Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment) (International Court of Justice, General List No 143, 3 February 2012)

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Introduction

On 3 February 2012, the International Court of Justice ('ICJ') adjudged a dispute between the Federal Republic of Germany and the Italian Republic — the Hellenic Republic intervening. The dispute concerned Germany's purported immunity in Italian courts for atrocities committed by German troops during World War II.[1] Ultimately, Germany's immunity was upheld, marking a pivotal moment in foreign sovereign immunity and bringing to a head years of conjecture about what may be loosely termed a human rights exception to state immunity. The ruling should prove fundamental to further development in the field. This note first briefly summarises the current state of foreign sovereign immunity. A history of the case follows, outlining the material facts, and setting out pertinent legal issues, arguments made by the parties and an analysis of the ruling.

Prior Law

Foreign sovereign immunity prevents a nation from being impleaded in a foreign domestic court. It stemmed from the doctrine of state official immunity[2] and is most often cited as originating in the United States Supreme Court decision of *The Schooner Exchange v McFaddon*.[3] Gradually *The Schooner Exchange* became the chief authority for the notion of absolute immunity,[4] which prevents a nation being impleaded in a foreign court for any reason without its consent. Beginning in the late 19th century, however, and increasingly in the 20th, Mediterranean states including Italy, Egypt, and Greece (but also other states including Belgium), began favouring a restrictive immunity[5] that divides conduct into private and sovereign behaviour, according immunity only to the latter. Western nations — including the United States ('US'),[6] United Kingdom ('UK'),[7] Australia[8] and Canada[9] —

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1 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012) ('*Germany v Italy*').

2 This is otherwise known as head of state immunity. For the basis of foreign sovereign immunity in the pre-existing head of state immunity, see Ian Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980) 167 *Hague Recueil des Cours* 113, 121.

3 11 US (7 Cranch) 116 (1812) ('*McFaddon*').

4 Sinclair, above n 2. Some scholars wonder if Marshall was really preaching absolute immunity: see Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff, 1984) 13.

5 For a survey of state practice up to 1950, see Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *British Yearbook of International Law* 220, 250–72.

6 Jack B Tate, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments' (1952) 26 *State Department Bulletin* 983; *Foreign Sovereign Immunities Act of 1976*, 28 USC §§ 1330–69 (2010).

7 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529; *State Immunity Act 1978* (UK).

8 *Foreign State Immunities Act 1985* (Cth).

followed suit by adopting the views of the Mediterranean states later in the 20th century, creating a clear trend in favour of restrictive immunity.[10] However, that trend is by no means universal, with some nations still adhering to absolute immunity.[11]

The most significant recent issue in the field is whether a state should be granted immunity in cases where human rights have been violated by a breach of *jus cogens*.[12] This is what was referred to above as the human rights exception to state immunity. In the past two decades, a number of cases have been filed in the US,[13] the UK[14] and Canada,[15] and before the European Court of Human Rights,[16] attempting to assert through various arguments that a state, even when acting in a sovereign capacity, should not be immune for grave human rights abuses. Unlike the conceptually similar argument in the state official immunity case of *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte*[17] — the relevant logic there being that, even if committed in an official capacity, some acts should not be accorded that classification if they violate basic human rights — these suits were generally unsuccessful.[18] Nonetheless, the last decade has seen growing support in the West for a possible human rights exception to state immunity.

Case History and Facts

Germany v Italy grew out of multiple claims in Italian and Greek courts[19] seeking compensation for atrocities committed by German forces against the people of several occupied nations (including Italy and Greece) during World War II. In 1998 in Italy, Luigi Ferrini filed suit in the Court of Florence, alleging he was deported and subjected to slave labour. At first instance and in the Florence Court of Appeals the case was dismissed due to Germany's sovereign immunity. On further appeal, however, the Italian Court of Cassation[20] allowed the case to proceed, finding that there can be no sovereign immunity — even for acts performed in a sovereign capacity — where human rights have been trampled by a violation of a *jus cogens* norm. Two more cases followed, before the Court of Turin and the Court of Sciacca, each also concerning allegations of deportation and slave labour. Germany's interlocutory appeals pleading immunity were dismissed by the Court of

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9 *State Immunity Act*, RSC 1985.

