Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)

Benjamin Nußberger, Victoria Otto

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A. Introduction

1 In its 2012 judgment on Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening), the → International Court of Justice (ICJ) determined the scope and extent of States’ entitlement to jurisdictional immunity in civil proceedings before foreign courts involving claims based on serious violations of humanitarian law under → customary international law.

2 Germany had requested the Court to adjudge that Italy had failed to respect Germany’s → State immunity first by granting civil claims based on violations of international humanitarian law by the German Reich during World War II; second by taking measures of constraint against German property used for governmental, non-commercial purposes; and third by granting exequatur to a judgment rendered by Greek courts against Germany in proceedings arising out of the Distomo Massacre (Judgment para. 15).

3 On 3 February 2012, the Court held that Italy had violated Germany’s entitlement to immunity on all three counts. The judgment constitutes a landmark decision in the infinite controversy amongst national courts and legal scholarship concerning restrictive approaches to State immunity.

B. Factual Background

1. Cases Involving Italian Nationals (Judgment paras 27-29)

4 The facts underlying the disputed proceedings before Italian courts concerned acts committed by German armed forces during World War II (→ Compensation for Personal Damages Suffered During World War II). They were uncontested by both parties and Germany had acknowledged their unlawfulness, admitting that they had brought ‘untold suffering’ upon Italian civilians (Judgment para. 52). These acts comprised, first, large-scale killings of civilians in occupied territory, second, → deportation of civilians to → forced labour/slave labour in Germany, and third, denying members of the Italian armed forces the status of → prisoners of war and deploying them as forced labourers (Judgment para. 52).

5 One of the victims, Italian national Luigi Ferrini, initiated proceedings against Germany before Italian courts in 1998, seeking compensation for his deportation to Germany and his subjection to forced labour during 1944 and 1945. The courts of first and second instance dismissed his claims as inadmissible due to Germany’s jurisdictional immunity. The Italian Court of Cassation, however, in its judgment of 11 March 2004, held that Italian courts had jurisdiction over these claims since States were not entitled to immunity in cases involving international crimes. Ultimately, the Court of Appeal of Florence ruled on 17 February 2011 that Germany could not invoke immunity for international crimes committed in 1944/45 and that it was obliged to pay damages to Ferrini. Subsequent to the Court of Cassation’s judgment, Italian courts denied Germany’s immunity in cases instituted by other Italian nationals based on similar facts.

2. Cases Involving Greek Nationals (Judgment paras 30-36, 121)

6 Furthermore, Italian courts granted exequatur to a judgment by the Greek Court of Livadia in 1997. Greek nationals whose relatives had been victims of the Distomo Massacre of 10 June 1944, in which German armed forces had killed approximately 200 civilians in the Greek village of Distomo, had claimed compensation before the court of Livadia. Setting aside Germany’s immunity, the Greek courts, upheld by the Hellenic Supreme Court, had awarded damages to the relatives. However, the Greek Minister of Justice had withheld the obligatory authorization for the enforcement of judgments against foreign States. Thus, the judgments, though final, remained unexecuted in Greece. Ensuing complaints before the
European Court of Human Rights (ECtHR) had been rejected as inadmissible. Claims before German courts requesting enforcement had remained likewise unsuccessful.

Following the Italian *exequatur* decisions, the Greek claimants registered a legal charge over Villa Vigoni, a cultural centre owned by the German State in Italy (*Judgment* paras 35, 109).

### C. History of Proceeding

Based on these occurrences, Germany instituted proceedings against Italy on 23 December 2008 requesting a determination that Italy’s judicial practice infringed Germany’s immunity. During the proceedings, Italy presented a counter-claim requesting the Court to find that Germany had violated its obligation of reparation (→ Reparations) by denying effective compensation to Italian victims of → war crimes and → crimes against humanity.

By order of 6 July 2010, the Court rejected the counter-claim as inadmissible under Art. 80 para. 1 Rules of the Court for lack of jurisdiction *ratione temporis*. The relevant facts underlying Italy’s counterclaim concerned the legal regime established in the aftermath of World War II (→ Reparations after World War II). The latter occurred prior to the entry into force of the → European Convention for the Peaceful Settlement of Disputes (1957) in 1961. Because Art. 27 (a) of the Convention restricted its scope of application to disputes relating to facts occurring after its entry into force, it could not establish the Court’s jurisdiction.

On 13 January 2011, Greece applied to intervene as a non-party under Art. 62 ICJ Statute with regard to the *exequatur* decision rendered by the Italian courts. Limited to this aspect, the Court granted Greece permission to intervene on 4 July 2011.

