

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

States' Jurisdictional Immunity After ICJ's 2012 Ruling

<https://www.e-ir.info/2013/10/24/states-jurisdictional-immunity-after-icjs-2012-ruling/>

FRANCESCO CORRADINI, OCT 24 2013

Jurisdictional Immunities of States: What's New After the Judgment of the International Court of Justice (ICJ) in the Dispute Between Germany and Italy?

The Doctrine of Jurisdictional Immunity of States: A Theoretical Contextualisation

Before discussing the recent judgment rendered by the ICJ in the case of Jurisdictional Immunities of States and providing a critical commentary thereof, it is crucial, en vie préliminaire, to identify the broad subject matter of this paper, which is the doctrine of jurisdictional immunity of States before the domestic courts of a foreign State. To do so, I shall first distinguish this particular doctrine from other ones, which, however linked to the former, have to be kept separate to avoid any risk of misunderstanding.

In other words, the issue of jurisdictional immunity of states is to be considered as a distinct matter, presenting different questions from those posed, for instance, by the doctrine of immunity of execution[1] (immunité d'exécution) and the functional immunity of states' organs[2], which pertains, respectively, the measures of constraints which are taken as a means of enforcement of the judgment, and the individual responsibility of the state's official. When it comes to the immunity from enforcement, it is widely accepted and authoritatively acknowledged by the ICJ that "even if a judgment has been lawfully rendered against a foreign state [...] it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on a third State"[3].

If we look back at its origins, we note that national tribunals have hugely contributed to the development of the doctrine of jurisdictional immunities of states (immunité juridictionnelle des Etats). Indeed, the application of the regime of jurisdictional immunities of states has been one of the main avenues through which domestic courts have started dealing with matters governed by international law and its principles[4]. Incidentally, the role of municipal courts in adjudicating cases on the alleged violation of human rights by foreign States, has often been hampered, not to say prevented, by the rule of jurisdictional immunity in international law. Thus, the important adjudicatory function of municipal courts, in an international legal order which lacks a centralized enforcement mechanism, would be hardly effective if the rule of jurisdictional immunities of states were to be applied in all circumstances[5].

The very first case law in which plaintiffs sought remedies for violation of their human rights committed by a foreign state, were brought before US domestic Courts[6]. In literature, the *Schooner Exchange v. McFaddon* (1812) is often cited as the first domestic case law in which the doctrine of absolute immunity found applicability for the first time ever in a case brought before a US municipal court[7]. The relevance of domestic jurisprudence's dictum in the evolution of the doctrine does not mean, however, that the issue shall be characterised as a domestic as opposed to an international one[8]. Not only is state immunity a matter governed by international law[9] and its principles, it also remains one of its most controversial issues.

Firstly, with regard to the international legal character of the subject this essay is dealing with, it is traditionally accepted that the regime of jurisdictional immunity is governed by three principles of international law: the principle of territoriality, the principle of sovereignty and the principle of legality (rule of law)[10].

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

Secondly, when it comes to the contradictory character of the doctrine of jurisdictional immunity of states, it is evident that the contradiction lies in the inevitable antinomy existing between the protection of universal values, conceived of as the pillars of today's international order, and the maintenance of one of the traditional principles governing international relations, the sovereign equality of states, summarized in the Latin adagio *par in parem non habet iudicium*. Indeed, that sovereign states cannot be subject to the will of other states, in an international order which is traditionally portrayed as an horizontal one[11], is linked to the very concept of state as *ens superiorem non reconoscens*[12]. In such an international legal order, whatever dispute which may arise between its members shall be settled by means of consent. This is so particularly when it comes to judicial means of settlement of controversies.

The principle of sovereign equality of states, however, is not the only theoretical foundation upon which the modern doctrine of jurisdictional immunity of States is based. The principles of territorial sovereignty and legality (rule of law) are the second and third theoretical assumptions which have to be kept in mind while considering the evolution of the doctrine of state immunity.

Furthermore, it is widely recognized both in states' practice[13] and by the community of authors[14] that states immunity is a principle of, and governed by, customary law. Eventually, the ICJ solved any possible ambiguity on the matter by authoritatively holding that "any entitlement of immunity can be derived only from customary international law, rather than treaty"[15].

