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Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity

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Introduction

In December 2008, Germany initiated proceedings in the International Court of Justice (“ICJ”) against Italy for failing to respect Germany’s jurisdictional immunity in three ways: first, by allowing civil claims to be brought against Germany in Italian courts for war crimes committed by German forces against Italian nationals in

Italy and elsewhere during World War II; second, by taking “measures of constraint” against *Villa Vigoni*, a building in Italy owned by the German government and used for non-commercial purposes; and third, by declaring that judgments against Germany obtained in Greece for a massacre of Greek civilians by German forces during the German occupation of Greece in 1944 were enforceable in Italian courts.[1] On February 3, 2012, the ICJ issued a judgment in favor of Germany.[2]

The Parties’ Positions

Germany conceded that the conduct of its forces was unlawful. However, Germany argued that “[t]he liability of a national community for the tortious actions orchestrated by its leaders cannot be unlimited,”[3] and that “authorizing individual claims the background of which is an armed conflict with thousands or perhaps even millions of victims [would have] incalculable financial dimensions.”[4] Italy, by contrast, argued that Germany had an obligation to provide reparations to Italian victims, and that it would be “inconsistent” to hold that individual perpetrators do not have immunity from prosecution by international criminal tribunals, but that “the victims have no rights when they attempt to have satisfaction directly from the State which ordered the commission of those acts.”[5] The ICJ held that, under the current state of development of customary international law, a state enjoys jurisdictional immunity from legal proceedings in the domestic courts of another state with respect to its public (i.e., non-commercial) acts, even if those acts amount to international crimes.[6]

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Article 1 of the European Convention for the Peaceful Settlement of Disputes confers jurisdiction on the ICJ to resolve disputes between contracting parties relating to questions of international law and alleged breaches of international obligations.[7] The parties agreed that the jurisdictional immunity of states “is governed by international law and is not a mere matter of comity.”[8] Although Germany cited Chief Justice John Marshall’s 1812 opinion in *The Schooner Exchange* for the principle that state immunity derives from the idea of sovereign equality,[9] Germany took pains to reject the U.S. Supreme Court’s view that such immunity is a matter of “grace and comity.”[10]

1. *The State’s Immunity for Acta Jure Imperii Encompasses Acts Committed by Its Armed Forces in the Conduct of Armed Conflict*

The ICJ held that, because Germany’s conduct constituted *acta jure imperii* (sovereign acts) rather than *acta jure gestionis* (commercial acts), Germany was entitled to state immunity as a matter of customary international law.[11] This was true even though many of the challenged acts took place on Italian soil, because such acts were performed by Germany’s armed forces in the course of conducting an armed conflict.[12] The Court noted the potential tension between the principle of territorial sovereignty, on the one hand, and sovereign equality, on the other hand:

The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[13]

The ICJ left open whether denying a foreign state immunity for “territorial torts” that did not involve the conduct of armed forces during armed conduct would be consistent with customary international law, because that question was not before it.[14]

2. *The State’s Immunity for Acta Jure Imperii Encompasses Alleged Violations of Peremptory Norms*

The ICJ was not persuaded by the argument that state immunity excludes *jus cogens* violations as a matter of state practice and *opinio juris*, in part because national courts have by and large upheld state immunity for such violations.[15] The Court also expressed concern that if “the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.”[16] The Court found this possibility troubling, even though the same might be said of claimants’ efforts to characterize acts *jure imperii* as acts *jure gestionis* for the purpose of negating immunity. The Court also emphasized that its holding relates only to “the immunity of the State itself,” and not “the

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question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State.”^[17] In so doing, the Court recognized that state agents do not always benefit from the immunity of the state itself.

3. *The State’s Immunity from Measures of Enforcement, Distinct from Its Immunity from Jurisdiction*

With respect to *Villa Vigoni* (the seat of an Italian-German cultural center), the ICJ specified that, before any measure of constraint may be taken with respect to property belonging to a foreign state, (1) the property must be in use for an activity “not pursuing government non-commercial purposes,” (2) the foreign state must have expressly consented to the measure, or (3) the foreign state must have allocated the property for the satisfaction of a judicial claim.^[18] None of these conditions were satisfied here. Consequently, by allowing Greek claimants to enter a charge against *Villa Vigoni* in the Land Registry of the Province of Como, Italy violated Germany’s entitlement to immunity from enforcement.

Italy further violated Germany’s immunity from jurisdiction when the Florence Court of Appeal accorded *exequatur* to the judgment of a Greek court, upon which the measures of constraint against *Villa Vigoni* were based.^[19] This is because Italian courts would have been required to grant jurisdictional immunity to Germany if they had been in the position of the Greek court that issued the underlying judgment.^[20] The ICJ indicated that the grant of *exequatur* should be analyzed as a question of immunity from the jurisdiction of Italian courts (rather than immunity from enforcement) because, although such was not the case here, Germany might have waived its immunity from the jurisdiction of Greece, but not its immunity from the jurisdiction of Italy.^[21] The granting of *exequatur* was an exercise of Italian jurisdiction that could be evaluated separately from the question of whether Greece, a non-party to the proceedings, also violated Germany’s jurisdictional immunity.^[22]

Separate and Dissenting Opinions

Judges Koroma, Keith, and Bennouna each wrote a brief separate opinion, and three judges wrote dissenting opinions. Judge Yusuf took issue with the majority’s approach for failing to consider whether the particular victims in question had other effective means of obtaining redress.^[23] Judge *ad hoc* Gaja, who was appointed by Italy, disagreed with the majority’s conclusion that the “tort exception” does not encompass activities of a hostile state’s armed forces on the forum state’s territory.^[24] Judge Cançado Trindade, former President of the Inter-American Court of Human Rights, disagreed with the majority’s conclusions in their entirety, and set forth his reasons in a detailed opinion.^[25]

Conclusions

The ICJ offered Italy the consolation that the claims of Italian victims “could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.”^[26] The Court observed that an entire category of Italian victims had been denied redress by being denied prisoner of war status by the Nazi authorities, and then being denied access to a German compensation scheme for forced labor that excluded prisoners of war.