### D. The Court’s Decision

#### 1. The Court’s Jurisdiction (Judgment paras 39-50)

The Court based its jurisdiction on Art. 1 European Convention for the Peaceful Settlement of Disputes, which was applicable to the Italian decisions and measures adopted between 2004 and 2011. The Court reserved its position on the question concerning its jurisdiction to determine whether Germany had fully complied with its duty to reparation, as it found that this determination would only become relevant if a failure to grant reparation had a legal effect on the scope of Germany’s immunity.

#### 2. Compensation Proceedings in Italy

(a) Determination of Legal Issues and Applicable Law (Judgment paras 52-61)

The Court found neither the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) (‘UN Convention’) nor the → European Convention on State Immunity (1972) to apply in the present case. Thus, it assessed the scope of jurisdictional immunity solely under customary international law. Notably, the Court defined its methodological approach and identified and listed the sources of → State practice and → opinio iuris which were of ‘particular significance’ ‘in this context’ (*Judgment* para. 55).

On this basis, the Court found that a ‘right to immunity under international law’ existed ‘together with a corresponding obligation on the part of other States to respect and give effect to that immunity’ (*Judgment* para. 56). Furthermore, it acknowledged the importance of immunity in international law and international relations as it derived from the principle of sovereign equality of States (→ States, Sovereign Equality) (Art. 2 para. 1 UN Charter).
The Court underlined that exceptions to State immunity depart from this fundamental principle and may depart from the principle of territorial sovereignty (Judgment para. 57).

14 The Court outlined that the rules on State immunity were procedural in nature and entirely distinct from the substantive law determining the lawfulness of the particular conduct at the basis of the material claims, since they solely regulated the exercise of a State’s jurisdiction in respect of the conduct. Referring to Art. 13 Articles on State Responsibility, the Court noted that the scope of State immunity had to be assessed by reference to the law in force at the time of the proceedings in Italy, as they were the relevant acts in question (Judgment para. 58) (→ Intertemporal Law).

15 Following these considerations, the Court turned to the disputed scope of State immunity under customary international law. Although the Court accepted the distinction between acta iure imperii and acta iure gestionis with regard to a State’s entitlement to immunity, it noted that this classification of States’ acts remains unaffected by their lawfulness. Accordingly, the relevant acts of German armed forces still had to be characterized as acta iure imperii despite their uncontested unlawfulness (Judgment para. 60). With respect to such acts, the Court noted, cursorily referring to relevant international conventions, national legislation, and jurisprudence of national courts, that States were generally entitled to immunity in respect of acta iure imperii (Judgment para. 61). Against this background, the Court embarked upon further analysis, assessing whether immunity was applicable to acts committed by the armed forces of a State in the course of an armed conflict.

(b) Territorial Tort Exception (Judgment paras 62–79)

16 First, the Court discussed Italy’s argument that the customary international law on State immunity had a ‘territorial tort exception’. According to Italy, State immunity no longer applied in civil proceedings for acts causing death, personal injury, or damage to property on the territory of the forum State, even where the relevant acts constituted acta iure imperii or were committed by armed forces.

17 The Court conducted a detailed study of relevant State practice and opinio iuris. It reserved, however, its position on the question whether a territorial tort exception applies to acta iure imperii in general, and confined its analysis to acts committed by armed forces in the course of an armed conflict. The Court first assessed both the European Convention on State Immunity as well as the UN Convention as indicators of customary international law. Even though the Court found that these conventions generally provided tort exceptions, it concluded first that neither convention was applicable to acts committed by armed forces in the context of an armed conflict. Second, the Court noted that while some national legislation contained no general exclusion of acts committed by armed forces, the courts had not been called upon to apply that legislation to armed forces. Third, the Court analysed that the overwhelming majority of judgments of national courts concerned with the present question granted immunity. Consequently, the Court rejected Italy’s contention.

(c) Gravity of the Violation, Absence of Effective Remedies

18 The second argument upon which Italy relied to justify the denial of Germany’s immunity referred to the particular nature of the acts underlying the Italian civilians’ claims as well the circumstances under which those claims had been made. Against the background that Germany had ‘committed serious violations of the international law of armed conflict, which amounted to crimes under international law’ (Judgment paras 81, 52), Italy developed a three-stranded argument (Judgment para. 80). First, it contended that customary international law had developed to contain an exception to jurisdictional immunity with regard to such crimes. Second, Italy relied on a hierarchy of norms in international law: since the rules breached were → ius cogens, Germany’s immunity had to
give way, the latter being of non-peremptory character. Third, Italy maintained that it was entitled to deny immunity as a last resort in order to grant an effective remedy to the Italian civilians, as a large number of victims had been denied compensation.