It is equally undisputed that, like any other rule or doctrine of international law—but we might generalize this consideration to the very concept of law as such—the law of jurisdictional immunities of States has been developing over years. In literature, this doctrine is said to have undergone a process of erosion, moving from a theory of absolute immunity to a restrictive one, which was linked to the evolution of the principle of sovereignty of states[16]. Such an evolutionary process has been identified in three distinct phases or periods.

The first one is the phase of absolute immunity of states, traditionally linked to the diplomatic immunity of the sovereign, according to which a state cannot be sued before the domestic courts of a foreign state, regardless the nature of the acts it has carried out.

The second type of immunity is the so-called restrictive or relative immunity of state. This second stage in the doctrine of sovereign immunity is based on the conceptual distinction between *acta iure imperii* and *acta iure gestionis*. According to this second type of immunity, which is historically linked to the emersion of Soviet states in the international scenario, around the first half of the XXth century, states are immune from the jurisdiction of other states for those acts (*iure imperii*) pertaining their statehood as such, as opposed to acts that might be qualified as commercial or economic in nature (*iure gestionis*)[17]. For this second category of states' acts the general rule of jurisdictional immunity shall not be applied in case of domestic proceedings taking place before national courts. More recently, attempts have been made to imagine a third category that overcomes the traditional dichotomy based on the nature of the act, either public or private, and perceived as inconsistent with the complexity of the acts for which a state can be suit before the municipal court of another state. In this perspective "les violations graves des droits de l'homme- notamment la violation d'une regle imperative de droit international- constituent à cet égard une catégorie propre, sorte de tertium genus, dont on peut faire abstraction"[18].

The third stage in the development of the doctrine, the current one, is characterised by the juridical antinomy between two necessities. On the one hand is the necessity to protect fundamental values of the international order and to ensure that there is no impunity in case of their violation. On the other hand, it is equally important that states are immune from the jurisdiction of other states. The doctrine of jurisdictional immunity of States, at the current state of the art, lies between these two pillars.

Differently from the issue whether or not a state organ shall be denied functional immunity in case of commission of international crimes, which is undisputed according both to the judicial practice, the authors[19] and the Statute of International Courts and Tribunals[20], the issue at stake remains, as I was arguing before, one of the most controversial of international law. Indeed, despite the long debate which have been developing over years, the issue at hand remains one of the core topics of contemporary international law, as it is one of the conflicting areas of the

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

law in which different sets of rules clash each other. The central problem to address while discussing the doctrine of jurisdictional immunity of state from domestic courts, is how this pillar of classical international law interplays with other legal obligations deriving from international treaties and other sources of law, whose provisions have increasingly become part of the foundations of the contemporary international scenario of the last 60 years.

In other words, the discussion in the *cas d'espèce* is focused on the relationship between state immunity, as reflecting one of the principle of classical international law, namely the equal sovereignty of States[21], and the alleged violation of human rights, understood, more generally, as peremptory norms of *jus cogens*[22]. Eventually, the relationship between these two bodies of law is what the dialectic relationship between the idea of justice and the maintenance of the status quo in the international legal order is about, an ambivalent and indeterminate space between apology and utopia[23].

How is it possible to reconcile such conflicting bodies of law as the doctrine of sovereign immunity of States and the protection of international law of human rights? How can the doctrine of state immunity be reconciled with the current international public order?[24] To give but one example, US national courts have provided different answers to the question by relying to various interpretative approaches, namely by interpreting domestic law consistently with contemporary standards of international law; implying a waiver of immunity argument; by recalling the treaty exception; on the basis of the tort exception and finally relying on the hierarchy of rules argument[25].

This paper moves from the assumption that law has, first of all, a teleological dimension. It is a means for the realization of an end. By providing a critical commentary to the recent judgment rendered by the ICJ on the Immunities of States, the paper aims at contributing to the on-going debate on the issue whether or not the jurisdictional immunity of States should always prevail, even when international crimes are committed. In particular, the relationship between traditional principles of the international legal order, such as the general rule of immunity before domestic courts of foreign States, and the fundamental values upon which the contemporary international legal order is based, will be discussed.

