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# *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*

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## **Abstract**

*In the Ferrini case the Italian Supreme Court affirmed that Germany was not entitled to sovereign immunity for serious violations of human rights carried out by German occupying forces during World War II. In order to reach this innovative conclusion, the Court widely referred to international legal arguments, such as the concept of international crimes, the principle of primacy of jus cogens norms and the notion of a strict analogy between state immunity and the 'functional immunity' of state officials. Based upon a systematic interpretation of the international legal order, the Court conducted a 'balancing of values' between the two fundamental international law principles of the sovereign equality of states and of the protection of inviolable human rights. This article explores the Court's reasoning and its consistency with international legal theory and preceding case law with the view to verifying whether, and in which sense, the Ferrini judgment may facilitate a radical reappraisal of the relationship between human rights and the law of state immunity.*

## **1 Introduction and Outline**

The recent judgment of the Italian Supreme Court (*Corte di Cassazione*) in *Ferrini v. Federal Republic of Germany*,<sup>1</sup> which asserted Italian jurisdiction over Germany in a case

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<sup>1</sup> *Corte di Cassazione (Sezioni Unite)*, judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004, 87 *Rivista di diritto internazionale* (2004) 539. For an initial favourable commentary, see Ronzitti, 'Un cambio di orientamento della Cassazione che favorisce i risarcimenti delle vittime', 14 *Guida al diritto* (10 Apr. 2004), 38; for a different opinion, see Baratta, 'L'esercizio della giurisdizione civile sullo Stato straniero autore di un crimine di guerra', 54 *Giustizia civile* (2004) 1200. For a deep and analytical commentary see also Giannelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini', 87 *Rivista di diritto internazionale* (2004) 643.

deriving from the actions of the German occupying forces during World War II, is significant for at least three reasons.

Firstly, the *Ferrini* case constitutes the first case in which the Italian courts have addressed the controversial issue of the relationship between the international rule on foreign state immunity and fundamental human rights norms, expressly invoked by the applicant. This issue has been widely discussed among scholars in recent years,<sup>2</sup> focusing mainly on US decisions<sup>3</sup> and, more recently, on the Greek Supreme Court decision in the *Prefecture of Voiotia v Federal Republic of Germany* case.<sup>4</sup> Among these decisions, beginning with the 1980 *District of Columbia* judgment on the political assassination of Orlando Letelier,<sup>5</sup> there has been no shortage of judgments concerning crimes committed by German occupying forces during the last war, including for

<sup>2</sup> For a critical review of this discussion, see De Vittor, 'Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali', 85 *Rivista di diritto internazionale* (2002) 573. Among the authors particularly dealing with this topic in recent years, see especially Bianchi, 'L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international' 108 *RGDIP* (2004) 63; 'Sovranità dello Stato, giudice interno e gravi violazioni dei diritti dell'uomo', 18 *Ragion Pratica* (2002), 27, and 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J Publ Int'l L* (1994) 195; Flauß, 'Droit des immunités et protection internationale des droits de l'homme', 10 *Revue suisse de droit international et européen* (2000) 299; Ress, 'The Changing Relationship between State Immunity and Human Rights', in M. de Salvia and M. Villiger (eds.), *The Birth of European Human Rights Law – L'élosion du Droit européenne des Droits de l'homme, Liber Amicorum Carl Aage Norgaard* (1998), at 175; Karagiannakis, 'State Immunity and Fundamental Human Rights', 11 *Leiden J Int'l L* (1998) 11; Gavouneli, 'War Reparation Claims and State Immunity', 50 *Revue hellénique de droit international* (1997) 595; J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997); Gergen, 'Human Rights and the Foreign Sovereign Immunities Act', 36 *Virginia J Int'l L* (1995) 765; Belsky, Merva, and Roht-Arriaza, 'Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violation of Peremptory Norms of International Law', 77 *Calif LR* (1989) 365; Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*', 16 *Mich J Int'l L* (1995) 403; Zimmerman, 'Sovereign Immunity and Violation of International *Jus Cogens*: Some Critical Remarks', 16 *Mich J Int'l L* (1995) 433; Kokott, 'Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsvertößen', in U. Beyerlin, *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt* (1995), at 135; Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: a Critique of the Normative Hierarchy Theory', 97 *AJIL* (2003) 741. The problem had previously been well highlighted with specific reference to human rights in Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYIL* (1951) 220, and, from a more general point of view, in R. Quadri, *La giurisdizione sugli Stati stranieri* (1941), in *Scritti giuridici* (1988), I, 239.

<sup>3</sup> The question of state immunity in the case of violations of international law norms has for the most part come before US courts. Among the numerous examples we recall the best known: *Letelier v Chile*, 488 F Supp 665 (DDC 1980), 63 ILR (1982) 378; *Liu v Republic of China*, 892 F Supp 1419 CA 9th Cir (1993), 101 ILR (1995), 519; *Frolova v Union of Soviet Socialist Republics*, 761 F 2d 370 (CA 7th Cir 1985), 85 ILR (1991) 236; *Von Dardel v Union of Soviet Socialist Republics*, 623 F Supp 246 (DDC 1985), 77 ILR (1988) 258; *Argentine Republic v Amerada Hess Shipping*, 102 L Ed 2d 818 (SC 683 1989), 81 ILR (1990), 658; *Nelson v Saudi Arabia*, 923 F 2d 1528 (CA 1991), 88 ILR (1992) 189, reversed by the Supreme Court, 113 S Ct 1471, 87 AJIL (1993) 442; *Siderman de Blake and others v Republic of Argentina*, 965 F 2d 699 (CA 9th Cir 1992), 103 ILR (1996) 454; *Hugo Princz v Federal Republic of Germany*, 813 F Supp (DDC 1992), 103 ILR (1996) 598, overruled by Court of Appeals, District of Columbia Circuit, 26 F 3d 1166 (1994), 103 ILR (1996) 604.

<sup>4</sup> *Prefecture of Voiotia v Federal Republic of Germany*, Supreme Court (*Areios Pagos*), case No. 11/2000, 4 May 2000, published in extract form with comment by Gavouneli and Bantekas, in 95 *AJIL* (2001) 198.

<sup>5</sup> See *supra* note 3.

instance the *Princz* case.<sup>6</sup> Although this issue has recently become prominent in Italian jurisprudence from the point of view of individual responsibility of perpetrators of such crimes,<sup>7</sup> the *Ferrini* case constitutes the first judgment specifically regarding Italian jurisdiction over the German state as such. With the Supreme Court's positive ruling on this question, it would seem reasonable to expect similar suits, with equally positive results, in the near future.

Secondly, the Supreme Court 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 relating to the protection of human rights. 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.

Indeed, as has been pointed out in a number of doctrinal comments, the main defect of the US judgments is the shortage, if not the total lack, of any reference to relevant international norms. It has been argued that it is this very omission which led to the application of the traditional regime of state immunity in these judgments, despite the gravity of the violations of fundamental human rights.<sup>8</sup> On the contrary, the wealth of international law issues referred to in the *Ferrini* decision enabled the Italian Supreme Court to reach very different findings to those of the above-mentioned US cases. Such decision also constitutes an important stage in the development of Italian jurisprudence regarding state immunity, taking into account that the Supreme Court has often been reluctant to provide an evolutive interpretation of general international norms in this field, as illustrated by its hesitation displayed so far in the sphere of employment relationships.<sup>9</sup>

The third and most interesting aspect of the *Ferrini* decision relates to its implications within the broader picture of case law concerning the conflict between the law on state immunity and the norms on the protection of human rights. In excluding

<sup>6</sup> See *supra* note 3.

<sup>7</sup> See the judgment of 22 July 1997 (at *Cassazione penale* [1998] 668) in which the Rome Military Tribunal found two officials of the SS, Erich Priebke and Karl Hass, responsible for the 'Fosse Ardeatine' massacre and affirmed the principle of non-applicability of statutory limitation periods to war crimes and crimes against humanity (see Starita, 'La questione della prescrivibilità dei crimini contro l'umanità', 81 *Rivista di diritto internazionale* (1998) 86).

<sup>8</sup> See Bianchi, 'L'immunité des Etats et les violations graves des droits de l'homme', *supra* note 2, at 66 and 'Sovranità dello Stato, giudice interno e gravi violazioni dei diritti dell'uomo', *supra* note 2, at 28–29. The author underlines the innovative character of the *Voiotia* case, which is also marked by the recourse to international law arguments. See also Reimann, *supra* note 2, at 417 ff.

<sup>9</sup> In this field, the Supreme Court has sometimes referred to the traditional distinction between *acta jure imperii* and *acta jure gestionis* (see *De Ritis v Governo degli Stati Uniti d'America*, judgment No. 3441 of 25 Nov. 1971, 55 *Rivista di diritto internazionale* (1972) 483 ff., and, more recently, *Giamahiriya Araba Libica v Trobbiani*, judgment No. 145 of 16 Jan. 1990, 63 *Rivista di diritto internazionale* (1990) 402 ff.). On other occasions, however, the same Court upheld the jurisdiction of the Italian courts in relation to the patrimonial aspects of actions brought by Italian citizens employed in Italy by a foreign state (see *Consolato generale britannico in Napoli v Toglia*, judgment No 2329 of 15 May 1989, 72 *Rivista di diritto internazionale* (1989) 687 ff.; *Ecole Française de Rome v Guadagnino*, judgment No 8768 of 9 Sept. 1997, 34 *Rivista di diritto internazionale privato e processuale* (1998) 816 ff., 9 *Italian Yearbook of International Law* (1999) 152 ff.. See B. Conforti, *Diritto internazionale* (6th ed. 2002), at 251–252.

the applicability of the traditional regime of foreign state immunity with regard to ‘international crimes’, this decision would clearly seem to represent a real reversal of the established trend in the previous case law. Despite the recent decision by the Greek Supreme Court in the *Prefecture of Voiotia v. Federal Republic of Germany*,<sup>10</sup> the ‘progressive’ conclusion reached by the Italian Supreme Court has found a parallel in only a few judgments by US courts, which, furthermore, have been regularly overturned by the Supreme Court.<sup>11</sup>

On this ground it appears necessary to ascertain whether the *Ferrini* decision can really bring about a general *revirement*, as regards the relationship between state immunity and human rights, reaching beyond the concrete hypothesis the judgment refers to.

