

## HUMAN RIGHT IN CONFRONTATION WITH STATE IMMUNITY

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### ABSTRACT

**H**uman right is not only a political and moral concept but also a legal one. The origins and applicability of international law has been examined more and more by those who seek redress for historic human right violations committed. Also, various courts around the world are being asked to apply international law to these matters to determine whether reparations are due to atrocities committed long ago or not. Immunity of state is one of the important issues of international law for governments. As a result of the sovereign equity principle, no state accepted pursuing and proceeding in the courts of another states. The aim of the current research was to clarify the International Court of Justice's (ICJ) point of view on immunity of state facing human right breach. The core finding of this paper showed that serious violations of human right do not justify denying state's immunity. The International Court of Justice clearly acknowledged that state's immunity is not dependent on the gravity of unlawful act.

**Keywords:** human right, State's immunity, International Court of Justice.

## 1. Introduction:

Various human rights are widely recognized in codified and customary international law. “These human rights promise protection against specific severe harms to all human beings who might have experienced them locally or by foreigners” (Pogge, 2005, p. 1).

Often some governments have committed violations in the field of international human right law. People who have suffered due to the actions of such foreign governments act against them and demand their civil loss while a delinquent government seeks to invoke its immunity in such cases.

The origins and applicability of international law is being examined more and more by those who seek redress for committed historic human right violations. As the number of such cases increases, various courts around the world are being asked to apply international law to these matters to determine whether reparations are due to atrocities committed long ago or not. International law has been used by claimants in these court applications for the following reasons:

- “Involvement of political reasons
- It is sometimes easier to use international law when trying to comply with the jurisdictional requirements of certain courts
- Various alternatives and novel routes are being sought to achieve success in such cases” (Sarkin, 2007, p. 1).

It is widely agreed that State immunity is a norm for general customary international law. Foreign state immunity refers to various incarnations of a doctrine that prevent a private party from impleading a foreign government in a domestic court. Historically, “the extent of the prohibition has fluctuated. Its precise origins have been called murky and not very easy to discern” (Sinclair, 1980, p.121). This is probably because “sovereignty was regarded as appertaining to a particular individual in a state and not as an abstract manifestation of the existence and power of the state until very recently” (Shaw, 2008, pp. 697-698). The State immunity principle is an integral part of both international and national legislation (Shkira, 2012, p. 5). Within the literature of the international law, the immunity has ~~been~~ undergone significant developments. Although many years passed since the investigations on government's immunity began by the international law commission, we observe that these investigations continue without reaching a final conclusion. This indicates that this area of international law is highly potential for development. The reason is that developments in this area turn the concept of government's immunity from absolute immunity into limited immunity. However, new issues have been discussed about the research limitations and exceptions of the government's immunity. Many studies have been carried out on the subject of immunity. (Timberg, 1961, 1976; Gibbons, 1983; Jackson, 1988; Nash, 1989; Meltzer, 1996, 1999; Brohmer, 1997; Randall, 2002; Caplan, 2003; Keusch, 2003; Parren, 2003; Cmiel, 2004; Gruskin, 2007; Ishay, 2008; Voeten & Verdier, 2012)

In recent years, international law has been considered as an effective tool for resolving international disputes. It has been considered as a basic principle of the structure of the international community for preventing the occurrence of any war or conflict between the countries.

According to the international law as well as the basic pillar of justice affiliated with the United Nations, the International Court of Justice (hereafter “The Court”) is firstly responsible for resolving the disputes between governments. Also, The Court always seeks to end the disputes with observing the international law based on the integrity protector of the international law. As a result, The Court develops international law through handling the claims and giving advice. In addition to applying and practicing the international law, The Court is obliged to develop the international law and this indicates the importance of the judgments issued by The Court for the international law issues.