Some domestic courts have tried to address these issues by linking the concept of jurisdictional immunity of States to the functional immunity of State's organs[26]. In *Ferrini v. Federal Republic of Germany*, one of the arguments the Italian Corte di Cassazione relied upon was the widely accepted assumption that in case of international crimes being committed, the functional immunity of states' organs cannot be invoked. A fortiori, where states' officials are denied immunity for such heinous crimes, there would be no reason why jurisdictional immunity of states should apply[27].

Instead of relying upon the a fortiori argument provided for by the Italian Corte di Cassazione, this paper aims at stressing the conflicting relationship between the doctrine of state immunity and the fundamental values underpinning the contemporary international legal order. The only way to overcome the contradictory outcome which would inevitably result from that, is to give priority to one set of rules over the other one. In other words, the general rule of states immunity is to be prevented from being applied by another rule, which plays as an exception, or as a *lex specialis*, being understood as one of the fundamental principles upon which the international community is based.

Jurisdictional Immunity of States: Germany v. Italy, A Critical Commentary

Background of the Judgment: the Ferrini Case

The recent judgment rendered by the ICJ in the contentious case between Germany and Italy represents the point of departure for any attempt of analysis of the current state of affairs in the development of the doctrine on jurisdictional immunity of States, and perhaps also to draw some possible trends in the future development of it. As already mentioned, however, in order to grasp the main underlying approach in the reasoning of the Court, it is worth dwelling primarily on the broad context the dispute originated from. A brief theoretical foundation has already been provided in section one of this paper.

On 3 February 2012, day on which the Judgment on Jurisdictional Immunities of States was rendered, the International Court of Justice found that "the Italian Republic [...] violated its obligation to respect the immunity which

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945". The contentious case between Germany and Italy originated from the decision of the Italian Corte di Cassazione to deny jurisdictional immunity to Germany and to recognize the jurisdiction of the Italian Courts to judge a sovereign state for having committed international crimes[28].

The facts took place during the II World War, when the then Nazi Germany was the occupying power in the Italian territory. Mr. Ferrini, was one of the "Italian military internee" (IMIs henceforth), to whom Germany had denied the status of prisoner of war and who was obliged to forced labour, in violation of international humanitarian law. Mr. Ferrini filed an application against Germany claiming civil reparations for the degrading treatment he suffered while in detention. The Tribunal of first instance of Arezzo (Italy) rejected the claim of the appellant, by declaring its lack of jurisdiction on the basis of the customary rule of immunity of a foreign state from the domestic courts of another state, therefore preventing it from deciding the case.

One crucial point which lead to the conclusion that the immunity of Germany should be granted was that the acts carried out at the time of facts by Germany were acts which Germany performed in the exercise of its power as a sovereign state. As I have discussed earlier, such acts are defined with the Latin expression of *acta iure imperii* and are distinguished from *acta iure gestionis*, to which the general rule of state immunity does not apply. Indeed, this is one of the main developments the doctrine of state immunity has experienced since its inception. Originally understood as an unqualified (or absolute) rule of international law (immunity *ratione personae*), the doctrine has developed a new concept of relative (or residual) immunity (immunity *ratione materiae*) [this first development lead to the fragmentation of a regime which was once perceived as a unitary one[29]]. It is for this second type of immunity that the difference between *acta iure imperii* and *acta iure gestionis* is relevant, as the rule would shield only those acts which stems directly from the sovereign functions of a state.

Eventually, after the Court of Appeal of Florence confirmed the finding of the Tribunal of first instance, the Italian Corte di Cassazione reversed the judgments of the two previous courts, by finding that Germany was not entitled to immunity from the jurisdiction of Italy, because the acts which were at the origin of the claims brought before the Italian judge, constituted international crimes. Thus, the Ferrini case provided an innovatory approach which departed, for example, from the *Al-Adsani* case before the ECHR. In *Al-Adsani*, a case originated from an application based on the claim that the UK, by not allowing Mr. Al-Adsani to seek redress before its domestic courts against the state of Kuwait for acts of torture allegedly committed by Kwatian officials, would have violated art. 3 and art. 6 of the ECHR by the United Kingdom, the Court held that:

"While the Court accepts [...] that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furunzija* and *Pinochet*, the criminal liability of an individual (emphasis added) for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged"[30].