This paper aims to explore such issue. For this purpose we will start with a brief overview of the facts behind the lawsuit as well as a summary of the logical and legal stages leading up to the decision (Section 2).

Then we will proceed to a close and critical examination of the legal arguments upon which the reasoning of the Supreme Court is founded. In this regard, we will take a detailed look into the meaning of the fact that the *locus commissi delicti* coincided, in the *Ferrini* case, with the Forum State (Section 3). Then we will examine both the definition of the acts committed by Germany as ‘international crimes’ (Section 4) and the role of having recourse to the concept of *jus cogens* (Section 5). Finally we will deal with the analogy set up by the Court, with regard to international crimes, between state immunity and so-called functional immunity (Section 6). In the concluding section we will put forward some considerations about the actual relevance of the *Ferrini* decision from the point of view of the relationship between customary international law on state immunity and human rights (Section 7).

<sup>10</sup> The decision of the Greek Supreme Court was to some extent contradicted by the same Court, which refused judicial execution against German assets, lacking the authorization of the Ministry of Justice under Art. 923 of the Code of Civil Procedure (decisions Nos. 36 and 37 of 28 June 2002). As a consequence of this, an application was made to the European Court of Human Rights, alleging violation of the right to the execution of a final judgment guaranteed by Art. 6(1) of the Convention. The Court, however (in line with the previous *Al-Adsani* case), denied that the Greek government’s behaviour could constitute a violation of the Convention, and declared that there were no grounds for appeal (Application no. 59021/00, *Kalogeropoulou and others v Greece and Germany*, 12 Dec. 2002, available at [www.coe.int.echr.int](http://www.coe.int.echr.int)).

<sup>11</sup> See *Amerada Hess Shipping Corporation v Argentine Republic*, 830 F 2d 421 (CA 2nd Cir 1987), 79 ILR (1989), 8, referring to the violation of non-peremptory norms, subsequently reviewed by the Supreme Court: *supra* note 3. As for official acts of torture, see the Court of Appeals decision for the 11th circuit of 21 Feb. 1991 in the *Nelson v Saudi Arabia* case, subsequently rejected by the Supreme Court on 23 Mar. 1993, both cited *supra* note 3. In the *Princz* case, after an original decision upholding US jurisdiction, the Court of Appeals held in favour of German immunity (*supra* note 3). In the *Letelier, Liu, and Von Dardel* cases (*supra* note 3), there was no appeal to the Supreme Court. Save for the *Letelier* case, which was settled by an international agreement between Chile and the United States (*Agreement between the United States and Chile with regard to the dispute concerning responsibility for the deaths of Letelier and Moffit* 31 ILM (1992) 3), these decisions remained unexecuted because the respondent state refused to recognize their legitimacy. The judgments applying the 1996 *Antiterrorism and Effective Death Penalty Act* (in 36 ILM (1997) 759) seem to be of little relevance, given that such Act is *lex specialis*, only applicable in particular cases (see *infra* section 5).

## 2 Presentation of the *Ferrini* Case and the Line of Reasoning Followed by the Supreme Court

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 4 August 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 20 April 1945. On 23 September 1998, Ferrini petitioned the Court of Arezzo for reparation from Germany for physical and psychological harm due to the inhuman treatment he was subject to while imprisoned. However, the Court of First Instance applied the international norm guaranteeing foreign state immunity for all acts carried out by states in the exercise of their sovereign powers. Thus, the Court held that the Italian courts had no jurisdiction in this matter.<sup>12</sup> To this end, the Court considered that, even though the treatment inflicted on Ferrini could be considered a war crime in accordance with the international law of the time,<sup>13</sup> the German acts were of a sovereign nature.<sup>14</sup>

Ferrini turned to the Court of Appeal in Florence, which upheld the findings of the Court of First Instance. The appellant's case was then brought before the Supreme Court, 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.<sup>15</sup>

The Court reached such conclusion by strictly focusing on the four arguments proposed by Ferrini, which need to be briefly examined.

The first of these arguments involved the application to this case of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (today replaced, except for Denmark, by Council Regulation 44/10 of 22 December 2000). The appellant argued that the Convention's provisions prevailed over the customary rule on state immunity. Without analysing the merits of this issue, the Court wholly rejected this argument, pointing out that the Convention is not applicable to suits relating to sovereign acts, in line with consistent jurisprudence of the European Court of Justice.<sup>16</sup> On this basis the Court rejected the connected third argument proposed by the applicant, according to which the Court should refer the case to the European Court of Justice.<sup>17</sup>

<sup>12</sup> Tribunale di Arezzo, decision No. 1403/98 of 3 Nov. 2000, unpublished.

<sup>13</sup> *Ibid.*, at 27.

<sup>14</sup> *Ibid.*, at 23–24. The Court reached such conclusion on the basis of the need to distinguish between individual and state responsibility, wholly unlike the reasoning which would be followed by the Supreme Court (see *infra* sections 6 and 6A).

<sup>15</sup> Para. 9 of the judgment; on this point, see *infra*, section 4.

<sup>16</sup> Para. 2.1 of the judgment. The Supreme Court referred to the decisions of the European Court of Justice (ECJ) in Case 29/76 *LTU* [1976] ECR 1541, Case 814/79 *Rüffer* [1980] ECR 3807, and Case C-172/91 *Volkert Sonntag* [1993] ECR I-1990.

<sup>17</sup> Para. 3 of the judgment. The principle whereby even courts of last resort can legitimately abstain from referring a question of interpretation to the ECJ every time the conclusion is 'so obvious as to leave no reasonable doubt' has been stated several times by the same Court (see, e.g., the judgment in Cases 28 to 30/62 *Da Costa* [1963] ECR 31, and Case 283/81 *CILFIT* [1982] ECR 3415).

The second argument was based upon questioning the customary nature of the state immunity rule, and its subsequent application in Italian law by virtue of Article 10 of the Italian Constitution. This argument was also rejected by the Court, which asserted that there could be no doubt concerning the ‘existence of a *customary* norm of international law obliging States to abstain from exercising jurisdiction against foreign States’.<sup>18</sup> Nonetheless, the Court went on to affirm that this norm, which initially was ‘absolute in nature, in that it granted foreign State full immunity, . . . has become, and continues to become, gradually limited’.

The latter consideration is particularly significant, as on this basis the Supreme Court discussed the fourth and main argument proposed by the appellant, namely, whether the immunity principle must apply even here. In this regard, the Court began by citing a number of precedents in Italian and foreign jurisprudence, where the principle of immunity of foreign sovereign activities, and especially of those activities strictly connected to warfare, had been applied.

Among Italian rulings, the Court firstly quoted its earlier decision No. 530 of 3 June 2000, in which it established that Italian courts could not exercise jurisdiction over the training activities of the United States armed forces on Italian territory.<sup>19</sup> Furthermore, a specific reference was made to the order (*ordinanza*) of 5 June 2002, concerning the bombing of the Serbian Broadcasting Headquarters on 23 April 1999, during the NATO operations against the Federal Republic of Yugoslavia. In this case the Court reiterated that no Italian judge has jurisdiction over government choices relating to the way hostilities are carried out.<sup>20</sup>

Among foreign rulings, the Court referred to the judgment delivered by the Irish Supreme Court on 15 December 1995 in the *McElhinney* case. This judgment was fully in line with the findings reached in the two Italian cases cited above. Indeed, the Irish Court granted immunity to the United Kingdom for police activities carried out only partially on Irish territory.<sup>21</sup>

Since all of these decisions came down in favour of the traditional rule on state immunity, the Court was forced to underline some legally relevant elements used to justify the opposite solution adopted in the *Ferrini* case. One of these elements was the fact that the event took place in Italy, i.e. on the territory of the forum state.

<sup>18</sup> Para. 5 of the judgment (emphasis in original). In this way the Court showed that it was at variance with theories questioning the customary status of the norms on state immunity (on this issue, see Bianchi, ‘L’immunité des Etats et les violations graves des droits de l’homme’, *supra* note 2, at 69), as well as with those theories affirming that conceding immunity can be seen as mere international *comity* (see the views of H. Lauterpacht, *supra* note 2, at 227, and, more recently, Caplan, *supra* note 2, at 744).

<sup>19</sup> *Presidenza Consiglio dei ministri e Stati Uniti d’America v Federazione italiana lavoratori dei trasporti della provincia di Trento and others*, judgment No. 530, 3 August 2000, 37 *Rivista di diritto internazionale privato e processuale* (2001) 1019.