The aim of the current research was to clarify the Court's point of view on immunity of state facing human right breach. After talking about human right, the source of dispute between Germany and Italy had been described. Then, the judgment of the Court and its reasons of judgment were mentioned. In order to critically value the Court's order, dissenting opinions of judges about human right were described. The final section explored the general approach of the Court to the immunity of state and humanity rights.

## 2. Human Right

Human right is not just a political and moral concept but also a legal concept. Not surprisingly, human right has been the subject of a burgeoning jurisprudential literature (D'Amato, 1989). Human right, which affects states, is one of the most important issues in modern world. Human right and human freedom have become the main slogans of humanity, are considered in states constitution, and have limited government's authorities.

Human right activities have raised several scientific discussions about confliction between *jus cogens*(?) and state immunity all over the world; if there is such a conflict, which one is paramount? Generally, there are two approaches in this regard:

If the principle of state jurisdiction is so paramount to the community of states as to place it within the body of *jus cogens*, the human right litigation problem may involve a clash of two peremptory norms, the protection of human right and the principle of exclusive state jurisdiction.

The first approach is the base of arguments of Greece court in *Voiotia v. German* case which is based two arguments:

First argument: A state is said to waive or forfeit its entitlement to immunity by implication when it commits a *jus cogens* violation. State conduct that violates a *jus cogens* norm is said to fall outside the category of protected state conduct known as *acta jure imperii*, for which immunity is traditionally granted. Such conduct is devoid of legitimacy because it contravenes the will of the community of nations (Caplan, 2003:774).

Second argument: Enacting the human right treatise with guaranteeing the effective ways of remedies' rights means that a state implicitly forfeited its entitlement to. (Karagiannakis, 1998) These enactments are based on what the local legislature has understood to be required and permitted by international law. (Karagiannakis, 1998, 13) These arguments are not convincing enough because they didn't determine how a state implicitly forfeited its entitlement to immunity when committed a breach of international law. These kinds of treaties are often limited to domestic territories so they didn't mean to waive immunity.

In the second approach, the conflict between *Jus cogens* and state immunity, in the normal hierarchy *Jus cogens* stands above the state immunity. It puts the immunity away and let victims of breaching human right brought their claim before the courts.

In fact, a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law that are norms "accepted and recognized by the international community of States as a whole from in which no derogation is permitted"(UN report, 2006, p. 419).

In contrast to Greece court, The Supreme Court, in the *Ferrini* case, widely applied international legal arguments in its decision. In fact, the Court reached its findings in the light of the relationship between the customary rule on state immunity and the international norms related to the protection of human right. Even though the choice of the arguments and the connections made between them are not always fully convincing and commonly held, this application of international law actually appears to be of remarkable importance (De Sena & De Vittor, 2005)

The Court addressed the issue of whether “immunity from jurisdiction can exist even in relation to actions which take on the gravest connotations, and which is figured in customary international law as international crimes since they undermine universal values which transcend the interests of single States” (De Sena & De Vittor, 2005, p. 98)

While mutually reinforcing, the norms of human right and state immunity essentially govern distinct and exclusive aspects of the international legal order. Human right norms protect the individual’s inalienable and legally enforceable rights against state interference and the abuse of power by governments from the other standpoint state immunity norms which enable state officials to carry out their public functions effectively and secure the orderly conduct of international relations. To demonstrate a clash in international law norms, the normative hierarchy theory must prove the existence of a jus cogens norm that prohibits the granting of immunity for violations of human right by foreign states. However, “the normative hierarchy theory provides no evidence for such a peremptory norm” (Caplan, 2003, p. 772). For the case of Germany versus Italy, the Court investigated government's immunity in terms of violating human right. In recent decades, most of the internal courts have been asked to decide on the relationship between government's immunity and individuals' right of having access to the trials. The controversy between governments' immunity and individuals' right is at the center of the academic discussions. The argumentations of the court are based on the extant investigation about the governments' functions and procedures where they adopted a realistic approach. Accordingly, The Court clearly reflects a global dominant idea. It seems that the judges consider governments' immunity as an unchallengeable concept within the swiftly changing area of the assumption of international law.