Indeed, Ferrini was one of the first attempts to overcome the rigid dichotomy between *acta iure imperii* and *acta iure gestionis*, upon which the very foundation of the restrictive doctrine of state immunity lies. The revolutionary decision taken by the Italian Corte di Cassazione recognised the possibility to overcome the immunity of States from foreign domestic courts in case of massive violation of human rights, conceived of as the foundations of the contemporary international legal order.

The Judgment of the ICJ

As a preliminary issue, the Court clarified the subject matter of the dispute and verified the basis of its jurisdiction. As regards the matter object of the contentious, the Court noticed that it was asked to judge and declare that Italy had "failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

be brought against it in Italian courts seeking reparation for injuries caused by violations of international humanitarian law [...], by taking measures of constraint against Villa Vigoni [...] and by declaring enforceable in Italy decisions of the Greek civil courts"[31]. On the other hand, the Court noticed Italy's request for it "to adjudge Germany's claims to be unfounded and therefore reject them, a part from the submissions regarding the measures of constraint against Villa Vigoni"[32]. One would easily notice that the issue matter of dispute is at the very foundation of the clash in international law between the two rationalities that I briefly summarized in the previous paragraphs of this paper, notably the conflict between the fundamental values on which the contemporary international law is based and the doctrine of immunity of state.

The argument adduced by Italy is based on the assumption that "a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity before the court of the State of the victim's nationality"[33].

The first question the Court was called upon to answer was whether or not Italy had violated its obligation to accord jurisdictional immunity to Germany[34]. Before dealing with the issue of the alleged violation of Germany's jurisdictional immunity, the Court provided some comments on the acts which gave rise to the commencement of proceedings before Italian Tribunals. It noticed the particular gravity of the acts carried out by the German Reich by recognizing that with no doubt, by performing those acts, Germany violated the then applicable international law of armed conflict[35]. In spite of the fact that unlawfulness of those acts was not the issue that the Court was called upon to adjudicate, the Court decided nonetheless to say something about them. It is therefore surprising that the Court did not formulate the most obvious legal conclusions that would follow from that finding.

By analysing the rhetorical structure upon which the whole judgment is based, it is worth noting that the judges of the Court wanted to provide some pieces of authoritative statements, sometimes formulated in terms of obvious truths. It was obvious that, at the time of fact, Germany committed grave violations of international law. Eventually, this dogmatic statements did not come up with any practical consequence.

After establishing the existence of a customary rule, the Court recognized that the rule of jurisdictional immunity of State covers an "important place in international law and international relations". The doctrine would be derived from the principle of sovereign equality of States". While defining the doctrine of state immunity as one of the foundation of the contemporary international order, the Court provided the basis for the argumentations that would follow in its judgment. Any exception to the former would inevitably lead to a departure from the latter. A result that any member of the international community—implicitly perceived as one in which only states could have a place to stay—would accept.

Interestingly enough, the Court is not alone in its finding on the centrality of the rule of jurisdictional immunity of States in the current international legal order. More crucial is the fact that "the Parties are [...] in broad agreement regarding the validity and importance of State immunity as part of customary law". Already at this early stage of the decision, the Court put a first important element which paves the way for the development of its judgment. There was no dispute over the customary nature of the doctrine of state immunity, nor on the validity of the rule as one of the pillar of the international legal order. The lack of any dispute on the customary nature and, therefore, on the fundamental role the doctrine of jurisdictional immunity plays, eventually made the task of the ICJ dramatically easy.

"The law of immunity is essentially procedural in nature [...] and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful"[36]. After recognizing the procedural character of the rule of immunity, the Court authoritatively acknowledged the theory of restrictive immunity, based on the distinction between *acta iure imperii* and *acta iure gestionis*. The distinction, as already discussed, is an important one as it establishes the scope of applicability of the general rule of state immunity. While the general rule of state immunity is always applicable in respect to acts performed in the exercise of the sovereign prerogatives of the State, that rule would not be applicable when it comes to *acta iure gestionis*. No doubts, the Court said, the acts carried out by Germany are *acta iure imperii*. Most importantly, they are so notwithstanding their unlawful character[37].