<sup>20</sup> *Presidenza Consiglio ministri v Markovic and others*, order No. 8157, 5 June 2002, 85 *Rivista di diritto internazionale* (2002) 800.

<sup>21</sup> This decision was held to be in conformity with the principle of a fair trial deriving from Art. 6 of the European Convention and from the case law of the European Court of Human Rights: see Application No. 31253/96, *McElhinney v Ireland*, ECtHR judgment of 21 Nov. 2001, available at [www.coe.echr.int](http://www.coe.echr.int) (the otherwise unpublished Irish decision is extensively reported in the Court’s judgment).

However, this aspect of the argument seems to be of secondary importance compared with both the definition of Ferrini's deportation and forced labour as international crimes and as violations of a peremptory rule protecting human rights. The Court actually used the above-mentioned arguments to affirm the existence of an exception to the general rule on state immunity which would justify the exercise of jurisdiction over Germany in the *Ferrini* suits.

According to the Court, the existence of such an exception is further justified in the light of individual responsibility provided for by international law relating to state officials committing international crimes while carrying out official duties. Given that such responsibility constitutes an *exception* to the traditional rule of 'functional' immunity, and the latter rule is an expression of the general principle of state sovereignty, this exception would necessarily extend – in the Court's view – even to state immunity *per se*, which would equally represent no more than a corollary of this general principle.

### 3 The Significance Attributed to the Fact that the Forum State and the *locus commissi delicti* Coincided

The fact that Ferrini was captured on and deported from Italian territory was a relevant factor in the Court's reasoning. This circumstance was taken into consideration only in the latter part of the decision-making process, as an *a fortiori* argument, to bring out the distinction between this case and a number of precedents where it had been 'attested that States were entitled to sovereign immunity even in the case of claims for redress for international crimes'.<sup>22</sup> However, it is well worth examining this point now, in order to assess the real scope of the *Ferrini* judgment.

The reference made by the Court to the fact that Ferrini was captured on and deported from Italian territory (territorial nexus) can be explained by the need to distinguish the case under examination from the *Al-Adsani* case, in which the *English Court of Appeal* had upheld Kuwait's immunity in relation to acts of torture on a British citizen committed by agents of the Kuwaiti Government in Kuwait itself.<sup>23</sup> This decision could not fail to take on a particular significance for the Italian judge too, considering that the European Court of Human Rights confirmed its compliance with the European Convention and with customary international law.<sup>24</sup> Furthermore, its

<sup>22</sup> Para. 10 of the judgment.

<sup>23</sup> *Al-Adsani v Government of Kuwait*, English Court of Appeal, 12 Mar. 1996, 107 ILR (1997) 536.

<sup>24</sup> Application No. 35763/97, *Al-Adsani v United Kingdom*, ECtHR judgment of 21 Nov. 2001, *Reports of Judgments and Decisions* 2001-XI, 117. It is important to note that the Strasbourg Court's judgment has been criticized in the literature, mainly because it seems not to take into due consideration the peremptory nature of the violated norm: see Bou Franch, 'Inmunidad del Estado y violación de normas internacionales de *jus cogens*: el asunto *Al-Adsani* contra el Reino Unido', 18 *Anuario de Derecho Internacional* (2002) 296. For further observations, see de Frouville, 'Chronique de jurisprudence de la Cour européenne des droits de l'homme. Droit à un tribunal et immunités de juridiction (*Al-Adsani c. Royaume-Uni, Fogarty c. Royaume-Uni, McElhinney c. Irlande*)', 128 *Journal du droit international* (2001) 276; Flauss, 'La compétence civile universelle devant la Cour européenne des droits de l'homme', 14 *Revue trimestrielle de droits de l'homme* (2003) 156.

findings were in line with the more or less consistent case law of other countries,<sup>25</sup> also relating to crimes committed by Germany during World War II.<sup>26</sup>

Despite the apparent similarity of the subject-matter, the Supreme Court underlined that such judgments actually dealt with crimes ‘committed in a State *other* than the forum State’, and so differed, in legally important terms, from the specific facts of the *Ferrini* ruling.<sup>27</sup>

From the point of view of the *locus commissi delicti*, the *Ferrini* case can be likened to the only precedent in which a supreme court denied jurisdictional immunity of an occupying state in relation to war crimes and crimes against humanity committed during occupation. Clearly this is the already mentioned *Prefecture of Voiotia v. Federal Republic of Germany* case, in which the Greek Supreme Court affirmed the Greek courts’ jurisdiction to provide a remedy for the relatives of victims of the Diostomo massacre of 10 June 1944 by German occupation forces.<sup>28</sup> On this occasion, the Court denied German immunity applying Article 11 of the European Convention on State Immunity,<sup>29</sup> considered to correspond to customary international law.<sup>30</sup> Moreover, the Greek Court affirmed that the violation of *jus cogens* norms by Germany should be considered as an implied waiver of immunity.<sup>31</sup>

Despite the similarities pointed out between the facts of the *Ferrini* case and those of *Prefecture of Voiotia v. Federal Republic of Germany*, there is no corresponding similarity in the development of the reasoning used in the drafting of the two decisions.

<sup>25</sup> The Court cited the decision of 1 May 2002 of the Ontario Superior Court of Justice in *Housang Bouzari v Islamic Republic of Iran*, 124 ILR (2003) 428, later upheld by the Ontario Court of Appeal judgment of 30 June 2004, and the opinion of Lord Hutton in the *Pinochet* case (see *infra* note 74). The following decisions are also of interest: *Saudi Arabia v Nelson*, *supra* note 3, and *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F 3d 239 (CA 2nd Cir 1996), 113 ILR (1999) 534.

<sup>26</sup> Among civil actions brought against Germany by Jews who had been victims of the Holocaust, see the decision of the court of Appeals in the Federal Republic of *Germany v Prinz*, *supra* note 3, and *Hirsch v State of Israel and State of Germany*, 962 F Supp 377 (SDNY 1997), 113 ILR (1999) 542.

<sup>27</sup> Para. 10 of the judgment (emphasis in original).

<sup>28</sup> See *supra* notes 4 and 10.

<sup>29</sup> European Convention on State Immunity, signed in Basel on 16 May 1972, 11 ILM (1972), at 470. In the Greek Court’s interpretation, shared by the Italian Supreme Court in *Ferrini* (see para. 10.1 of the judgment), Art. 11 would imply an exception to immunity for all crimes committed in the forum state, regardless of whether the respondent state had acted *jure imperii* or *jure gestionis*. On the importance given by the Greek Court to the fact that the event occurred on Greek territory, see De Vittor, *supra* note 2, at 588 (n. 49), which shows the similarity, due to the place of the event, between the case in question, and the decisions in *Letelier v Chile*, *supra* note 3, at 378, and in *Liu v China*, *supra* note 3, at 519.

<sup>30</sup> An exception to the rule of state immunity in civil proceedings for damages caused through a crime committed by agents of a foreign state on the territory of the forum state is provided for in Art. 12 of the ‘Draft Articles on Jurisdictional Immunities of States and Their Property’, approved by the International Law Commission in 1991: *Yearbook of the International Law Commission* (1991), II(2), at 13. Regarding domestic laws on foreign state immunity, see among others, § 1605(5) of the 1976 US *Foreign Sovereign Immunities Act* (63 ILR (1982) 655), and s. 5 of the British *State Immunity Act* 1978 (64 ILR (1983), at 718). For an ample survey of all the domestic laws which provide for a similar exception, see Bröhmer, *supra* note 2, at 96 ff.

<sup>31</sup> More precisely, the Court used this argument only later on, in order to exclude the applicability of another principle, set out in Art. 31 of the same Convention, whereby immunity would have to be guaranteed in any case when the actions were committed in situations involving armed conflicts.

Basing its decision on Article 11 of the European Convention, the Greek Court in no way asserted the existence of a sort of universal civil jurisdiction with regard to violations of peremptory norms of international law. On the contrary, it underlined that the exercise of jurisdiction is possible only as a result of the existence of a connection between the event and the forum state. In this case, the event occurred in Greece and the perpetrators were on Greek territory at the time.<sup>32</sup>

On the other hand, the Italian Supreme Court did not consider the territorial nexus as a determining feature. This is clear, not so much because the *Al-Adsani* and *Housang Bouzari*<sup>33</sup> rulings came in for criticism, being based on the assumption that only an express norm could justify a derogation from the rule of state immunity,<sup>34</sup> but because, at another stage in the *Ferrini* judgment, it is explicitly stated that the principle of universality of jurisdiction for individual international crimes could be extended ‘also to civil actions arising from such crimes’.<sup>35</sup>

In the light of this reasoning, the reference made by the Court to the *locus commissi delicti* does not seem to constitute a sufficient argument for limiting the scope of the conclusion reached in *Ferrini* to the case of tortious conduct occurring only in the forum state. This is all the more evident if we consider the weight the Court gives to the consideration that the alleged violations were held to be both individual international crimes and violations of *jus cogens* norms.

## 4 Defining the Alleged Violations as International Crimes

As mentioned above, with decision No. 8157 of 5 June 2002, in the *Markovic* case, the Italian Supreme Court found that the choice of the manner in which hostilities are carried out constitutes a ‘manifestation of a political function’, with regard to which it is not possible to envisage individual rights.<sup>36</sup> An obvious consequence of the principle thus established was the statement of an absolute lack of jurisdiction in a civil action taken against the Italian Government by relatives of the victims of the bombing of the Serbian Broadcasting Authority by NATO aircraft in 1999. This decision constitutes an important precedent, as the principle of immunity from jurisdiction thus established logically had to be applied also in the *Ferrini* case. In fact, there is

<sup>32</sup> See the references at *supra* note 4, at 199. See also E. de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law’, 15 *EJIL* (2004) 97, at 108 f.

