr. Ferrini as subject to the statute of limitation. Subsequently, the Florence Court of Appeals, with a decision rendered on April 12, 2011, annulled the decision of the Arezzo Tribunal and accorded to Mr. Ferrini a compensation of €30,000 for the damages suffered plus interest accrued since 1945.

25. The Court of Cassation rendered twelve orders on May 29, 2008. Cass., sez. un., 29 maggio 2008, n. 14201–212 (It.). The principle was also confirmed, as an *obiter*

the Court of Cassation ruled not only on a preventive motion on jurisdiction (as in previous cases), but also on the merits. The Court affirmed the judgment of the Military Court of Appeals ordering Germany, together with Sergeant Milde, to pay one million euros each as compensation to the victims of the civilian massacre of Civitella, where more than 200 civilians were killed as a military reprisal.[26] In the opinion of the Military Appellate Court, affirmed by the Court of Cassation, the preeminence recognized in international law for rules concerning the protection of human rights and the peremptory character of the rule prohibiting international crimes function to restrict the application of the customary rule on state immunity.[27] According to the Court, the violation of such peremptory obligations entails the obligation to give compensation (a principle already recognized in the Fourth 1907 Hague Convention respecting the Laws and Customs of War on Land)[28] to the victims for all damages, economically assessable or not.[29]

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dictum, in two Court of Cassation cases. Cass., sez. un., 25 febbraio 2009, n. 4461, 92 RIVISTA DI DIRITTO INTERNAZIONALE 2009, at 856 (It.) (affirming the *Ferrini* principle but explaining it did not apply to the present case because the rights at stake were not "fundamental" and human rights issues do not automatically trump internationally sovereignty); Cass. Pen., sez. un., 27 maggio 2005, n. 11125, 88 RIVISTA DI DIRITTO INTERNAZIONALE 2005, at 1091 (It.) (same).

26. *See* Cass., sez. un., 13 gennaio 2009, n. 1072, 92 RIVISTA DI DIRITTO INTERNAZIONALE 2009, at 618 (It.) (rejecting Germany's action challenging the judgment). Josef Milde was first condemned by the Military Tribunal of La Spezia on January 13, 2006, and the decision was affirmed by the Rome Military Court of Appeals on December 18, 2008 and by the Court of Cassation on March 11, 2004. *See* Cass. n. 5044/2004.

27. *See* Cass. 1072/2009 paras. 4–5 (It.) (affirming that state immunity is inoperative in cases alleging serious injuries of the inviolable human rights); App. Militare Roma, 18 dicembre 2008, paras. 4–5 (It.), *aff'd*, Cass. 1072/2009 (It.).

28. Artice 3 of the Hague Convention provides that a belligerent party which violates the regulations respecting the laws and customs of war on land annexed to the Convention shall be liable to pay compensation. Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277; Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (Annex to the Hague Convention No. IV). In an advisory opinion, the ICJ recalled a statement already made by the Nuremberg Military Tribunal in 1945 and declared that the humanitarian rules included in the regulations annexed to the Hague Convention No. IV of 1907, and in the Convention itself "were regarded as being declaratory of the customs of war" and "reflected the most universally recognized humanitarian principles." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 80, 82–83 (July 8). The Court also raised the question whether these principles and rules are part of *jus cogens* but did not answer the question because it did not pertain to the specific issue under consideration. *Id.* ¶ 83. It is true that when the Hague Convention—to which Germany and Italy are parties—was concluded, Article 3 concerning the duty to pay compensation referred to the compensation due to the other belligerent party. Nevertheless, following a general principle, recognized by the ICJ's case law, a treaty provision "has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J.

As far as state immunity *in executivis* is concerned, this new trend of Italian case law is expressed in two decisions from the Court of Appeals of Florence, confirmed by the Italian Court of Cassation. These decisions, by making enforceable the Greek judgment in the *Distomo* case, authorized the registration of a judicial mortgage on Villa Vigoni, a German property that Germany claims is intended for governmental non-commercial purposes.[30] The matter is currently at the ICJ's attention as a part of the application introduced by Germany before the Court.[31] Following Germany's submission to the ICJ, Italy adopted a legislative measure in April 2010 providing for the suspension of claims and proceedings concerning measures of constraint against a foreign state, which has submitted a recourse to the ICJ asking the Court to decide on its immunity with respect to the jurisdiction of Italian courts. [32] This suspension expires on December, 31 2011.[33]

More specifically, in the *Germany v. Italy* dispute still pending before the Court, Germany asked the Court to declare that Italy violated the jurisdictional immunity that Germany enjoys under

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16, ¶ 53 (June 21) (taking into account the developments of international law in the field of human rights, and especially the developments that have occurred in the field of humanitarian law and of international law of human rights). For a similar thought, see also Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), 2009 I.C.J. 213, ¶¶ 64–66, 70–71 (July 13) (holding that the meaning of a treaty term should evolve with the law and correspond with the meaning attached by the force of law at any given time); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 90, ¶¶ 40–42 (Nov. 6) (holding that the relevant rules of international law form an integral part of the interpretation of the treaty). The principle figures among the customary rules on treaty interpretation are reflected in the Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. For example, a treaty has to be interpreted, *inter alia*, in the light of "any relevant rules of international law applicable in the relations between the parties." *Id.* art. 31(3)(c); *see also infra* Part IV and notes 103, 105–08 and accompanying text.

29. *See* App. Militare Roma 2008, para. 7 (It.) Furthermore, face to the objections raised by the Appellant, the judges highlight that, following Italian criminal code, the right to compensation (of the victims as well as of the state) can be enacted anytime, without being barred by the statutes of limitations insofar as it is connected with a crime not subject itself to the statute of limitations.

30. *See* Repubblica Federale di Germania v. Amministrazione Regionale della Vojotia, Grecia, App. di Firenze, 6 febbraio 2007, n. 486 (It.). The Court of Cassation affirmed the decisions of the Court of Appeals with two judgments. Cass., sez. un., 12 gennaio 2011, n. 11163 (It.); Cass., sez. un., 29 maggio 2008, n. 14199, 92 RIVISTA DI DIRITTO INTERNAZIONALE 2009, at 594 (It.).

31. Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings (Dec. 23, 2008), *available at* http://www.icj-cij.org/docket/files/143/14923.pdf.

32. *See* Disposizioni urgenti in tema di immunità di Stati esteri dalla giurisdizione italiana [Urgent Provisions Concerning Immunity of Foreign States from Italian Jurisdiction] Decreto Legge 28 aprile 2010, n. 63 (It.) (codified into law by Legge 23 giugno 2010, n. 98) (It.).

33. D.L. n. 63/2010 art. 1 (It.).

international law. [34] Germany claims that Italy committed this violation by allowing civil claims against the Federal Republic of Germany based on violations of international law by the German troops during World War II, by taking measures of constraint against Villa Vigoni, and by declaring Greek judgments enforceable in Italy against the Federal Republic of Germany.[35]

In its counter-memorial filed on December 23, 2009, Italy not only requested that the court reject all of the claims made by Germany, it also submitted a counterclaim asking the Court to declare that Germany had violated its obligation to provide reparation, under international law, to the Italian victims of war crimes and crimes against humanity committed by the Third Reich.[36] To support this counterclaim, Italy argued that disputes existed concerning the interpretation and application of the 1961 Agreements with Germany concerning the Settlement of Certain Property-Related, Economic and Financial Questions, and the Settlement of Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution,[37] as well as the application of subsequent unilateral legislation enacted by Germany to give compensation to

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34. *See* Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, *supra* note 31, at 18 (praying the court declares Italy violated Germany's jurisdictional immunity by allowing civil claims to be brought against Germany for violations of international humanitarian law during World War II).