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

The second authoritative statement of the judgment, upon which neither of the parties disagrees, and which, therefore, is to be conceived of as an undisputable truth, is that “States are generally entitled to immunity in respect of *acta iure imperii*”[38]. The statement, as it is formulated, seems to provide support to the central argument of Germany, namely that a State would always be immune from the jurisdiction of foreign states, for acts of *iure imperii*, without limitations.

On the other hand, Italy contended that the scope of applicability of the general rule of immunity, not only depends upon the characterisation *iure imperii/iure gestionis* of the act but, most importantly, on other two exceptions. According to the first exceptions, known as territorial tort principle, the general rule of immunity should not apply for those acts “occasioning death, personal injury or damage to property on the territory of the forum State”[39]. The central argument of the second exception brought forward by Italy, is that in case of “serious violation of rules of international law of a peremptory character”, the general rule should be waived[40].

When it comes to the Italian first argument, the Court noted that “the notion of State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to the property originated in cases concerning road traffic accidents and other “insurable risks”.

Most importantly, the Court found that “none of the national legislation which provides for the territorial tort exception” to immunity expressly distinguish between *acta iure imperii* and *acta iure gestionis*”. Such a distinction is not considered either by the few available International Conventions addressing the issue of jurisdictional immunity of States[41]. Moreover, the Court found, as Germany did, that art 12 of the United Nations Convention does not reflect customary international law.

The second argument put forward by Italy, which shall be analysed in light of the tension between a traditional set of values and the foundations of contemporary international law, consists of three distinct considerations: a) the gravity of the violations; β) the relationship between *jus cogens* and the rule of State immunity; γ) the “last resort” argument. In order to grasp the legal reasoning underpinning the judgment of the Court, it is worth dwelling upon each of these distinct arguments.

The Gravity of the Violations

The first consideration of Italy is that, given the seriousness of the violations of *ius in bello* committed by Germany at the time of facts, and amounting to international crimes, the general rule of immunity, which would have otherwise been applied, in the *cas d'espèce*, is to be waived.

The Court answered to this first point by arguing that Italy's reasoning is based upon a logical problem[42]. According to the ICJ, the general rule of jurisdictional immunity of State is “preliminary in nature”. In light of this consideration, the jurisdictional immunity of a state prevents any domestic court of another state, not only from adjudicating the case in favour of either of the parties, but also, and more crucially, from even considering the subject-matter of the dispute.

Procedural and substantive rules are two sets of norms which apply in distinct situations, address different matters and therefore are not linked to, nor conflicting with, each other. Consequently, and considering the state practice, both in form of domestic legislation and municipal jurisprudence, and the case law of international courts and tribunals, the procedural nature of immunity shall apply regardless of the seriousness of violations committed by Germany, which is an issue of a substantive character.

Arguably, the very rhetorical structure in the argument of the Court, based on the finding that Italy's reasoning is logically inconsistent, is not immune from being rejected by using the same argumentative tool. There is, in fact, a logical problem underpinning the reasoning upon which the Court's finding is based. As it is well established, states are immune from the domestic jurisdiction of foreign states, only in respect to acts committed in the exercise of its public function, otherwise qualified as *acta iure imperii*. According to the majority of the authors, states would not be immune in respect of those acts they have carried out as private actors/persons, which are commercial or economic

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

in nature. In other words, the distinction public v. private requires the appreciation by an international court or tribunal of the material nature of the act performed by the State.

Hence, the dichotomy procedural vis-à-vis substantive is at odds with the conceptualisation aforementioned, that is, with the very doctrine of restrictive immunity, based on the distinction *acta iure imperii* and *acta iure gestionis*. How would a domestic court know that immunity shall apply, without considering, at least *prima facie*, the material issue before it? In order to qualify an act as belonging to either of the two categories, a national Court is indeed obliged to enter, at least *prima facie*, in the merit of the case. The procedural character of the rule on jurisdictional immunity, therefore, does not prevent domestic courts from considering the merits of the case.