<sup>33</sup> See *supra* note 25.

<sup>34</sup> See the final part of para. 10 of the judgment, where the Court criticizes not only the judgments cited in the text, but also the decision of the ECtHR in *Kalogeropoulos v Greece and Germany* (*supra* note 10), especially regarding the impossibility of carrying out the *Voiotia* judgment.

<sup>35</sup> See the last sentence of para. 9, and para. 12 of the judgment.

<sup>36</sup> See *Presidenza Consiglio ministri v Markovic*, *supra* note 20, at 802. It should be pointed out that this finding has been criticized on the ground of the principle, later also recognized in the *Ferrini* case (at para. 7.1 of the judgment), whereby the freedom of choice of a government is always limited by the legitimacy of the means or methods of warfare, and so there is an individual legal interest that the act be carried out according to law (Ronzitti, ‘Azioni belliche e risarcimento del danno’, 85 *Rivista di diritto internazionale* (2002) 682, at 685; see also Frulli, ‘When are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Markovic* Case’, 1 *J Int’l Crim Justice* (2003) 406).

no question that the acts carried out by Germany occurred in the course of wartime activities and constituted the exercise of sovereign powers.

Nevertheless, the Court observed that ‘the general norms of international law which protect the freedom and dignity of the person as fundamental rights, and which recognize as “international crimes” such behaviour as would seriously damage the integrity of these values’ are an integral part of Italian law. These norms are therefore ‘fully able to set legal parameters for the injury arising from an intentional or negligent act’. In other words, in the Italian legal system, the violation of these norms would imply the violation of a legal right, even with respect to individuals. Furthermore the Court pointed out that the ‘non-justiciable nature of carrying out the administration of the State at the highest level is not an obstacle to the verification of any individual crime committed during the exercise of such power, and the assessment of responsibility, either in criminal or civil jurisdiction’.<sup>37</sup>

In this light 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 figure in customary international law as *international crimes*, since they undermine *universal* values which transcend the interests of single States’.<sup>38</sup> In other words, the Court discussed whether state immunity can be set aside for crimes committed by individuals in the course of hostilities.

From the phrases quoted from the decision so far, it is clear that the Court tended to consider the principles emerging in relation to the repression of individual international crimes and those pertaining to state responsibility together. This is even more evident as the reasoning of the decision continues, when it is asserted that the alleged violations can be considered as international crimes.

In this connection, the Court pointed out that ‘following Resolution 95-I of 11 December 1946, whereby the General Assembly of the United Nations “confirmed” the principles of international law of the Statute and judgment of the Military Tribunal of Nuremberg, both deportation and subjection to forced labour were to be classified as “war crimes” and thus *international law crimes*’. In fact, the Court noted that Article 6, letter *b*) of the Statute signed in London, on 8 August 1945, also included ‘deportation to slave labour’ among ‘war crimes’. Furthermore, in the judgment of the Nuremberg Tribunal on 30 September 1946, it was asserted that even prior to 1939, the rules established by the 1907 Hague Convention on Laws and Customs of War on Land (including the prohibition of imposing labour on the civilian population to services not immediately necessary to effecting occupation<sup>39</sup>), had acquired the status of customary international law insofar as they had been recognized and accepted as binding by all civilized nations.<sup>40</sup>

The definition of deportation and subjection to forced labour as international crimes was also confirmed, in the view of the Supreme Court, by the Principles of International Law adopted by the International Law Commission in June 1950, as

<sup>37</sup> Para. 7.1 of the judgment.

<sup>38</sup> Para. 7 (emphasis in original).

<sup>39</sup> Art. 52 of the Convention Regulations.

<sup>40</sup> Para. 7.2 of the judgment (emphasis in original).

well as by the resolutions of the Security Council establishing the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and by the Rome Statute of the International Criminal Court.<sup>41</sup> Finally, the Court stated that Germany itself recognized the seriousness of the crimes in question with the law of 2 August 2000 establishing the Foundation 'Remembrance, Responsibility and the Future'.<sup>42</sup>

The reference to this law seems to be particularly indicative of the wide-ranging use made by the Court of the concept of international crime, and that resorting to this concept served mainly to underline the exceptional seriousness of the wrongful acts to which Ferrini was subjected. Although it is correct to assert that such law represents the German Government's *de facto* acceptance of responsibility, its actual significance, in terms of defining the alleged violations as international crimes does not appear particularly relevant in the light of the following considerations. Firstly, in the Court's opinion, deporting prisoners and subjecting them to forced labour represented an individual international crime, *even at the time when the violations took place*. Secondly, it should be remembered that the main purpose of the law of 2 August 2000 was to put an end to civil actions brought, especially in the United States, against private German companies which had taken advantage of the deported workers.<sup>43</sup>

Along the same lines, it should also be pointed out that, in a judgment regarding the *civil* responsibility of the state, the Court did not justify the direct application of examples relating to the *criminal* responsibility of individuals committing international crimes. Nor did it investigate the question of charging a state with actions carried out by its own officials or by private individuals (meaning, of course, companies which made use of the 'services' of deported workers).

Finally, the Court did not take into particular consideration the spatio-temporal relevance of a number of the examples it cited. It is in fact clear that what was envisaged by the statutes of the *ad hoc* international criminal tribunals set up in 1993 and 1994, and the Statute of the International Criminal Court of 1998, is indicative of what is considered 'crime' by the international community today, but not necessarily the state of international law when the actions in question were carried out.

It seems, however, that the apparent inconsistencies mentioned above do not challenge the overall reasoning of the Court, if one reflects briefly on the deeper logic it expresses. Actually, this reasoning was not intended to establish a *legal definition* for a given act, but to show its *gravity*. To this end, the Court referred to different kinds of examples to prove that the violations against Ferrini were contrary to *universal values*

<sup>41</sup> Para. 7.3 of the judgment.

<sup>42</sup> *Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'*, 38 *Bundesgesetzblatt*, 11 Aug. 2000, at 1263 (para. 7.4 of the judgment).

<sup>43</sup> Art. 17(2) of the statute states that the first allocation of funds to the Foundation requires as a precondition the establishment of 'adequate legal security for German enterprises'. It should also be noted that the statute was adopted following a bilateral agreement signed by Germany and the United States on 17 July 2000 (text at 39 *ILM* (2000) 1298); this agreement establishes that the Foundation would be 'the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II' (art. 1). On this agreement and the subsequent German law, see Hahn, 'Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg', 48 *Neue Juristische Wochenschrift* (2000) 3521.

shared by the whole international community and how these *values* represent the fundamental principles of the international legal system.

Recognizing the fundamental character of the values on which the violated norms are based constituted the necessary premise for the second part of the Court's reasoning, which aimed to show that the specific facts of the case represent crimes of *such gravity* as to extinguish the immunity of the state. To this end the Court based its argument on Articles 40 and 41 of the Draft Articles on State Responsibility approved by the International Law Commission in 2001,<sup>44</sup> and the *Furundzija* ruling.<sup>45</sup> The Court in fact showed how the requirement to uphold values of particular importance, such as those violated in *individual* crimes, leads to profound changes also in terms of *state* responsibility. It emphasized how the conviction that such grave violations *must* bring about a *qualitatively* different (and stronger) reaction than that arising from other wrongful acts is becoming better established, also in relation to states.<sup>46</sup>

In the light of this, the Court held that the recognition of sovereign immunity to states acting in clear contrast with this system of values would surely be incompatible with a *systematic* and consistent interpretation of the international legal order.<sup>47</sup> This conclusion is wholly independent of the *positive proof* of the existence of a *specific* derogation relating to the traditional regime of state immunity, reflecting relevant international practice.

## 5 Resorting to the Notion of *jus cogens* and Its Consequences on Germany's Sovereign Immunity

The arguments referring to the concept of *jus cogens* are strictly linked to the reasoning which led the Court to define the German violations as international crimes. Again, in other words, the Supreme Court tends to use the concept of *jus cogens* essentially in order to underline the peculiar importance of the *values* protected by the violated norms, and thus the *gravity* of the violations themselves.

An initial confirmation of this can be found in the logical process followed in the *Ferrini* decision, in order to classify the violated norms under *jus cogens*. In this regard, in fact, the Court used concepts of international crime and violation of *jus cogens* norms indiscriminately, showing that it assumed that the two legal categories amount to the same content, as they represent the same *values*.

<sup>44</sup> International Law Commission, *Report on the work of its fifty-third session* (23 April–1 June and 2 July–10 Aug. 2001), General Assembly, Official Records, Fifty-fifth Session, Supp. No. 10 (A/56/10).

<sup>45</sup> ICTY Trial Chamber, *Prosecutor v Furundzija*, case No. IT-95-17/1-T10, judgment of 10 Dec. 1998, at para. 155 (available at [www.icty.org](http://www.icty.org)). Once again, the Supreme Court indiscriminately made use of the practice relating to *state* responsibility and the practice relating to *individual* responsibility for international crimes. Also of note in this regard is that the part of the judgment in the *Furundzija* case cited by the Court, while being general in scope, refers *specifically* to torture, and therefore to a *completely different type* of crime.