35. *Id.*

36. Jurisdictional Immunities of the State (Ger. v. It.), Counter-Memorial, para 7.2 (Dec. 22, 2009), *available at* http://www.icj-cij.org/docket/files/143/16648.pdf.

37. Both agreements were concluded on June 2, 1961. By virtue of the first agreement, Germany paid compensation to Italy for "outstanding questions of an economic nature" (Article 1) and Italy declared on its part to be settled all outstanding claims on the part of Italy or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons (Article 2). Agreement Governing Certain Property-Law, Economic and Financial Questions arts. 1–2, Ger.–It., June 2, 1961, G.U. 27 agosto 1962, n. 214 (It.). According to Article 3 of the second agreement, the payment provided for in paragraph 2 of Article 1, "shall constitute final settlement between Germany and Italy of all questions governed by the treaty, without prejudice to any rights of Italian nationals based on Germany compensation legislation." Settlement of Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, Ger.–It., June 2, 1961, G.U. 6 aprile 1963, n. 293. In the perspective adopted in the Italian counterclaim, no relevance seems to be attributable to the two judgments delivered by the Japanese Supreme Court on April 27, 2007 regarding the question of waiver of claims to compensation by individual nationals of the Republic of China. Saikō Saibansho [Sup. Ct.] Apr. 27, 2007, Hei (Ju) no. 1658, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3 (Japan) (The Nishimatsu Construction Case); Saikō Saibansho [Sup. Ct.], Apr. 27, 2007, 1969 HANREI JIHŌ [HANJI] 38 (The Comfort Women Case). In fact, in those decisions the Japanese Supreme Court applied the Treaty of Peace Between the Republic of China and Japan, China–Japan, Apr. 28, 1952, 1858 U.N.T.S. 38 and the Joint Communiqué by the Government of Japan and the Government of the People's Republic of China (Sept. 27, 1972), *available at* http://www.mofa.go.jp/region/asia-paci/china/joint72.html.

victims of the Nazi regime.[38] Italy declared *inter alia* that it was because of the absence of alternative mechanisms for reparations that the Italian victims of the Nazi crimes brought their claims before Italian courts,[39] and that it was precisely due to Germany's failure to offer effective compensation to Italian victims that Italian judges lifted state immunity in the *Ferrini* case (2004) and a number of similar cases (*Mantelli, Maietta*, etc.) subsequently decided by Italian courts.[40] The Court, by thirteen votes to one, dismissed the Italian counterclaim because of a lack of jurisdiction *ratione temporis* under the European Convention for the Peaceful Settlement of Disputes of 1957, adopted as the basis of the Court's competence in the application introduced by Italy.[41]

On January 13, 2011 Greece submitted an application for permission to intervene under Article 62 of the Statute of the Court in order to protect and preserve its legal rights that could be affected by the Court's decision. By an order dated July 4, 2011, the Court has granted Greece the permission to intervene in the proceeding as non-

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38. *See* 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, § 2 (Ger.) (establishing a foundation for the purpose of giving compensation to former forced laborers and others affected by injustices during WWII).

39. *See* Jurisdictional Immunities of the State (Ger. v. It.), Counter-Memorial, *supra* note 36, para. 7.11 (stating that the absence of a reparation mechanism is what has forced Nazi victims to bring their claims before Italian courts).

40. As noted previously, the Italian Court of Cassation rendered twelve orders on May 29, 2008, including Repubblica Federale di Germania v. Presidenza del Consiglio dei Ministri e Maietta, Cass., sez. un., 29 maggio 2008, no. 14209 (It.) and Repubblica Federale di Germania v. Presidenza del Consiglio dei Ministri e Giovanni Mantelli, Cass., sez. un., 29 maggio 2008, no. 14201 (It.). *See* cases cited *supra* note 25. Recently, the Rome Military Court of Appeals, affirming (except in respect to the accused Albers who died in the meantime) a previous judgment rendered by the Rome Military Tribunal on 26 June 2009 concerning the massacre of San Terenzo and Winka, sentenced the accused to imprisonment as well as payment of compensation to the victims along with Germany. *See* Trib. Militare Roma, 20 aprile 2011 (It.). Previously, a decision of the Rome Military Court of Appeals had sentenced Albers to life imprisonment and to pay a compensation, to be determined in a separate proceeding, to the victims of the massacre of Marzabotto, however, in that decision Germany was not associated with Albers. App. Militare Roma, 7 maggio 2008, n. 25 (It.).

41. Jurisdictional Immunities of the State (Ger. v. It.), Order (July 6, 2010), *available at* http://www.icj-cij.org/docket/files/143/16027.pdf. In a dissenting opinion, Judge Conçado Trinidade argued for upholding the admissibility of Italian counterclaim under the *jus cogens* exception. In their joint opinion, Judge Keith and Judge Greenwood opined that Italy failed to identify precisely the elements of the legal dispute with Germany concerning the interpretation and application of the 1961 agreements, *id.* (dissenting opinion of Judges Keith and Greenwood), while Judge Gaja regretted that the Court passed its decision before giving the parties full opportunity to be heard arguing that an oral hearing would have helped the Court to ascertain more precisely when the dispute arose, *id.* (separate opinion of Judge Gaja).

party.[42] This will presumably cause the Court to consider the recent developments in state immunity, as practiced by individual states, in greater detail.[43]

II. THE INTERNATIONAL PRACTICE CONCERNING THE RELATIONSHIP BETWEEN INTERNATIONAL CRIMES AND RULES ON STATES' IMMUNITY. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. THE CODIFICATION CONVENTIONS.

Leaving aside the jurisdictional and procedural issues raised by the Italian counterclaim (which are for the Court to decide), on a substantial level the Italian position is correct in recalling the existence of a principle of general international law that grants victims of serious violations of fundamental human rights and humanitarian international law a right to effective compensation. The Italian position is also correct in implicitly referring to a right of access to justice as a fundamental human right recognized by international customary law as well as by universal and regional agreements on the issue.[44]

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42. These legal rights "include, *inter alia*, the ones emanating from disputes created by particular acts . . . of Germany during World War II and the ones enjoyed under general international law, especially with respect to jurisdiction and the institution of state responsibility." Jurisdictional Immunities of the State (Ger. v. It.), Application to Intervene, at 12 (Jan. 13, 2011), *available at* http://www.icj-cij.org/docket/files/143/16304.pdf (Greece seeking to intervene); Jurisdictional Immunities of the State (Ger. v. It.), Order, ¶ 34 (July 4, 2011), *available at* http://www.icj-cij.org/docket/files/143/16556.pdf (granting Greece permission to intervene).

43. In fact, as the Court pointed out, it might need to consider the Greek court's *Distomo* decision in light of state immunity principles in order to make findings regarding Germany's request relating to whether Italy further breached Germany's jurisdictional immunity by declaring as enforceable in Italy, Greek judgments based on occurrences similar to those defined in the first request. *See* Jurisdictional Immunities of the State (Ger. v. It.), Order, *supra* note 42, ¶ 25.

44. *See* International Covenant on Civil and Political Rights art. 2(3), Mar. 23, 1976, 999 U.N.T.S. 171 (declaring that any person whose rights or freedoms are violated should have access to a judicial remedy, notwithstanding the fact that the violation may have been committed by persons acting in an official capacity); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights] (declaring the right to a fair civil or criminal trial); Universal Declaration of Human Rights art. 8, G.A. Res. 217 (III) A, GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Organization of American States, American Convention on Human Rights art. 8, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123 (entitling civil or criminal trial parties to a hearing and due process guarantees). Additionally, the European Court of Human Rights has treated the right of access to court as an inherent aspect of the procedural safeguards enshrined in Article 6 of the European Convention on Human Rights. *See* Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 9–12 (1975) (declaring a right to a fair, speedy, and public trial).

