ASIL The American Society of International Law

ASIL Insight

November 19, 2009
Volume 13, Issue 22
PDF Print Version

Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity – Legal Underpinnings and Implications for U.S. Law

By Ronald J. Bettauer

Introduction

It is now generally accepted that foreign countries can be sued in domestic courts when they engage in commercial activities or commit ordinary torts within the jurisdiction. This is not the case, however, when countries engage in official, governmental activities. In such instances, they enjoy jurisdictional immunity. However, a few countries have broadened the exceptions to such immunity, notably Italy and the United States. Italy allows its nationals to file domestic civil suits against foreign states for their actions abroad that allegedly violate fundamental human rights norms (often called "peremptory" or "*jus cogens*" norms of international law). Similarly, the United States allows certain suits against countries it designates as state sponsors of terrorism. Are these broader exceptions consistent with international law? A new case at the International Court of Justice ("ICJ") will address this question. On December 22, 2008, Germany filed the case against Italy at the ICJ because the Italian courts allowed claims to proceed despite Germany's assertion that it was entitled to jurisdictional immunity under international law.[1] On April 29, 2009, the ICJ set June 23, 2009, as the deadline for Germany's memorial and December 23, 2009, as the deadline for Italy's counter-memorial.[2] This article reviews the background of the German ICJ case, the terrorism exceptions to foreign sovereign immunity in U.S. law, and the consistency of those exceptions with international law.

Efforts to Erode State Immunity – Recent Cases

1. Germany's Claim against Italy

Germany brought its case because in 2004 the Italian Supreme Court, in *Ferrini v. Germany*,[3] held that Italian courts have jurisdiction to consider compensation claims of persons deported during World II to perform forced

RELATED ASIL INSIGHTS

Foreign Officials and Sovereign Immunity in U.S. Courts

Foreign Sovereign Immunities Act: Supreme Court Upholds New York City Action for Tax Liens against UN Missions

World Court finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide

The World Court: Which Court Is It?

U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin

Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives

New Supreme Court Term Includes Issues of Foreign Sovereign Immunity

Liechtenstein Sues Germany before the World Court over a Dispute Concerning Property Seized by Czechoslovakia During World War II

Insights Archive>>

DOCUMENTS OF NOTE

labor in Germany, and that State immunity is not a valid reason for declining jurisdiction. The Court reasoned that recognition of jurisdictional immunity in a civil action for compensation for serious violations of fundamental human rights, rights protected by norms from which no derogation is permitted, would impede the protection of those norms. Germany claims that this decision has resulted in roughly 250 proceedings against Germany in Italian courts, and notes that the Italian Supreme Court confirmed its 2004 holding in decisions on May 29, 2008,[4] and a judgment of October 21, 2008. While acknowledging the untold suffering caused by Germany during World War II, Germany requests the Court to find that Italy has violated its obligations under international law to respect Germany's jurisdictional immunity. Germany also asks the Court to declare the Italian measures of constraint against German governmental property used for non-commercial purposes and the Italian courts' willingness to enforce Greek judgments against Germany in Italy as violations of international law.

In *Perfecture of Voiotia v. Germany*, the Greek Supreme Court rejected Germany's claims of jurisdictional immunity and ordered Germany to pay damages for atrocities committed by German occupation troops in 1940 against people in the Greek village of Distomo. However, the Greek Supreme Court refused to allow execution of judgments, finding immunity applicable to execution. (Later, the Greek Special Supreme Court rejected the reasoning in *Voiotia* and held foreign states immune in all proceedings concerning acts of their armed forces). Since the claimants could not collect on their damage judgment in Greece, they first, unsuccessfully, sought redress in the European Court of Human Rights ("ECHR"), and then sought to collect on the Greek judgment in Italy.[5]

2. The Criticism of Ferrini

Most writers who have analyzed the *Ferrini* case under existing international law have been critical.[6] Lady Hazel Fox, a key authority on jurisdictional immunity of states, notes that in allowing the cases against Germany to proceed, the Italian court "abandons the distinction between an individual's criminal liability and the state's international responsibility" and "does so more by reference to moral values than legal concepts."[7] Fox points out that "immunity is a rule of law is generally acknowledged by States."[8] She further states that in the present classical structure of international law "there is no room for an exception to State immunity for acts in violation of international law," and violations of international law "may only be made subject to adjudication, whether by international or regional human rights or of national tribunals, with the consent of the alleged wrongdoer State."[9] Fox further says that the Italian court seems "to ignore that, just as the jurisdiction of the International Court of Justice rests on the consent of the state against whom a claim is brought, so the purported exercise of jurisdiction of a national court over a claim against a foreign state, will, without that state's consent, remain largely unrecognised and unenforceable."[10]