### 3. Origin of Dispute

The facts underlying the dispute between Germany and Italy are fairly simple. During World War II, the German Reich committed many serious breaches of international humanitarian law under its Nazi leadership to the detriment of people of Italian nationality (Tomuschat, 2011).

#### 3.1. *Ferrini* Case in Italy and Italian Nationals

The facts of *Ferrini* are unfortunately typical of the situation arising in Italy during the German occupation during the latter part of World War II. On August 4, 1944, the applicant, *Luigi Ferrini*, was captured by German troops in the province of Arezzo and deported to Germany where he was forced to work for the war industry until April 20, 1945 (De Sena & De Vittor, 2005). On November 3, 2000, The Court of *Arezzo* decided that Mr. *Luigi Ferrini*'s claim was inadmissible because sovereign state of Germany was protected by jurisdictional immunity (Germany v. Italy, 2012, Para. 27). *Ferrini* turned to The Court of Appeal in Florence which upheld the findings of The Court in the first instance (De Sena & De Vittor, 2005).

#### 3.2. Cases Involving Greek Nationals

The *Distomo* case concerns the recognition of a Greek judgment which ordered Germany to pay damages for a massacre committed against the civilian population of the Greek village *Distomo* during World War II (Finke, 2010). Its judgment could not be executed in Greek because of the Greek Code of Civil about granting permission to enforce the judgment.

This case was then brought before the Supreme Court of Italy, which drew a conclusion which was exactly the opposite of the previous decisions. Thus, the Supreme Court asserted that a foreign state cannot enjoy immunity for sovereign acts which can be classified as international crimes at the same time (De Sena and De Vittor, 2005).

#### **4. The Subject-Matter Of The Dispute And The Jurisdiction Of The Court**

Germany requests The Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany has benefited from international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War. They claimed that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory. It has also breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those that gave rise to the claims brought before Italian courts. Consequently, the applicant requests The Court to declare that Italy's international responsibility is engaged to order the respondent to take various steps by way of reparation (*Germany v. Italy*, 2012, Para. 37)

#### **5. The Court judgment**

The Court considers that Italy has violated the jurisdictional immunity within the first three requests by Germany. Germany took the advantage under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945. Italy has also committed violations of the immunity owed by Germany by taking enforcement measures against *Villa Vigoni*. Lastly, Italy violated Germany's immunity by declaring enforceable in Italy Greek judgments (*Germany v. Italy*, 2012, Para. 135)

In its fourth submission, Germany requested The Court to judge and declared that Italy's international responsibility was engaged.

There is no doubt that the violation of certain international legal obligations by Italy entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation is considered below in connection with Germany's fifth and sixth submissions. The Court's ruling thereon is set out in the operative clause. On the other hand, The Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged; to do so would be entirely redundant since that responsibility is automatically inferred from the finding that certain obligations have been violated. (*Germany v. Italy*, 2012, Para. 136)

In its fifth submission, Germany asks The Court to order Italy to take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable by means of its own choosing. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that The Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have an effect; and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect. (Germany v. Italy, 2012, Para. 137)

Finally, in its sixth submission, Germany asks The Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945) (Germany v. Italy, 2012, Para. 138).

As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by The Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while The Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which must be assessed on a case-by-case basis by The Court.

In the present case, The Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany's final submissions (Germany v. Italy, 2012, Para. 138).

## **6. The most important criticism on the judgments by The Court**

The quarrel between Germany and Italy ended when The Court issued its judgment. Therefore, once again the international law demonstrated that it can be effective in peacefully resolving the international disputes. However, it seems that the issue hasn't been sufficiently regarded by The Court. Especially, given the fact that the judgment would affect the next events, it was better for The Court to add some other points regarded by the judges to its judgment. Some opposite comments by The Court indicates the reality that the ideas and judgments of The Court couldn't be completely accepted and there are some criticisms on them.