It is true that the right of access to justice is not conceived of as absolute under relevant international agreements such as the 1966 Civil and Political Rights Covenant or the European Convention on Human Rights, insofar as it is subject to general limitations deriving from situations of war or other public emergencies.[45] Moreover, by its very nature, this right calls for regulation by states that enjoy a margin of appreciation in this respect. On the other side, as the European Court of Human Rights has declared several times, the limitations introduced to the individual right must not restrict or reduce access to justice for individuals in such a way that the essence of the right is impaired. Furthermore, the limitations introduced must pursue a legitimate aim, and the restriction must be proportionate to that legitimate aim.[46]

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45. Under these circumstances a state may "take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." International Covenant on Civil and Political Rights, *supra* note 44, art 4. The same authorization is expressed in the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 44, art. 15, provided that the derogation is strictly necessary and does not contravene other international obligations of the state concerned. No derogation is permitted even in time of war or public emergency to some fundamental human rights. *See* European Convention on Human Rights, *supra* note 44, art. 15 (enumerating these to include the right to life, except in cases resulting from lawful acts of war; the freedom from torture and slavery; and the non-retroactivity of criminal offences). Under the International Covenant on Civil and Political Rights, *supra* note 44, art.4(2), non-derogable rights are the rights to life, and recognition as a person, the freedoms of thought, conscience and religion, the freedom from torture and slavery, the prohibition of retroactivity of criminal legislation and the prohibition of imprisonment on ground solely of inability to fulfil a contractual obligation. In the American Convention on Human Rights, *supra* note 44, art. 27(2), the following are declared as non-derogable rights: the right to judicial personality, life and humane treatment, freedom from slavery, freedom from retroactive laws, freedom of conscience and religion, the rights to a name and to free participation in government, and the rights of child.

46. *See* Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415, 427 (holding that the rules of public international law on state immunity cannot impose a disproportionate restriction on the right of access to court embodied in the European Convention on Human Rights); Fogarty v. United Kingdom, 123 I.L.R. 53, 65 para. 33 (Eur. Ct. H.R. 2010) (holding that a limitation must pursue a legitimate aim and that the means employed must be proportional to the aim sought to be achieved); Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 99; McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, 47 (holding that restrictions to access must comply with generally recognized principles of public international law); Waite v. Germany, 1999-I Eur. Ct. H.R. 393, 408–09 ("[T]he test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law."); Grosz v. France, App. No. 14717/06, Eur. Ct. H.R. (2009) (finding the claim inadmissible based on the principles of *Al-Adsani* and the other ECtHR cases), *discussed in* EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION NOTE ON THE COURT'S CASE-LAW (2009).

In the said perspective, a sensitive and most controversial aspect concerns the relationship between the granting to the individual the right of access to justice and the respect for immunity of states and their agents. In fact, restrictions to the immunity of states in relation to *acta jure imperii* (acts of government) have emerged in the practice of some states when victims bring suit against a foreign state in a national court, alleging serious violations of human rights or international law with the character of *jus cogens*. This is especially true when the violations occurred in the forum state.[47] The decisions of the Italian judges already mentioned are significantly expressive of this trend.[48] A similar tendency has been shown by Greek courts regarding cases that occurred on Greek territory in similar circumstances.[49] The position expressed by national judges in the above-mentioned cases is that, with respect to violations of fundamental rights obligations, such as those concerning the prohibition of torture, slavery, genocide, war crimes, and crimes against humanity, the right of access to justice must be maintained in

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47. *See, e.g.*, Princz v. Federal Republic of Germany, 26 F.3d 1166, 1179–80 (D.C. Cir. 1994) (Wald, J., dissenting) (arguing that an implied waiver to sovereign immunity under the United States Foreign Sovereign Immunities Act should apply when a country engages in "barbaric acts"); Al-Adsani v. Gov't of Kuwait, 107 I.L.R. 536 (Q.B.) 541–42 (1996) (Eng.) (rejecting the argument that international law prohibited granting immunity to foreign states accused of violations of *jus cogens* norms); *Controller & Auditor Gen. v Davidson* [1996] 2 NZLR 278 (CA) (N.Z.).

48. For the recent Italian case law concerning those aspects, see *supra* notes 25–26, 40 and accompanying text.

49. *See* Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece) (denying immunity and awarding damages for a German massacre of over 200 Greek civilians), *summarized in* Maria Gavouneli & Ilias Bantekas, *Sovereign Immunity–Tort Exception–Jus Cogens Violations–World War II Reparations–International Humanitarian Law*, 95 AM. J. INT'L L. 198 (2001). However later on, the Greek Supreme Court, in a similar case, recognized to Germany immunity from jurisdiction in relation to warlike acts of German armed forces. Areios Pagos [A.P.] [Supreme Court] 6/2002, paras. 15–16 (Greece). No particular relevance in the perspective discussed so far seems to be attributable to national decisions—like the decisions rendered by the Ontario Superior Court in Bouzari v. Islamic Republic of Iran, [2002] O.J. No. 1624, 124 I.L.R. 427 (Can. Ont. Sup. Ct. J.), the Ontario Court of Appeal in Bouzari v. Islamic Republic of Iran, [2004] 71 O.R.3d 675 (Can. Ont. C.A.), by the House of Lords in Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.) (U.K.), or by the UK High Court in *Al-Adsani*, 107 I.L.R. 536 (U.K.)—that dismissed individual claims because of a lack of territorial nexus between the *forum* and the act of torture which occurred abroad. In fact, in the cited cases municipal courts applied national statutes. *Bouzari*, [2004] O.R.3d para. 2 (Can.) (citing State Immunity Act, R.S.C. 1985, c. S-18 (Can.)); *Al-Adsani*, 107 I.L.R. at 540 (U.K.) (quoting State Immunity Act, 1978, c. 33, § 5 (Eng.)). Furthermore, it is worth noting that the UN Committee Against Torture specifically criticized the Canadian decisions and recommended that Canada "review its position under Article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture." Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations for Canada*, 34th Sess., May 2–20, 2005, para. 5(f), U.N. Doc. CAT/C/CR34/CAN (July 7, 2005).

all circumstances as a component of the peremptory character of the substantive rule violated by the state conduct.[50] The rationale of that jurisprudence is to ensure that the immunity granted to the responsible state does not leave victims of international crimes without an effective remedy or access to justice.

In this respect, there seems to be a relevant difference between the position taken so far by international tribunals and the attitude shared by national courts. International tribunals seem to be reluctant to accept an exception to state immunity with regard to individual claims for alleged violations of human rights, even in the case of serious violations stemming from peremptory rules, like torture or serious violations of humanitarian law.

Sufficient evidence of this attitude can be found in several decisions of the European Court of Human Rights upholding the principle of jurisdictional immunity of the defendant state from civil suits, even with respect to claims concerning war crimes or acts of torture that the Court recognized as prohibited by a rule of "special character," i.e., a rule of *jus cogens*. [51]

However, it must be mentioned that these decisions were made by a narrow majority,[52] with the minority judges expressing the view that the peremptory rule prohibiting war crimes and torture had to prevail over the customary rule on state immunity.[53] Moreover, it has to be considered that in the cases decided so far, the European judges had to evaluate exclusively the proportionality and reasonableness of internal measures restricting individual access to justice, taken by member states in accordance with their internal law. In this specific perspective, the European Court of Human Rights had to decide on the legitimacy, in light of the obligations from European Convention on Human Rights, of those national measures restricting the

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50. See for example the reasoning of the Italian Court of Cassation in *Ferrini v. Germany*, Cass., sez. un., 11 marzo 2004, n. 5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE 2004, at 53, paras. 19–20 (It.) (explaining customary norms relating to international war crimes should prevail against customary rule on state immunity) and in the *Milde* case, Cass., sez. un., 13 gennaio 2009, n. 1072, 92 RIVISTA DI DIRITTO INTERNAZIONALE 2009, at 618, para. 3 (It.) (same).