Others have also found the Italian decision troubling. Professor Focarelli sees the Ferrini decision as inconsistent with existing state practice.[11] Professors De Sena and De Vittor also critique the reasoning in *Ferrini* in their article *State Immunity and Human Rights, The Italian Supreme Court*

German Application against Italy

Jurisdictional Immunities of the State (Ger. v. It.)

Antiterrorism and Effective Death Penalty Act of 1996

Victims of Trafficking and Violence Protection Act

Terrorism Risk Insurance Act

ASIL EISIL>>

ORGANIZATIONS OF NOTE

International Court of Justice

The Insights Editorial Board includes: Cymie Payne, UC Berkeley School of Law; Amelia Porges, Sidley Austin LLP; and David Kaye, UCLA School of Law. Djurdja Lazic serves as the managing editor.

Decision on the Ferrini Case.[12] Professor Gattini calls the case a "notable example of self-assured judicial activism," and adds that "the Court shows a deplorable superficiality, because it affirms the universal jurisdiction principle as a logical corollary to the nature of international crimes. . . mixing up individual responsibility and state responsibility and making no attempt to check its premises against the relevant international practice."[13]

This criticism is not surprising because generally secondary authorities maintain that state practice does not support the existence of a specific *jus cogens* exception to the jurisdictional immunity of states.[14] Indeed, the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property, adopted by General Assembly resolution A/59/49 (2004), contains no exception to immunity for cases arising out of violations of international law. An International Law Commission working group that studied the matter concluded that the issue was not ripe enough for a codification exercise.[15]

To be sure, multiple efforts have been made to assert that foreign states should not be entitled to benefit from jurisdictional immunity where damages are sought for fundamental violations of human rights. But, such efforts usually do not succeed. A leading case, which was brought to the ECHR by a claimant seeking compensation from Kuwait for torture, was dismissed by British courts on the basis of Kuwait's jurisdictional immunity. In 2001, that Court said it accepted "that the prohibition of torture has achieved the status of a peremptory norm in international law," but that

> the present case concerns not . . . the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[16]

The ECHR said in 2002, in the case brought against Greece and Germany by the holders of the Greek damage judgment mentioned above, that it "does not find it established . . . that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity."[17] The Court reached a similar conclusion in two other cases.[18]

Domestic courts in the United Kingdom and Canada have reached the same conclusion. In *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, the claimants sought damages in Britain from the Saudi Arabian government for alleged torture by the Saudi police. The House of Lords 2006 judgment upheld the government's immunity defense.[19] Lord Bingham said that "international law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority."[20]

Referring to the *Ferrini* decision, he said that it "cannot in my opinion be treated as an accurate statement of international law as generally understood."[21] Rather, he said, despite sympathy for the claimants if their complaints are true, "since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails."[22] Similarly, in *Bouzari v. Iran*, a claimant sought damages from Iran for being abducted, imprisoned and tortured in Iran. The Ontario Court of Appeal found that "states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant."[23]

The U.S. Approach

What happens in the German ICJ case has relevance to the United States. The law in the U.S. contains exceptions to sovereign immunity applicable to a small number of foreign countries for certain acts of terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 inserted new subsection (a)(7) into 28 U.S.C. 1605 (the Foreign Sovereign Immunities Act, or "FSIA") permitting suits against states designated by the United States as state sponsors of terrorism.[24] The Victims of Trafficking and Violence Protection Act authorized vesting of Cuban assets to pay a judgment against Cuba and authorized payment of certain specified judgments against Iran out of U.S. government funds.[25] When the government funds allocated proved insufficient, and a variety of defenses to attachment and execution of foreign government assets proved successful, legislation sought to make it easier for plaintiffs to attach such assets.[26] This law permitted plaintiffs to attach blocked assets to satisfy judgments and established a pro-rata distribution system for the remaining U.S. funds made available to pay certain claims against Iran. Because certain claimants still suffered setbacks in court, and because of the difficulty in collecting on judgments, in January 2008, Section 1083 of the National Defense Authorization was enacted.[27]

