Leiden Journal of International Law, 24 (2011), pp. 173–200
 doi:10.1017/S0922156510000683

The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?

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Abstract
The pending dispute at the ICJ between the Federal Republic of Germany and the Republic of Italy on jurisdictional immunities of states bears on the hotly debated question of whether a state having committed a violation of *jus cogens* loses its immunity from civil jurisdiction abroad, as maintained by the Italian Court of Cassation. The article aims to demonstrate the untenability of the position of the Italian Court of Cassation, not only under current international customary law, but also under a prospective *de lege ferenda*. Nevertheless, different options are open to the ICJ to adjudicate the case, without impinging on possible future developments of state practice. The article closes by pointing at the risks that, in a strict dualist/pluralist perspective, not even an ICJ's decision in favour of Germany would eventually ensure compliance by Italian domestic judges.

Key words
compliance; International Court of Justice; international responsibility; jurisdictional immunities; *jus cogens*

1. Introduction

Does the rule of customary international law providing for state immunity from civil jurisdiction for acts *jure imperii* still hold when the state has committed a grave violation of a peremptory norm of international law? This is the simple, and at the same time difficult and important, question that the ICJ has been asked to answer in the case of *Jurisdictional Immunities of the State*, brought by Germany against Italy on 23 December 2008.[1]

At the heart of the dispute lies the fact that since 2004, the Italian Court of Cassation has being denying state immunity for civil actions brought by (until now) Italian citizens against Germany for war crimes committed during the Second World War.[2] Furthermore, on 29 May 2008, the Italian Court of Cassation rejected the appeal of Germany against the *exequatur* of the Greek decision in the *Distomo* case of 2000, which dealt with a war crime committed by the

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1 See www.icj-cij.org/docket/files/143/14925.pdf.
2 *Ferrini v. Federal Republic of Germany*, Court of Cassation, Decision No. 5044/2004, 11 March 2004, (2004) 87 *Rivista di Diritto Internazionale* 539; English translation in (2004) 128 ILR 658.

Wehrmacht in occupied Greece in 1944, thus permitting the decision's enforcement in Italy.[3]

2. The foreseeable outcome of the dispute under customary international law

At first blush, the positive answer could be simple and straightforward. With the exception of the recent jurisprudence of the Italian Court of Cassation, and the one isolated decision by the Greek Supreme Court referred to, there is no judicial practice denying state immunity for acts *jure imperii* in case of a violation of international law, be it of a peremptory nature or not. On the contrary, there is plenty of evidence that domestic courts, although aware of the paramount importance of the material norms allegedly violated by the respondent state, still feel obliged to comply with the customary norm of immunity.[4] There is, of course, the notable exception of the US federal courts, which are enabled by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to adjudicate cases brought by US citizens against foreign states for alleged acts of torture and other egregious violations of human rights.[5] The US experience, however, cannot set any useful precedent as such, because of its blatant political bias: the only foreign states that can be sued are those that the Executive, in its absolute discretion, designates as sponsors of terrorism.[6]

No government of any other state has ever expressed the opinion that the rule on state immunity either has changed or ought to be changed. This fact unequivocally results from the debates that preceded the adoption by the General Assembly of the UN Convention on Jurisdictional Immunities of States of 2 December 2004.[7] Back in 1998, the General Assembly had required the UN International Law Commission (ILC) to consider whether the Draft Articles on Jurisdictional Immunities of States approved in 1991 needed to be updated with regard to 'outstanding substantial issues', in light of the results of informal consultations held in the open-ended working group at the Sixth Committee.[8] In 1999, the ILC established a working group, which concentrated on the five main issues identified in the informal consultations previously mentioned, but decided also to explore the further question whether there should be an exception of state immunity for violations of *jus cogens*.[9]

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3 *Prefecture of Voiotia v. Federal Republic of Germany* (*Distomo* case), Greek Supreme Court, Case No. 11/2000, 4 May 2000, (2001) 95 AJIL 198; English translation in (2000) 129 ILR 513.

4 I will leave here aside the doctrinal debate of whether there is any rule of international customary law on state immunity, because both international practice and *opinio juris* clearly point at the existence of such rules. For the negative view, see L. M. Caplan, 'State Immunity, Human Rights and *Jus Cogens*; A Critique of the Normative Hierarchy Theory', (2003) 97 AJIL 741; A. Orakhelashvili, 'State Immunity and International Public Order', (2002) 45 GYIL 227, at 249.

5 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214. Section 221 (Jurisdiction for Lawsuits against Terrorist States) amended Section 1605 of Title 28 United States Code (Foreign Sovereign Immunity Act).

6 At the time, there are four states designated as terrorism sponsors: Cuba, Iran, Sudan, and Syria.

7 UN Doc. A/RES/59/38 (2004).

8 UN Doc. A/RES/53/98 (1998).

9 'Report of the Working Group on Jurisdictional Immunities of States and their Property', 1999 YILC, Vol. II (Part Two), Annex, at 155. The five issues were: the concept of a state for purposes of immunity; the criteria for determining the commercial character of a contract or transaction; the concept of a state enterprise or

The observations of the ILC Working Group on this latter question, contained in an appendix to its report, noted that 'in most cases the plea of sovereign immunity [had] succeeded', but also drew attention to the AEDPA in the United States and to the *Pinochet* decision of the House of Lords of 24 March 1998 as 'a recent development relating to immunity which should not be ignored'.[10] Significantly, the ILC did not adopt the suggestions of the working group contained in the appendix,[11] and in the Sixth Committee, no representative of any state ever picked up the question.

In the Sixth Committee, a debate arose with regard to the scope of the tort exception of Article 12 of the Draft UN Convention, which, although it addresses a different issue, could to some extent overlap with that of *jus cogens* violations. As will be recalled, Article 12 provides for an exception from state immunity in the case of an action for personal injuries, where the injury occurred in the territory of the forum state and the organ of the foreign state that authored the conduct was present in the territory of the forum state at the time of the occurrence. In the Sixth Committee, the question was debated whether or not acts of foreign armed forces were excluded from Article 12. The question was particularly relevant, because the Draft Convention lacked a norm such as that contained in Article 31 of the European Convention on State Immunity of 1972,[12] which expressly excludes the activities of armed forces from its scope of application (and therefore from the application of its Article 8 on tort exception). Neither in the reports of the two special rapporteurs, nor in the verbatim records of the ILC meetings, nor in the commentary of former Article 14 approved in first reading in 1984 is there any trace of a debate on the matter. The commentary of Article 12 in the second reading of 1991, however, states that the article 'does not apply to situations involving armed conflicts'.[13] The result of the debate at the Sixth Committee was then summarized in the Statement of the Chairman of the Ad hoc Committee on jurisdictional immunities of states and their property, Professor Hafner, for whom 'the general understanding had always prevailed' that armed-forces activities were excluded from the scope of Article 12.[14]

In the last preambular paragraph of Resolution 59/38 adopting the text of the Convention, the General Assembly limited itself to 'tak[ing] into account' this statement. Admittedly, the intricate normative complex dealing with the scope of application of the UN Convention – made up by its Article 2 on use of terms, by the annex on 'Understandings with Respect to Certain Provisions of the Convention', and by two different paragraphs in the preamble of Resolution 59/38, one endorsing and the other taking into account some statements of Ad hoc Committee – is hardly a model of clarity.[15] Nevertheless, it can be safely concluded that at least until December

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other entity in relation to commercial transactions; the contracts of employment; the measures of constraint against state property.

10 Ibid., at 172, para. 13.

11 Ibid., at 128, para. 484.

12 1972 European Convention on State Immunity, ETS 74 (1972).

13 Cf. 1991 YILC, Vol. II (Part Two), at 46, para. 10.

14 Summary Record of the 13th Meeting of the Sixth Committee, UN Doc A/C.6/59/SR. 13 (2005), para. 36. For a critical assessment of the ILC work, see A. Dickinson, 'Status of Forces under the UN Convention on State Immunity', (2006) 55 ICLQ 427.

15 Cf. T. Treves, 'Some Peculiarities of the UN Convention on Jurisdictional Immunities of States and their Property: A Footnote on the Codification Technique', in I. Buffard et al. (eds.), *International Law between*

2004, no state had ever thought to suggest a possible exception of state immunity, either for violations of international law in general or for violations of *jus cogens* in particular.

Furthermore, of great relevance to the ICJ's pending decision is the fact that the Italian government itself had in various circumstances unmistakably shared Germany's view on the non-existence of an exception of state immunity for egregious violations of international law. Most notably, that position was formally expressed as late as May 2008 by the Italian Attorney-General before the Court of Cassation in the proceedings related to the *Milde* case.[16]

The second question presented to the ICJ – concerning the Italian Court of Cassation's decision of 29 May 2008 to allow the enforcement in Italy of the Greek *Distomo* judgment of 4 May 2000 – should be answered in the same simple and straightforward way. Because the Greek Areios Pagos dismissed Germany's plea of immunity, the judgment of the Leivadia Court became definitive. As is well known, however, the Greek minister of justice denied the enforcement of the judgment under Article 923 of the Greek Code of Civil Procedure, and that decision was upheld by the same Areios Pagos on 28 June 2002. Later on, the European Court of Human Rights found no violation of either Article 6 of the European Convention on Human Rights (ECHR) or Article 1 of the First Protocol.[17] Both the German Supreme Court and the Federal Constitutional Tribunal refused to enforce the judgment in Germany.[18]

After the groundbreaking *Ferrini* judgment of the Italian Court of Cassation of March 2004, the Prefecture of Voiotia managed to obtain from the Court of Appeal of Florence the *exequatur* of the part of the *Distomo* judgment regarding judicial costs. On appeal by the Federal Republic of Germany, the Florence Court of Appeal dismissed the argument that the recognition of the *Distomo* judgment would be contrary to the procedural *ordre public*, by maintaining that under Article 35 of EC Regulation 44/2001 on Jurisdictional Competence, Recognition and Enforcement of Judgments in Civil and Commercial Matters, *ordre public* as a ground for the non-recognition of a foreign judgment cannot apply to the rules on jurisdictional competence.[19] In its Order 14199 of 29 May 2008,[20] the Italian Court of Cassation agreed with the appellant that the *Distomo* judgment could not be enforced under EC Regulation

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Universalism and Fragmentation, Liber Amicorum Prof. Gerhard Hafner (2008), 503. For the author, the interplay between the statement of the Ad Hoc Committee's Chairman and the text of the General Assembly's preamble are useful interpretative tools, but he does not wish to go as far as to see in them 'instruments' in the meaning of Art. 31(2)(b) of the Vienna Convention on the Law of the treaties, as maintained by G. Hafner and L. Lange, 'La Convention des Nations Unies sur les immunités juridictionnelles des états et de leur biens', (2004) 50 AFDI 45, at 75.

16 *Max Josef Milde*, Court of Cassation, Case No. 1072/2009, 21 October 2008, reproduced in (2009) 92 *Rivista di Diritto Internazionale* 618.

17 *Kalogeropoulou v. Greece and Germany*, Decision of 12 December 2002, no. 59021/00, [2002-X] ECHR. The Chamber dismissed the claim against Germany as manifestly inadmissible and against Greece as unfounded.