(i) Gravity of the Violation (Judgment paras 81–91)
19 The Court examined in detail Italy’s proposition that States are deprived of their entitlement to jurisdictional immunity for claims concerning serious violations of international human rights law or the law of armed conflict under customary international law. The Court found that there was virtually no State practice besides the Italian judgments to support such a contention. By contrast, the Court referred to a report of the → International Law Commission (ILC) in preparation of the adoption of the UN Convention as well as to judgments by national courts and by the ECtHR which had explicitly upheld immunity in similar cases and had not found such a development in customary law.

(ii) Relationship between ius cogens and State Immunity (Judgment paras 92–97)
20 The Court also rejected Italy’s argument relying on the ius cogens nature of the rules breached.
21 The Court held that there was no conflict between immunity and the substantive rules breached by Germany—remarkably only ‘assuming for this purpose’ that the latter constituted ius cogens norms. The rules on state immunity were purely procedural in nature; their essence was limited to the exercise of jurisdiction in respect of another State. They had no bearing upon the substantive question whether the conduct was lawful. For this reason, by granting State immunity, a State did not recognize as lawful the acts at the basis of the respective claims. The Court found that dismissing compensation claims on grounds of immunity therefore could not contravene the principle in Art. 41 Articles on State Responsibility.
22 Furthermore, the Court stated that Germany’s duty to make reparation also did not conflict with the rules on State immunity. The duty to make reparation was distinct from the rules regulating the means of its implementation, such as those referring to State immunity. Moreover, the Court stated that the obligation of States to make reparation did not share the peremptory character of the substantive rule violated in the case. This could be inferred from the constant State practice of not requiring reparation or concluding post-war → lump sum agreements. Finally, the Court rejected the contention that ius cogens norms require the non-application of rules hindering the enforcement of ius cogens rules.
23 Notably, the Court supported its conclusions again by referring to national court decisions as well as the ECtHR’s judgments which had also rejected such arguments.

(iii) The ‘Last Resort’ Argument (Judgment paras 98–104)
24 Concerning Italy’s ‘last resort’ argument, the Court again emphasized that States’ entitlement to immunity was distinct from the question of their international responsibility. The Court explained that Italy’s contention did not find support in State practice. It continued by pointing to practical difficulties arising if States’ national courts had to ascertain whether or not States had actually provided appropriate redress.
25 However, the Court acknowledged that judicial redress for the individuals may be precluded and noted with ‘surprise— and regret’ that Germany had actually excluded compensation claims of the civilians concerned (Judgment para. 99). Thus, it encouraged both Italy and Germany to further negotiate a solution on this issue (Judgment para. 104).
(iv) The Combined Effect of the Circumstances Relied upon by Italy (Judgment paras 105–106)

Lastly, Italy claimed that the three circumstances on which it had based its arguments cumulatively justified the denial of Germany’s jurisdictional immunity. The Court, however, rejected this contention as not supported by State practice. Furthermore, it stated that a balancing of different factors against jurisdictional immunity would contradict the very essence of State immunity.

(d) Conclusion of the Court

The Court could not determine any rule of international law entitling Italian courts to deny Germany’s jurisdictional immunity, it found by 12 votes to 3 that the Italian judgments had breached international law.

3. Italy’s Measures of Constraint (Judgment paras 109–120)

Germany claimed that the measures of constraint taken against Germany’s Villa Vigoni had violated its entitlement to immunity from enforcement measures under international law.

The Court observed that immunity from enforcement measures was entirely distinct from the rules on jurisdictional immunity. Therefore, the Court could assess the legality of the enforcement measures without having to examine first the conformity with international law of the Greek judgments or Italy’s exequatur decision.

The Court found that enforcement measures may only be taken against a foreign State’s property if the property was used for non-commercial purposes or the owning State had consented or had allocated the property for the satisfaction of a judicial claim. Since in the Court’s view, the measures of constraint against Villa Vigoni fulfilled none of these conditions, it found by a majority of 14 to 1 that Italy had violated its obligation to grant Germany immunity from enforcement.

4. Italy’s Exequatur Decision (Judgment paras 121–133)

Lastly, the Court dealt with the question whether by declaring Greek judgments enforceable in Italy, Italian courts had violated Germany’s jurisdictional immunity. The Court rejected both Germany’s and Italy’s contention that this question depended on whether the Greek courts had respected Germany’s immunity. The Court found itself barred from such an appraisal, as it held that Greece had not consented thereto and the Court therefore lacked jurisdiction. Rather, the Court determined that it needed to assess whether the respondent State would have been entitled to immunity, if the proceedings on the merits had been instituted in the State now called upon to grant exequatur. The Court concluded from the fact that granting exequatur to a foreign judgment had effects similar to rendering a judgment on the merits. As Germany would have enjoyed immunity before Italian courts had the compensation claims for the Distomo Massacre come before them, the Court found by a majority of 14 to 1 that Italian courts declaring Greek decisions enforceable had violated Germany’s immunity.