From a second critical point of analysis, it is worth noting the way in which the Court endeavoured to demonstrate the existence of a customary rule recognizing state immunity, even where international crimes are committed. In support of this thesis, the Court found that the judgments of national courts of only seven states, namely Canada, France, Slovenia, New Zealand, Poland and United Kingdom, would constitute an "evident" practice demonstrating the existence of a customary rule recognizing immunity[43]. According to international law, the existence of a customary rule requires the "actual practice and opinion *juris* of states"[44]. While it is not required to demonstrate that all and every member of the international community have contribute to the development of it, it is widely accepted[45] that the objective element of custom must be "general". In light of that, it is hard to imagine how such a general practice can be demonstrated by simply relying on the judgments rendered by the national courts of only seven states.

The Relationship Between Jus Cogens and the Rule of State Immunity

The second argument relied upon by Italy is based on the assumption that "there is a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another"[46]. In rejecting the argument, the Court once again relied on the *iper-positivistic* and logically-inconsistent distinction between procedural and substantive rules.

Apart from the critical view that one should take while considering the position of the Court in regards to the sharp distinction between preliminary and substantive rules, it is also worth dwelling upon a second type of criticism, based on the understanding of the teleological dimension of international law and the refusal of a formalistic approach to it –characteristic of a state-centric outlook of international relations. Law –also international law- has, first of all, a teleological dimension. It is a means to the realization of an end. Broadly, we might call this end justice.

In the words of Judge Cançado Trindade, "the separation between procedural and substantive law is not ontologically nor deontologically viable: *la forme conforme le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice[47]"

The "Last Resort" Argument

The third argument brought forward by Italy is based on the proposition that the refusal of jurisdictional immunity to Germany by the Italian judge was justified as that was the last avenue to secure the right to reparation for certain categories of victims who were denied prisoner of war status, and who would otherwise have been without any compensation.[48] The best answer the Court was able to give to this final argument was that "it is a matter of surprise- and regret- that German Government decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize"[49].

The ambiguous approach adopted by the majority of the judges of the Court, is even more evident if one reads the two following paragraphs of the judgment –clearly conflicting each other. Firstly, it is said that the rule of jurisdictional immunity does not alter the applicability of substantive rules. In light of that assumption, a State whose international responsibility is engaged has the obligation to make reparations to victims of the unlawful act. No doubt, the treatment reserved for IMIs (Italian Military Internees)- whose prisoner-of-war status was *de facto* denied by the Third Reich- clearly violated basic rules of international law and the law of armed conflicts. Consequently, if one were to follow purely arguments of reason, it would be clear that Germany was under an international obligation to make

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

reparation for the unlawful act. This is not, however, the approach followed by the ICJ in its judgment. Notwithstanding the heinous violations of international law committed by Germany, "the Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims, entitled the Italian courts to deprive Germany of jurisdictional immunity". In other words, despite the fact that the international responsibility of Germany would have been engaged, the general rule of immunity cannot be set aside, therefore it is Italy indeed that- by denying state immunity to Germany- committed an international wrongful act.

As I was arguing before, it is hardly understandable how the Court can argue that there is no conflict between the rule of state immunity –as procedural in nature- and the question whether or not Germany had to pay compensation to the victims of its international crimes –conceived of as a substantive issue. From a practical point of view –as opposed to a pure formalistic one- the former clearly prevents the applicability of a substantive body of law, to which the right to reparation of victims of international wrongful acts is an integral part.

Concluding Observations

In conclusion, it shall be noted that the Court's judgment, although very logical–Judge Yusuf would say "formalistic"[50]–leaves the international community with a dilemma, or at least with a bitter taste. Some scholars might argue that the judgment finally closes the "long saga" of the doctrine of jurisdictional immunity of states[51]. Be that as it may, one of the most important remarks that is to be done in regard with the Court's approach, concerns the denial of existence of any conflict between immunity and other substantial norms, and between immunity and the duty/right to a remedy. As Judge Yusuf pointed out in his dissenting opinion, "it is doubtful whether a responsibility that does not afford a means of redress or a remedial context within which the claims may be settled can be of much use to such victims"[52].

Structurally, the Court's approach and final conclusions have been very conservative, in a way that could hamper the ongoing evolutionary process regarding the matter of reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law, and a more general evolutionary process of the international law, driven by a human rights approach rather than a State-oriented one.