<sup>46</sup> Para. 9 of the judgment; it is particularly emphasized that states not directly affected by the violation of a peremptory norm would be obliged neither to recognize situations arising out of such a violation, nor to aid or assist in maintaining such situations (Art. 41 of the Draft Arts. on State Responsibility).

<sup>47</sup> Para. 9.1 and 9.2 of the judgment.

Continuing this line of thought, the Supreme Court underlined that the ‘crimes’ committed by Germany consisted ‘in the particularly grave violation . . . , of the fundamental rights of the human person, whose protection is upheld by *peremptory* norms of international law’<sup>48</sup>. These norms, which are at the pinnacle of the international legal system, ‘prevail over all other norms, either statutory or customary in nature . . . and therefore also over norms concerning immunity’.<sup>49</sup> In this way, the Court would appear to embrace the theory, often shared among scholars, but so far almost always rejected in practice, whereby the *formal* supremacy of the *jus cogens* norms gives them prevalence over all clashing non-peremptory norms, and therefore also over norms concerning sovereign immunity.<sup>50</sup>

On closer inspection, however, what led the Court to deny Germany’s immunity from Italian jurisdiction is not merely the *formal* supremacy of the *jus cogens* category, covering the norms violated in this case, but the *substantial* importance which can be attributed to the *values* protected by these norms, in contrast to the traditional principle of state sovereignty.

Consistently with this premise, the Court first rejected the argument, previously held by the Greek Supreme Court in *Prefecture of Voiotia v. Federal Republic of Germany*, whereby the violation of peremptory norms would constitute an implied waiver of jurisdictional immunity.<sup>51</sup> The Court rejected this opinion via the observation that ‘a waiver cannot . . . be envisaged *in the abstract*, but only encountered *in the*

<sup>48</sup> Para. 9 of the judgment (emphasis in original).

<sup>49</sup> *Ibid.*

<sup>50</sup> The idea that states responsible for violations of *jus cogens* norms would lose sovereign immunity (because of the hierarchical supremacy of such norms) was developed by Reimann, *supra* note 2, at 403 ff. See also Karagiannakis, *supra* note 2, at 19 ff. The essentials of the theory can also be found in Kokott, *supra* note 2, at 135 ff., stating that the loss of immunity is the consequence of the ‘abuse of sovereignty’ caused by the violation of fundamental rights. See also Gergen, *supra* note 2, at 765 ff., who upheld the theory from an international law perspective, while stating that to apply it in the United States would mean amending the Foreign Sovereign Immunities Act. According to Bianchi (‘Denying State Immunity’, *supra* note 2, at 200) guaranteeing sovereign immunity even in the case of the violation of *jus cogens* norms would mean exempting a state from respecting the most fundamental rights. As regards the relevant case law, the concept of losing sovereign immunity because of *jus cogens* violations was held by the District of Columbia District Court in *Princz v Germany*, where the court held that Germany’s violations against the Jews made her an ‘outlaw nation’ and that this meant the loss of any right to the application of the FSIA (*supra* note 3, at 601). However, the decision was overturned by the Court of Appeals, which granted Germany’s immunity (see *supra* note 3). In the context of the FSIA, the theory in question was also rejected by the Court of Appeals for the 9th Circuit in *Sideman de Blake*, *supra* note 3, at 474. In non-US case law, see the English Court of Appeal in *Al-Adsani v Kuwait*, *supra* note 23, at 542 ff. In the framework of the codification of state immunity, the International Law Commission also dealt with this issue; nevertheless the working group on the question noted that ‘in most cases the plea of sovereign immunity has succeeded’ even in the case of action for injury resulting from acts of a state in violation of human rights norms having the character of *jus cogens* (see the *Report of the Working Group on Jurisdictional Immunities of States and Their Property*, 6 July 1999, UN Doc. A/CN.4/L.576, 56 ff.).

<sup>51</sup> *Prefecture of Voiotia v Federal Republic of Germany*, *supra* note 4, at 200. Among scholars, this theory was developed by Belsky, Merva, and Roht-Arriaza, *supra* note 2, at 365 ff. Following reasoning analogous to that for *jus cogens*, the implied waiver is also affirmed in relation to international treaties protecting human rights: see Paust, ‘Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law Under the FSIA’, 8 *Houston J Int’l L* (1985) 65 and K. Randall, *Federal Courts and the International Human Rights Paradigm* (1990), at 96.

*concrete . . .*.<sup>52</sup> This is an all the more valid argument, if we consider that in the case in point, as in all preceding ones, the only manifestation of the will of the defending state is the claim to maintain its own immunity, and this was precisely the reason for the controversy.<sup>53</sup>

In the view of the Italian Supreme Court, resorting to the theory of an implied waiver of immunity seems to be a straining of the truth, due to the need to get round the principle whereby state immunity can be denied only in application of an explicit exception. However, it is precisely this principle which is questioned and consistently challenged in the second part of the Court's reasoning.

In the Court's opinion, the norms on state immunity, like all the other norms of international law, have to be interpreted in a systematic way, in accordance with other principles of the same legal system.<sup>54</sup> It follows that for consistency's sake, further exceptions to immunity, different from those so far established and codified, may be recognized. One of these exceptions results from the need to give 'priority to hierarchically superior norms', (i.e. *jus cogens*), because in this case, recognizing immunity 'would hinder the protection of values whose safeguard is to be considered . . . essential to the whole international community'.<sup>55</sup>

It would seem that the stages of the judgment examined here illustrate clearly that the notion of *jus cogens* is not used in strictly *normative* or *formal* terms. First of all, the Court did not feel the need to give any *specific* evidence of the fact that the highlighted peremptory norms actually permit the exercise of jurisdiction over states responsible for their violation.<sup>56</sup> Secondly, it needs to be said that the Court did not merely assert the priority of these norms over the traditional principle of sovereign immunity, *sic et simpliciter* because of their *formal* supremacy in the hierarchy of sources of international law. Rather, as we have just shown, the Supreme Court felt the need to specify that the refusal to grant Germany immunity from jurisdiction was based on the need to emphasize *substantial* values of international law, such as those regarding respect for the human person. In other words, in the *Ferrini* case, there seems to be a *balancing*

<sup>52</sup> Para. 8.2 of the judgment (emphasis in original). Because of the same consideration, the theory of implied waiver had previously been rejected in the United States by the District of Columbia Court of Appeals in *Germany v Princz*, *supra* note 3, at 610. While referring to the concept of waiver upon signing a treaty (see *supra* note 51), the argument was recognized by the District of Columbia District Court in *Von Dardel v USSR*, *supra* note 3, at 267 ff. It was rejected, however, by the 7th Circuit Court of Appeals in *Frolova v USSR*, *supra* note 3, at 245.

<sup>53</sup> For a critical analysis, see De Vittor, *supra* note 2, at 576 ff. and Bröhmer, *supra* note 2, at 191.

<sup>54</sup> In the words of the Court, 'the legal norms are not, in fact, to be interpreted independently of one another, because they complete and integrate each other, influencing one another in their application' (para. 9.2 of the judgment).

<sup>55</sup> Para. 9.2 of the judgment (emphasis added).

<sup>56</sup> This need is highlighted in Bröhmer, *supra* note 2, at 195. See also Zimmerman, *supra* note 2, at 434 ff. It has to be stressed that the Court specifically cited (at para. 9.1) para. 155 of the judgment of the International Criminal Tribunal for the former Yugoslavia in *Furundžija* (*supra* note 45) to support the existence of a norm envisaging effects at an 'interstate level' of the violation of peremptory norms, and the possibility of victims bringing a case for compensation against a foreign state. However, this did not assume a vital role in the logic of the decision. Further, it is not clear whether in *Furundžija* the argument referred to the *state* or its officials as *individuals*.

of two fundamental principles of international law: i.e., the principle of ‘sovereign equality of states’ (implying the recognition of sovereign immunity) and that of the ‘respect of inviolable human rights’ (which forms the background of the legal regime of international crimes).<sup>57</sup>

This would also appear to bring to light some corollaries in the construction of the decision. First of all, this view leads to a critical assessment of the *Antiterrorism and Effective Death Penalty Act* approved in the United States in 1996.<sup>58</sup> As is widely known, this law provides an exception to sovereign immunity in a few cases of gross violations of human rights, but only if the lawsuit is brought by a US citizen against one of the states which the US Department of State considers a ‘sponsor of terrorism’. The Court found in this a ‘confirmation of the priority which, in the face of particularly grave criminal acts, is nowadays attributed to safeguarding the human person rather than to the protection of the interests of a State’s sovereign immunity’. Yet nevertheless, it pointed out that, referring as it does to only a few countries, the *Antiterrorism and Effective Death Penalty Act* ‘does not seem to coincide with the principle of the “sovereign equality” of States’.<sup>59</sup> In fact, it is clear that the non-recognition of sovereign immunity is the result of balancing the principle of state sovereignty, which is the *same* for all states, and the peremptory norms protecting human rights, which have the *same* value regardless of the nationality of the victim and the perpetrator. This can only lead to a consistent solution, which will only vary, if at all, in terms of the *particular right* being violated, but not in terms of the *diplomatic relations* enjoyed between the forum state and the state violating the norms.<sup>60</sup>

Moreover, there are two other conclusions inherent in the *Ferrini* judgment. In cases like this one, the exercise of *civil jurisdiction* would also take place on the basis of the criterion of universality.<sup>61</sup> Furthermore, we note the conviction, implicitly manifest in the judgment, that the right to redress for damages arising from the alleged violations would not be submitted to statutory limitation, in line with the legal regime relating to such violations under international criminal law.<sup>62</sup> These findings are in fact devoid of any *specific legal argument* in the Court’s reasoning, and may be justified only as consequences of the prevailing *value* recognized in the protection of human rights.