5. Remedies (Judgment paras 134–138)

Referring to Arts 30 (a) and 35 of the Articles on State Responsibility, the Court ruled that Italy had to re-establish the status quo ante and reverse the effects of its relevant conduct by means which Italy considered best suited. However, the Court rejected Germany’s submission that it order Italy to offer assurances of non-repetition or to take
specific measures to ensure non-repetition, since it did not find the special circumstances to warrant such orders.

E. Assessment

33 It is unsurprising that the judgment has caused wide repercussions amongst scholars and it is likely to have a major impact on national and international jurisprudence. The (legal) dispute underlying the Court’s judgment, the question how to cope with historical injustices in international law, derives from differing views on the very purpose of the legal order established by international law. The traditional, State-centred approach emphasizing States’ sovereignty, which Germany had embraced in its arguments, is opposed by a more ‘progressive’ school of thought, which focuses on the individual and the promotion of basic common values and human rights.

34 With regard to the relationship between these two concepts, the judgment—resolutely criticized by Judge Cançado Trindade’s extensive dissent, which pleads for the individual-centred approach (at paras 161, 183)—reveals a more traditional notion upholding basic principles and structures of international law—on a methodological level as well as with regard to the subject matter.

1. Methodological Foundations of International Law

35 With regard to the theoretical and methodological foundations of international law, the judgment casts light on the Court’s understanding of the current status of the concept of *ius cogens* and on the identification of customary international law.

36 The Court scrutinizes the concept of *ius cogens*. Interestingly, the Court also refers to national courts’ decisions and legislation (*Judgment* para. 96), and thus appears to assess its current scope demanding requirements similar to the prerequisites of the development of customary international law. In any case, the Court indicates that *ius cogens* as a concept seems no longer to be contested. However, the Court does not explain—beyond referring to the definition in *Art. 53 → Vienna Convention on the Law of Treaties (1969)* (*Judgment* para. 94)—how *ius cogens* norms emerge. Nonetheless, the Court is reluctant to accept even fundamental norms embodying ‘elementary considerations of humanity’ as peremptory (*Judgment* paras 52, 93, 97). As concerns the legal effect of *ius cogens* norms, the Court interprets it (currently) as confined merely to their substantive content. The peremptory character of a norm has no effect on either procedural means of implementation or other secondary norms. The Court—in line with its previous jurisprudence (*Judgment* para. 95; Vidmar 19–22)—thus reveals a narrow understanding of the *ius cogens* concept.

37 As regards the identification of customary international law, the Court does not further refine *expressis verbis* the criteria required for a rule to form customary international law. However, its careful and extensive review and analysis of State practice and *opinio iuris* elucidate the Court’s approach to identifying customary international law and clarify the pertinent elements, ie State practice and *opinio iuris*. For example, the Court’s judgment illustrates the impact and relevance of multilateral conventions (not yet in force), especially those based on the ILC’s work, of national legislature and of domestic courts’ judgments. Moreover, the Court indicates how to handle internally contradictory State practice (*Judgment* para. 76).

38 On a more abstract level, the judgment exposes the structural dilemma of the evolution of customary rules, as the violation of an old rule is intrinsic in the transformative process. Nonetheless, the Court abstains from explicitly pronouncing itself upon the question how customary international law may change and develop. However, this silence of the Court might be understood as an implicit rejection of harmonizing approaches like the one of
Judge ad hoc Gaja. The latter concludes in his dissenting opinion that there existed a ‘grey area’, in which ‘States may take different positions without necessarily departing from what is required by general international law’ (at paras 9–10). The majority’s view seems to be more strict, as it does not consider such a ‘grey area’, and consequently— irrespective of whether State practice in fact is as ambiguous as proponents of an exception to State immunity allege— requires a clear-cut answer on the question whether a new customary rule has emerged (cf Dickinson 162–63). The majority therefore comes to the firm conclusion that Italy’s practice amounted to a breach of international law, being unable to view the departing State practice as a possible starting point of a new rule. Notwithstanding this, the Court endeavours not to close the door on the development of customary State immunity forever. The majority emphasises that its judgment is confined to ‘customary international law as it presently stands’ (Judgment para. 91) or, as Judge Koroma puts it in his separate opinion (at para. 7): ‘Nothing in the Court’s Judgment today prevents the continued evolution of the law on State immunity.’