18 *Greek Citizens v. Federal Republic of Germany* (*The Distomo Massacre* case) (2003) 42 ILM 1030.

19 *Repubblica Federale di Germania c. Amministrazione Regionale della Vojotia*, Florence Court of Appeal, Order of 22 March 2007, in (2008) I *Foro Italiano* 1308.

20 *Repubblica Federale di Germania c. Amministrazione Regionale della Vojotia*, Court of Cassation, Order of 29 May 2008, in (2009) 92 *Rivista di Diritto Internazionale* 594.

44/2001,[21] but held that it could nevertheless find execution under the autonomous Italian procedural rules on recognition and enforcement of foreign political decisions.[22] In particular, the Court dismissed the argument that the recognition of a foreign judgment arrived at in violation of international customary norms on state immunities would violate the Italian *ordre public*, by cursorily stating that the denial of immunity is justified by the 'absolute primacy of the fundamental values of liberty and dignity of the individual' and therefore cannot be a violation of *ordre public*.

In the present context, it is unnecessary to discuss in greater depth the limits of the applicability of concepts of international law to the definition of procedural *ordre public*.[23] It is obvious that the Court of Cassation would have ended up with the recognition of a foreign judgment, which was based on the same jurisdictional ground as the Court had previously endorsed with regard to domestic judgments. As a consequence, the Court of Appeal of Florence reissued the decision of enforcement and permitted the inscription of a mortgage on the Villa Vigoni, a state-owned centre for cultural exchange located at Lake Como, as well as on the credits by the German federal railway company against the Italian one.

However, in April 2010, the Italian government issued a decree, retroactively suspending all enforcement measures against property of foreign states as long as a controversy on their immunities in domestic proceedings 'objectively related to those enforcement measures' is pending before the ICJ.[24]

Leaving aside the question of the impermissibility of enforcement measures against state property serving governmental purposes such as a cultural centre,[25] one might well concede that the recognition of a foreign judgment, regardless of its wrongfulness per se, is a different matter from the violation of state immunity through the enforcement of that judgment.[26] Yet, it is difficult to see how a finding by the ICJ that the Italian judges had violated the international customary rule of jurisdictional immunity could not but affect also the act of *exequatur* of a foreign judgment violating the same rule, regardless of its subsequent enforcement or not. Therefore, it is logical and appropriate that Germany requested the Court to find that Italy (i.e. through its municipal judicial decisions) violated Germany's jurisdictional

21 The European Court of Justice had already stated in *Sonntag v. Waidmann* [1993] ECR I-1963 that an action against a 'public authority in the exercise of its powers' does not fall unto the notion of 'civil and commercial matter'. In *Lechouritou v. Federal Republic of Germany* [2007] ECR I-1519, the ECJ held that civil actions for war damages are excluded from the application of Reg. 44/2001.

22 Arts. 64–7 of the Law 218/1995.

23 See M. Bordoni, 'L'ordine pubblico internazionale nella sentenza della Cassazione sulla esecuzione della decisione greca relativa al caso Distomo', (2009) *Rivista di Diritto Internazionale* 496.

24 Decree No. 63/2010 of 28 April 2010, converted into Law 98/2010, *Gazzetta Ufficiale della Repubblica Italiana* 147 of 26 June 2010.

25 See A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17 EJIL 803, at 824 for pertinent case law. The UN 2004 Convention fails to indicate cultural centers among the specific categories of state property immune from measures of constraint listed in Art. 21, but as a rule, they belong to property in use for 'government non-commercial purposes' in the meaning of Art. 19(c).

26 The distinction between the two questions is stressed by a commentator of Judgment 14199/2008, but it is not clear which consequences he intends to draw; see P. Franzina, 'Norme sull'efficacia delle decisioni straniere e immunità degli Stati dalla giurisdizione civile, in caso di violazioni gravi dei diritti dell'uomo', (2008) 2 *Diritti Umani e Diritto Internazionale* 638.

https://doi.org/10.1017/S0922156510000683 Published online by Cambridge University Press

immunities both by taking measures of constraint against Villa Vigoni and by declaring that the Greek judgment was enforceable in Italy. Nevertheless, the issue could lead to some complications. If one can assume that the domestic courts will comply with an ICJ decision forbidding the execution of the Greek judgment,[27] it is far from certain that in a strict understanding of Article 59 of the ICJ Statute, the judges of other states would consider themselves equally bound.

At the same time, the central question raised by the present controversy is a daunting one. It seems that the Italian Court of Cassation, albeit with some uncertainties and contradictions, which will be addressed later, did not want to entangle itself in a demonstration of existent customary international law, but decidedly chose to posit itself on the higher ground of a discourse on the fundamental strictures of the system of international law. In the *Ferrini* decision of 11 March 2004, the core of the Court of Cassation's reasoning was an elementary juridical syllogism: the customary norm of international law, namely state immunity, must cede to the hierarchically higher norm, namely the *jus cogens* prohibition of the violations of certain fundamental human rights. Later on, in the 11 judgments of 29 May 2008, the Court became aware of the limits of such an argument and developed a more elaborate discourse on a theme that had remained somehow underexposed in the arguments of the *Ferrini* decision, namely the need for a systemic interpretation of the international legal order and the logic of 'qualitative consistency' when assessing its sources.

As I have already tried to demonstrate elsewhere,[28] the Court's assumptions are and remain fundamentally flawed. The alleged conflict of principles, which ought to be decided in favour of the higher one or to be recomposed by way of interpretation, is not a conflict at all.[29] As was rightly observed by many commentators, the rule of customary international law on state immunity is procedural, operating *in limine litis*, and therefore it is placed on a completely different plane from the substantive norms of international law, making a hierarchical ordering of the two nonsensical.[30]

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27 The issue is less unquestionable than it would seem, since it deals with the as yet unsettled question of the direct applicability of ICJ's decisions; on this, see A. Gattini, 'Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes', in Fastenrath et al. (eds.), *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma* (forthcoming 2011).

28 A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', (2005) 3 JICJ 224.

29 For the contrary opinion, see notably A. Bianchi, 'L'immunite´des états et les violations graves des droits de l'homme: la fonction de l'interprète dans la determination du droit international', (2004) 108 RGDIP 63, at 96: 'conflit entre deux valeurs normative'. Of the same author, see 'Denying State Immunity to Violators of Human Rights', (1994) 46 *Austrian Journal of Public and International Law* 195, at 219.

30 H. Fox QC, *The Law of State Immunity* (2002), at 525. This opinion is largely shared; see Caplan, *supra* note 4, at 771; C. Tomuschat, 'L'immunité des états en cas de violations graves des droits de l'homme', (2005) 109 RGDIP 51; A. Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens*: Some Critical Remarks', (1995) 16 Mich. JIL 433; T. Giegerich, 'Do Damages Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (2006), at 203. This is also the position of the House of Lords in the *Jones* decision of 14 June 2006, *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] 2 WLR 1424; [2006] UKHL 26, para. 24, per Lord Bingham, paras. 44–45 per Lord Hoffmann. For a criticism of this view, see among others Orakhelashvili, *supra* note 4, at 258, and by the same author, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', (2007) 18 EJIL 955, at 968.

In order to posit a conflict of principles, the Italian Court of Cassation, and the doctrine supporting its jurisprudence,[31] should first have proved either that the right to access to justice and, to be more precise, to domestic justice is itself an international *jus cogens* norm, or that a violation of *jus cogens* necessarily implies such a right. Neither the first nor the second of these presuppositions is true. As for the first, neither Article 6 of the ECHR nor Article 14 of the UNCCPR can be read as affirming an absolute right and, with the possible exception of the jurisprudence of the Inter-American Court of Human Rights,[32] there is not a single international decision supporting such a reading.[33] As for the second presupposition, again, there is no binding international text that has ever affirmed that access to domestic justice must necessarily follow from a violation of a *jus cogens* norm. As is well known, until now, the few suggestions to the contrary are an ambiguous *obiter dictum* of the ICTY Trial Chamber in the *Furundjia* decision of 10 December 1998 (which, by the way, was undoubtedly *ultra vires* to the extent that it dealt with civil suits)[34] and the opinion of the UN Committee on Torture of 7 July 2005 (possibly *ultra vires* as well)[35] criticizing the *Bouzari* judgment of the Ontario Superior Court. As for the UN General Assembly

31 Not surprisingly, some alert authors, although supporting the jurisprudence of the Court of Cassation, are aware that 'the hierarchy of norms theory based upon the *jus cogens* nature of the norms breached does not necessarily fit with the Court's reasoning'; see A. Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The Civitella Case', (2009) 7 JICJ 597, at 607. For the author, 'the Court seems to be more concerned to solve a conflict of values than a formal clash of rules'. See also F. De Vittor, 'Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli', (2008) 2 *Diritto Internazionale e Diritti Umani* 632, at 634.

32 See *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment of 22 September 2006, IACHR Series C, No. 153, para. 131; *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006, IACHR Series C, No. 162, para. 160: 'Access to justice constitutes an imperative rule of International Law, and as such, it generates *erga omnes* obligations for the States to adopt the necessary provisions so as not to leave those violations without punishment.'

33 A partially different matter is the question of whether access to justice is a rule of customary international law; on the point, see F. Francioni, 'The Rights of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (2001), 1.

34 *Prosecutor v. Furundzija*, Trial Judgement, Case No. IT-95–17/I-T, 10 December 1998, para. 155. The *obiter dictum* was ambiguous because it is not clear from the text whether the civil redress is meant only against the individual culprit or also against the state, whose organ the individual might be. Be that as it may, the *obiter dictum* was *ultra vires*. Article 106 of the Rules of Procedure expressly states that civil claims for damages related to the crimes under the jurisdiction of the ICTY must be submitted to domestic courts according to their domestic procedures. Even the authors most inclined towards developing as far as possible a systemic theory of *jus cogens* did not fail to see the exorbitant character of this *obiter dictum*; see P.-M. Dupuy, 'L'unité de L'ordre juridique internationale', (2002) 297 RCADI 9, at 312, labelling it an example of 'jurisprudence commando' of the ICTY.

35 In its *Bouzari v. Islamic Republic of Iran* [2002] OJ No. 1624, judgment of 1 May 2002, the Ontario Superior Court of Justice (Canada) held that Art. 14 of the UN Convention against Torture 1984, 1465 UNTS 85, does not apply to civil actions for torture committed abroad (paras. 49–51), reproduced in 124 ILR 427 (2002) (the judgment was confirmed by the Court of Appeal for Ontario on 30 June 2004). In an exchange of views with the Canadian representative, the UN Committee against Torture maintained the Art. 14(1) mandates for civil universal jurisdiction, cf. Conclusions and Recommendations of the Committee against Torture: Canada. 07/07/2005, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, paras. 4(g) and 5(f). Art. 14(1), reads: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.' For a sympathetic view with the CaT, see C. K. Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad', (2007) 18 EJIL 921, though his accurate study of the travaux préparatoires of the Convention does not provide any conclusive evidence that the drafters wanted, first, to affirm universal civil jurisdiction, and, second, to dispose of the state immunity rule. For the view that the removal of state immunity could be implied in Art. 14 by way of teleological interpretation, see C. Consolo, '*Jus cogens* and *rationes* dell'immunità giurisdizionale civile degli stati stranieri e dei loro

Resolution 60/147 of 16 December 2005, on 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', it suffices to say, besides any other consideration, that on the relevant issue, it is expressly framed in terms of guidelines *de lege ferenda*.[36] Significantly, even the UN Committee of Human Rights' General Comment No. 32 of 2007 on Article 14 IPCCR did not address the question. It limits itself to saying that the guarantees of fair trial of Article 14 may not be 'subject to measures of derogation' whenever one of the core rights enshrined in Article 4, paragraph 2, is at issue,[37] but, in the absence of any discussion whatsoever on the point, it would be a totally unwarranted conclusion to infer that by 'derogation', the Committee meant also the recognition of state immunity in accordance with applicable rules of customary international law.