References

ICJ Case Law:

Jurisdictional Immunities of States: (Germany v. Italy, Greece intervening), Judgment 2012

Jurisdictional immunities of States: (Germany v. Italy, Greece intervening), Dissenting Opinion of Judge Augusto Cançado Trindade

Jurisdictional Immunities of State: (Germany v. Italy, Greece intervening) Dissenting Opinion of Judge Yusuf

ECHR's Case Law:

Al-Adsani v. The United Kingdom, 21 November 2001

Journal Articles:

Bianchi Andrea, "Denying State Immunity to Violators of Human Rights", *Austrian Journal of International Law* 46.3 (1994)

Bianchi Andrea, "L'immunità des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international", *Revue générale de droit international public* 63-101 (2004)

Bianchi Andrea, "Violazioni del diritto internazionale ed immunità degli Stati dalla giurisdizione civile negli Stati Uniti:

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

il caso Hercules”, *Rivista di diritto internazionale* v. 72, No. 3, 1989

Caplan Lee M., “State Immunity, Human Rights, and Jus Cogens. A critique of the normative theory”, *American Journal of International Law*, 97.741 (2003)

Focarelli Carlo, “Denying Foreign State Immunity for Commission of International Crimes: the Ferrini Decision”, *International and Comparative Law Quarterly*, V. 54.4 (2005)

Lalive Jean-Flavien, “L’immunité de juridiction et d’exécution des Etats et des Organisations Internationales”, *RCADI* v.84 1953

Kingsbury B., “Sovereignty and Inequality”, *European Journal of International Law*, 9.4 (1998)

Robinson Darryl, “The Impact of Human Rights Accountability Movement on the International Law of Immunities”, *Canadian Yearbook of International Law*, V. 40, 2002 pg. 151,

Orakhelashvili Alexander, “State Immunity and International public Order“ *German Yearbook of International Law*, v. 45 2002, pg. 227

Orakhelashvili Alexander, “State Immunity and International public Order (Revisited)”, *German Yearbook of International Law*, v. 49 2006, , pg. 227

Reinisch August, “European Court Practice Concerning State Immunity from Enforcement Measures”, *European Journal of International Law*, 17.4 (2006)

Sassoli Marco, “L’arrêt Yerodia: quelques remarques du rone affaire au point de collision entre les deux couches du droit international” *Revue General du Droit International*, v.106, 2002,

Books:

Hazel Fox, *The Law of State Immunity*, (Oxford International Law Library 2008)

Marti Koskeniemi, *From Apology to Utopia, the Structure of International Legal Argument* (Cambridge University Press 2009)

Xiadong Yang, *State Immunity in International Law* (Cambridge University Press 2012)

Antonio Cassese et al., *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)

Lori F.Damrosch, *International Law: Cases and materials* (American Casebook Series 5th Edition)

[1] On the conceptual distinction between jurisdictional immunity and immunity from execution or enforcement, see August Reinisch in “European Court Practice Concerning State Immunity from Enforcement Measures”, *EJIL* vo. 17 No. 4, 2006

[2] On the point see Alexander Orakhelashvili, “State Immunity and International Public Order” in *German Yearbook of International Law*, v. 45 2002

[3] See §113 ICJ in *Jurisdictional immunities of States, Judgment 2012*

[4] Jean-Flavien Lalive “L’immunité de juridiction et d’exécution des Etats et des Organisations Internationales”, *RCADI* 1953