10 See Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 330.

11 China is one such nation. See generally Wang Houli, 'Sovereign Immunity: Chinese Views and Practices' (1987) 1(1) *Columbia Journal of Chinese Law* 23, 28–30. Some scholars believe China may be reconsidering its position: see Dahai Qi, 'State Immunity, China and Its Shifting Position' (2008) 7(2) *Chinese Journal of International Law* 307.

12 See generally Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 715–18.

13 *Saudi Arabia v Nelson*, 507 US 349 (1993).

14 *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270.

15 *Bouzari v Iran* (2004) 243 DLR (4th) 406 (Ontario Court of Appeal).

16 *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79.

17 *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 ('*Pinochet (No 1)*'); *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 ('*Pinochet (No 2)*'); *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 ('*Pinochet (No 3)*').

18 But see *Simpson v Libya*, 326 F 3d 230 (2003). That was a special case, however, since it involved the *Antiterrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, 110 Stat 1214. See also *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, which was decided by just nine votes to eight.

19 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [27]–[36].

20 *Ferrini v Federal Republic of Germany* (2004) 128 ILR 658 ('*Ferrini*').

Cassation.[21] Finally, the Military Court of La Spezia convicted German soldier Max Josef Milde of committing massacres and, among other things, ordered the German Government to pay reparation to the victims' families. Germany's appeal to the Rome Military Court of Appeals alleging immunity was unsuccessful. So too was a further appeal to the Court of Cassation.[22]

Similar cases were proceeding against Germany in Greek courts. One of the massacres had occurred in a Greek village called Distomo. In 1995, families of the victims filed suit against Germany in the Livadia Court of First Instance and were awarded a default judgment. Germany appealed on the grounds of immunity, but was unsuccessful in the Supreme Court,[23] although the authorisation required by Greek law to enforce the judgment was never granted. This prompted the *Distomo* claimants to file suit in the European Court of Human Rights for the enforcement of the judgment in Greece. That claim was dismissed,[24] leading to a suit in Germany, which was dismissed in 2003 by the Federal Supreme Court on the basis that states are entitled to immunity when acting in a sovereign capacity.[25] Some months later, the Italian Court of Cassation ruled against Germany in *Ferrini*, which encouraged the *Distomo* claimants to seek enforcement in Italy. Ultimately, the Florence Court of Appeal on 13 June 2006 and the Court of Cassation on 12 January 2011 ruled that the *Distomo* judgment was enforceable in Italy.[26] After their success in the Florence Court of Appeal, the Greek litigants registered a legal charge over a German property in Italy called Villa Vigoni, but this charge was suspended 'pending the decision of the International Court of Justice'.[27]

Legal Issues, Arguments, and Ruling

At the ICJ Germany alleged Italy had:

> [B]y allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law.[28]

Germany claimed that Italian recognition of *Distomo* and the grant of a charge over Villa Vigoni similarly violated its immunity. The crux of the matter was thus: had the Italian judgments impermissibly extended the exceptions to immunity beyond their accepted bounds?

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21 *Mantelli*, Corte di Cassazione [Italian Court of Cassation], No 14201, 29 May 2008 reported in [2009] I *Il Foro Italiano* 1568; *Maietta*, Corte Di Cassazione [Italian Court of Cassation], No 14209, 29 May 2008 reported in [2008] *Rivista di Diritto Internazionale* 896.

22 *Milde*, Corte di Cassazione [Italian Court of Cassation], No 1072, 13 January 2009 reported in [2009] *Rivista di Diritto Internazionale* 618.

23 *Prefecture of Voiotia v Federal Republic of Germany* (2000) 129 ILR 513 ('*Distomo*').

24 *Kalogeropoulou v Greece and Germany* [2002] X Eur Court HR 417.

25 *Greek Citizens v Federal Republic of Germany* (2003) 129 ILR 556.

26 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [34].

27 Ibid [35].

28 Ibid [17].

Italy pressed two arguments as to why its actions did not violate German immunity: the territorial tort principle and the last resort argument. The territorial tort principle[29] maintains that 'a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum state, even if the act in question was performed *jure imperii*'.[30] In a survey of state immunity statutes,[31] the ICJ found many, although varied, manifestations of this principle. The Court also consulted the European[32] and United Nations[33] immunity treaties, indicative only of customary obligations since Italy was not a party to the former and neither had signed the latter. Finally, the Court surveyed many domestic and international decisions,[34] including some already noted above.[35] Ultimately, the Court felt the balance of state practice and *opinio juris* weighed against the territorial tort principle, which it rejected.