Far from being a *jus cogens* norm, it is even doubtful whether international customary law, as distinguished from treaty regimes, provides for any individual right to reparation at all. It is well known that the ILC did not deal with this question until the very end of its codification work on state responsibility for internationally wrongful acts. It was just in the session of 2000 that the Draft Committee thought it advisable to insert in Article 33, paragraph 2, and without any adequate discussion, a saving clause to the effect that 'this Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. One could speculate about the many reasons why the ILC had until then failed to discuss the topic altogether, but one cannot of course exclude the most probable one, namely that until then, the shared view among ILC members was that there was no rule of customary international law providing for

funzionari: tortuosità finemente argumentative (inglesi) in material di "tortura governativa" (saudita)', in *Il diritto processuale civile nell'avvicinamento internazionale. Omaggio ad Aldo Attardi* (2009), 307, at 344. It must be recalled that even the issue of civil universal jurisdiction is far from settled. The United States ratified the Convention in 1990, with the understanding that 'Article 14 requires a State party to provide a private right of action for damages only for acts of torture committed in the territory under the jurisdiction of the State party', and, significantly, the understanding was not contested either by other states parties or by the CaT itself. Later on, the limited scope of application of Art. 14 of the UN Convention to civil actions in the forum *delicti commissi* has been affirmed also by the House of Lords in the *Jones* case, *supra* note 30, para. 25 (per Lord Bingham). For the right conclusion that neither the text of Art. 14 of the UN Convention nor the subsequent practice provide the legal basis for states to assert universal civil jurisdiction over torture, not to speak of denial of state immunity, see P. D. Mora, 'The Legality of Civil Jurisdiction over Torture under the Universal Principle', (2009) 52 GYIL 367, at 378.

36 Clause 12 on the right to an effective judicial remedy is circumscribed 'as provided for under international law', without touching upon the question of state immunity. The resolution aptly does not differentiate between the normative force of its 'principles' and its 'guidelines', but the *de lege ferenda* character of Clause 12 is made clear by the 7th paragraph of the Preamble of the Resolution and by Clause 26, which expressly states that both principles and guidelines are 'without prejudice to special rules of international law'. In the same sense, see C. Tomuschat, 'Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law', in M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (2006), 569; P. d'Argent, 'Le droit de la responsabilité complété? Examen des principes fondamentaux et directives concernant le droit à un recours et à réparation des victims de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire', (2005) 51 AFDI 27.

37 See General Comment No. 32, 'Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', CCPR/C/GC/32 (2007), para. 6.

an individual right of reparation.[38] Be that as it may, by the mere fact of its existence, the saving clause of Article 33, paragraph2, implies that such a right could indeed exist. So far, so good. The problem is, however, that Article 33 is placed in the Second Part of the Articles, dealing with the content of international responsibility, and not in the Third Part, dealing with the invocation of international responsibility. It seems therefore clear that the ILC, while leaving open the question whether a rule of customary international on the right to reparation of the individual exists at all, was perfectly aware that at any event, under customary international law, only states have the right to invoke each other's international responsibility.[39]

The decisions of the Italian Court of Cassation consider none of these issues. The Court's reasoning, however, is not just apodictic. For the Court, it is all and only a question of systemic interpretation. In this regard, the Court, especially in the *Ferrini* decision of 2004, made a great deal of the concept of international crime of states. It is to some extent moving for international lawyers attached to their doctrinal creatures to watch how a domestic supreme court should try to resuscitate an infant whose own mother (the ILC) had aborted some years earlier.[40]

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38 For the inexistence of an individual right of reparation under general international law, see C. Tomuschat, 'Reparation for Victims of Grave Human Rights Violations', (2002) 10 Toulane JICL 173, and of the same author, *supra* note 36, at 578. For the opposite view, see R. Pisillo Mazzeschi, 'International Obligations to Provide for Reparation Claims?', in C. Tomuschat and A. Randelzhofer (eds.), *Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999), 149.

39 In the *LaGrand* judgment of 27 June 2001, the ICJ held that Art. 36(1), of the 1963 Vienna Convention on Consular Relations conferred rights on an individual (*LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001 [2001] ICJ Rep. 494, para. 77). In the subsequent *Avena* Judgment of 31 March 2004, the Court specified that the violation of the right entailed a judicial remedy (*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] ICJ Rep. 128, paras. 138 ff.), but later on, however, the Court was not able to draw any particular consequence from the violation of such right, having omitted to specify the direct effect of the judicial remedy in question and/or of its judgment (*Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 19 January 2009 (not yet published), on which see A. Gattini, 'La Corte Internazionale di Giustizia fra judicial activism e judicial self-restraint: il curioso caso della richiesta di interpretazione della sentenza resa nell'affare Avena', (2009) 92 *Rivista di Diritto Internazionale* 476. In the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 136, the Court made a step forward, by affirming that Israel had a duty 'to compensate . . . all natural or legal persons having suffered any form of material damage' as a result of its unlawful act, at 198, para. 152. It is, however, unclear on which ground the Court based this right, whether as a consequence in general of the violation of an *erga omnes* obligation, or, as seems more probable, having in mind the peculiarity of the case, due to the fact of Israeli occupation of the territories and the continuing absence of a Palestinian state. On the issue, see P. d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion', in P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat/Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 463. A positive view on the right of reparation of individual victims of serious human rights abuses has been taken also by the International Commission of Inquiry on Darfur in an *obiter dictum* of its Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60 (2005), para. 597.

40 The *Ferrini* case and its aftermath should also be a reminder for international lawyers of their responsibility as 'subsidiary sources' of international law. I wonder whether the Italian Court of Cassation would have ventured its arguments if it had not found them 'ready to use' in the sixth edition of the most authoritative and popular of Italian textbooks, B. Conforti's *Diritto Internazionale* (2002). At p. 253 of the textbook, the Court, as the majority of Italian students of international law, could read that 'Ci sembra che in linea di principio l'esercizio della giurisdizione debba ammettersi, le norme di jus cogens non potendo non prevalere non solo sulle convenzioni internazionali ma anche sulle altre norme consuetudinarie' ('As a matter of principle, the exercise of jurisdiction [against defendant states in cases of violations of *jus cogens*] must be admitted, because the norms of *jus cogens* cannot but prevail not only on international treaties but also on customary rules' (my own translation). Unfortunately for the Court of Cassation, Conforti radically changed his mind from

The Court's reasoning is awing in its apparent ineluctability, as mysterious and implacable as the oracle of a Greek drama. It runs as follows. From the commission of an international crime derives the international criminal responsibility of the individual, whether or not it is a state organ, and the principle of universal criminal jurisdiction. Because organic functional immunity and state immunity are two sides of the same coin, the consequences must be the same: loss of immunity and universal civil jurisdiction. The Court's hieratic mood is even enhanced in its 11 orders of 29 May 2008,[41] in which the Court went so far as to invoke concepts such as 'the meta-value of international legal order' when referring to fundamental human rights, and qualifying their violations as 'the breaking point of an acceptable exercise of sovereignty'.[42]

Even when the Court endeavours to take account of some rules *de lege lata*, it misses the target or overshoots it. This is the case with the Court's reliance in the *Ferrini* decision on Article 41 of the ILC Articles on State Responsibility for International Wrongful Acts. As is well known, Article 41, paragraph 2, sets forth the obligation of all states not to recognize as lawful the situation created by a serious breach of an obligation arising under a peremptory norm of general international law.

The reference to this norm is misleading, for a number of reasons. First, the Court does not go so far as to view the exercise of jurisdiction as an obligation, but as a mere option, without realizing that by this reduction, it undermines the reasoning of the norm of Article 41 and makes a reliance on it pointless.[43] Second, from a systemic perspective, Article 41 is not concerned with the different ways and means of implementing the international responsibility of a state, being placed as it is in Part Two, which deals with the content of the international responsibility of the state, and not in Part Three, which deals with its implementation. Third, Article 41 speaks of 'situations', and while the term does not necessarily apply only to breaches having a continuing character, the attentive choice of the noun clearly refers to certain

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2002 to 2006 (possibly after realzing the consequences of his theory becoming true). In the seventh edition of Conforti's *Diritto Internazionale* (2006), the majority of Italian students of international law read at p. 230 that 'la prassi non autorizza una simile estensione, essendo limitata ai casi di genocidio, tortura e simili, con la conseguenza che l'estensione finisce per essere una mera opinione dottrinale espressa per via deduttiva e non induttiva' ('state practice does not authorize such an extension [of the lack of immunity in cases of violation of *jus cogens*], its being limited to the cases of genocide, torture, and the like, with the consequence that such an implication is a mere doctrinal opinion expressed in a deductive and not inductive manner' (my own translation). Finally, in the eighth edition (2010), Conforti admits at p. 255 that on the whole matter of state immunity and grave violations of human rights, one could at best speak of a 'semplice *trend*'.

41 *Repubblica federale di Germania c. Presidenza del Consiglio dei ministri e Maietta*, Italian Court of Cassation, Order of 29 May 2008, No. 14209, (2008) 91 *Rivista di Diritto Internazionale* 896.

42 It has been observed that only this sentence in itself synthesizes the Court's entire thought on the matter; Consolo, *supra* note 35, at 324. The recourse to ever more resounding phrases, however, cannot make up for a lack of positive law; see C. Focarelli, 'Diniego dell'immunità giurisdizionale degli Stati stranieri per crimini, *Jus Cogens* e dinamica del diritto internazionale', (2008) 91 *Rivista di Diritto Internazionale* 738. The author rightly concludes that the Court would have done a better service to its cause by openly assuming a position *de jure condendo*.

43 See T. Rensmann, 'Impact on the Immunity of States and their Officials', in M. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (2008), 151, at 165. A different question would be whether, in general, as a consequence of violations of *erga omnes* obligations, states have a duty to ensure compliance. For a different answer, depending on the primary obligation violated, see G. Gaja, 'Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 31.

breaches, such as the occupation of a foreign territory by the illegal use of force and/or the attempted acquisition of sovereignty over a foreign territory through the denial of the right of self-determination of peoples, which were exactly the examples that the ILC had in view when drafting the norm.[44] Fourth, the respect of foreign-state immunity cannot be simplistically equated with acquiescence or even less with support for an international wrongful act. It only means that customary international law does not consider domestic judges to be the proper actors to deal with those issues.[45] I will return to this issue.