Section 1083 directed courts to hear the cases of victims of terrorism against terrorist states based on the new provisions despite prior deficiencies – and against states such Libya, that are no longer designated as state sponsors of terrorism;[28] allowed previously dismissed cases to be revived; established a new, sweeping federal cause of action for terrorist acts by state sponsors of terrorism; significantly expanded the types of damages recoverable, permitting punitive damages and making states vicariously liable for actions of state agents; allowed *ex parte* liens on foreign state real and tangible property for claims covered by the terrorism exception to immunity; made property of any state-controlled separate juridical entity subject to execution to satisfy a judgment against the state; eliminated certain U.S. defenses; and waived the defenses of *res judicata*, collateral estoppel, and time limitations for a range of cases.

These U.S. provisions would be very hard to defend as consistent with the existing state of international law.[29] Even the arguments that are generally made in favor of allowing civil damage cases against foreign governments for violations of *jus cogens* are hard to make, since the FSIA exceptions do not purport to apply to such violations across-the-board but only to certain violations by a number of states unilaterally designated by the United States

as state-sponsors of terrorism. Indeed, President Clinton, in exercising a waiver in 1998, noted the risks of breach of treaty obligations, of reciprocal action by foreign states, and of the loss of important U.S. leverage.[30]

Fox sees the U.S. legislation as "partisan" and not a satisfactory precedent for other states to adopt.[31] Gattini calls the U.S. approach "of dubious value" because of its "unilateral nature and political overtones."[32] Bankas called subsection (a)(7) and the pre-2008 amendments to it "draconian in many respects and therefore may be vigorously contested by defendant states."[33] Professor van Alabeek says that "the terrorist state exception to the FSIA causes the United States to violate its obligations under international law."[34]

Conclusion

A series of ICJ cases making clear that jurisdictional immunity under domestic law is to be distinguished from substantive violations are strongly suggestive that the U.S. legislation would be considered by the ICJ to be contrary to international law;[35] but they are not directly on point. That is why the case brought by Germany against Italy is so interesting. If the ICJ holds the Italian exception to jurisdictional immunity unlawful under international law, it would be difficult to contend the U.S. legislation is lawful under international law. But even if the ICJ upholds the Italian domestic courts' position, whether the U.S. legislation can convincingly be argued to be lawful under international law would depend on the Court's reasoning. Further, an ICJ holding can have diplomatic consequences for the United States and affect the U.S. reputation for compliance with international law.

About the Author

Ronald J. Bettauer, an ASIL member, is Visiting Scholar at the George Washington University Law School. This article is derived from material presented by the author at the Twenty-Second Sokol Colloquium at the University of Virginia School of Law on April 2, 2009.

Endnotes

[1] The German application is *available at* http://www.icj-cij.org/docket/files/143/14923.pdf. Germany brought the case under Article 1 of the 1957 European Convention for the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 243, 244, (provides for the parties to submit "any international legal dispute" to the Court).

[2] Jurisdictional Immunities of the State (Ger. v. It.) (Order of Apr. 29, 2009), *available at* http://www.icj-cij.org/docket/files/143/15127.pdf.

[3] Ferrini v. Federal Republic of Germany, 128 I.L.R. 658 (2006).

[4] The May 29, 2008 rulings are the subject of a comment by Carlo Focarelli of the University of Perugia at 103 AM. J. INT'L L. 122 (2009) [hereinafter *Focarelli*].

[5] *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL

HUMAN RIGHTS LAW 329-31 (2008) [hereinafter van Alebeek].

[6] A few writers, while finding difficulties in the *Ferrini* court's reasoning, see the decision as part of a potential trend or evolution in customary international law. *See, e.g.*, Annalisa Ciampi, *The Italian Court Of Cassation Asserts Civil Jurisdiction Over Germany In A Criminal Case Relating To The Second World War*, 7 J. INT'L. CRIM. JUST. 597 (2009); Axel Knabe, Pending ICJ Case Questions Scope Of Foreign Sovereign Immunity Defense, 25 INT'L ENFORCEMENT L. REP. 162 (2009).

[7] Hazel Fox, *State Immunity and the International Crime of Torture*, 2 EUR. HUM. RTS. L. REV. 142, 156 (2006) [hereinafter Fox I].

[8] HAZEL FOX, THE LAW OF STATE IMMUNITY 13 (2nd ed. 2008) [hereinafter Fox II].

[9] *Id.* at 141.