### **6.1. The Serious Violations Of Human Right**

The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human right law or the international law of armed conflict. In reaching that conclusion, The Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the Courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case. (Germany v. Italy, 2012, Para.91)

Judge Trindade in his dissenting opinion mentioned: "The threshold of the gravity of the breaches of

human right and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals. It is indeed important that all mass atrocities are nowadays considered in the light of the threshold of gravity, irrespective of who committed them. Criminal State policies and the ensuing perpetration of State atrocities are not to be covered up by the shield of State immunity.” (Trindade, 2012, Para. 303) “What jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice. What troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims’ search for justice? When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose.” (Trindade, 2012, Para. 305) “Grave breaches of human right and of international humanitarian law, amounting to international crimes, as anti-juridical acts, are breaches of *Jus cogens*, which cannot simply be removed or thrown into oblivion by reliance on State immunity.” (Trindade, 2012, Para. 306) “Even in the domain of State immunities, there has been acknowledgment of the changes undergone by it, in the sense of restricting or discarding such immunities in the occurrence of those grave breaches, due to the advent of the international law of human right, with attention focused on the right of access to justice and international accountability.” (Trindade, 2012, Para. 311) “There is nowadays a growing trend of opinion sustaining the removal of immunity in cases of international crimes, for which reparation is sought by the victims. In effect, to admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time to insist on shielding States with immunity, in cases of international crimes (marked by grave violations of human right and of international humanitarian law) in pursuance of State (criminal) policies, amounts to a juridical absurdity.” (Trindade, 2012, Para. 312) “The right of access to justice *lato sensu* is to be approached with attention focused on its essence as a fundamental right, and not on permissible or implicit “limitations” to it.” (Trindade, 2012, Para. 313) “*Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity. On the basis of all the aforesaid, my firm position is that there is no State immunity for international crimes, for grave violations of human right and of international humanitarian law. In my understanding, this is what the International Court of Justice should have decided in the present Judgment.” (Trindade, 2012, Para. 316)

Judge Yusuf, also in his dissenting opinion, critiqued the Court point of view and in his final observations mentioned: “The core issue in this dispute was not that in each and every case of an alleged violation of human right or humanitarian law, immunity should be derogated from, or that there is, generally speaking, a human right or humanitarian law exception to jurisdictional immunity. The core issue was whether in those exceptional circumstances where immunity may prevent the victims of international crimes from obtaining an effective remedy or where no other means of redress is available; such immunity should be granted or set aside by domestic courts.” (Yusuf, 2012, Para. 56)

Although some of The Court’s ruling appears questionable, state practice and *opinio juris* simply favored Germany’s cause in the present case, at least in the majority’s opinion. Judge Yusuf held a different view. Perhaps he went too far in calling that state practice merely ‘fragmentary’ and ‘unsettled’, although his main point is well made. Restrictive immunity is no longer a controversial doctrine, although it was originally. A handful of progressive nations incubated the concept in their judiciaries for many years before it gained critical mass. The human right exception is still a relatively new concept. Who is to say which other nations may have adopted it in the future, had the matter not gone to the Court? We may never know, as *Germany v Italy* will likely pose a significant hurdle to the doctrine’s future development. Customary international law by its nature follows a haphazard evolutionary course, often growing slowly in relative isolation before it gains broader acceptance. It is an organic process, which some might say The Court, in *Germany v Italy*, has artificially cut off, while others will say it has merely provided determinacy in the law. (Walker, 2012:256-257)

## 7. General Approach of The Court Judgment

The judgment of the ICJ in the matter relating to Jurisdictional Immunities of the State supports the Court's position as a guardian of the *status quo* of international law. The Court made it clear that it does not see its role as promoter of a specific progressive judicial policy, but as an institution adjudicating disputes between states on the basis of a positivist analysis of public international law. This may be a relief to many but a disappointment to some (Krajewski & Singer, 2012).