Furthermore, the reference to Article 41, paragraph 2, of the ILC Articles proves too much. By the same token, the obligation not to recognize a certain situation as lawful could justify, and even force, states to disregard any rule of international law that gets in the way of the full realization of the norm. The functional scope of the norm would then not be any different from that of countermeasures, but even in this regard, its applicability to the issue of state immunity would be misconceived. From the perspective of the 'specially affected' state, be it the forum *delicti commissi* or the forum of the victims, the denial of foreign-state immunity could indeed be equated to a countermeasure,[46] but then the question inevitably arises of whether it would be admissible that the judiciary power adopts countermeasures without the authorization of the executive and/or the legislative powers. The question should clearly be answered in the negative. That is also the reason why the US experience, pointlessly invoked at length by the Italian Court of Cassation in the *Ferrini* decision, can only be understood when read in the light of countermeasures, since it is the executive that decides which countries are 'unworthy' of immunity. As for the judges of states other than the injured one, namely judges applying a presumed principle of universal civil jurisdiction, their denial of state immunity cannot in any case be equated to a countermeasure, but at most, as Article 54 of the ILC Articles puts it, to 'lawful measures . . . under international law'. In the absence of any practice, however, it would be very dubious, to say the least, whether the exercise of universal civil jurisdiction accompanied by the denial of state immunity could be considered a 'lawful measure' under present international law.

Again, it would be useless to draw the attention of the Italian Court of Cassation to its contradictions, or to remind it that the lack of functional immunity from

44 Report of the ILC on its Fifty-Third Session, UN Doc. Supplement No. 10 A/56/10, (2001), 287, para. 5. On the meaning of the obligation of non-recognition, see S. Talmon, 'The Duty Not to Recognize as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?', in Tomuschat and Thouvenin, *supra* note 30, at 107.

45 The same observation is made by the House of Lords in the *Jones* case (para. 24 per Lord Bingham, para. 44 per Lord Hoffmann). *Mutatis mutandis* see also the ICJ's judgment in the *Arrest Warrant* case, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, para. 60: 'Immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they may enjoy impunity in respect of any crimes that they may have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.'

46 For an earlier discussion of the denial of state immunity as a countermeasure, see J. Bröhmer, *State Immunity and the Violations of Human Rights* (1997), 192, who unconvincingly reaches a negative conclusion.

https://doi.org/10.1017/S0922156510000683 Published online by Cambridge University Press

criminal jurisdiction is a much more complex issue than it seems to believe,[47] and that the equivalence of functional immunity and state immunity is to a great extent unwarranted,[48] not to speak of the supposed equivalence between universal criminal and civil jurisdiction.[49]

It would probably be just as useless as to remind the Court, as the House of Lords in the *Jones* case had done,[50] that the ICJ did already largely prejudge, if not dispose of, the entire matter in two recent cases. In the *Arrest Warrant* decision of 2002, the ICJ held that the customary rules on personal immunity prevail even in the case of an alleged violation of *jus cogens*,[51] and in the *Democratic Republic of Congo against Ruanda (new application)* case of 2006, the ICJ held that even a violation of *jus cogens* cannot confer jurisdiction on the Court when it had none.[52] Admittedly, as far as the ICJ's jurisprudence is concerned, one could still try to distinguish these two precedents. Regarding the first, it has been argued that the rules on personal immunities represent a special exception, which should be interpreted restrictively, and the Court has been accused of not having really succeeded in demonstrating their customary status.[53] Regarding the second, the objection could be raised that the limit of the jurisdiction of an international judicial body is an essentially different matter from that of a domestic one. But, to state the point once again, any discussion with the Italian Court of Cassation either on the matter of practice or on the matter of opinion, either on the admissibility of analogy or on the merits of international jurisprudence, would not have any chance of succeeding, because, as already happened to this unfortunate writer, all possible arguments would be rebuffed by the Court as 'without worth'[54] when compared with the mantra of 'qualitative consistency' of the sources of international law.[55]

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47 On the issue, see now R. Kolodkin, Special Rapporteur, Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/601 (2008).

48 Although it can be conceded that the doctrine of state immunity is historically rooted in the rule of the personal immunity of the heads of state at the time in which a patrimonial conception of sovereignty prevailed, the emancipation of the concept of state immunity is traceable in positive international law as far back as the beginning of the nineteenth century, as shown by the US Supreme Court's classical decision in *The Schooner Exchange v. McFaddon*, 11 US 116 (1812). Differently from the UK House of Lords in the *Jones* decision of 2006, which derived functional immunity from state immunity (see *supra* note 30), the US Supreme Court in the *Samantar v. Yousuf et al.*, US Supreme Court, No. 08–1555, 1 June 2010 (unreported), unanimously held that the FSIA does not encompass individual functional immunity, observing that 'the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests', although leaving aside the question 'as to the precise scope of an official's immunity at common law' (per Judge Stevens, slip op. at 15).

49 On this, see Gattini, *supra* note 28, at 238.

50 See *Jones* Judgment, *supra* note 30, para. 24.

51 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, *supra* note 45, para. 58.

52 *Armed Activities in the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Rep. 6, para. 64.

53 Dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, *supra* note 45, at paras. 10–12, followed by, among others, Orakhelashvili, *supra* note 4, at 250; Rensmann, *supra* note 43, at 163.

54 *Max Joseph Milde*, *supra* note 16, at 627.

55 For a criticism, see C. Focarelli, 'Diniego dell'immunità alla Germania per crimini internazionali: la Suprema Corte si fonda su valutazioni "qualitative"', (2009) 92 *Rivista di Diritto Internazionale* 363, who concludes that the Court, by insisting on maintaining the existence *de lege lata* of the exception, manoeuvred itself 'in a blind alley', at 408s.

3. THE (SAME) FORESEEABLE OUTCOME OF THE DISPUTE UNDER DIFFERENT PERSPECTIVES EITHER *DE LEGE LATA* OR *DE LEGE FERENDA*

At the supreme heights to which the Court of Cassation raises itself, in which the glowing light of *jus cogens* blurs the *Sein* and the *Sollen* of international law, we touch the most delicate aspect of the whole issue. If, by the actual standards of positive international law, there is no exception to state immunity for violations of *jus cogens*, should there nevertheless be one?

Before reaching the answer, I think it instructive to illustrate some recent doctrinal attempts, presented either *de lege lata* or *de lege ferenda*, commendably aimed at disentangling the apparent knot of conflicting principles, but which end by entangling themselves at some other juncture.

3.1. *Forum non conveniens*

To begin with, in order to avoid the predictable anarchy that a worldwide endorsement of the *Ferrini* arguments would cause, some authors have proposed a solution modelled on the *forum non conveniens* doctrine.[56] The suggestion would appeal to some practitioners accustomed to all the subtle nuances of common-law countries' jurisprudence on jurisdiction. Far from being a reliable model for either the assumption or denial of jurisdiction in any single instance of international civil litigation even at its present state,[57] a generalized use of the *forum (non) conveniens* doctrine for the purpose of affirming/declining jurisdiction over foreign states would have the paradoxical consequence of substituting a clear, if negative, rule into an unpredictable, fundamentally arbitrary, and possibly inequitable option. To counter this objection, one could envisage common standards, such that a forum would be convenient to the extent that the *jus cogens* violation occurred on the territory of the forum state, or that the victims were citizens of that state or residents in its territory. But by doing so, the whole thrust of the *jus cogens* argument would be greatly reduced, and with it, the only (allegedly) logical ground for this new exception to state immunity. In the first example above, the assumption of jurisdiction would already be grounded on the tort exception; in the second example, the assumption of jurisdiction would come near to a generally abhorred and discriminatory *forum actoris*, in itself an aspect inconsistent with the 'philosophy' of *jus cogens*.

This is the trap into which the Italian Court of Cassation manoeuvred itself in the *Ferrini* decision when, having in so many words proclaimed the concept of universal tort jurisdiction as the inescapable corollary of *jus cogens*,[58] it found it

56 See A. Orakhelashvili, 'State Immunity and International Public Order Revisited', (2007) 50 GYIL 327, at 365; Caplan, *supra* note 4, at 777, labelled as 'collective benefit theory'.

57 See J. J. Fawcett, 'General Report', in Fawcett (ed.), *Declining Jurisdiction in Private International Law* (2001), 10, and, for an even more critical approach, H. Zhenjie, '*Forum Non Conveniens*: An Unjustified Doctrine', (2001) 48 NILR 143.

58 Also with respect to this amazing statement, one would search in vain for examples of practice or *opinio juris*. As is well known, the United States is the only country in the world in which a universal civil jurisdiction, based on the Alien Tort Statute of 1789 (Alien Tort Claims Act 1789 (28 USC §1350)), has been practised in the last decades. The conformity with international law of such jurisdiction, in the absence of some pertinent

opportune to stress that, at any rate, a part of the criminal conduct attributable to Germany (deportation for forced labour) had taken place in Italy. The incoherence of this reasoning has been mostly belittled by benevolent commentators,[59] but it is dangerously close to becoming self-defeating. By relying also on the *forum loci delicti commissi*, the Court of Cassation unwittingly made the *jus cogens* plinth of its arguments unsteady, because it could have altogether narrowed the question as to whether or not the conduct of foreign armed forces is included in the tort exception. It is as if an intended grand tour were to end up with a visit to a nearby orchard, for which, to use a celebrated metaphor, there would be no need to take the Rolls Royce out of the garage.

The position of the Italian Court of Cassation on the issue of the jurisdictional basis is particularly confused. In each of the 11 judgments given on 29 May 2008, the Italian Court of Cassation repeated verbatim the *Ferrini* formula on jurisdiction, coupling the universal civil jurisdiction with the *forum loci delicti commissi*, without noticing that in at least one case, *Sciacqua*, this latter basis of jurisdiction was literally out of place, because the claimant, a former military internee, had been deported to Germany from Greece. In the subsequent *Milde* judgment of 21 October 2008, the First Criminal Chamber of the Italian Court of Cassation had to deal, on appeal by Germany, with a criminal case against a German SS officer for a massacre in Tuscany in 1944, in which Germany had been sued by the heirs of a victim as the civilly responsible party, jointly and severally liable with the defendant officer. The Court did not spend a word on the issue of jurisdiction, probably holding it for obvious reasons, since all the relevant facts had happened on Italian territory. It is, however, interesting to note that the judgment by the Military Court of Appeal of one year earlier,[60] which the Court of Cassation upheld and variously referred to, had extensively dealt with the matter. Without being too critical of the theory of universal civil jurisdiction of the Court of Cassation, the Military Court had nevertheless squarely based its decision to deny Germany's immunity on the tort exception of Article 12 of the UN Convention, as an expression of customary international law. The apparently inexplicable silence of the First Criminal Chamber of the Court of Cassation on the point can be better explained if one recalls the judgment by the same Court just some months earlier in the *Lozano* case, in which, in order to affirm

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jurisdictional links, is rather dubious. See the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the ICJ *Arrest Warrant* case, *supra* note 45, in which it is said that 'this unilateral exercise of the function of guard of international values . . . has not attracted the approbation of States generally', at 77, para. 48. See also the US Supreme Court judgment of 29 June 2004 in the *Sosa v. Alvarez Machain et al.* case (542 US 692 (2004)), in which the Court, having taken note of the *amicus curiae* briefs presented by the governments of Australia, Switzerland, and the United Kingdom, and the EC Commission, stated its intention to limit the scope of application of the ATS to the only cases of a clear, either personal or territorial, jurisdictional link with the United States. On the whole issue, see C. Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations', (2007) 38 NYIL 3, who, weirdly applying the *Lotus* principle, maintains that customary international law would not prohibit universal tort jurisdiction. For a criticism of this approach, see Mora, *supra* note 35.