The Court considers that it is a matter of surprise—and regret—that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize,

particularly since those victims had thereby been denied the legal protection to which that status entitled them.[27]

It is unclear whether the Court's "surprise and regret" will motivate Germany to revisit the terms of its compensation scheme or to conclude another negotiated settlement.

As for the effect of the judgment on Italy, the ICJ held that Italy has an obligation to "reverse" the effects of past and continued infringements of Germany's jurisdictional immunities "by enacting appropriate legislation or by resorting to other methods of its choosing"[28] to restore the situation that existed prior to the infringements. It is also likely that Greek courts will take the ICJ's decision as an authoritative statement of the customary international law of state immunity in the context of reparations claims for the conduct of armed forces during armed conflict, even though Greece was not a party to the proceedings. Other courts and decision-makers are likely to do the same.

No doubt, some will seek to draw lessons from the Court's judgment beyond the context of wartime reparations claims. From a U.S. perspective, the Court's reasoning might lend some support to the view that the "state sponsors of terrorism" exception in the Foreign Sovereign Immunities Act, which allows suits to proceed against designated states for certain *acta jure imperii*, is inconsistent with the current state of customary international law. The ICJ's decision reinforces the observation that, just as successful revolutions vindicate themselves with hindsight, international law-breakers only become international law-makers when their legal "transgressions" attract a sufficient following to establish a new rule of customary international law.

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Endnotes:

[1] Jurisdictional Immunities of the State (Ger. v. Italy), Application Instituting Proceedings (Dec. 23, 2008), <http://www.icj-cij.org/docket/files/143/14923.pdf>. The ICJ had previously determined that it lacked jurisdiction over a counter-claim by Italy seeking reparations from Germany. See Order of July 6, 2010, Jurisdictional Immunities of the State (Ger. v. Italy), <http://www.icj-cij.org/docket/files/143/16027.pdf>.

[2] Jurisdictional Immunities of the State (Ger. v. Italy), Judgment (Feb. 3, 2012), <http://www.icj-cij.org/docket/files/143/16883.pdf> [hereinafter Judgment]. The ICJ found in favor of Germany on the first claim (allowing civil claims in Italian courts) by a vote of 12-3; on the second claim (taking measures of constraint against *Villa Vigoni*) by a vote of 14-1; and on the third claim (declaring Greek judgments enforceable in Italy) by a vote of 14-1.

[3] Jurisdictional Immunities of the State (Ger. v. Italy), Memorial of the Federal Republic of Germany, ¶ 59 (June 12, 2009), <http://www.icj-cij.org/docket/files/143/16644.pdf> [hereinafter Memorial of the Federal Republic of Germany].

[4] *Id.* ¶ 75.

[5] Jurisdictional Immunities of the State (Ger. v. Italy), Counter-Memorial of Italy, ¶ 4.85 (Dec. 22, 2009), <http://www.icj-cij.org/docket/files/143/16648.pdf>.

[6] The ICJ previously held that a sitting foreign minister is entitled to immunity *ratione personae* from the criminal jurisdiction of another state's domestic courts. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 53-54 (Feb. 14) (holding that a Minister for Foreign

Affairs “when abroad enjoys full immunity from criminal jurisdiction and inviolability” because the minister is “responsible for the conduct of his or her State’s relations with all other States”).

[7] Judgment, *supra* note 2, ¶ 41.

[8] *Id.* ¶ 53.

[9] Memorial of the Federal Republic of Germany, *supra* note 3, ¶ 48.

[10] *Id.* ¶ 98 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004)).

[11] *Id.* ¶ 60.

[12] *Id.* ¶¶ 77-78.

[13] *Id.* ¶ 57.

[14] *Id.* ¶ 65.

[15] *Id.* ¶¶ 83-85.

[16] *Id.* ¶ 82.

[17] *Id.* ¶ 91.

[18] *Id.* ¶ 118-19.

[19] *Id.* ¶ 124.

[20] *Id.* ¶ 131.

[21] *Id.* ¶ 132.

[22] *Id.* ¶ 127. Greece intervened in the case as a non-party. See Jurisdictional Immunities of the State (Ger. v. Italy), Order (July 4, 2011), <http://www.icj-cij.org/docket/files/143/16556.pdf>.

[23] Dissenting Opinion of Judge Yusuf, ¶ 9, <http://www.icj-cij.org/docket/files/143/16893.pdf>.

[24] Dissenting Opinion of Judge *ad hoc* Gaja, ¶ 9, <http://www.icj-cij.org/docket/files/143/16895.pdf>.

[25] Dissenting Opinion of Judge Cançado Trindade, <http://www.icj-cij.org/docket/files/143/16891.pdf>.

[26] Judgment, *supra* note 2, ¶ 104.

[27] *Id.* ¶ 99.

[28] *Id.* ¶ 137.