<sup>57</sup> See also para. 9.1 of the judgment. On the principles of ‘sovereignty, independence, equality and dignity of States’ as logical premises of sovereign immunity, see Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 *RdC* (1976-I) 116.

<sup>58</sup> *US Antiterrorism and Effective Death Penalty Act* of 24 Apr. 1996, 36 *ILM* (1997) 759.

<sup>59</sup> Para. 10.2 of the judgment.

<sup>60</sup> For further comments on doubts raised by US legislation as an instrument for the protection of human rights, see De Vittor, *supra* note 2, at 606 f.

<sup>61</sup> See the last sentence of para. 9 and para. 12, and *supra*, section 3 of this article.

<sup>62</sup> Considering that Ferrini started proceedings in the Court of Arezzo in 1998 concerning events which took place in 1944, this is the implied premise of the entire decision, which makes only a passing reference to the conventional norms which confirm the non-applicability of statutory limitation to international crimes. It must be noted, in any case, that this issue will probably be addressed by the Arezzo Court to which the Supreme Court referred the case in order to determine the remedy.

## 6 The Analogy between the ‘Functional Immunity’ of State Officials and State Immunity in the Field of International Crimes

As noted in the second section of this article, the last argument used by the Court in order to justify jurisdiction over foreign states in cases of serious violations of human rights, consists in an appropriate *extension* of the international legal regime provided for international crimes committed by individuals. According to this regime, individual crimes can in fact be prosecuted, even though their authors were acting as state officials, in spite of so-called functional immunity, traditionally recognized by international law in relation to state agents acting in an official capacity.

On closer examination, the Court’s statement on this point can be considered from two complementary perspectives. First of all, one can ask whether the reasoning it expresses is both logically well grounded and in line with the *general* tenets of the relevant practice. Secondly, a similar question may be posed, with more *specific* regard to domestic case law concerning jurisdiction over state officials who have committed international crimes, taking into account that the Supreme Court frequently referred to this case law to bear out the conclusion referred to above.

### A *The Logical Basis for the Above Analogy and the Different Trend of the Relevant Practice*

The logical basis for the analogy outlined by the Court between the loss of ‘functional immunity’ of an official committing international crimes and the exception to the rule of state immunity, which would ensue in the same case, would at first sight seem valid, starting, as the Court did, from the premise that ‘functional immunity’ and state immunity express the *same* international obligation to refrain from the exercise of jurisdiction over foreign states. From this point of view, which is grounded on the attribution to the state of acts committed by state agents (acting) in an official capacity,<sup>63</sup> it seems more than legitimate to refer to the practice relating to the punishment of state officials responsible for international crimes, and to infer from this the possibility of also subjecting foreign states to jurisdiction.

However, it should be observed that the authors favourable to such reasoning do not generally use this argument in most cases. In other words, while allowing that

<sup>63</sup> This approach was originally set out by Kelsen in ‘Collective and Individual Responsibility with Particular Regard to the Punishment of War Criminals’, 31 *Calif LR* (1942–1943) 530, especially at 539–541. ‘Collective and Individual Responsibility for Acts of State in International Law’ [1948–1949] *Jewish Yearbook of Int’l L* 226, at 230–231, and *Principles of International Law* (ed. R.W. Tucker) (1966), at 211 and 358. In the same sense, see P. Guggenheim, *Lehrbuch des Völkerrecht* (1948), at 171 ff., and G. Dahm, *Völkerrecht* (1958), i, at 225, 237, 303 ff., and 325, and, in particular, Bothe, ‘Die strafrechtliche Immunität fremder Statsorgane’, 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaörV*) (1971) 251. More recently, see I. Seidl-Hohenfeldern, *Völkerrecht* (1984), at 312 (see also the previous *Immunität ausländischer Staaten in Straf- und Verwaltungsverfahren*, *Gedächtnisschrift für Hans Peters* (1967), at 922) as well as Herdegen, ‘Die Achtung fremdes Hoheitsrechts als Schranke nationaler Strafgewalt’, 47 *ZaörV* (1987) 221, R. Jennings and A. Watts (eds.), *Oppenheim’s International Law* (1992), i, at 365 ff. and I. Brownlie, *Principles of Public International Law* (5th ed. 1999), at 361.

state immunity and immunity for official acts both express the same international obligation to refrain from the exercise of jurisdiction over foreign states, the widely accepted exception to 'functional immunity' in the case of international crimes is *not* generally invoked to justify an analogous exception regarding state immunity from civil jurisdiction.<sup>64</sup>

This is why the Supreme Court's reasoning, while being logically sound, is rather different from the line of thought it seems to be based on. This impression is reinforced by a number of elements, emerging from the relevant domestic practice and regarding both state immunity from jurisdiction, and the 'functional immunity' of state officials. Unlike the findings of the case under examination, in both the aforementioned sectors one can find indications supporting the idea that 'functional immunity' and state immunity are in fact two legally *distinct* issues in international law.<sup>65</sup>

The case law regarding state immunity shows that the few judgments in favour of jurisdiction in the case of serious violations of human rights are *never* grounded on the *extension* of the legal regime provided for international crimes committed by state agents acting in an official capacity.<sup>66</sup> Parallel to this is the fact that the prosecution of state officials for such crimes does *not* constitute a matter of regulation within the main domestic statutes on state immunity nor within the framework of the Draft Articles on Sovereign Immunity established by the International Law Commission of the United Nations.<sup>67</sup>

Finally, returning to the above-mentioned *Letelier* case, it must be stressed that the prosecution of the Chilean agents responsible for the murder, on US territory, of a former ambassador of the Allende government, remained absolutely undecided in the

<sup>64</sup> On the contrary, there is a tendency to refer the distinction between acts *jure imperii* and acts *jure gestionis* also to the 'functional immunity' of state officials in order to explain the exceptions to this rule: see Bothe, *supra* note 63, at 262 ff. For a criticism of this view see P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996), at 53 ff., and, more recently, A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 869, at n. 42.

<sup>65</sup> Among the supporters of this idea, see R. Quadri, *Diritto internazionale pubblico* (5th ed. 1968), at 616, and W. Wengler, *Der Begriff des Politischen im internationales Recht* (1956), at 19 f., though with differing nuances.

<sup>66</sup> Among the US courts' decisions see, e.g., *Von Dardel v USSR*, *Liu v China* and, especially, *Princz v Germany* (*supra* note 3). In the Greek Supreme Court's judgment in *Prefecture of Voiotia v Germany*, Greek jurisdiction was upheld (despite a fleeting reference to the prosecution of war crimes committed by officials of the occupying state) essentially on the ground that Germany, by breaching *jus cogens* norms, had tacitly waived its immunity (*supra*, section 5; see also Bianchi, *L'immunité des Etats*, *supra* note 2, at 65 ff.; for a different opinion on this point see Giannelli, *supra* note 1, at 656 f.).

<sup>67</sup> On these aspects, see De Sena, *supra* note 64, at 55 ff. and nn. 32 (for an examination of the above statutes) and 34 (for a summary of the debate on this topic among some members of the Commission). A different and favourable conclusion can be found in US case law, with regard to the *different* problem of attributing to the state acts committed by state officials under the FSIA, i.e. with regard to the *civil* consequences of such acts. Even though this possibility is not explicitly set out in § 1603(b) of the FSIA, it is consistently held by the courts: see, e.g., *Chuidian v Philippine National Bank*, 912 F. 2nd 1095 (CA 9th Cir 1990), 92 ILR (1993), 480, especially at 486 ff., and, more recently, *Byrd v Corporacion Forestal y Industrial de Olancho SA*, 182 F. 3d 380 (CA 5th Cir 1999), at 389.

judgment of the Arbitral Commission which settled the dispute between Chile and the United States.<sup>68</sup>

As regards the case law concerning the ‘functional immunity’ of state officials, the tendency to keep this question separate from that of state immunity emerges both from a US judgment of the 1980s and the more recent decision of the House of Lords regarding the *Pinochet* case.

The first of these decisions dates back to 1987 and was adopted by the 9th Circuit Federal Court of Appeals of the United States relating to the *Gerritsen v. De La Madrid Hurtado* case,<sup>69</sup> where the question of the immunity of a number of Mexican consular agents arose. These were charged with having illegally impeded, on US territory, protest demonstrations against the Mexican President of the day. While considering that this action was directly attributable to Mexico,<sup>70</sup> the Court settled the issue by referring only to provisions on the ‘functional immunity’ of consular agents as set out in the Vienna Convention of 1963, and therefore *independently* of any question of the immunity of Mexico from United States jurisdiction.