59 See A. Bianchi, 'Ferrini v. Federal Republic of Germany', (2005) 98 AJIL 242, at 246: 'ambiguity on the actual rule of decision'; M. Iovane, 'The Ferrini Judgment of the Italian Supreme Court', (2004) 14 *Italian Yearbook of International Law* 172, at 177: 'theoretical incoherence.'

60 *Max Josef Milde*, Italian Military Court of Appeal, Judgment No. 72 of 18 December 2007 (registered 25 January 2008), unreported (on file with the author).

the functional immunity of a US soldier from the Italian criminal jurisdiction, the Court had plainly affirmed that the conduct of armed forces is excluded from the scope of Article 12.[61] Even if the UN Convention was possibly mentioned as *obiter dictum* in that case, it now seems that the Court will have to stick exclusively to its *jus cogens* argument in order to deny state immunity in future cases dealing with foreign armed forces. But even that consequence is far from certain, since it cannot be taken for granted that the Court of Cassation's right hand (i.e. its civil chambers) knows what the left one (i.e. its criminal chambers) does.

Under a different perspective, redolent of legal pluralism, another author has recently proposed that instead of clinging to a presumed shared rule on state immunity, every court, be it domestic or international, should optimize its institutional task and look for the solution better suited to enhance its own goals.[62] A new rule, if ever, would then arise from the inter-judicial dialogue and competition. In this light, the majority decision of the European Court of Human Rights in the *Al-Adsani* case in 2001[63] should be criticized for its endeavour to read Article 6 ECHR in accordance with general international law, instead of giving an a priori priority to its task of protection and promotion of human rights. Like other implications of the pluralistic theory, the appeal of such a solution would not be lost on practitioners accustomed to forum shopping and versed in lobbying strategies. However, far from guaranteeing a final outcome of internationally shared views and consistent solutions (admittedly, a goal that some pluralist theorists would consider hopelessly old-fashioned and simply irrelevant), this inward-looking approach would, at least for a long time to come, produce widely different, if not completely opposite, solutions for what is, at its core, a single problem – which would again produce an inequitable result.

3.2. Equivalent protection

A more balanced view is put forward by those who see the denial of state immunity as a last resort whenever the tort could not otherwise be redressed.[64] This view is based on the theory of equivalent protection, which has already been applied by the ECHR in the *Waite and Kennedy* case with regard to the immunity of international organizations,[65] and in a different context in the *Bosphorus* case with regard to EC law.[66] Presumably, such an approach would appeal to a wider audience. But, again, the difficulties start when trying to identify the court best suited to deal with the

61 *Lozano*, Court of Cassation, First Criminal Division, Judgment No. 31171 of 24 July 2008, in (2008) 101 *Rivista di Diritto Internazionale* 1124. The case dealt with the killing by a US soldier on duty at a checkpoint in Baghdad of an Italian secret service agent, Calipari. The Court held that Italian judges had no jurisdiction because of the functional immunity of the US soldier. As for the *jus cogens* exception, the Court held that the killing did not amount to a war crime, because of the factual development of the 'episode' and because of the 'isolated and individual character of the act'. For a sharp criticism of the Court's understanding of war crime, see A. Cassese, 'The Italian Court of Cassation Misapprehends the Notion of War Crimes', (2008) 6 JICJ 1077.

62 Rensmann, *supra* note 43, at 156. A similar argument had been made by Orakhelashvili, *supra* note 30, at 959.

63 *Al-Adsani v. United Kingdom* [2001] ECHR 761.

64 See T. Mizushima, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means', (2008) 71 *Modern Law Review* 734.

65 *Waite and Kennedy v. Germany* (Appl. 26083/94), GC Judgment of 18 February 1999, ECHR 1999–1, 393.

66 *Bosphorus hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. 45036/98), GC Judgment of 30 June 2005, ECHR 2005-VI, 107.

claim and to determine the concept of unavailability. Regarding the first issue, the stumbling block would be the same already encountered by the *forum non conveniens* theory previously touched upon. The second issue is even more problematic. Would the unavailability test apply whenever local remedies in the allegedly responsible state have been exhausted, or should the test be reserved only for cases in which there is a complete absence of remedies (judicial or otherwise) in the alleged responsible state? And, if the latter, who would decide whether there were such a denial of justice?[67]

On this point, the *Ferrini* case is illustrative. Ferrini had sued the Federal Republic of Germany in his home court, the Tribunale di Arezzo, in 1998, long before the German Federal Supreme Court and the German Federal Constitutional Tribunal had rejected the claim of the Italian internees in 2003 and 2004, respectively. The fact is that Ferrini had from the beginning contested the benefits mechanism provided for by German foundation Erinnerung, Verantwortung, Zukunft, because he considered the sum available 'symbolic and derisory' and 'insulting for the dignity of the victims'.[68]

Furthermore, would the exercise of diplomatic protection be relevant in deciding whether the unavailability test is satisfied? If so, what would happen in the case that the state of citizenship should refuse to exercise diplomatic protection or waive the claim or dispose of it by transacting with the responsible state? By simply posing these questions, the apparently clear-cut issue of state immunity becomes intertwined with various irksome issues concerning the admissibility of the claim, if not outright with its merits. Again, we would end up substituting a clear rule with an opaque situation susceptible to all possible abuses and arbitrariness.

This danger is apparent from the decisions by the Italian Court of Cassation in 2004 and 2008. The Court denied Germany immunity with regard to conduct by German troops in Italy during the Second World War, knowing perfectly well that in Article 77, paragraph 4, of the 1947 Peace Treaty, Italy had renounced any claim for herself and for her citizens against Germany with regard to any fact related to the war.[69] Any possible interpretative doubt regarding the scope of the Italian waiver was set aside by a later bilateral compact between Italy and the Federal Republic of Germany, the Bonn Treaty of 2 June 1961, in which Germany agreed to pay

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67 A debate on the necessity *vel non* of exhausting local remedies has arisen also with regard to the application of the US Alien Tort Statute, as a consequence of the US Supreme Court's decision of 2004 in the *Sosa v. Alvarez Machain* case, *supra* note 58, in which the Court noted the question but left it open (ibid., at 733). It is to be noted that the 1991 US Torture Victim Protection Act (28 USC § 1350) expressly requires the exhaustion of local remedies before an alien can sue in US courts. Doctrine on the whole reacted favorably; see Anon., 'The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm', (2008) 121 *Harvard Law Review* 2110; G. C. Ackerman, 'An Analysis of Whether Aliens Should Be Required to Exhaust Local Remedies before Suing in the United States under the Alien Tort Statute', (2008) 7 Wash. U GSLR 543; L. E. Holtzclaw, 'Finding a Balance: Creating an International Exhaustion Requirement for the Alien Tort Statute', (2009) 43 *Georgia Law Review* 1245.

68 See Gattini, *supra* note 28, at 232.

69 1947 Treaty of Peace with Italy, Signed at Paris, 10 February 1947, 126 UNTS 1950: 'Without prejudice to these and to any other dispositions in favor of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.'

ex gratia 40 million Deutsche Mark for the benefit of Italian citizens (others than those of Jewish descent) who had been victims of Nazi measures of persecution.[70] If the Court of Cassation's United Sections still succeeded in avoiding the waiver issue by referring it to a later stage of the proceedings,[71] that changed in the subsequent *Milde* decision of 21 October 2008. In one fell swoop, the First Criminal Chamber dismissed both the plea of immunity and the objection of inadmissibility, by holding that the Italian waiver did not dispose of the individual claims for moral damages, although it did not explicitly endorse the Military Court of Appeal's view that such an option would have been at any rate impermissible.[72] It was this decision, together with the previous decision of the Court of Cassation to permit the enforcement in Italy of the *Distomo* judgment, that eventually convinced Germany of the need to bring the dispute on jurisdictional immunity to the ICJ.

Quite surprisingly, the Italian government reacted with a counterclaim, arguing that by signing the Bonn Treaty, Germany acknowledged its previous debt, thus obligating it to pay compensation for all other Italian victims of German occupation between September 1943 and April 1945. On 12 July 2010, the ICJ, by 14 votes to one, declared the counterclaim inadmissible for lack of jurisdiction.[73] Nevertheless, the incidental proceedings show how creative counsels could try to link the issue of state immunity to opinionated arguments about the purported lack of alternative remedies.

From a more general perspective, the ILC notoriously was not able to find a way to contribute to the progressive development of international law with regard to diplomatic protection in the case of violation of *jus cogens* norms. Already, in 2000, the majority of the ILC squarely refused to endorse the rule originally proposed in Draft Article 4 by Special Rapporteur Dugard. Framed in prudent and balanced terms, the rule would have obligated the states to exercise diplomatic protection if the injury resulted from a grave breach of a *jus cogens* norm attributable to another state, but it provided for an exception in the case that the exercise of diplomatic protection would have 'seriously endangered the overriding interests of the State and/or its people'.[74] Final Article 19 on 'Recommended Practices',[75] hastily inserted in the draft during the same session in 2006 in which the final text was adopted,

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70 1961 Treaty between the Federal Republic of Germany and the Italian Republic concerning Compensation for Italian Nationals subjected to National Socialist Measures of Persecution (Italian text in *Gazz. Uff. Rep. It.* 1963 No. 93; German text in *BundesGesetzBlatt* 1963, II, 669). On the meaning and the context of this treaty, see Gattini, *supra* note 28, at 227.

71 *Repubblica federale di Germania c. Presidenza del Consiglio dei Ministri e Maietta*, Court of Cassation, Judgment of 29 May 2008, No. 14209, in (2008) 91 *Rivista di Diritto Internazionale* 896, at 898: 'the dispositions [of the two treaties of 1947 and 1961] concern the merits and not the jurisdiction. It is the competence of the tribunals to decide the civil suits object of the waiver.'

72 *Max Joseph Milde*, *supra* note 16, at 631, para. 8.

73 See *Jurisdictional Immunities of the State (Germany v. Italy)*, Counterclaim, Order of 6 July 2010 (not yet published).

74 See J. D. Dugard, Special Rapporteur, First Report on Diplomatic Protection, UN Doc. A/CN.4/L 506, at 27, para. 74. For the ILC's rejection, see 2000 YILC, Vol. II (Part Two), at 78, para. 456.