51. *See* cases cited *supra* note 46, especially *Kalogeropoulou*, 2002-X Eur. Ct. H.R. 415 and *Al-Adsani*, 2001-XI Eur. Ct. H.R. 79. Two similar cases (Jones v. United Kingdom, App. No. 34256/06, Eur. Ct. H.R. (2010) and Mitchell v. United Kingdom, App. No. 40528/06, Eur. Ct. H.R. (2010)) are still pending before the European Court of Human Rights concerning proceedings already brought before national courts by individuals seeking redress against a foreign state and its officials for acts of torture and dismissed by national judges.

52. *See, e.g.*, *Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 436 (nine votes to eight) and *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 103 (same).

53. *See, e.g.*, *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 111 paras. 3–4 (Rozakis and Caflisch, JJ., dissenting) (declaring that states cannot hide behind state immunity without limit to avoid proceedings for torture and other egregious human rights violations); *id.* (Loucaides, J., dissenting).

individual access to justice in relation to civil suits raised against a foreign state concerning tortious acts or omissions committed by the foreign state and *occurring outside the territory of the forum state* (implicitly recognizing the legitimacy of the national legislation denying foreign states' immunity in relation to tortious acts occurring *inside* the territory of the forum state).[54] Alternatively, the Court had to determine the legitimacy—always in light of Convention obligations—of national provisions denying measures of constraint against foreign states' properties because of a lack of authorization *by the competent national authority*—i.e., the Minister of Justice—notwithstanding a previous judgment that had recognized the individual right to compensation against the foreign state in a civil proceeding.[55] With regard to the specific *petitum*, the European Court concluded that the national measures under consideration cannot be regarded as disproportionate insofar as they reflect generally recognized rules of public international law on state immunity;[56] in the opinion of the Court, governments of member states (i.e., the Greek government) cannot be requested to override the rule of state immunity *against their will* nor to compromise their good foreign relations in order to fully ensure their obligations under the Convention.[57] Worth noting, the Court underlined that the conclusion reached was true "at least as regards the current rule of public international law . . . but does not preclude a development in customary international law in the future."[58]

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54. *See id.* at 90–91 (quoting European Convention on State Immunity, *supra* note 1, art. 15).

55. *See, e.g.*, *Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 430 (holding that because of their direct knowledge of their society and its needs, national authorities are better positioned to appreciate what is in the public interest).

56. *See Al-Adsani*, 2001-XI Eur. Ct. H.R. at 99–100 (stating that the limitation must pursue a legitimate aim, the restriction must be proportionate to that aim, and that the measure must reflect generally recognized rules of public international law on state immunity).

57. *See Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 428 (holding the doctrine of state immunity must be regarded as an inherent restriction on the right to access).

58. *Kalogeropoulou*, 2002-X Eur. Ct. H.R. at 429; *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 100 para. 57, 103 para. 66. Worth noting, in a substantially similar perspective, even if related to the immunity of a high rank state official, is the well-known judgment of the ICJ in *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), in which the court recognized the customary law nature of the immunity of an incumbent minister of a foreign state as barring his criminal prosecution for claimed serious violations of human rights and humanitarian law. Nevertheless, even in this case, decided with a majority of votes, some judges in their common separate opinion, acknowledged that "[I]t is not increasingly claimed in the literature that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone . . . can perform . . . ." *Id.* para. 85 (separate opinion of Judges Higgins, Kooijmans and Buergenthal) (citations omitted). Even though the cited case concerned the immunity from criminal jurisdiction and the personal inviolability of an incumbent minister of a foreign state rather than immunity of the foreign state itself from a civil suit for

In fact, the European Court has already acknowledged, although cautiously, a trend in international and comparative law towards restricting state immunity with respect to personal injuries that are caused by an act or omission attributable to a foreign state and occurred in the forum state.[59] The Court admitted that the connection between the tortious act or omission and the territory of the forum state, together with the obligation of that state to secure human rights (including the right of access to justice) to everyone within its territory, could provide sufficient ground for the removal of the defendant state's immunity.[60]

Worth noting in this perspective is a section of the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA), which excludes immunity in cases in which damages are sought against a foreign state for personal injury, death, or damage to or loss of property, occurring in the United States and caused by a tortious act or omission of the foreign state or of any official or agent of the foreign state.[61] The Alien Tort Statute already affirmed U.S. jurisdiction over any civil action brought by an alien for a tort committed in violation of the law of nations or of a treaty of the United States in 1789.[62] A further modification was made to FSIA in 1996 through the Antiterrorism and Effective Death Penalty Act. That modification, expressly recalled by the European Court in *Al-Adsani*, includes a new exception to state immunity with respect to claims for damages for personal injury or death caused by an act of torture, extra-judicial killing, or hostage-taking occurred outside the territory of the United States.[63] The Act makes the lifting of state immunity contingent upon the Executive Branch designating the defendant state as a state sponsoring terrorism, and it provides that measures of constraint should be enacted against property of the foreign state that would otherwise be immune, such as diplomatic premises.[64]

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compensation, notably, some judges observed in their separate opinion that there is an "international *consensus* that the perpetrators of international crimes should not go unpunished . . . and national courts all have their part to play [in the punishment]." *Id.* para. 51.

59. *See Al-Adsani*, 2001-XI Eur. Ct. H.R., paras. 60–66.

60. *See* McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, 46 (2001) (noting the trend in public international law towards limiting state immunity with respect to personal injury).

61. 28 U.S.C. § 1605 (2006).

62. 28 U.S.C. § 1350 (2006).

63. DAVID M. ACKERMAN, CONG. RESEARCH SERV., RL 31258, SUITS AGAINST TERRORIST STATES 6–13 (2002) (describing the modifications introduced in 1996 and 1998 to the FSIA).

64. In 2004, the Rome Court of Appeals recognized and made enforceable in Italy two United States decisions based on the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 1605, 1610 (2006), which sentenced Iran to a pecuniary compensation in favor of two American citizens whose relatives were killed in a terrorist act committed by Hamas and attributable to Iran. *See* Eisenfeld v.

An exception similar to the one originally conceived by the U.S. FSIA, with a territorial *nexus* and without any distinction as to the nature of state act or omission, whether *jure imperii* or *jure gestionis*, appears in other national legislations concerning foreign state immunity, such as the UK State Immunity Act of 1978; the Australian Foreign States Immunities Act of 1985; and Canada's State Immunity Act of 1985.[65]

A similar perspective is shared by the two codification conventions on state immunity. Already in 1972, the European Convention on State Immunity (Basle Convention) provided that "a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."[66] The Basle Convention has been ratified so far by eight European states, including Germany.[67] The trend of creating exceptions to state immunity was confirmed in 2004 by the UN Convention on Jurisdictional Immunities of States and their Property, adopted by the UN General Assembly on the basis of draft articles originally elaborated by the International Law Commission (ILC) and then revised by an Ad Hoc Committee.[68] In the UN Convention on Jurisdictional Immunities of States and Their Property, Article 12 provides an exception to the general rule of state immunity in cases of civil liability resulting from an act or omission attributable to the state, which has caused injury to a natural person or damage to or loss of tangible property.[69] Immunity is denied provided that: (1) the

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Islamic Republic of Iran, 177 F. Supp. 2d 1 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998). The Italian Court of Cassation annulled the two decisions because of a lack of notification to the defendant state. *See* Islamic Republic of Iran v. Flatow, Cass., sez. un., 22 giugno 2007, n. 14570 (It.); Islamic Republic of Iran v. Eisenfeld, Cass., sez. un., 22 giugno 2007 n. 14571 (It.).