2. Responses to the Judgment

39 Despite these efforts to soften the more rigid approach, the judgment sets an authoritative precedent and its reception by the international community will influence the direction in which rules on immunity will develop.

40 Indicative in this regard are the responses the judgment prompted in the international arena. Executing the Court’s judgment, Italy enacted Law No. 5/2013. Pursuant to its Art. 3, in disputes in which, Italy being a party, the ICJ had excluded the possibility of subjecting the specific conduct of another State to civil jurisdiction, Italian courts were obliged to declare lack of jurisdiction ex officio in pending proceedings. Moreover, final decisions could be challenged by motion for revocation. Accordingly, Italian courts, including the Italian Court of Cassation, denied jurisdiction in cases against Germany (for further information see Nesi 188 et seq).

41 However, on 22 October 2014, the Italian Constitutional Court declared Art. 3 of Law No. 5/2013 as well as the 1957 Italian law ratifying the United Nations Charter unconstitutional in so far as they obliged ‘the Italian judges to comply with the Judgment of the ICJ of 3 February 2012’. In doing so, it expressly did not question the ICJ’s Judgment as a matter of existing international law. Furthermore, the Italian Constitutional Court excluded questions relating to immunity from enforcement. Although the Italian Constitutional Court acknowledged the Court’s interpretation of the customary international law on State immunity, it declared the Italian laws implementing the Court’s judgment incompatible with fundamental principles of the Italian Constitution, in particular, the right of access to justice and of effective judicial protection of fundamental human rights. These principles, in addition, barred the incorporation of the conflicting customary jurisdictional State immunity into the Italian legal order (see generally → International Law and Domestic [Municipal] Law).

42 This judgment, however, remains an exception. Notably, the Canadian as well as the Dutch Supreme Courts respectively confirmed the Court’s ruling by applying it to cases before them. Most recently, the ECtHR—resuming the dialogue commenced by the ICJ citing the ECtHR’s judgments (Judgment paras 72, 73, 76, 78, 90, 96)—relied on the ICJ’s judgment in Jones and Others v United Kingdom. The ECtHR abstained from analysing any evolution of customary jurisdictional immunity that was claimed to have occurred since its 2001 judgment in the → Al-Adsani Case, but referred to the Court’s judgment as ‘authoritative as regards the content of customary international law’ (Jones para. 198).
Consequently, the ECtHR found that immunity did not disproportionately restrict the applicant’s right of access to court.

3. ‘Transitional Justice’

43 As regards the subject matter of the Court’s judgment, it clarifies longstanding controversies over State immunity, generally regarding its nature, origin, and relationship to fundamental principles, as well as with special respect to cases of war crimes. Yet it is important to note that the Court defines its enquiry in narrow terms: The assessment is restricted solely to the question of State immunity in civil proceedings (Judgment paras 87, 91). The development of the law on immunity in criminal proceedings against State officials is expressly distinguished, thus rendering possible an independent evolution of this issue. The analysis of the territorial tort exception is limited to the context of an armed conflict (Judgment para. 65). It further does not define general requirements for enforcement immunity, but limits its assessment to the particular case (Judgment paras 115–117). Last but not least, the Court neither answers questions raised by the parties regarding waiver clauses, nor the existence of the individual’s right to compensation, nor Germany’s international responsibility (Judgment para. 108).

44 Nevertheless, the Court takes a firm stand regarding the resolution of post-war claims, recognizing realities of the aftermath of war. Even though the Court acknowledges and denounces the unjust consequences of the current state of law on State immunity, where victims might be left without compensation, it rightly recognizes that State immunity is only one aspect of the overall endeavour to restore peace and harmony and to promote reconciliation in the aftermath of a conflict. Not the lawful possibility of States to rely on immunity alone makes for the ‘justice gap’. Rather the facts that Germany may refuse to renegotiate, that Italy seems unable to exercise diplomatic protection, and that victims are not attributed a right to compensation, either under German national law or under international law, are the origin of the ‘regret’ and ‘surprise’ which the Court expresses about the resulting denial of compensation. Against this background, the Court’s emphasis that State immunity occupies ‘an important place in international law and international relations’ and that every exception of State immunity represents a departure from the principle of sovereign equality, ‘one of the fundamental principles of the international order’ (Judgment para. 57), indicates that the Court sees the solution to such injustice on another level. As the Court’s proposal to re-engage in negotiation shows, the process of transitional justice is not incumbent on one single State. Contemporary international law requires States rather to seek solutions consensually.

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