[10] Fox I, *supra* note 7, at 144.

[11] *Focarelli*, *supra* note 4, at 125-131.

[12] Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights, The Italian Supreme Court Decision on the* Ferrini *Case*, 16 EUR. J. INT'L L. 89, 91 (2005).

[13] Andrea Gattini, *The Right of War Crime Victim to Compensation before National Court*, 3 J. INT'L CRIM. JUST. 224, 230-31, 242 (2005).

[14] *See, e.g.*, Thomas Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Court, in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER—*JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 216 (Jean-Marc Thouvenin & Christian Tomuschat eds., 2006). *See also* Gattini, *supra* note 13, at 236 (the author says that "[w]hile it is agreed that a state violating a peremptory norm incurs aggravated responsibility, there is no evidence in international practice, or any logical necessity, for the loss of state immunity to ensue").

[15] General Assembly, Chairman of the Working Group, *Report: Convention on Jurisdictional Immunities of States and Their Property*, ¶¶ 46-47, U.N. Doc. A/C.6/54/L.12 (1999).

[16] Al-Adsani v. United Kingdom, 34 Eur. Ct. H.R. 11, ¶ 61 (2002), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/. However, this case was decided by a nine against eight majority. On June 16, 2009, a seven-judge chamber of the ECHR decided unanimously to follow *Al-Adsani* and *Kalogeropoulou* decisions and find sovereign immunity precluded the admissibility of a claim brought by a French national for compensation from Germany for forced labor during World War II, stating, after quoting those decisions, "[a]insi, la Cour ne saurait considérer comme une restriction disproportionnée au droit d'accès à un tribunal tel qu'il est consacré par l'article 6 § 1 de la Convention, des

mesures prises par un Etat qui reflètent des règles généralement reconnues en matière d'immunité des Etats. Rien dans la présente espèce ne permet de s'écarter d'une telle conclusion." *Décision Sur La Recevabilité de la requête no 14717/06 présentée par Georges GROSZ contre la France*, Eur. Ct. H. R. (June 16, 2009), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[17] Kalogeropoulou v. Greece & Germany, App. No. 59021/00, Decision on Admissibility of Dec. 12, 2002, *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[18] *See* Fox I, *supra* note 7, at 155-156.

[19] Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2007] 1 AC 270; [2006] 2 WLR 70; [2006] UKHL 26, *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm.

[20] *Id.* ¶ 12.

[21] *Id.* ¶ 22.

[22] *Id.* ¶ 27.

[23] Bouzari v. Islamic Republic of Iran, ¶ 94, 71 O.R. (3d) 675 (2004) (Ct. App. Ontario), *available at* http://www.ontariocourts.on.ca/decisions/search/en/OntarioCourtsSearch_VOpenFile.cfm?serverFilePath=D%3A\Users\Ontario%20Courts\www\decisions\2004\june\bouzariC38295.htm.

[24] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 221 (1996).

[25] Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386 § 2002 (2000).

[26] Terrorism Risk Insurance Act, Pub. L. No. 107-297 § 201 (2002).

[27] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 1083 (2008) (replacing 28 U.S.C. 1605(a)(7) with a new Section 1605A and making other changes).

[28] *See also* Beaty v. Iraq, 129 S. Ct. 2183 (2009) (upholding the President's waiver of the immunity exceptions for Iraq).

[29] In his massive review of litigation under the terrorism exception, Chief Judge Lamberth of the U.S. District Court of the District of Columbia, concludes that the exception has not provided relief to most victims, has the potential for impeding foreign policy objectives, and that it is time for a new approach. *In* Re Islamic Republic Of Iran Terrorism Litigation, _F. Supp. 2d_, 2009 WL 3112136 (D.D.C. 2009). However, not once does Judge Lamberth address the consistency of the exception with customary international law.

[30] Terrorist-list States; Waiver of Requirements Relating to Blocked Property, Presidential Determination No. 99-1, 63 Fed. Reg. 59, 201 (Oct. 21, 1998).

[31] Fox I, *supra* note 7, at 151.

[32] Gattini, *supra* note 13, at 230.

[33] ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW – PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURT 294 (2005).

[34] Van Alebeek, *supra* note 5, at 355.

[35] *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, ¶¶ 59-60 (Judgment of February 14, 2002) (immunity is a "separate concept" that can be asserted even in cases where grave violations of the 1949 Geneva Conventions are asserted).