65. *See* State Immunity Act, 1978, c. 33, § 5 (Eng.); *Foreign State Immunities Act 1985* (Cth) pt 2 s 13 (Austl.) (discussing personal injury and damage to property); State Immunity Act, R.S.C. 1985, c. S-18, § 6 (Can.) (discussing death and property damage).

66. European Convention on State Immunity *supra* note 1, art. 11.

67. *See Chart of Signatures and Ratifications*, COUNCIL OF EUR., http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=074&CM=0&DF=&CL=ENG (last visited Nov. 1, 2011). Portugal signed the Convention on May 10, 1979 but has never ratified it.

68. *See supra* note 1 (describing the development of the UN Convention on Jurisdictional Immunities).

69. UN Convention on Jurisdictional Immunities, *supra* note 1, art. 12 ("Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged

act or omission causing the death, injury or damage occurred in whole or in part in the territory of the state of the forum (so that the applicable law is correctly the *lex loci commissi delicti*), and (2) the author of such act or omission was present in the forum state at the time of the act or omission.[70] It was expressly stated that the purpose of this exception is to not leave the injured individual without recourse, which would happen if the foreign state may invoke jurisdictional immunity.[71]

The exception established by the UN Convention, which clearly limits the victim's right to pecuniary compensation, is irrespective of the nature of the act or omission, accidental or intentional, whether acts of government or acts of a commercial nature.[72] The same holds true for the Basle Convention.[73] No reservations concerning *jure imperii* activities were made to Article 11 of the Basle Convention by the eight ratifying states, including Germany.[74] Furthermore, it is worth noting that Article 12 of the 2004 UN Codification Convention does not *explicitly* exclude from the scope of application activities of armed forces of a foreign state, whereas the Basle Convention expressly does so in Article 31.[75] In fact, few countries (only Norway and Sweden among the eleven parties), in ratifying the Convention, declared that Article 12 does not apply to activities of armed forces during an armed conflict nor to activities undertaken by military forces of a state in the exercise of their official duty.[76]

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to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.").

70. The two conditions mentioned above to the removal of immunity have been inserted in Article 12 to give relevance to the connection between the damaging act or omission and the forum state, in line with the general criterion that designates the tribunals of the state in which delict was committed as the *forum most conveniens*. That point is clearly highlighted in the commentary to Article 12. *See* Rep. of the Int'l Law Comm'n, 43d Sess., 29 Apr.–19 July, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10 (1991), *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 44, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

71. *Id.*

72. *See supra* notes 69–70 (discussing the limits to the contracting state's immunity claim).

73. *See supra* text accompanying note 66.

74. *See Chart of Signatures and Ratifications*, *supra* note 67 (listing the eight ratifying states).

75. European Convention on State Immunity, *supra* note 1, 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.").

76. *Status: United Nations Convention on Jurisdictional Immunities*, *supra* note 1. Worth noting in this respect is the statement of the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, Professor Hafner, in whose opinion the general understanding has always prevailed that armed forces activities were excluded from the scope of the tort exception recognized in Article 12. *See* Ad Hoc Comm. on Jurisdictional Immunities of States and Their Property,

Originally introduced in relation to damageable consequences of traffic accidents or insurable damages, the tort exception has been expressly debated in the ILC Ad Hoc Working Group given the recent developments in state practice and national legislation concerning the exception to state immunity in the case of death or personal injury resulting from acts of a state, committed not in the territory of the forum state, which constitute serious violations of human rights norms that have the character of *jus cogens*.[77] The Working Group recognized that those developments, though not specifically dealt with in the Draft Articles, "are a recent development relating to immunity which should not be ignored."[78]

Summary Record of the 13th Meeting, ¶ 36, U.N. Doc. A/C.6/59/SR.13 (Mar. 22, 2005) (stating that Article 12 does not apply to armed conflict). However authoritative it could be, the Chairman's statement is surely not conclusive on the ground of the interpretation of Article 12. The exception concerning military forces activities, as recognized by the Basle Convention, was acknowledged in principle, but not applied to the case under consideration, by the Greek Court of Cassation in the *Distomo* case decided on 4 May 2000. Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece). In fact, the Court observed that even if "admittedly, State immunity could not be dispensed with for military acts . . . the exception to the immunity should apply when the offenses for which compensation is sought (especially crimes against humanity) *had not targeted civilians generally, but specific individuals* . . . neither directly nor indirectly connected with military operations." *Id.* (emphasis added). Consequently, the Greek Court concluded in the case examined that the Third Reich troops had violated *jus cogens* rules and that consequently Germany had tacitly waived its immunity. This decision was superseded by a judgment of the Greek Special Supreme Court rendered on 17 September 2002, supporting the view that a foreign state may always plead immunity with respect to activities of its armed forces also in relation to crimes committed in the territory of the forum state. Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece).

77. *See* Rep. of the Working Group on Jurisdictional Immunities of States and Their Property, 51st Sess., Int'l Law Comm'n, June 1–July 5, 1999, at 171–72, U.N. Doc. A/CN.4/L.576 (July 6, 1999). In that document the Ad Hoc Working Group, after having recalled a number of decisions rendered by municipal courts on the specific issue, noted that since those decisions were handed down, two important developments have occurred giving further support to the argument that a state may not plead immunity in the case of death or personal injury resulting from acts in violation of human rights norms having the character of *jus cogens*. The first development concerned the amendment to the Foreign Sovereign Immunity Act of 1996. 28 U.S.C. § 1605 (2006). The second is the *Pinochet* case, which emphasized the limits of immunity with respect to gross human rights violations by state officials. *See* R v. Bow Street Metro. Stipendiary Magistrate *ex parte* Pinochet (No. 3), [2000] A.C. 147 (H.L.) (Eng.).

78. Rep. of the Working Group on Jurisdictional Immunities of States and Their Property, *supra* note 77, at 171–72.

III. THE 2009 RESOLUTION OF THE *INSTITUT DE DROIT INTERNATIONAL* CONCERNING INTERNATIONAL CRIMES AND IMMUNITIES FROM JURISDICTION OF STATES AND THEIR AGENTS

In the Naples Session of 2009, the *Institut de Droit International* adopted a resolution on the issue of foreign state immunity.[79] The *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* considers the underlying conflict between jurisdictional immunities and claims arising out of international crimes (identified as genocide, torture, war crimes, and crimes against humanity).[80] The Resolution recalls the obligation that states have, under customary international law and applicable treaties, to respect and ensure human rights for all persons within their jurisdiction and to prevent and suppress international crimes; in that respect, immunities (of states and their agents) should not constitute an obstacle to the appropriate reparation to which the victims of such crimes are entitled.[81] Additionally, the Resolution recognizes that the lifting of immunity from proceedings in national courts represents "one way by which effective reparation for the commission of international crimes may be achieved."[82]

Recalling that, in accordance with international law, no jurisdictional immunity other than personal immunity applies to state agents with regard to international crimes, the Resolution affirms that states "should consider waiving immunity where international crimes are allegedly committed by their agents."[83] In so far as immunity of states is concerned, the Resolution declares that it is not intended to prejudice the issue of whether and when a state enjoys jurisdictional immunity before the national courts of another state in civil proceedings relating to an international crime committed by its agents.[84]

Contrary to the very cautious formulation of the text passed by the *Institut*, the presentation made by the Rapporteur, Lady Fox, proves

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79. *See* Institute of Int'l Law, Third Comm'n Resolution, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (Sept. 10, 2009) (by Lady Fox), *available at* http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf.

80. *Id.* pmbl. para. 3.

81. *Id.* pmbl. para. 2, art. II para. 2.