Italy's last resort argument consisted of three strands:[36] (1) Germany's acts seriously violated rules of international humanitarian law; (2) those rules had the status of *jus cogen*s; and (3) lacking other means of redress, Italy exercised jurisdiction as a last resort. In considering the first strand, the Court thought there was a logical problem with immunity being contingent on a delict's magnitude, because immunity from jurisdiction was a procedural matter that had to be considered preliminarily.[37] As to the second strand, the Court disagreed with Italy's contention that there was a logical conflict with a hierarchically superior *jus cogens* norm yielding to a regular norm like state immunity. The Court, reasoning much like it did with the first strand, felt there was no conflict because state immunity is a procedural and preliminary matter that does not 'bear upon the question whether or not the conduct […] was lawful or unlawful'.[38] Regarding the third strand, the Court could find 'no basis in the State practice [for the contention that] the entitlement of a State to immunity [is] dependent upon the existence of effective alternative means of securing redress'.[39] The Court therefore rejected the last resort argument and ruled in Germany's favour.

Judge Yusuf in his dissenting opinion felt the judgment focused too much on the first and second strands of the last resort argument to the virtual exclusion of the third strand, which was the only strand that had actually emphasised Italy's conduct as a last resort.[40] He thought the other two strands fell into a different light when considered with the third strand. His Honour also felt the rules of foreign sovereign immunity were 'fragmentary and unsettled', which made it dangerous to attempt a 'formalistic exercise of surveying conflicting judicial decisions of domestic courts, which remain sparse as regards human

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29 Distinct from the extraterritorial tort issue, for which see *Alien Tort Statute*, 28 USC § 1350 (2010).

30 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [62].

31 Ibid [70].

32 *European Convention on State Immunity*, opened for signature 16 May 1972, 1495 UNTS 182 (entered into force 11 June 1976).

33 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 2 December 2004 (not yet in force).

34 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [72]–[76].

35 *Saudi Arabia v Nelson*, 507 US 349 (1993); *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270; *Bouzari v Iran* (2004) 243 DLR (4th) 406 (Ontario Court of Appeal); *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79.

36 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [80].

37 Ibid [82].

38 Ibid [92].

39 Ibid [101]. This was also suggested in *Pinochet (No 2)* [2000] 1 AC 119.

40 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [6]–[11] (Judge Yusuf).

rights and humanitarian law violations'.[41] In Judge Yusuf's opinion, it was open to the Court to rule that, although the field was unsettled, the *Ferrini* judgment encapsulated the emerging rule.

Analysis

The Court's classification of Germany's acts as of a sovereign nature[42] might initially appear indisputable, although that is not necessarily the case. One might argue massacres and slave labour are so despicable and repugnant to human dignity that they could not possibly have been public acts, nor could they have a public purpose — hence they could not attract immunity due to lack of a sovereign nature. In fact, Italy tentatively advanced this view.[43] It draws on the argument in *Pinochet* that torture could not be an official act. The ICJ rejected the notion,[44] stating *Pinochet* did not apply because it was a state official immunity case, not a foreign sovereign immunity case, and also because it was a criminal trial, not a civil suit. Yet, elsewhere in the judgment,[45] the ICJ cited and applied a rule from a state official immunity case.[46] This is inconsistent. Regardless, Italy's allogamous strategy is worth exploring.

In *Ferrini*, the Italian Court had mentioned state official immunity, to show how developments have led to the eradication of functional immunity in cases involving international crimes. It then said 'functional immunity constitutes a sub-species of State immunity'.[47] This contention will not be accepted by many scholars, as functional immunity belongs to state official immunity, which is technically a separate issue to foreign sovereign immunity. Andrea Gattini noticed the error[48] in an article anticipating the ICJ's judgment in *Germany v Italy*. Although he appears to have been a little uncharitable in summarising the Court's stance as 'functional immunity and state immunity are two sides of the same coin',[49] nonetheless it was certainly a poor choice of words on the part of the Italian court. Yet Gattini's view, and ultimately that of the ICJ — that the two doctrines are separate; that concepts applicable to the one do not translate to the other — need not be the final word. He observes in a footnote[50] what was earlier observed in this note:[51] foreign sovereign immunity initially grew out of state official immunity. They are unquestionably related. Their overall similarity can be easily appreciated by considering the US stance toward them[52] from the enactment of the *Foreign Sovereign Immunities Act of 1976*,[53] or even from the Tate Letter,[54] until quite recently in *Samantar v Yousuf*.[55]

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41 Ibid [24], [27].