75 According to Art. 19, a state entitled to exercise diplomatic protection should: (a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; (c) transfer to the injured person any compensation obtained for the injury from the responsibles state subject to any reasonable deductions.

exposes the lack of consensus on a more robust norm, rather than papering it over, as was perhaps the intention of its proponents. Therefore, in the absence of any discussion of the issue in the ILC, any attempt to now read an implicit support for a denial of state immunity for *jus cogens* violations in the saving clause of Article 16 and in its vague reference to 'actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act' would simply be preposterous.[76]

3.3. Abuse of rights

The same pitfalls of the alternative-remedy theory would a fortiori apply to the related abuse-of-rights theory, namely the attempt to justify the denial of state immunity on the basis of the legal maxim that no one should derive an advantage from his/her own wrong (*nullus commodum capere potest de injuria sua propria*). The proposal to use this doctrine in order to deny state immunity in case of grave violations of peremptory international-law norms has not yet been squarely made, but some arguments to the effect that states hiding behind their immunity commit an 'abuse of sovereignty' seem to hint in this direction.[77] At a superficial level, an attempt to employ the abuse-of-rights theory seems alluring, at least for those cases, such as that pending before the ICJ, in which the state deprived of immunity does not deny the wrongfulness of the acts attributed to it. But a closer look shows that the theory fails.

Assuming, for the sake of argument, the theory's validity in international law, and leaving aside the aspect of the *onus probandi*,[78] the problem remains that the theory is tailored to matters falling within the exclusive purview of the state using/abusing its rights. This point is also made in the most famous plea for recognition of the doctrine of abuse of rights in international law, made by Hersch Lauterpacht in the 1930s: if the introductory formulation is broad enough to include all kinds of situations,[79]

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76 See, however, Mizushima, *supra* note 64, at 751, for the odd theory that the entertaining of court proceedings against a foreign state might be seen as a form of diplomatic protection, allowed by Art. 1 of the Draft Articles on Diplomatic Protection: 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State.' For the confuse drafting history of Art. 16 and its obscure relation to Art. 17 (Special rules of international law), see A. Gattini, 'Alcune osservazioni sulla tutela degli interessi individuali nei progetti di codificazione della Commissione del Diritto Internazionale sulla responsabilità internazionale e sulla protezione diplomatica', in M. Spinedi et al. (eds.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (2006), 431, at 461. The incongruity is due to the fact that in its final reading, Art. 16 seems to refer, as opposed to Art. 17, to 'actions or procedures other than diplomatic protection' under customary international law. Now, it is difficult to see which other actions or procedures should be available to natural persons, legal persons, or other entities besides those provided for by treaties. For the relation between diplomatic protection and state responsibility, see A. Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*', (2007) 56 ICLQ 553.

77 See J. Kokott, 'Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen', in R. Bernhardt and U. Beyerlin (eds.) *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (1995), 135. See also the Italian Court of Cassation's assertion that the violation of peremptory norms constitutes 'the breaking point of an acceptable exercise of sovereignty', *supra* note 41.

78 See *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, 25 May 1926, PCIJ Rep. Series A No. 7, at 30: 'such misuse cannot be presumed . . ., it rests with the party who states that there has been such misuse to prove this statement.'

79 H. Lauterpacht, *The Function of Law in the International Community* (1933), at 286: 'there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of

then all the examples point in the same direction of 'so-called exclusive rights of domestic jurisdiction'.[80] There is a reason for this limitation of the doctrine's range of application, and it follows from the fact that it is in the *domaine réservé* that states were traditionally thought to be free from any international-law constraints, so that the doctrine of abuse of rights was an *Ersatz* for an international obligation. The case of jurisdictional immunity is obviously different: far from leaving the issue at the disposal of each state, international law provides for a coherent set of rules dealing with the international responsibility of states for wrongful acts, so that there is no need for a construct, such as the abuse-of-rights doctrine, which would help to overcome purported normative lacunae. Simply, the denial of state immunity does not belong *de lege lata* to that set of rules.

3.4. Intervention of civil parties in criminal proceedings

Lastly, the *Milde* decision has been greeted by an author as a valuable guideline, if not as a possible overall solution for the debate on the limits to state immunity.[81] The argument runs as follows: given that the criteria of domestic criminal jurisdiction, including universal jurisdiction, are internationally more widely shared than the civil ones (considering also the purported fundamental equivalence between functional immunity and state immunity), it is inevitable to deny state immunity in all those cases in which the victims, or their heirs, intervene in the criminal proceedings as 'civil parties'.

This argument is unpersuasive. On the one hand, the concept of a civil action brought within a criminal trial is not known in all legal systems, and so this solution would favour only some claimants – or, more generally speaking, the judicial policy of some countries. On the other hand, the alleged equivalence between functional individual immunity and state immunity goes too far. While the UN Convention on Jurisdictional Immunities of States also covers proceedings against state organs,[82] the Preamble of Resolution 59/38 of the General Assembly makes it clear that the Convention 'does not cover criminal proceedings', and so the Convention does not permit any inference that the two kinds of immunity are conceptually interchangeable. It suffices to say that the criminal proceedings end with the death of the accused individual, whereas it is not even clear whether the responsibility of the state ends with its extinction.[83] Lastly, it would be inequitable to make the prospect of gaining civil damages from a foreign state dependent upon whether or not the individual defendant still happens to be alive.

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an important social or individual interest to a less important, though hitherto legally recognized, individual right.'

80 Ibid., at 306.

81 Ciampi, *supra* note 31, at 610.

82 2004 UN Convention on Jurisdictional Immunities of States and their Property, UN Doc. A/59/508 (not yet in force), Art. 2(1) (b)(i) of the Convention, by which 'State' means 'the State and its various organs'.

83 On the rules of state succession in tort, see B. Stern, 'Responsabilité internationale et succession d'états', in L. Boisson de Chazournes and V. Gowland-Debbas (eds.), *The International Legal System in Search of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 327, who supports the thesis of automatic succession in general, but with the notable exception of violations of *jus cogens*, having regard to the character 'éminemment personnel' of that aggravating aspect of responsibility, at 349.

https://doi.org/10.1017/S0922156510000683 Published online by Cambridge University Press

The pitfalls of each of the doctrines that try to reconcile the loss of state immunity with a viable practical solution show that the customary-law rule on state immunity for *acta jure imperii* is not just an unjustified, abuse-prone privilege of the past, but an indispensable device in order to maintain a minimum procedural order for the sake of peaceful intercourse between sovereign states as well as to avoid possible inequitable and/or discriminatory solutions.

This is also due to the fact that there is almost no shared view among states with regard to the exercise of their domestic jurisdiction. One could deplore this fact, for example, in light of the impossible situation in which defendants find themselves in cases of contrasting disclosure injunctions, but the truth is that the exercise of domestic civil jurisdiction has never been a matter of concern for customary international law, as long as the sovereign rights of states were respected by virtue of immunity. Currently, the domestic civil systems differ enormously with regard to the procedures, evaluation of evidence, means of redress, assessment of damages, and enforcement of judgments. Furthermore, while some domestic systems apply the doctrines of act of state and political question to the conduct of foreign relations,[84] others do not. To remove the only international regulative principle on immunities of foreign states would be to unleash a competitive race between courts, each differently linked to the claim, each differently acquainted with the subject matter, each differently sensitive to lobbying strategies, each differently deferential to the executive power.[85] The ensuing judicial traffic jam would sooner or later lead to calls for a traffic warden, namely the ordering hand of international law, re-establishing at some point in the process an inevitable barrier, which, in order to be effective, could only be *in limine litis*.

84 On the still very resilient character of these classical limitations on state jurisdiction, at least in common-law systems, see H. Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans, *International Law* (2006), at 363; A. D. Patterson, 'The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong', (2008) 15 *U.C. Davis Journal of International Law and Policy* 111. On the application of the two concepts to war claims, see A. Gattini, 'To What Extent Are State Immunity and Non-Justiciability Major Hurdles for Individuals' Claims for War Damages?', (2003) 1 JICJ 348. Remarkably, that was also the view of Morelli, for whom some cases commonly but mistakenly dealt with as cases of immunity should have, in reality, been understood as cases in which domestic judges had no jurisdiction because of the nature itself of the controversy, namely situations in which the foreign state acted as an international subject. See G. Morelli, *Diritto processuale civile internazionale* (1954), 187; and of the same author, 'Immunità dalla giurisdizione e competenza giurisdizionale', (1958) 41 *Rivista di Diritto Internazionale* 126. The article was a case note on a judgment by the Italian Court of Cassation (*Regno di Grecia c. Gamet*, Court of Cassation, No. 2144/1957, in (1958) 41 *Rivista di Diritto Internazionale* 123, English translation in (1963) 28 ILR 153), which had upheld the immunity of Greece in a civil action concerning the taking of property under the enemy property clause of the Peace Treaty of 1947 and the Greek–Italian Treaty of 1949.

85 The relationship between civil jurisdiction and international human rights is on the whole not yet sufficiently investigated; see P. Dubinsky, 'Human Rights Law Meets Private Law Harmonization: The Coming Conflict', (2005) 30 Yale JIL 211, who ends his overview of the state of the art by pleading for the development of 'a set of common principle applicable to adjudicating grave human rights offenses', but without putting into question 'the principle' of individual compensation (at 314). For a sympathetic view of lobby strategies in international/domestic human rights litigation, see L. R. Helfer, 'Forum Shopping for Human Rights', (1999) 148 *University Pace Law Review* 285; B. Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations', (2002) 27 Yale JIL 10.

4. THE (SAME) FORESEEABLE OUTCOME OF ANY DISPUTE CONCERNING GRAVE VIOLATIONS OF *JUS COGENS*

The doctrinal attempts to demonstrate that the rules on state immunity have already changed or are in need of reconsideration tend to overlook or summarily dispose of an important issue – that of the cause of action.

What makes the pending case before the ICJ so disturbing is that beyond the issue of state immunity, the cause of action of the Italian claims is totally lacking. As we have already seen, all of the pending Italian cases against the Federal Republic of Germany are moot, because of the Italian waivers of 1947 and 1961. But, even in more general terms, it is very doubtful whether international law at all permits civil actions against a former belligerent state for damages related to the conduct of the war. Both Article 3 of the IV Hague Convention of 1907 and Article 91 of the 1977 First Protocol to the four Geneva Conventions of 1949 affirm the liability of belligerent states to pay an indemnity for the violations committed by their armed forces, but the norm is formulated in terms that clearly exclude its direct applicability. The *travaux préparatoires* of both conventions make absolutely clear that the solution envisaged was that of post-war interstate agreements.[86] Until recently, the view that the norm lacked applicability was almost unanimous in legal literature[87] as well as in domestic and international jurisprudence. It is too early to say whether matters have significantly changed in recent years. It is, however, not surprising that the Italian Court of Cassation failed to examine the issue, and perfunctorily affirmed that violations of internationally protected fundamental human rights 'are apt to serve as a parameter of the injustice of the tort under domestic law'.[88] It is instructive to compare this easy way out not only with the opposite view held by both the German Federal Constitutional Tribunal and the German Federal Supreme Court,[89] but also with some recent decisions of the European Court of Human Rights. The decision of 4 September 2007 in the case *Associazione Nazionale Reduci dalla Prigionia (ANRP) and 275 Others* v. *Germany* is particularly relevant, since the case was closely related to the *Ferrini* case before the Italian Court of Cassation. Indeed, Mr Ferrini was one of the 275 applicants in the ANRP case. The ANRP had maintained that its

86 With regard to the 1907 IV Hague Convention, see Gattini, *supra* note 84, at 348. For the 1949 Geneva Conventions, cf. J. S. Pictet (ed.), *Commentaire de la IV Convention de Genève* (1956), at 645.