82. *Id.* pmbl. para. 5.

83. *Id.* art. II para. 3.

84. *Id.* art. IV.

much clearer on fundamental aspects of the issue analyzed.[85] Taking into account the significant development of state practice and of international law in the field of fundamental human rights protection, which is reflected in the previous resolutions adopted by the *Institut* at the Cracow Session concerning *Obligations and Rights* Erga Omnes *in International Law* [86] and *Universal Criminal Jurisdiction*, [87] the Rapporteur highlights clearly that the exception to jurisdictional immunity provided for in Article 12 of the UN Convention belongs to international *jus positum* and that it also applies in a proceeding related to a pecuniary compensation in respect of a violation of the fundamental rights of the person amounting to an international crime.[88] In fact, no particular objections were raised by the states when Article 12 was adopted in New York, nor were objections raised during the discussion of the final Report of the Ad Hoc Committee.[89] Moreover, in the opinion of the Rapporteur, the way in which the Article 12 exception is drafted does not bar an extension of the tort exception to serious violations of fundamental human rights, this extension being in line with currently accepted international standards.[90] A similar conclusion could also be inferred from the

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85. *See* Institute of Int'l Law, Third Comm'n Report, The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law 108–12 (Sept. 10, 2009) (by Lady Fox), *available at* http://www.idi-iil.org/idiE/annuaireE/2009/Lady-Fox.pdf.

86. Institute of Int'l Law, Fifth Comm'n Resolution, Obligations and Rights *Erga Omnes* in International Law (Aug. 27, 2005) (by Giorgio Gaj), *available at* http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf.

87. Institute of Int'l Law, Seventh Comm'n Resolution, Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (Aug. 26, 2005) (by Christian Tomuschat), *available at* http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

88. *See* Institute of Int'l Law, *supra* note 79, para. 53, at 96–97 ("[A]n extension of the tort exception to the violation of fundamental human rights as defined in Article 1 would be a permissible innovation, not out of line with currently accepted international standards, and would bring jurisdictional immunities of States in line with the third principle above stated of achieving a balance between the competing values."); *id.* at 100. A point of view in line with the interpretation of Article 12 referred to above has been expressed by Italian judges in the decisions rendered by the Rome Military Court of Appeals and by the Court of Cassation in the *Milde* case, Cass., sez. un., 13 gennaio 2009, n. 1072, 92 RIVISTA DI DIRITTO INTERNAZIONALE 2009, at 618 (It.) (applying the exception to a civil proceeding for pecuniary damage), and in the judgment given by the Rome Military Court of Appeals in the *Albers* case, App. Militare Roma, 7 maggio 2008, n. 25 (It.) (same), where it is emphasized the customary nature of the so-called tort exception, whose existence in international law is independent of Article 12 of the UN Convention on Jurisdictional Immunities, *supra* note 1.

89. *See id.*

90. "This exception [i.e., the tort exception] . . . appears without any restriction as to the nature of the act or omission and extends to acts whether of a private or public nature (*acta jure gestionis, acta jure imperii*). . . . [T]he Commission considers that an exception to the violation of fundamental human rights as defined in Article 1 [i.e., violations amounting to international crimes] would be a permissible innovation,

reading of the decision of the European Court of Human Rights in *Al-Adsani* where, in fact, the discriminatory point of the Court's reasoning concerning the so-called tort exception was whether torture or a tortuous act occurred within the territorial jurisdiction of the forum state or outside of the territory of that state.[91]

On the other hand and *de lege ferenda*, the Rapporteur suggests that with respect to a violation of fundamental rights of the person, *wherever committed*, a state may not enjoy immunity from the civil jurisdiction of the former state unless it is established that the state has performed its obligation to make reparation to the victims in accordance with applicable treaties and customary international law.[92] This perspective may also be inferred from the reading of Articles 2 and 5 of the 2005 Resolution of the *Institut* on *Obligations and Rights* Erga Omnes *in International Law*, concerning the consequences of the

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not out of line with currently accepted international standards . . . ." Institute of Int'l Law, *supra* note 85, at 96–97. In the draft resolution introduced by the Rapporteur a provision (not retained in the final text adopted by the Institute) making express reference to Article 12 of the UN Convention on Jurisdictional Immunities excluded the application of the tort exception "in respect of international or non-international armed conflict." *Id.* at 100. The application of the exception provided for in Article 12 also with respect to acts or omissions of the armed forces of a state still remains a controversial issue. It is true that, as Italian judges expressly pointed out, in *Milde*, Cass. 1072/2009 para. 6 and *Albers*, App. Militare Roma, 25/2008 para. 7, the text of Article 12 does not provide derogations to the general principle expressed nor does the Convention contains a specific provision concerning activities of the armed forces of a state as the Basle Convention does in Article 31. *See* UN Convention on Jurisdictional Immunities, *supra* note 1, art. 12; European Convention on State Immunity, *supra* note 1, art. 31. Nevertheless, it seems appropriate to conclude that activities of armed forces in time of war are excluded from the application of Article 12 in so far as, and to the extent that, they are regulated by specific customary or conventional rules of the international law of armed conflicts. Similarly, the general exception expressed by Article 12 could not be applied to situations regulated by specific treaties like the various Status of Forces Agreements (SOFA). *See* Rep. of the Int'l Law Comm'n, 43d Sess., *supra* note 70 (commentary to Article 12).

91. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, paras. 38–40, 57, 66. "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed *outside the forum State*." *Id.* para. 66 (emphasis added). The UK State Immunity Act, which grants immunity to states in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent, in the opinion of the Court, with those limitations generally accepted by the community of nations as part of the doctrine of state immunity. State Immunity Act, 1978, c. 33, § 5 (Eng.).

92. *See* Institute of Int'l Law, *supra* note 79, pt. II; Institute of Int'l Law, *supra* note 85, at 101 para. 38 ("A State may not enjoy immunity from the civil jurisdiction of the national courts of another State for violations of the fundamental rights of the person as defined in the present Resolution wherever committed unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international conventions or customary international law.").

breach of those obligations and related remedies.[93] In line with the 2001 ILC Draft Articles on State Responsibility,[94] the 2005 Resolution affirms that when a state commits a breach of an *erga omnes* obligation, all the states are entitled, "even if not specifically affected by the breach," to claim from the responsible state "cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the state, entity or individual which is specially affected by the breach" (Article 2) and to take "non-forcible counter-measures . . . ." (Article 5 of the Resolution). In that perspective, the interpretative declaration made by Switzerland with respect to Article 12 on the occasion of the ratification of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property seems relevant in that it points out that the Convention is not intended to prejudice the developments in international law regarding the exercise of jurisdiction in cases concerning pecuniary compensation for serious human rights violations, presumably attributed to the foreign state and committed *outside* of the forum state.[95]

In line with the development of international law acknowledged by the *Institut de Droit International* and by the case law of international tribunals and municipal courts is a resolution passed by the UN General Assembly in 2006 on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross*

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93. Institute of Int'l Law, *supra* note 86, arts. 2, 5.

94. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 63, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001). The Draft Articles introduce two regimes of responsibility following a state wrongful act: (a) an ordinary regime and (b) an "aggravated" regime. The first follows a breach of a rule laying down reciprocal or synallagmatic obligations, which are confined to the bilateral relation between the injured state and the wrongdoer. The second regime relates to the breach of an obligation due to the international community as a whole or, in case of conventional obligations, to the community of all contracting states. In the last case, all other states (or, all the other contracting parties) can invoke the responsibility of the guilty state, irrespective of whether they have been materially or morally damaged by the violation, and are entitled to demand compliance with the infringed rule and to take remedial action to compel the wrongdoer to cease its wrongful conduct and to make reparation. The Draft Articles were adopted by the International Law Commission on August 9, 2001. In a resolution passed on December 12, 2001 the General Assembly "took note" of the Draft Articles and recommended it to the attention of member states inviting governments to submit writing comments on any future action concerning the Articles. *See* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). That recommendation has been reiterated over the years. *See* G.A. Res. 65/19, pmbl., U.N. Doc. A/RES/65/19 (Jan. 10, 2011) ("*Recalling* its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts . . . ."); G.A. Res. 62/61, pmbl., U.N. Doc. A/RES/62/61 (Jan. 8, 2008) (same); G.A. Res. 59/35, pmbl., U.N. Doc. A/RES/59/35 (Dec. 16, 2004) (same). The case law of the International Court of Justice and the decisions of international tribunals often reference the Draft Articles as evidence of customary international law.

95. *Status: United Nations Convention on Jurisdictional Immunities of States and Their Property*, supra note 1.

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. [96] The Resolution, adopted through *consensus*, confirms that states have an obligation to respect, ensure respect for, and implement international human rights law and international humanitarian law as provided for under treaties to which a state is a party, customary international law, and the domestic law of each state; states shall also ensure that their domestic law is consistent with their international legal obligations.[97] In particular, in so far as the perspective just discussed is concerned, the Resolution considers that in accordance with international law victims of gross violations should be provided with a right to a remedy which includes an effective reparation proportionate to the gravity of the harm suffered and an effective access to justice, and affirms that states should make available in their domestic law all appropriate legal and administrative measures to ensure that victims can exercise their right to a remedy, providing them with equal and effective access to justice.[98] Worth noting, the Resolution emphasizes that the Basic Principles formulated by the General Assembly do not entail *new* international or domestic legal obligations, but identify mechanisms and procedures for implementing *existing* legal obligations under international human rights law and international humanitarian law.[99]

IV. CONCLUDING REMARKS

Within the legal framework just described, one can better appreciate the most recent Italian judicial practice. This practice restricts the traditional immunity that foreign states enjoy with respect to *acta jure imperii* (acts of government) as a consequence of

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96. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). In the same perspective, see Int'l Law Ass'n, *Reparation for Victims of Armed Conflict*, Res. No. 2/2010 (Aug. 20, 2010).

97. G.A. Res. 60/147, *supra* note 96, para. 2.

98. *Id.* paras. 11–23. The resolution emphasizes *inter alia* that "[c]ompensation should be provided for any economically assessable damage . . . such as (*a*) physical or mental harm; . . . (*c*) Material damages . . . (*d*) Moral damage . . . ." *Id.* para. 20.

99. *Id.* pmbl. para. 7. UN General Assembly resolutions are not binding on member states; nevertheless, when they are formulated in connection with general rules of international law and are supported by a large majority vote or by *consensus* (as it is the case), they may be regarded as evidence of the opinions of states. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 187–95, 203–05 (June 27) (discussing the reality that the court has "to consider whether a customary rule exists in the *opinio juris* of States, and satisfy itself that it is confirmed by practice"). It is generally accepted that where they are framed as general principles, General Assembly resolutions provide a basis for the progressive development of customary law as well as for the speedy consolidation of customary international rules. *See* Sedco Inc. v. Nat'l Iranian Oil Co., ITL 59-123-3 (Iran–U.S. Claims Trib. Mar. 27, 1986).

the emerging international rules and standards concerning the respect for and the protection of fundamental human rights. Respect for these rules must in fact be ensured primarily through the exercise of jurisdiction as highlighted by, for example, Article 8 of the Universal Declaration; Articles 1 and 13 of the European Convention on Human Rights; Article 2, para. 3 of the UN Covenant on Civil and Political Rights; Article 25 of the American Convention on Human Rights; and Article 1 and Preambular paragraph 10 of the Statute of the International Criminal Court.[100]

Under general international law, serious violations of human rights and humanitarian law are classified as international crimes and are prohibited by norms having a peremptory character.[101] Victims of these gross violations of human rights are entitled to adequate reparation and effective compensation that is proportional to the harm suffered. This general principle is expressly recognized, in Article 14 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in Article 75 of the Statute of the International Criminal Court, as well as in many other conventional instruments on human rights.[102] According to an

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100. International Covenant on Civil and Political Rights, *supra* note 44, art. 2 ("To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."); European Convention on Human Rights, *supra* note 44, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority . . . ."); Universal Declaration of Human Rights, *supra* note 44, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); American Convention on Human Rights, *supra* note 44, art. 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . . [and t]he States Parties undertake . . . to ensure that any person . . . shall have his rights determined by the competent authority . . ." and undertake "to develop the possibilities of judicial remedy . . . ."); The preamble of the Statute of the International Criminal Court emphasizes that: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[e]mphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . . ." Rome Statute of the International Criminal Court pmbl. paras. 6, 10, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). According to Article 1 of the statute the court's jurisdiction "shall be complementary to national criminal jurisdictions." *Id.* art. 1. The principle of complementarity is specified in Articles 12–13 of the Court's Statute. *Id.* arts. 12–13.

101. Relevant in that respect are the statutes of International Criminal Tribunals. Statute of the International Criminal Court, *supra* note 100; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955/1994, U.N. Doc. S/RES/955 (Nov. 8, 1994); International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827/1993, U.N. Doc. S/RES/827 (May 25, 1993).

102. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 14, U.N. Doc. A/RES/39/46

authoritative interpretation given by the International Committee of the Red Cross, this principle is implicitly recognized in Article 91 of the Protocol Additional to the Geneva Conventions.[103] The right to compensation must be secured through the recognition of an effective access to justice for the victims and entails an obligation for every state to guarantee fully such access with legislative as well as administrative measures, or through the exercise of jurisdiction.

In the light of foregoing and in conclusion, whenever victims bring a claim pertaining to serious violations of human rights before the courts of one state against a foreign state, the judges of the forum state are confronted with a conflict between two competing obligations, both stemming from rules of customary international law (or from applicable treaties). That conflict can be settled by drawing a balance between values recognized and protected by international law: the respect for the foreign state immunity, which reflects the principle of sovereign equality of states (a cornerstone of international relations), and the protection of human dignity and fundamental human rights,

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(Dec. 10, 1984) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law."). Statute of the International Criminal Court, *supra* note 100, art. 75 ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. . . . The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."). Similar provisions are retained in other international instruments. *E.g.*, European Convention on Human Righs, *supra* note 44, art. 41; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), art. 6, U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965); Declaration of the Rights of the Child, G.A. Res. 1386(XIV), art. 6, U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959).

103. Int'l Comm. of the Red Cross, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Part V: Execution of the Conventions and of this Protocol; Section II—Repression of Breaches of the Conventions and of This Protocol* para. 3656, at 1056 (July 12, 1978), *available at* http://www.icrc.org/ihl.nsf/COM/470-750111?OpenDocument ("Those entitled to compensation will normally be Parties to the conflict or their nationals . . . ." (commentary to Article 91)); *id.* para. 3657, at 1056 ("Apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation. *However, since 1945 a tendency has emerged to recognize the exercise of rights by individuals.*" (emphasis added) (commentary to Article 91)). Worth noting is that International Committee recalls that "Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations". *Id.*

including the recognition of a right to compensation for the victims of serious violations of those fundamental rights. The resolution of the conflict must be achieved, as the Italian Court of Cassation correctly pointed out in the *Milde* decision of 2009, only through a systemic balance of values and legally protected interests, taking into account the content and the purpose of the rules that specifically come into consideration and evaluating those rules in the light of the whole system of principles, norms, and values that constitute the international legal order at the present time.[104] In recent years, international law has evolved as a consequence of the general acknowledgement of the crucial importance of human rights. This had an impact on several traditional rules and doctrines of international law, including rules that restrict the exercise of states' sovereignty. Promotional elements of those developments are the acknowledgement of the existence of obligations towards the international community as a whole,[105] the denial of functional immunity to state agents when committing an international crime,[106] the principle of universal criminal jurisdiction,[107] and the lifting of the domestic jurisdiction

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104. *See supra* notes 26, 40.

