Hess on Germany v. Italy

State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)

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In this blog, the pronouncement of the judgment of the ICJ in the case *Germany v. Italy* was announced, but no comment has been posted yet. I would like to start a discussion on this judgment and its implications for the development of international law, because this judgment seems a landmark decision to me. My following comments are part of a more comprehensive article (written in German) commenting the judgment which will be published in *IPRax* 3/2012.

1. The Background of the Decision

As the background of the ICJ's judgment is well known to most of the readers of this blog it can be briefly summarised as follows: Since the 1990s, Germany has been sued by many victims of Nazi atrocities in European (and American) courts. The plaintiffs asserted that they had not been fully compensated for losses of the lives of their family members, for their personal injuries, for violations of their personal liberty and for losses of property through the reparation agreements after WW II. A major incentive triggering these lawsuits was the ambiguous wording of the Treaties on the Reunification of Germany (especially the so-called 2+4 Treaty) which stipulated to be "final regarding the legal effects of WW II", but did not comment on the reparation issue. In the late 1990s, German companies were sued in American and German courts for reparations of forced (or more correctly: slave) labour during the war. Finally, these claims were settled by a governmental agreement establishing the Foundation "Remembrance, Responsibility and Future" which provided for compensation for many, but not all victims of Nazi atrocities. Especially those victims who were not compensated initiated additional lawsuits against Germany (and German corporations) in their respective home-states.

In 2000, the Supreme Greek Civil Court gave a judgment against Germany and ordered the compensation of damages (of several million Euros) for atrocities committed by the German Wehrmacht and SS soldiers in the Greek village of

Distomo where almost the whole population was killed in 1944. The Greek Court denied Germany's claim for sovereign immunity for two reasons: First the Court held that the crime committed by the German soldiers was considered a non-commercial tort in the forum state which was no longer covered by state immunity. Secondly, and more importantly, the Court opined that the claims were based on violations of jus cogens and, therefore, Germany was not entitled to immunity. However, two years later a Greek special court declared that this judgment was not to be enforced in Greece. In 2002, the plaintiffs challenged this case law in the ECHR, but without success. In 2004, the Italian Corte di Cassazione, in the *Ferrini*-decision gave judgment against Germany and denied the immunity for the same reasons: first because the crimes had been committed by the soldiers of the German Reich on Italian soil and secondly, because the atrocities were qualified as war crimes and crimes against humanity belonging to jus cogens. According to the *Ferrini*-decision, jus cogens overrules state immunity which cannot bar the victims' civil action for damages. In 2008, the Corte di Cassazione rendered two additional judgments against Germany which confirmed that Italian courts had jurisdiction over Germany in compensation cases for war damages. Since 2005, the Greek claimants sought the enforcement of the Distomo decision in Italy and, finally, seized the Villa Vigoni, a property of the German State near the Lac Como which is used for cultural exchanges.

In 2008, Germany initiated proceedings in the ECJ under the European Convention on the Peaceful Settlement of Disputes of 1957 which confers the ICJ the jurisdiction for disputes among the Contracting parties on the interpretation of international law. Italy counterclaimed for war damages, but the ICJ rejected this counterclaim in 2010 as inadmissible because the European Convention of 1957 did not confer jurisdiction on disputes which arose before its entry into force. Finally, Greece intervened in the proceedings in order to "protect" the judgments of its courts and the ICJ permitted this intervention.

2. The Arguments of the ICJ

On February 2, 2012, the ICJ found by a majority of twelve to three judges that Germany's right to sovereign immunity had been infringed by the decisions of the Italian courts and by a majority of fourteen to one vote that the enforcement measures against the Villa Vigoni equally infringed Germany's sovereign immunity from enforcement measures. The majority opinion was written by President *Owada*; only the dissent of *Cancado Trindade* asserted that

international law generally privileges human rights claims. Accordingly, the fundamental issue before the court was the relationship between jus cogens and state immunity. The importance of the decision is underlined by its clear outcome: although recent decisions of the ECtHR on the relationship of human rights protection to state immunity (*ECtHR, Al Adsani v. United Kingdom*, ECHR-Reports 2001-XI, p. 101, *Kalegoropoulou v. Germany and Greece,* ECHR Reports 2002 X-p.417), had been given by very small majorities (of only one vote), the majority of the ICJ is clear and unambiguous. The majority opinion on jurisdictional immunity unfolds in three steps: first, it enounces the importance of state immunity as a principle of the international legal order and derives from this premise thatItaly must demonstrate that modern customary law permits a limitation of state immunity in the situation under consideration. Secondly, the Court scrutinises whether there is an exception from immunity in the case of tortuous conduct committed by foreign troops in the forum state. Thirdly, the Court addresses the issue of whether the violation of a peremptory norm (jus cogens) demands an exception from state immunity. The argument of the majority is based on a positivist approach to customary international law which can be summarised as follows:

2.1 Setting the Scene: State Immunity as a Fundamental Principle of International Law

The majority opinion acknowledges the importance of state immunity as a principle of the international legal order which is closely related to the principle of the sovereign equality of States, and in addition recognises that present international law distinguishes acta jure imperii and acta jure gestionis, Furthermore the Court states that the dispute depends on the determination of customary international law in this area of law. However, the Court notes that the underlying atrocities of the troops of the German Reich clearly were acta iure imperii, regardless of their unlawfulness. Consequently, the Court states thatItalymust prove that customary international law provides for an exception from state immunity in the present case.

2.2 The Territorial Tort Principle

The Court addresses the first argument ofItalythat the jurisdiction of the Italian courts could be based on an exception from state immunity in cases where the defendant state caused death, personal injury or damage to property on the

territory of theforumState, even if the act performed was an act jure imperii. In this respect, the ICJ carefully reviews the pertinent practice and opinion juris which it finds in international conventions, national legislation and court decisions on this issue. The result, however, is unambiguous: with the exception of the Italian case law (and the Distomo decision which the Court considers overruled), there are almost no cases holding such an exception – although the ICJ cited several judgments which expressly stated that foreign troops on domestic soil still enjoy full immunity – even in the case of tortuous conduct.

2.3 State Immunity and jus cogens

The most important part of the judgment deals with the relationship between state immunity and jus cogens. Again, the findings of the Court are rigid and succinct: It starts by expressing doubts on the argument that the gravity of a violation entails an exception from immunity. According to the Court, immunity from jurisdiction does not only shield the State from an adverse judgment, but from the judicial proceedings as such. However, an exception based on the "gravity of the violation of law" would demand an inquiry of the court on the existence of such gravity. Here, the Court differentiates between State immunity as a procedural defense and the (asserted) violations of international law which belong to the merits of the claim. In a second step, the Court inquires whether State practice supports the argument that the gravity of acts alleged implies an exception from immunity. Again, the Court does not find sufficient evidence for a new rule of customary law in this respect.

The distinction between procedure and substance is also used as the main argument against the assertion that jus cogens overrules state immunity. Again, the argument of the ICJ is unambiguous: There is no conflict of rules, because the rules address different matters: procedure and substance. The peremptory character of the norm breached does not per se entail any remedy in domestic courts. According to the ICJ, the breach of a peremptory norm of international law entails the responsibility of the state under international law, but does not deprive it from its claim for sovereign immunity (in this respect, the Court refers to its judgment in the Arrest Warrant of 11 April 2000, Congo v. Belgium, ICJ Reports 2002, p. 3 paras 58 and 78). Again, the Court quotes case law of national and international courts where the plea of immunity had been uphold in cases of violations of ius cogens.

The last part of the judgment addresses the so-called last resort argument: according to argument Italy asserted that the denial of immunity was the only way to secure compensation to the various groups of victims not included in the international reparation regime after WW II. Although the ICJ notes – with "surprise and regret" that the so-called Italian internees have been excluded from compensation, it nevertheless reiterates the argument that immunity and state responsibility are entirely different issues. The ICJ concludes that there is "*no basis in State practice from which customary international law is derived that international law makes the entitlement of a State dependent upon the existence of alternative means of securing redress.*" (no 101). Furthermore, the Court sticks to the adverse practical consequences of such situation as the domestic courts would be called to determine the appropriateness of international reparation schemes for the compensation of individual victims. Finally the Court states that it is well aware of the fact that its conclusions preclude judicial redress for the individual claimants, but recalls the State parties to start further negotiations in order to resolve the issue.