42 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [60].

43 Ibid [86].

44 Ibid [87].

45 Ibid [100].

46 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 25 [58], [95], [100].

47 *Ferrini* (2004) 128 ILR 658, 674.

48 Andrea Gattini, 'The Dispute on Jurisdictional Immunities before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 *Leiden Journal of International Law* 173.

49 Ibid 182.

50 Ibid 184 n 47.

51 Sinclair, above n 2, 121.

52 See generally Beth Stephens, 'The Modern Common Law of Foreign Official Immunity' (2011) 79 *Fordham Law Review* 2669; Ingrid Wuerth, 'Foreign Official Immunity Determinations in US Courts: The Case Against the State Department' (2011) 51 *Virginia Journal of International Law* 915.

Some state official immunity concepts might therefore equally apply to foreign sovereign immunity, mutatis mutandis. If this is admitted, then the argument drawn from *Pinochet* seems to have been given short shrift. Assuming it was pursued, however, one might ask: if the massacres and slave labour complained of are not treated as public or sovereign acts, how can they attract state responsibility? Article 2 of the 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* attaches responsibility only where an act 'is attributable to the State'.[56] Article 4 then states 'conduct of any State organ shall be considered as an act of that State',[57] while the commentary adds 'it is irrelevant for the purposes of attribution that conduct of a State may be classified as … *acta iure gestionis,* which is an act of a commercial or private nature.[58] State responsibility would thus remain engaged if a court were to rule the act could not be of a sovereign nature.

The real issue *Germany v Italy* hinged on, however, was the conflict — or lack thereof — between state immunity and *jus cogens* contained within the first two strands of Italy's last resort argument. The Court maintains immunity cannot depend on a delict's magnitude, because immunity is a procedural matter, qualitatively and completely separate from substantive issues.[59] Foreign immunity is a procedural and preliminary matter. The problem lies in the 'completely separate' aspect. The restrictive immunity doctrine would never have developed if its originators took such an approach. They would have been prevented from investigating the nature or purpose of the act in question on the basis that immunity is a procedural matter that must be dealt with separately. However, there is no relevant conceptual difference in an immunity qualification test that analyses whether an act is of a sovereign nature or whether an act would constitute a violation of *jus cogens*. In both situations, some investigation of the act's nature would be required to ascertain whether the state qualifies for immunity. It is surprising that the majority judgment in *Germany v Italy* did not appear to take cognisance of this fact, which did not escape Judge Yusuf's attention.[60]

Conclusion

Although some of the Court's ruling appears questionable, state practice and *opinio juris* simply favoured Germany's cause in the present case, at least in the majority's opinion. Judge Yusuf held a different view. Perhaps he went too far in calling that state practice merely 'fragmentary' and 'unsettled', although his main point is well made. Restrictive immunity is no longer a controversial doctrine, although it was originally. A handful of progressive nations incubated the concept in their judiciaries for many years before it gained critical mass. The human rights exception is still a relatively new concept. Who is to say which other nations may have adopted it in the future, had the matter not gone to the

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53 28 USC §§ 1330–69 (2010).

54 Letter from Jack B Tate, Acting Legal Advisor to the Department of State, to Philip B Perlman, Acting Attorney General (19 May 19 1952), in 26 *State Department Bulletin* 969, 984 (1952); 47 AJIL 93 (1953).

55 (No 08–1555, 1 June 2010) slip op.

56 *Report of the International Law Commission Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001).

57 Ibid.

58 Ibid 41.

59 *Germany v Italy* (International Court of Justice, General List No 143, 3 February 2012) [82], [92].

60 Ibid [36] (Judge Yusuf).

ICJ? We may never know, as *Germany v Italy* will likely pose a significant hurdle to the doctrine's future development.

Customary international law by its nature follows a haphazard evolutionary course, often growing slowly in relative isolation before it gains broader acceptance. It is an organic process, which some might say the Court, in *Germany v Italy*, has artificially cut off, while others will say it has merely provided determinacy in the law.