However, what constitutes, in no uncertain terms, the peculiar character of the Italian Supreme Court’s reasoning about the relationship between state immunity and ‘functional immunity’ in the field of international crimes, is the distance that lies between this reasoning and the position held on the same subject by the House of Lords in the famous *Pinochet* case.<sup>71</sup>

It will be remembered that in this judgment, the UK jurisdiction over the former Chilean head of state was upheld because of the *jus cogens* nature of the crime of torture, for which Pinochet’s extradition to Spain was requested.<sup>72</sup> It was precisely for this reason that the acts of torture ordered by Pinochet were considered international crimes, and so prosecutable in any state, by virtue of the principle of universal criminal jurisdiction and at the expense of the ‘functional immunity’ of state officials.<sup>73</sup>

Despite the room for manoeuvre offered by the use of the *jus cogens* argument, the line followed by the House of Lords did not lead, unlike in the *Ferrini* case, to considering the exception to the ‘functional immunity’ in the case of international crimes extendable, even only in theory, to state immunity. No explicit reference to

<sup>68</sup> As is well known, this dispute arose out of a decision adopted by the District of Columbia District Court wherein US jurisdiction over Chile was upheld for the murder case (for the references to the District Court of the State of Columbia case: *supra* note 3). For the text of the arbitral award which decided the amount of the *ex gratia* payment due to Letelier’s relatives and those of his driver, see 31 ILM (1992), at 5 ff. and *supra* note 11.

<sup>69</sup> *Gerritsen v De La Madrid Hurtado*, judgment of 18 June 1987, 819 F 2d 1511.

<sup>70</sup> It is on this ground that the Court examined the question of applying § 1605(a)(5) of the Foreign Sovereign Immunity Act of 1976, as the events in question gave rise to a civil *tort* on US territory: *ibid.* at 1517–1518.

<sup>71</sup> *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 38 ILM (1999) 581 (House of Lords).

<sup>72</sup> On this point, see the judgments of Lord Browne-Wilkinson (*ibid.*, at 589), Lord Hope of Craighead (*ibid.*, at 622), Lord Hutton (*ibid.*, at 626), Lord Millet (*ibid.*, at 649), and Lord Phillips of Worth Matravers (*ibid.*, at 661).

<sup>73</sup> In particular, see the judgments of Lord Browne-Wilkinson (*ibid.*, at 589) and Lord Millet (*ibid.*, at 650).

this possibility can be found in the text of the *Pinochet* judgment, and the tone of the only two opinions dealing expressly with this problem is absolutely unequivocal. In both Lord Hutton's and Lord Millet's opinions, the conclusion on Pinochet's immunity left wholly open the question of Chile's immunity from jurisdiction in relation to his crimes.<sup>74</sup>

### **B The Analogy between 'Functional Immunity' of State Officials and State Immunity and the Different Trend of Domestic Case Law Regarding International Crimes Committed by State Officials**

The above reference to the House of Lords' decision in the *Pinochet* case thus opens the way for an examination of the second aspect to emerge from the analogy between 'functional immunity' and state immunity as set out in the *Ferrini* judgment. Having seen that this analogy was not recognized in the *Pinochet* case, what can be said concerning the domestic case law on international crimes committed by state officials, which the Supreme Court expressly referred to? Before examining this issue, a few short considerations need to be made on the reasons for referring to domestic case law.

From this point of view, it should be observed straight away that the *Ferrini* judgment has another distinguishing feature which sets it apart from the line taken by the House of Lords in the *Pinochet* case. Even though this judgment directly dealt with the problem of the 'functional immunity' of a former head of state, in relation to acts of torture, it did not, however, contain any reference to relevant domestic case law. Indeed the UK jurisdiction was upheld *solely*, as already stated, on the basis of the *jus cogens* nature of the ban on torture, the possibility of classifying its violations as international crimes, and the incompatibility between the 'functional immunity' rule itself and the repression of the crime of 'official torture' as established by the United Nations Convention of 1984.<sup>75</sup>

The *Pinochet* case aside, the need which the Supreme Court felt to refer to domestic case law, even with reference to international crimes, appears to be *methodologically* appropriate, for at least one reason. In the absence of precedents – judicial or otherwise – in favour of a *specific* exception to state immunity for serious violations of

<sup>74</sup> 'I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. . . . But I am of the opinion that there is no inconsistency between Chile and Senator Pinochet's entitlement to claim immunity if sued in civil proceedings for torture brought against him personally. This distinction between the responsibility of the State for the improper and unauthorised acts of a State official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in article 4 and the commentary thereon in the 1966 Draft Report of the International Law Commission . . .' (Lord Hutton, at 640); 'In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the same reason, attract individual criminal liability' (Lord Millet, at 651). It should be noted, however, that Lord Hutton's opinion was known to the Italian Supreme Court, which, however, attributed this view to the fact that the crimes the dictator was charged with were committed on Chilean territory (at para. 10 of the judgment).

<sup>75</sup> *Supra* notes 71 and 72; for the subjects covered by the Convention on Torture, see the judgments of Lord Saville (at 642 f.), Lord Browne-Wilkinson (at 594), Lord Millet (at 651), and Lord Phillips (at 661).

human rights, having recourse to such case law seems perfectly admissible, especially in view of the line taken by the Supreme Court, whereby sovereign immunity and the ‘functional immunity’ of state officials express the same principle. Save for the famous Israeli Supreme Court judgment in the *Eichmann* case, it should be further borne in mind that the decisions cited by the Supreme Court are consistent on the whole with the *Ferrini* case, given that all of them refer to *civil jurisdiction* over state organs charged with international crimes. In spite of this, no really favourable cues can be found in the domestic case law cited in the *Ferrini* case to justify the findings drawn by the Supreme Court.

This conclusion does not refer to the famous *Eichmann* judgment of the Israeli Supreme Court, relating to the *criminal responsibility* of state officials for war crimes and crimes against humanity. Clearly, in this judgment – which is one of the very few cases where a ‘Major War Criminal’ was tried by a domestic court – Eichmann’s responsibility was interpreted *tout court* as resulting from an exception to the principle of sovereign immunity in the case of gross violations of international law.<sup>76</sup> And it is also clear that such an exception would seem a suitable justification for the exercise of jurisdiction, not only with regard to officials charged with international crimes, but also to the state to whom the crimes may be attributed.

The reasoning behind the *Ferrini* judgment, however, finds no parallel in the US decisions it quotes concerning the exercise of *civil jurisdiction* over officials committing international crimes.

It is well known that in such decisions US jurisdiction was recognized in civil proceedings for damages, derived mainly from acts of official torture committed outside US territory by representatives of the military dictatorships in Southern or Central America.<sup>77</sup> It is equally well known that in all these cases, including those cited in the *Ferrini* case, the US courts reached their findings by applying federal legislation dating back to the end of the eighteenth century – the *Alien Tort Claims Act* – whereby US district courts enjoy ‘original jurisdiction on any civil action, by an alien, for a tort committed in violation of the Law of Nations or a treaty of the United States’, irrespective of whether the wrongful act was committed on US territory.<sup>78</sup>

Yet it is quite another aspect of the reasoning usually followed by US courts on this matter which makes their approach unsuitable for extending the legal regime provided

<sup>76</sup> For the relevant part of the judgment, see 36 ILR (1968), at 308.

<sup>77</sup> For an updated description of this case law, see Bianchi, ‘L’immunité des Etats et les violations graves des droits de l’homme’, *supra* note 2, at 79 ff.; see also De Sena, *supra* note 64, at 167 ff. Among these decisions we can include both the judgment delivered by the Federal Court of Appeals, 9th Circuit, in *In re Estate of Ferdinand Marcos Human Rights Litigation*, concerning acts of torture charged with the daughter of the former Philippine dictator Marcos (32 ILM (1993) 107) and the *Kadic v Karadzic* decision of the Federal Court of Appeals, 2nd Circuit (34 ILM (1995) 1595), regarding a wide range of serious violations (torture, war crimes, and genocide) with which the well-known Serbian-Bosnian faction leader was charged.

<sup>78</sup> On the contrary, §1605(a) of the FSIA provides for US jurisdiction only over civil actions for torts taking place on US territory (the so-called tort exception: see *supra* note 30). For a close analysis of the *Alien Tort Claims Act*, see Simon, ‘The Alien Torts Claim Act: Justice or Show Trials?’, 11 *Boston U Int’l LJ* (1993) 52 and, with specific reference to the famous *Filartiga* case, Blum and Steinhardt, ‘Federal Jurisdiction over International Human Rights: the Alien Tort Claims Act after *Filartiga*’, 22 *Harvard Int’l LJ* (1981) 53.

for international crimes committed by individuals to the issue of state immunity. Rather, in the majority of cases, including the judgments in the *Xuncax*<sup>79</sup> and *Cabiri*<sup>80</sup> cases – expressly referred to in the *Ferrini* judgment – the ground on which US jurisdiction is recognized by virtue of the *Alien Tort Claims Act*, is that the crimes under scrutiny, not being real ‘official public acts’, cannot be attributed to the state to which the charged official belongs; it is because of this that application of the *Foreign Sovereign Immunities Act* is consistently excluded, so that US jurisdiction can thus be exercised directly over the individuals concerned.<sup>81</sup>

In other words, having recourse to this method, to exercise their own jurisdiction over state officials charged with international crimes, US courts show that they are aware that qualifying such crimes as ‘public official acts’ of a certain state, would lead to the immunity of that state from jurisdiction under the *Foreign Sovereign Immunities Act*.<sup>82</sup> It is precisely to avoid such a consequence that they tend to classify these crimes as ‘private acts’, despite forcing the issue with some recently outlined risks.<sup>83</sup>

Therefore, the abovesaid considerations show clearly that, in the logic followed here, the question of sovereign immunity tends to be kept well *apart* from the question of individual responsibility for international crimes. In the light of this, it becomes equally evident why the judgments cited in the *Ferrini* decision could not, in effect, be used by the Supreme Court, given the *strict connection* between ‘functional immunity’ and sovereign immunity on which its findings are, on the contrary, grounded.