The Court considers the actions of the armed forces of a country outside its territory as the *Jure imperii* which are immune from the foreign courts jurisdictions. Having discovered the procedures of the governments, The Court found two cases which didn't make the government's internal courts immune from pursuit in relation to extraterritoriality action, especially for the courts in Greece and Italy. The Court stated that the Greek and Italian courts performed exceptionally. And with respect to the customs established in the international law, these exceptional procedures couldn't be considered as a new rule in international customary law. Immunity is a preliminary issue, however, when it is claimed that the violation is significant, it is required to enter into the nature of the claim and these indicate that the immunity and *Jus cogens* are not considered as separated issues.

The Court stipulates that the normal hierarchy emerged among the rules of international law is substantive. But, immunity is procedural and the relationship between government's immunity and *Jus cogens* of the international law is not hierarchical and they do not conflict with each other. Therefore, The Court announced that individuals' accessibility to Jurisdiction or right of remedy are not related to governments' immunity. The Court notes that enjoying immunity does not legally require predicting the necessary arrangements and solutions for indemnification, and the government is not required to create the necessary mechanisms and solutions for indemnification of the victims for enjoying the immunity.

Obligations of the human right is "*Erga omnes*". If the obligations are violated, the international regulations could be cited in order to use reciprocal measurements. In its well-known resolution in 1998, titled as protecting human right and not interfering in internal affair of governments, the international law Institute considered the governments' obligations to insure observation of the human right derives from recognition of the human dignity as proclaimed in the charter and the universal declaration of the human right. The resolution contends that these obligations are the "*Erga omnes*"; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human right (Art, 1) In this case, in its resolution in 2005, entitled as "Obligations and rights *Erga omnes* in international law", the institute announced that "In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *Erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation" (Art, 3). Should a widely acknowledged grave breach of an *Erga omnes* obligation occur, all the States to which the obligation is owed: (a) Shall endeavor to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; (c) Are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach. (Art, 5)

## 8. Conclusion

We believe that in the case of Germany v Italy, The Court based its investigations on precaution while also regarding the governments' functions and procedures, i.e. the international realities. With *jure imperii* approach, The Court has based its analysis on exigency and maintenance of stability in the international relations. The Court believed that violation of the principles of the international law cannot be a justified base for disregarding immunity and the significant violation of the humanitarian rights cannot be considered as an exception to *Jus cogens*.

Currently, as the international law considers a hierarchy for the norms, and such concepts as *Jus cogens*, obligation *Erga omnes* and international crimes are not issues, The Court can balance between the *jure imperii* of the governments and international justice through resorting to *Jus cogens* which finally lost this opportunity in order to maintain the international stability.

Indeed, the judgment by The Court neglected the fundamental rights of the victims of human right violation including fair trial and judicial indemnification. Enjoying immunity is legally required to predict the arrangements for the necessary solutions of indemnification for the damages due to committing international crimes. Some gaps have been created at the core of the international law because the victims don't have sufficient access to the internal jurisdictions in order to claim their rights of remedy from the governments who violate the principles of human right called as *Jus Cogens*. In such situations, the individuals will face problems in finding a reference to be indemnified and in such cases common understanding of the international law as a protecting source of human right will be weakened. However, the judgment of The Court does not bar development of the rights related to government's immunity. Also, the governments' procedures may regulate the findings of The Court or they may put them away. In such situation, the governments' immunity couldn't be misused as a device for behavioral dictatorship in the domestic and international arenas. Therefore, existence of different limitations on governments' immunity was accepted in legal terms while also completely realistic in objective terms.

Among the constraints for governments' immunity, obliging them to observe the universal values emerge as important issues because this exception on immunity Changes governments' governance and conveys a message stating that the way contemporary world is governed is important and responsiveness to the universal values the most important of which is observance of the human dignity and position seems to get more significance.

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