87 See *ex multis* A. W. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces', (1955) 88 RCADI 267, at 333; N. Ronzitti, 'Access to Justice and Compensation for Violations of Law of War', in F. Francioni, *supra* note 33, at 95. It is only in recent years, and especially after the conflict in ex-Yugoslavia, that some doctrinal voices have been raised arguing for the direct applicability (either *de lege lata* or *de lege ferenda*) of Art. 3 of the 1907 IV Hague Convention (Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907); see among others T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 224; E. David, *Principes de droit des conflits armés* (1999), 570; M. Sassoli, 'State Responsibility for Violations of International Humanitarian Law', (2002) 84 IRRC 401, at 419.

88 *Ferrini*, *supra* note 2, at 7.1. On the point, see the critical remarks by A. Gianelli, 'Crimini Internazionali ed Immunità degli Stati dalla Giurisdizione nella Sentenza Ferrini', (2004) 87 *Rivista di Diritto Internazionale* 643, at 677.

89 See the decision of the German Constitutional Federal Tribunal of 28 June 2004, rejecting the joint constitutional complaint by the *Associazione Nazionale Reduci dalla Prigionia* and by Mr Ferrini, *In dem Verfahren über die Verfassungsbeschwerde*, Judgment of the German Supreme Court of 2 November 2006, III ZR 190/05 (*Varvarin-Brücke*), *BVerfG 2 BvR* 1379/01, available at www.bverfg.de/entscheidungen/rk20040628_2bvr137901.html.

https://doi.org/10.1017/S0922156510000683 Published online by Cambridge University Press

members' exclusion from the benefits provided by the German fund 'Erinnerung, Verantwortung, Zukunft'[90] violated their property rights, or better their legitimate expectations thereof, based on Article 3 of the IV Hague Convention. The Fifth Chamber unanimously held that 'whatever suffering the applicants' forced labour brought about, none of the Conventions referred to by the applicants establishes any individual claims for compensation'.[91]

Some months earlier, on 14 December 2006, the Grand Chamber of the European Court of Human Rights had rendered its decision in the *Marković v. Italy* case, dealing with an order by the Italian Court of Cassation of 5 June 2002. In that order, the Italian Court had declined to exercise its jurisdiction with regard to a civil claim against the Italian government submitted filed by the heirs of a victim of the NATO bombing on the Serbian Television station in Belgrade on 23 April 1999. The Court had found that the government's decisions to engage in military operations were non-justiciable as a 'manifestation of a political function'.[92] The Grand Chamber, by a majority vote, found no violation of Article 6 ECHR, holding that

> 'the Court of Cassation's ruling in the present case does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in domestic law'.[93]

The *Marković* decision of the Italian Court of Cassation sheds an interesting light on the risk that a domestic court could apply a double standard: civil actions against a foreign state, on the one hand, and civil actions against her own government, on the other.[94] The *Marković* judgment of the European Court of Human Rights, in turn, might be rightly criticized for going too far, because its logic would make a mockery of the right to access to the courts of the responsible state in all cases of war crimes.[95] My point here, however, is that not only domestic courts, but international ones as well are still extremely cautious when dealing with individual claims for war damages, regardless of the criminal character of the conduct that caused the damage. The reason for this is the same as that which persuaded the International Committee of the Red Cross in 1977 not to propose a change in the formulation of Article 3 of the IV Hague Convention of 1907: namely the still prevailing view that war damages, because of their potential (or – unfortunately – real) mass proportions,

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90 *Das Bundesgesetzblatt für die Republik Österreich* (*BGBl*), (2000), I, at 1263.

91 *Associazione Nazionale Reduci dalla Prigionia, dall' Internamento e dalla Guerra di Liberazione (A.N.R.P.) and 275 Others v. Germany*, Admissibility of Application, Judgment of 4 September 2007, [2007] ECHR 5556.

92 *Marković c. Presidenza del Consiglio dei ministri e Ministero della difesa*, Italian Court of Cassation, United Chambers, Order of 5 June 2002, No. 8157/2002, (2002) 85 *Rivista di Diritto Internazionale* 799, and 128 ILR 652.

93 Cf. *Marković v. Italy* (Appl. No. 1398/03), Judgment of 14 December 2006, [2006] ECHR 1141, para. 114.

94 This distasteful impression is not solved by the attempt of the Court of Cassation in the *Ferrini* decision to distinguish the *Marković* precedent, instead of simply rejecting it. See also Gianelli, *supra* note 88, at 664. For some benevolent commentators, such as Iovane, *supra* note 59, at 172, the *Marković* order 'was completely overturned' in the subsequent *Ferrini* decision.

95 The point was forcefully made in the dissenting opinion of the Italian Judge Zagrebelsky joined by six other judges; see *Marković v. Italy, supra* note 93: 'It is a matter of great concern that neither the Court of Cassation nor the Court provided any definition of what might qualify as an "act of government" or "political act" . . . or of what the limitation on such acts might be.'

are more equitably and eventually more efficiently dealt with through inter-state agreements than through random individual actions before domestic judges.[96]

Does the same reasoning apply equally to other cases of crimes against humanity? My tentative answer is yes. It is a somewhat paradoxical, surely sobering, but still old truth that the more systemic a violation becomes – involving masses of potential similar claims – the less efficient and satisfying the option of an individual judicial redress will be.[97] The lesson of the European Convention on Human Rights is particularly illustrative. The negotiators were well aware of the problem of systemic violations, and for that reason, they envisaged the instrument of inter-state claims, alongside the individual ones, and assigned to the Committee of Ministers the task to address the structural problems that an individual case might bring to the fore. The fact that state parties have too seldom utilized the tools at their disposal and that the peer review mechanism has too often shown its weakness and has caused the European Court of Human Rights in the last decade to look for new avenues, from the indication of general measures to the pilot-case procedure, not least in order to address the worrisome phenomenon of the Court's ever-increasing caseload and backlog.[98] Currently, the Court is torn between the perspective of sticking to the individual right to access to the Court and being submerged by the unstoppable rise in the number of applications, or the perspective of introducing some form of class or collective actions.[99] Yet, one could make the argument that not all violations of *jus cogens* have or tend to assume mass proportions. Torture could be an appropriate example, and indeed it is no coincidence that the only convention in which the question of civil redress has been addressed (even if the question of state immunity has not been decided upon) is the 1984 UN Convention against Torture.[100] And, again,

96 See Bröhmer, *supra* note 46, at 204; P. d'Argent, *Les réparations de guerre en droit international public* (2002), 802; A. Gattini, *Le riparazioni di guerra nel diritto internazionale* (2003), 653; Tomuschat, *supra* note 30, at 69. The point has recently and forcefully been made by the Eritrea–Ethiopia Claims Commission in its Final Award on 17 August 2009 in the *Ethiopia's Damages Claims* case, Ethiopia's Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea, Final Award, 17 August 2009 (Eritrea–Ethiopia Claims Commission). Rejecting Ethiopia's claims of billions of dollars for moral damages, with regard to the damages suffered by its population as a consequence of the 1998–2000 war, the Commission held that 'large per capita awards of moral damages may be logical and appropriate in some contexts involving significant injuries to an individual or to identifiable members of small groups. The concept cannot reasonably be expanded to situations involving claimed moral injury to whole populations of large areas', para. 18, available at www.Pca-cpa.org/showpage.asp?pag_id = 1151. After a painstacking assessment of the damages suffered by both parties, the Commission awarded to Ethiopia in respect of its claims a total monetary compensation of US$174,036,520 and to Eritrea a total monetary compensation of US$161 455 000 plus a little more than US$2 million in respect of claims presented on behalf of individual claimants.

97 This is, or should be by now, common wisdom in international criminal and transitional justice; see P. De Greiff (ed.), *The Handbook of Reparations* (2006); H. Ruiz-Fabri et al. (eds.), *La clémence saisie par le droit: Amnistie, prescription et grace en droit international et compare* (2006).

98 See L. Caflisch, 'New Practice Regarding the Implementation of the Judgments of the Strasbourg Court', (2005) 15 *Italian Yearbook of International Law* 3.

99 Even this last proposal, however, would be just palliative; it would not eradicate the problem of true systemic failures, which remains primarily and at its root a political one. See A. Gattini, 'Mass Claims at the European Court of Human Rights', in Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), 271. In a document issued by the President of the Court on 3 July 2009, 'Mémorandum du Président de la Cour Européenne des droits de l'homme aux états en vue de la Conférence d' Interlaken', the question of class actions is mentioned among the ideas that the Court is going to study in detail at sub. III.B.2.3.

100 See *supra* note 35.

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it is no coincidence that the most debated decisions upholding state immunity, such as *Al-Adsani* v. *Kuwait*, *Jones* v. *Saudi Arabia*, or *Bouzari* v. *Iran*, dealt with this crime. Albeit with some reluctance, however, I do not think that the time is ripe to create an exception to state immunity, not even for cases of torture. That exception would open the floodgates to every kind of claim, since the concept of torture in international law is broad enough to plausibly include almost all other crimes against humanity[101] so that any distinction based on the *nomen criminis* would be to a certain extent artificial. More importantly, given the fact that, as demonstrated above, there is as yet no general international-law norm providing for the right of access to justice as a consequence of a violation of a *jus cogens* norm, one could ask why, even *de lege ferenda*, access to domestic courts against a foreign state should be per se a better or more auspicious solution than, say, strengthening the existing international supervisory mechanisms of prevention and repression of torture.

So, again, we arrive at the core issue: the role of states and international organizations in dealing with violations of obligations *erga omnes* and/or violations of *jus cogens*. Notoriously, the ILC left more questions opened than it answered. I have already pointed out the ambiguous formulation of Article 54, which does not prejudice the right of any state 'to take lawful measures' against the state responsible for the violation of an *erga omnes* obligation. With regard to the serious breaches under peremptory norms of general international law, Article 41, paragraph 3, closes with a saving clause, through which the Commission does not exclude 'such further consequences that a breach to which this chapter applies may entail under international law'. Admittedly, all that is not very helpful, and the ILC did not make matters any easier by refusing some years later to progressively develop international law to any significant extent with respect to the exercise of diplomatic protection, even in the case of a violation of *jus cogens*.

Yet, if one were to sense an effort of overall coherence in the ILC codification, it would be that while a state is not obligated to raise a claim for violations of *jus cogens*, it also cannot renounce its right to raise such a claim. This is what I have tried to demonstrate elsewhere with regard to Article 45 of the ILC Articles on State Responsibility for International Wrongful Acts by stressing the relevance of the 'validity' of the waiver as a condition for the loss of the right to invoke state responsibility.[102] Because this is possibly a new aspect of *jus cogens*, namely a case of

101 See Art. 1 of the UN Torture Convention: 'For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.' For an application of an excessively broad concept of torture, see E. de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law', (2004) 15 EJIL 97, who mentions the *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C.Cir.1993) (which concerned a civil claim for forced labour during the Second World War brought by a US citizen before the District Court for the District of Columbia in 1994) and the *Distomo* cases, *supra* notes 3 and 18, as instances of torture, respectively at 105 and 106.