3. Evaluation

3.1 The Methodological Approach of the ICJ

The line of argument of the ICJ demonstrates a positivist approach mainly based on the determination of customary international law. According to this approach, the argument based on legal theory that the international legal order had changed and a new exception of state immunity was imminent, was not decisive. The majority of the Court held that any asserted change of the established rule on state immunity required the determination that such change was supported by state practice and opinion juris – consequently, the majority does not quote any scholarly opinion . The dissent of *Cancado Trindade* is different in its methodology and its conclusions: it is based on the idea that a new international constitutional order is emerging which is aimed at the enforcement of human rights. The dissent bases its argument on the opinion of international institutions and reputable scholars, not – as did the majority – on state consent. In this respect, the opinion of the majority is more conservative, but reflects much more the present state of international law. These considerations may explain the clear majority of the judgment which is supported by 12 of the 15 judges.

3.2 The Lacking Reference to American Case Law in the ICJ's Judgment

The practical consequences of the positivist approach of the majority are twofold: as the determination of state practice was decisive, the Court had not to review the line of arguments of national court decisions, but mainly focus on the outcome of these decisions. Accordingly, the Court could refrain from evaluating the different arguments used by domestic courts. However, there is some evaluation of state practice in the opinion of the majority: the ICJ gives considerable weight to national decisions which were supported by the European Court of Human Rights and improves the (indirect) dialogue of international courts and tribunals on the coherent application and development of international law. The opinion even quotes literally parts of the judgments of the ECtHR.

On the other hand, the ICJ does not refer to decisions on state immunity which are mainly based on the application of domestic law. However, it comes as a matter of surprise that the (pertinent) practice of American courts does not appear in the judgment – even the pertinent and prominent case *Amerada Hess v. Argentina*, or *Hugo Princz v. Germany*. The striking absence of American case law may be explained by the attitude of American courts to interpret international law via the lenses of domestic doctrines like the Alien Tort Claims Act and comity. However, according to the ICJ's decision in Germany v. Italy, sovereign immunity is not a matter of comity (as it is sometimes asserted by American authors), but directly determined by customary international law. Regarding the American practice, the Court simply noticed that the exception from immunity for "state sponsored terrorism" as provided for in 28 USC § 1605A "has no counterpart in the legislation of other states" and, therefore, was not considered relevant for the development of state immunity under international law (no 88). The question remains, however, whether national laws on State immunity which deviate considerably from international customary law in this field are compatible with international law.

3.3 The Impact of the Judgment on the so-called International Human Rights Litigation in Domestic Courts

One important aspect of the judgment relates to the individual's right of access to a court and its relationship with state immunity. In this respect, the findings of the Court are twofold: first, the Court does apparently not consider this fundamental right of the individual as part of jus cogens. Furthermore, the Court notes that public international law does not confer an individual right for full compensation to victims of war atrocities, but refers to set-off and lump sum

agreements in the context of war reparations which clearly demonstrate that international law does not provide for a rule of full compensation of the individual victim from which no derogation is permitted (no. 94). These findings are important with regard to doctrinal thinking as advocated by authors like *H.H. Koh, J. Paust* and *B. Stephens* on the decentralised enforcement of human rights by civil courts. According to these authors, domestic courts shall actively implement peremptory human right laws in a decentralised way. This idea is – to some extent – borrowed from the case law of the ECJ which refers to national courts of EU-Member States as decentralised European courts. According to the present judgment of the ICJ, the situation in international law is distinct when foreign states (and their agents) are targeted: In this case state immunity sets the limits and does not provide for any jus cogens exception.

However, the issue remains to what extent individuals or corporate actors may be sued for damages instead of the foreign state. Permitting these lawsuits (based mainly or even solely on international law) logically contradicts to the procedural bar of these lawsuits against the main actors (the States) under international law. However, the possibility remains to base such lawsuits on the private law of torts which applies to tortuous and criminal actions among private persons. In this respect, further clarification is needed and the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum* is imminent. It is hoped that the U.S. Supreme Court will take the ICJ's judgment in the present case into account.

Finally, it should be noted that the ICJ's landmark decision on State immunity does not exclude the possibility that domestic courts refer to international law when determining legal obligations of their own governments and administrations under international law. The same considerations apply to criminal responsibility of individuals under international and under domestic criminal law.