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

- [5] On this point see P.Gaeta, "Immunity of States and State Officials: a major stumbling block to judicial scrutiny?" in *Realizing Utopia : the Future of International Law* pg. 228
- [6] A.Bianchi, "Denying State Immunity for Violators of Human Rights", *Austrian Journal of Public and International Law*, pg. 199
- [7] See *International Law, Cases and Materials*, pg. 851
- [8] As correctly pointed out by A. Bianchi in "Denying State Immunity to Violators of Human Rights" *Austrian Journal of Public and International Law*, pg. 197 Vol. 46
- [9] See generally Hazel Fox, "The Aw of State Immunity", Oxford International Law Library, Second Edition, 2008
- [10] Jean-Flavien Lalive, "L'immunité de juridiction et d'exécution des Etats et des Organisations Internationales", *RCADI* 1953 pg. 4
- [11] See A. Bianchi, "L'immunité des Etats et les violations graves de droits de l'homme: la fonction de l'interprète dans la détermination du droit international", in *Revue Générale de droit international* 2004 pg. 63
- [12] The principle of sovereign equality of states, enshrined in §2.1 of the Charter of the United Nations, is one of the basis of the current international legal order
- [13] As authoritatively stated in the decision of the Italian Corte di Cassazione in *Ferrini v. Federal Republic of Germany* § 5
- [14] See X.Yang, "State Immunity in International Law" pg. 35 (Cambridge University Press 2012)
- [15] ICJ Judgment on jurisdictional immunities of State (*Germany v. Italy, Greece intervening*) § 54
- [16] See A. Bianchi "Denying State Immunity to Violators of Human Rights" in *Austrian Journal of Public and International Law* 1994 pg. 198
- [18] See A.Bianchi "L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international" pg. 98
- [19] See Bianchi, *L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international* pg. 80
- [20] See for instance Art 27 of the Statute of the International Criminal Court, art. 7 of the Statute of the International Tribunal of Nuremberg, art. 6 of the Tribunal of Tokyo, art 7.2 of the Statute of the International Tribunal for the Former Yugoslavia, art 6.2 of the Statute of the Tribunal for Rwanda, art. 6.2 of the Statute of the Tribunal for Sierra Leone
- [21] On the role of sovereign states in the contemporary international legal order, see B. Kingsbury *Sovereignty and Inequality* in *EJIL* v. 9, 1998
- [22] On the intrinsic linkages between human rights and jus cogens, see A. Bianchi *Human Rights and the Magic of Jus Cogens* in *The European Journal of International Law* Vol. 19 no. 3, 2008
- [23] On the point see M. Koskenniemi, *From Apology to Utopia*, Cambridge University Press
- [24] See Alexander Orakhelashvili, *State Immunity and International Public Order* pg. 227 in *German Yearbook of International Law* v. 45, 2002

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

[25] See generally A.Bianchi "Denying State immunity to violators of human rights", *Austrian Journal of International Law* 46.3 (1994)

[27] Corte di Cassazione, Sezioni unite n. 5044/04,

[28] *Ivi* §12

[29] See A.Bianchi, *L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international* pg 98

[30] *Case of Al-Adsani v. the United Kingdom* § 61

[31] See § 37, International court of Justice, *Judgment, Jurisdictional Immunities of States (Germany v. Italy: Greece intervening)* 2012

[32] See §38 *Ivi*.

[33] See §45 *Ivi*.

[34] See §51 *Ivi*.

[35] See §52 *Ivi*.

[36] §59 *Ivi*.

[37] §60 *Ivi*.

[38] §61 *Ivi*.

[39] §62 *Ivi*.

[40] §61 *Ivi*.

[41] United Nations Convention on jurisdictional immunities of States and their properties

[42] §82 International Court of Justice, *Judgment, Jurisdictional Immunities of States (Germany v. Italy: Greece intervening)* 2012

[43] See §85 *Ivi*.

[44] See ICJ Advisory Opinion in *Legality of the use or the threat of use of nuclear weapons* § 64; *Judgment Continental Shelf* § 27.

[45] See art 38 of the Statute of ICJ

[46] §93 International Court of Justice 2012 *Jurisdictional Immunities of States (Germany v. Italy: Greece intervening)*

[47] Judge Cançado Trindade, *Dissenting Opinion* §295

[48] See § 98 International Court of Justice 2012 *Jurisdictional Immunities of States (Germany v. Italy: Greece intervening)*

[49] See §99 ICJ *Ivi*.

States' Jurisdictional Immunity After ICJ's 2012 Ruling

Written by Francesco Corradini

[50] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissenting Opinion of Judge Yusuf, I.C.J. Reports 2012, p. 2, para. 7.

[51] See A.Bianchi, On certainty available at <http://www.ejiltalk.org/on-certainty/>

[52] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissenting Opinion of Judge Yusuf, I.C.J. Reports 2012, p. 13, para. 53.

—
Written by: Francesco Corradini
Written at: University of Geneva
Written for: Makane Moise Mbengue
Date written: June 2013