105. The category of *erga omnes* obligations is strictly connected with the emergence of new values of the international community as a whole, which are considered to be worthy of special protection. The characteristic features of *erga omnes* rules were highlighted by the International Court of Justice in the judgment of February 5, 1970 in *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). They could be resumed as follows: (a) these are obligations protecting common values; (b) these obligations are binding upon each state towards all the member states of the international community (or, in case of conventional rules, towards all the other parties to the treaty); (c) all the member states of the international community (or, all the other parties to the treaties, as expressly provided for), have the right to react, face to eventual breaches of the obligation, in order to safeguard the values protected by the *erga omnes* rules. International Covenant on Civil and Political Rights, *supra* note 44, art. 41; European Convention on Human Rights, *supra* note 44, art. 33. It follows that, as already pointed out, *supra* note 94, the legal reaction to breaches of such rules and obligations is different from the one provided for "ordinary" wrongful acts, entailing a so-called "aggravated" responsibility. In that regard, see *Draft Articles on Responsibility of States for Internationally Wrongful Acts, supra* note 94, art. 42 (providing that the implementation of state responsibility is in the first place an entitlement of the "injured State") and *id.* art. 48 (complimenting the rule found in Article 42).

106. Meaningful in this respect is the Statute of the International Criminal Court, *supra* note 100, art. 27 ("Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.").

107. The principle is recognized and upheld by the legislation of several countries, like Spain (LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23 (Spain), concerning genocide, war crimes, crimes against humanity and terrorism). Belgium, even though the concerned law was revised twice, in a very restrictive way only retaining the active or passive nationality principle and the principle of legal residence in Belgium. *See* Loi relative à la répression des violations graves de droit international humanitaire [Act Concerning Punishment for Grave Breaches of International Humanitarian Law] of Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of

exception insofar as the respect for and protection of human rights is concerned.[108] It is within this new legal framework that provisions such as Article 3 of the Fourth 1907 Hague Convention, imposing a duty to pay compensation on the party that violates conventional rules, have to be appreciated and interpreted, following a principle of systemic integration.[109]

In the perspective just discussed, it is worth considering that, first, the state immunity principle is not an absolute one, as the evolution of the relevant doctrine clearly shows.[110] Second, it must be taken into account that obligations concerning the protection of fundamental human rights possess undoubtedly an *erga omnes* character so that their breach entails the state's responsibility towards the international community as a whole. In particular, when no effective remedy is available to the victims, the violation of the obligation to give compensation is of concern to all states.

Following the general rules on state responsibility as codified by the International Law Commission, in the case of a violation of an *erga omnes* obligation (as it is the obligation of the responsible state to grant effective compensation to the victims of gross violations of human rights and of humanitarian law) any state other than an injured state is entitled to invoke the responsibility of the guilty state and has the right to take lawful measures against that state to ensure cessation of the internationally wrongful act and reparation in the interest of the

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Belgium], Mar. 23, 1999, 9286 (Belg.). For Germany, whenever the obligation to prosecute is stemming from an international treaty binding upon the state, according to the interpretation of Article 6(9) of the German Penal Code given by the German Supreme Court in the *Sokolovic* case. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 2001, 3 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 372/00 (Ger.).

108. It is worth recalling in this respect the role of the mandates system of the League of Nations and the minorities treaties associated with the Covenant as well as the activity of governing bodies of the International Labour Organisation. Nevertheless, the real turning point on this issue is represented by the UN Charter and by the activity, of legislative promotion and monitoring, developed by UN organs. In the area of protection of human rights, the intervention of the United Nations (that could take various forms, from general discussion in the General Assembly or other competent UN body, to general or specific recommendations, to the consideration by the Security Council in case of serious and large-scale violations of human rights) together with the growing network of international treaties, both on a universal as well as on a regional level, indicate a clear and considerable erosion of domestic jurisdiction.

109. In that regard, see *supra* notes 28, 104. On the principle of interpretation concerning the so-called systemic integration, see the Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

110. The starting point of the state immunity doctrine was the absolute immunity of foreign states from jurisdiction of the forum state originating in the principle of sovereign equality of states, which is a "constitutional" principle of international law. The concerned doctrine has then progressively evolved through state practice including national legislation and municipal courts activity, in order to respond to the needs of the international community. *See supra* notes 9–10.

injured state or of the beneficiaries of the obligation breached.[111] This aim could be achieved through the removal of immunity of the responsible state with respect to suits for compensation introduced by the victims before the courts of the state in which the responsible state would have been liable under the *lex loci commissi delicti* (according to the general principle expressed by Article 12 of the UN Convention).[112] Alternatively, immunity could be lifted when the forum state can be considered, in respect of the gross violations of human rights complained, a specially affected party[113] as the national state of the victims. The adoption of such measures, with the aim of ensuring the victim has recourse to justice if the responsible state refused to fulfil its obligation of reparation, could not to be barred by the nature of the obligation to respect foreign state immunity: customary rules on state immunity do not possess in fact, a peremptory character, nor do they appear among the obligations that cannot be affected by countermeasures.[114]

It is in the light of the development of international law referred to above and within the perspective so far discussed that the rationale which underlines the recent Italian case law on state

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111. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, supra* note 94, arts. 42, 48, 54.

112. According to Article 12 of the UN Convention on Jurisdictional Immunities a state cannot invoke immunity before the court of another state which is otherwise competent in a proceeding related to pecuniary compensation for death or personal injuries or damages to tangible property, caused by an act or omission attributable to the state, only if "the act or omission is occurred in whole or in part in the territory of that other State" and if the author of the act or omission was present in the territory of the forum state at the time that the act or the omission occurred. *See supra* note 69. Similarly, Article 11 of the Basle Convention provides that, "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State . . . if the facts which occasioned the injury or damage occurred in the territory of the State of the forum . . . ." European Convention on State Immunity, *supra* note 1, art. 11. The territorial connection between the act or the omission causing personal injuries or damages to property and the forum state is retained as a necessary criterion for the exercise of jurisdiction by the national legislations on foreign states immunities, quoted above. *See supra* note 65. It is not useless to recall that also the case law of the European Court of Human Rights usually gives relevance to the territorial criterion. *See supra* note 46.

113. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, supra* note 94, art. 42(b)(i) (noting that according to Article 42, a state is entitled to invoke the responsibility of another state if the obligation breached is owed to the international community as a whole and the breach "specially affects that State").

114. *Id.* art. 50 (identifying international obligations that cannot be prejudiced by the adoption of countermeasures). These obligations are: "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations . . . obligations for the protection of fundamental human rights . . . obligations of a humanitarian character prohibiting reprisals . . . other obligations under peremptory norms of general international law." *Id.* Similarly, a state taking countermeasures "is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State; (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents." *Id.*

immunity can be considered and evaluated. The recent Italian judicial practice can be regarded as a meaningful contribution to the clarification of some controversial issues concerning the new boundaries of state immunity that the UN Convention leaves unprejudiced once admitted that the principle of absolute immunity has been superseded by the new needs of the international community. In this regard the Italian judges' decisions referred to in these pages are likely to foster the consolidation of a trend that has emerged recently in international practice. This would support a further restriction of state immunity with respect to acts of government (*acta jure imperii*)—when the circumstances mentioned above are present—in order to allow the exercise of jurisdiction of the forum state when victims of human rights violations amounting to international crimes initiate civil proceedings concerning pecuniary compensation.

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