102 A. Gattini, 'La renunciation au droit d'invoquer la responsabilité internationale', in Dupuy, *supra* note 39, at 338. For a different position, see d'Argent, *supra* note 96, at 759, and by the same author, 'Wrongs of the Past, History of the Future', (2006) 17 EJIL 288.

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jus cogens superveniens, the principle obviously does not apply retroactively,[103] but it could play a useful role in solving the apparent conflict between state immunity and the consequences of the violation of *jus cogens* rules. If it is true that under current international law, a state cannot waive a claim for violations of *jus cogens*, then international organizations and civil society are endowed with great leverage over governments in inducing them to take *jus cogens* violations seriously. It is ill-advised, however, for domestic judges, even if they consider themselves part of the global civil society, to abuse their judicial powers in order to maximize that leverage.

5. Should that necessarily be the outcome of the dispute?

Beyond the letter of Article 59 of the Statute, the ICJ's decisions can be, and often are, landmarks in the history of international law. Their tenor can be a powerful stimulus for, or a powerful restraint on, the development of international law. The ICJ's responsibility for striking the right balance will seldom be more apparent than in the present case. Should the Court in the present case speak unmistakably or should it instead exert as much judicial self-restraint as possible?

To put it in other terms, are there ways to stop the flawed jurisprudence of the Italian Court of Cassation, without impinging on the possible future development of international customary law on state immunities?[104]

One could envisage at least two avenues, both of which use arguments of intertemporal law. The first option would be to argue that the *jus cogens* concept did not exist in positive international law at the time the wrongful acts were committed, or at least that it was not sufficiently settled to imply all the consequences that the Italian Court of Cassation has found. Once again, the Court of Cassation's reasoning in the *Ferrini* case and its subsequent judgments is remarkably simplistic. It is one thing to demonstrate, as the Court did, that deportation and forced labour were already considered war crimes at the time of their commission, as the Nuremberg trial proves, but quite another thing to demonstrate that at that time, the international criminal responsibility of the individual for war crimes was equated to the international responsibility of the state for the same violation.[105] The inference that one follows from the other is all the less warranted if one considers that deportation and forced labour, regardless of the magnitude of the phenomenon, were considered at that time to be no different from other 'war damages', reparable only through an inter-state compact.[106] If one were to agree with the Italian Court of Cassation that the concept

103 On the point, see G. Gaja, '*Jus Cogens* Beyond the Vienna Convention', (1981) 172 RCADI 271, at 292.

104 See *mutatis mutandis* the recent decision of 16 June 2009 of the Fifth Chamber of the European Court of Human Rights in the *Grosz v. France* case (*Grosz v. France (dec.)*, no. 14717/06, 16 June 2009), in which a French citizen had unsuccessfully tried to sue Germany in France for compensation for forced labor during the Second World War. The Court unanimously did not find any violation either of Art. 4 of the 1950 European Convention on Human Rights (ECHR), 213 UNTS 221, because the facts related to a time previous to the entry into force of the ECHR, or Art. 6 with regard to state immunity for *acta jure imperii*, adding that 'cela vaut du moins en l'état actuel du droit international public, ce qui n'exclut pas pour l'avenir un développement du droit international coutumier ou conventionnel'.

105 See *ex multis* Focarelli, *supra* note 42, at 393.

106 It is remarkable that after the First World War, the injuries suffered by Belgian citizens who had been deported for forced labor to Germany were considered 'civil damages' in the meaning of Annex I of Part VIII of the

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of *jus cogens* makes the state immunity lapse, it would be at best a case of *jus cogens superveniens*, hence non-retroactive.

The second option could stress the fact that even if the concept of *jus cogens* already existed in the 1940s, it did not limit the immunity of states, which, at that time, was still considered absolute. Regardless of the different views that domestic courts may have on the issue of state immunity, namely considering it as a mere procedural bar or a substantive matter, views that would inevitably influence the related issue of its rectroactivity *vel non*,[107] it is interesting to note that the two conventions on jurisdictional immunities of states – the 1972 Basel Convention of the Council of Europe and the 2004 UN Convention – albeit both expressly stating their non-retroactivity, offer two different solutions. Article 4 of the UN Convention is a typical 'non-retroactive' rule, in the sense that it excludes the application of the rules of the Convention for questions regarding immunity arising in a domestic process that started before the Convention entered into force, without prejudice to the application of the customary rules contained therein. On the contrary, Article 35, paragraph 3, of the Basel Convention says something more incisive. It states that '[N]othing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature'. The explanatory report attached to the Basel Convention makes it clear that it was the intention of the parties to exclude from its scope of application 'les litiges issus d' événements trop anciens'.[108] This means that the authors of the Convention were aware of the fact that not all of the exceptions to immunity in the Convention codified customary international law, and that it would be inopportune, or even illegitimate, to retroactively apply a new exception to immunity in relation to facts or acts that had taken place at a time when the exception did not yet exist. The solution provided by Article 35, paragraph 3, of the Basel Convention is proof of the fact that the question of state immunity in international law is a much too complex issue to be solved along the simple line of a domestic civil process.

Treaty of Peace at Versailles, 28 June 1919, Allied & Associated Powers-Ger., 225 Consol. T.S 188, and therefore appertaining to the general category of war damages, which Germany had to repair through the classical mechanism of inter-state reparations; see on the point Gattini, *supra* note 28, at 225.

107 The first view is held by Italian judges, applying to foreign state immunity the general solution provided by Art. 8 of the Italian Law 218/1995, read in combination with Art. 5 of the Italian Civil Procedural Code. The second view was held by the German Federal Court in its decision of 26 June 2003 (see *supra* note 18), in which the Court, in dismissing a claim filed in Germany by some of the *Distomo* plaintiffs, noted inter alia that a retrospective application of the tort exception to facts that occurred during the Second World War 'would raise serious concern'. The first view was held also by the US Supreme Court in the *Republic of Austria v. Altmann* judgment of 7 June 2004, concerning the application of the Foreign Sovereign Immunity Act of 1976 to Austrian actions that had taken place in 1948; see 541 US 677 (2004). It must be noticed, however, that the *Altmann* judgment was sharply criticized for having drawn away, without any reasonable explanation, from the precedent of the *Landgraf v. USI Film Products*, 511 US 244 (1994), which excluded retroactivity in all the cases in which it would 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed'. See C. M. Vazquez, '*Altmann v. Austria* and the Retroactivity of the Foreign Sovereign Immunity Act', (2005) 3 JICJ 207; M. Goodman, 'The Destruction of International Notions of Power and Sovereignty: The Supreme Court's Misguided Application of Retroactivity Doctrine to the Foreign Sovereign Immunity Act in *Republic of Austria v. Altmann*', (2005) 93 GLJ 1117; J. Chung, '*Republic of Austria v. Altmann*: A Flawed Attempt to Apply Retroactively the FSIA of 1976', (2006) 20 Temple ICLJ 163.

108 See Rapports Explicatifs Concernant la Convention européenne sur l'immunité des etats et le protocole additionnel, Conseil de l' Europe (1972), at 42.

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Each option could offer a viable solution for the pending case. Even if the Court were to miss a major opportunity to give states clear guidance on general principles, both solutions would still have the non-negligible merit of definitely disposing of a 'revenant' claim.

6. Will that be the end of the dispute?

I could have ended here. But, as in all good 'revenant' stories, you can never be sure whether, by the last page, you have really reached the end.

Imagine for the sake of argument that, after a judgment favourable to Germany, the Italian Court of Cassation was not ready to comply. Would it have an option? The *Medellin* v. *Texas* decision of the US Supreme Court of 26 March 2008,[109] stressing domestic constitutional limits to compliance with decisions of international tribunals, might have made school overseas. For instance, the Court of Cassation could ask the Italian Constitutional Court to decide whether Article 11, paragraph 2, of the Law 218/1995 is compatible with constitutional parameters, to the extent that it states the lack of domestic jurisdiction 'for effect of an international law norm'. According to Article 10 of the Italian Constitution, 'generally recognized international law norms' are automatically incorporated into the Italian legal order and have constitutional rank. But should the norm of customary international law on immunity prevail also against fundamental constitutional norms, such as Article 24 of the Italian Constitution, which grants every citizen the right to judicial redress for the violation of his/her individual rights and legitimate interests?

Interestingly, the question is not at all novel for the Italian Constitutional Court, which already addressed it in its Judgment 48 of 18 June 1979 concerning diplomatic immunities.[110] In that judgment, the Court had designated the year 1948, in which the Italian Constitution went into force, as a watershed moment, protecting as *lex specialis* the customary international-law norms formed before that time, and subjecting the application of norms created later to the respect of fundamental constitutional principles. That judgment, which, in my view, albeit through a debatable argument, had reached the right conclusion of the prevalence of the international customary norm, was authoritatively criticized for having taken a formalist view of what is really a problem of substance.[111] Since then, the Constitutional Court has not again had occasion to squarely address the issue of the relation between international customary law and constitutional law, yet, in recent judgments, it has confirmed its view that fundamental constitutional norms prevail over international law, be it treaty law or customary law.[112]

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109 *Medellín v. Texas*, 552 US 491 (2008). On the question of the direct applicability of ICJ decisions, see *supra* note 27.

110 *Soc. Imm. Soblim c. Russell*, Italian Court of Constitution, Judgment No. 48 of 18 June 1979, (1979) 62 *Rivista di Diritto Internazionale* 797.

111 Conforti, *supra* note 40, seventh edition, at 288.

112 See *Baraldini*, Italian Court of Constitution, Judgment No. 73 of 22 March 2001, (2001) 84 *Rivista di Diritto Internazionale* 490 (at 3.1, in which the principle of Judgment 48 of 1979 is recalled, but without the temporal divide); *R.A. c. Comune di Torre Annunziata et al.*, Italian Court of Constitution, Judgment No. 348 of 24 October 2007, (2008) 91 *Rivista di Diritto Internazionale* 198 (at 4.7, with regard to the European Convention on Human Rights).

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In the *Milde* judgment, the First Criminal Chamber of the Italian Court of Cassation seems to have already laid the groundwork for the next move. In one of the last paragraphs, the Court's focus unexpectedly shifts from the discourse of international *jus cogens* to the one of domestic constitutional law. Without any apparent reason,[113] the Court was keen to demonstrate the 'reliability of the result arrived at also in the perspective of the values and principles by which the Italian constitutional order is permeated'. After recalling Article 10 of the Italian Constitution, the Court found it 'extremely significant' to specify that fundamental human rights are inviolable constitutional rights that cannot be derogated even by customary international law. To the delight of the old dualists/new pluralists,[114] the stage is being set.

113 For a stringent criticism of the (lack of) coherence and logic of this part of the judgment, see Focarelli, *supra* note 55, at 398.

114 For an accurate overview of the current practice and doctrinal debate on the relation between international law and domestic constitutional law, see A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', (2009) 3 *Vienna Journal of International Constitutional Law* 170, who concludes with a dubitative note on the 'promise and peril' of constitutional pluralism.