<sup>79</sup> *Xuncax v Gramajo* concerning damages arising from a number of serious human rights violations (torture, summary executions, etc.) allegedly committed by a former Guatemalan minister of defence: 886 F Supp (DC Mass. 1995) 162, 104 ILR (1997) 165.

<sup>80</sup> *Cabiri v Assasie Gyimah*, regarding damages deriving from torture allegedly committed by a senior official of Ghana’s security services: 921 F Supp (DC SDNY 1997), 1189.

<sup>81</sup> On this matter, see *ibid.*: ‘The Court finds that the alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority as the Deputy Chief of National Security of Ghana. Therefore, he is not shielded from Cabiri’s claims by the sovereign immunity provided for in the FSIA. In short, the FSIA cannot be applied to this action. Furthermore, the Court has subject matter jurisdiction over this action pursuant to the *Alien Tort Claims Act*, 28 USC § 1330’. For earlier examples of this type of statement, see *Forti v Suarez Mason* (crimes committed by an officer of the Argentinian military regime) 672 F Supp 1531 (DC ND Calif 1987), at 1546; *Paul (et al.) v Avril* (regarding acts of torture and other crimes committed by a former Haitian military leader) 812 F Supp 207 (DC Fla 1993), at 212; *In re Estate of Ferdinand Marcos Human Rights Litigation* (*supra* note 77, at 109 f.).

<sup>82</sup> As mentioned above (*supra* note 67), the US courts tend to qualify acts committed by state officials as acts of a foreign state under §1603(b) of the FSIA, so that if these acts are considered as *jure imperii* as well, they no longer come under their jurisdiction.

<sup>83</sup> It has been pointed out – with specific reference to para. 61 of the decision adopted by the ICJ in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*, judgment of 14 Feb. 2002, available at [www.icj-cij.org](http://www.icj-cij.org)) – that this distinction is not in line with current customary international law, failing to take into account, in particular, the evolution that the traditional rule on ‘functional immunity’ has undergone in this context (Cassese, *supra* note 64, at 870–874). From the point of view of state responsibility, it has been added that classifying international crimes as private actions *tout court* may create serious problems pertaining to the attribution of such acts to the state (Spinedi, ‘State Responsibility v. Individual Responsibility for International Crimes: *Tertium non datur*’, 13 *EJIL* (2002) 895, at 897–899).

## 7 Concluding Remarks

In this paper, we have pointed out that the *Ferrini* judgment is innovative in character, not only because of the *conclusion* reached but also because of the *way* it is reached. Let us now summarize our findings in order to make some observations of more general interest on the consequences of this decision.

The peculiar nature of the *way* the Supreme Court reached its conclusion clearly emerges, in the first place, from the reasoning it followed to show that the principle of state immunity does not apply to international crimes.

In this framework the fact that the crimes committed by German forces – deportation and forced labour – entail *individual* responsibility, overlaps with other considerations relating to *state* responsibility for the violation of *jus cogens* rules. More precisely these two classes of argument were used in a very general way to show that the increasing legal role played by the *value* of human rights protection within the international legal system cannot fail to work *also* in the field of state immunity from jurisdiction.

A similar form of reasoning was chosen by the Court also with regard to the *jus cogens* nature of the violated norms. It has already been seen that the jurisdiction of the Italian courts over Germany was justified, not on account of the actual *content* of such norms, nor as the mere consequence of their *formal* rank, but as result of the *substantial* importance that can be given to the value of human rights protection they are based on.<sup>84</sup> Here too, the conclusion reached seems to be the result of a *systematic* interpretation of the international legal order which makes it permissible to give primacy to the *value* of human rights protection over the *value* of state sovereignty. In other words, it is on this ground that the *Ferrini* decision both differentiates from previous case law and appears to some extent forced, by applying, for example, the principles of universal jurisdiction and the non application of statutory limitation to international crimes to the civil consequences of such crimes as well.

Similar considerations can be made about the analogy drawn in the judgment between ‘functional immunity’ of state officials and state immunity in the field of international crimes. As we have already noted, no trace of this analogy can be found in the jurisprudence referred to by the Court to justify its conclusion on this point. Nevertheless, it seems to be well grounded from a purely logical point of view, if one starts from the premise that ‘functional immunity’ and sovereign immunity are the expression of a single principle which aims to protect state sovereignty.

Starting from this premise, the Supreme Court justified its conclusion, once again, by a systematic interpretation of international law, i.e. referring to the fundamental values of such legal order and the way they are linked, rather than referring to the relevant state’s practice as it has actually evolved. This logic explains the idea whereby the traditional principle of state sovereignty, which *cannot bar jurisdiction* over officials charged with international crimes, should analogously give way, in the opinion of the Supreme Court, *to allow jurisdiction* over a state to which these crimes are attributed. Thus, in spite of the abovesaid references to domestic case law, the

<sup>84</sup> *Supra*, Section 5.

argumentation followed by the Court appears to be actually grounded, here too, *on general principles*, as in the *Pinochet* case.<sup>85</sup>

What now remains to be examined is whether the *Ferrini* case can really be considered a key step in the development of the customary rule on state immunity from jurisdiction in the face of serious violations of human rights. The answer can only be affirmative, as regards the *arguments* used by the Supreme Court. From this point of view, one must note that the Court's reasoning is much clearer and more linear than that of the Greek Supreme Court in the recent *Prefecture of Voiotia v. Federal Republic of Germany* case to deny Germany immunity from jurisdiction, and also the reasoning followed for the same purpose by the District Court of Columbia in the *Princz* case.<sup>86</sup>

Both in the *Prefecture of Voiotia v. Federal Republic of Germany* case, and in the *Princz* case, the decisions adopted were based on arguments which can hardly be considered as the grounds of a (possible) *revirement* of the case law concerning state immunity in the face of serious violations of human rights. Suffice it to mention both the ambiguous concept of the implicit waiver of immunity for violations of peremptory norms, used by the Greek Supreme Court and rightly criticized by the Italian Supreme Court,<sup>87</sup> and the strange idea whereby states committing such violations would be considered as being *outside* of the international legal system, which formed the basis of the District Court of Columbia's ruling in the *Princz* case.<sup>88</sup>

Unlike these somewhat artful arguments, the systematic approach adopted in the *Ferrini* case and the primacy granted to the value of human rights protection over the traditional principle of sovereign immunity represent important *methodological* starting points for the development of future case law.

More problematic considerations arise in assessing the consequences of the *Ferrini* case in terms of *concrete* results and the *specific* characteristics of its subject matter. As regards the first issue, it seems unlikely that the decision on merits which will have to follow the judgment of the Supreme Court will be positive regarding the damages sought by the claimant. Going against this possibility is the fact that the relevant norms of international humanitarian law, upon which the plaintiff is basing his claim, are consistently construed as non-self-executing,<sup>89</sup> irrespective of the fact that

<sup>85</sup> For some brief remarks on the arguments used by the House of Lords in the *Pinochet* case and related references, see *supra*, Section 6B.

<sup>86</sup> Both the abovementioned decisions concerned war crimes committed by German forces during World War II, as did *Ferrini*.

<sup>87</sup> See *supra*, section 5.

<sup>88</sup> *Princz v Germany*, *supra* note 3, at 601; as a consequence, such states should not be granted the protection normally expected from the FSIA.

<sup>89</sup> For this observation, see Ronzitti, *supra* note 1, at 40. It may be pointed out that the Supreme Court suggested a possible solution to this problem, affirming that 'the general norms of international law which protect the freedom and dignity of the person as fundamental rights... are an integral part of Italian law, and they are therefore fully able to set legal parameters for the injury arising from an intentional or negligent act'. This is an implied reference to Art. 2043 of the Italian Civil Code which establishes the right to reparation for any extra-contractual injury, and could be considered a basis for allowing *Ferrini* the damages he sought (for a deeper analysis of this point see Giannelli, *supra* note 1, at 677–682). Nevertheless, it must be stressed that the Supreme Court left to a subsequent judgment 'every issue concerning the existence of the claimant's right' (para. 12 of the judgment).

the decision on merits can easily be subject to judicial execution in Italian law, as the authorization of the Ministry of Justice (*Ministro della Giustizia*) is no longer required.<sup>90</sup>

As regards the second question, it should be borne in mind that the alleged violations constitute war crimes committed during World War II, begun on Italian territory by German military forces and continuing on German territory.

As for the coinciding *locus commissi delicti* and forum state, expressly underlined by the Supreme Court, it has already been pointed out that this does not have a particularly great impact on the *Ferrini* case. Nevertheless, this fact and the *specific* context within which such violations took place, brings the risk that the innovative scope of the *Ferrini* judgment could be objectively diminished.

In other words, it may come about, thanks to these circumstances, that the *Ferrini* case will become significant in a very *specific* sector of state practice, i.e., the exercise of jurisdiction by states which were occupied during the war regarding war crimes committed by German soldiers on their territory. It could even be said that the value of the Supreme Court findings is not particularly relevant even to this, considering that in the said practice, Germany's immunity from jurisdiction is constantly recognized by domestic courts, while extra-judicial settlements regarding the civil consequences of these crimes are preferred.<sup>91</sup>

However, against this the opposite line of reasoning chosen by the Italian Supreme Court can be set down. In other words, it needs to be stressed that the Court arguments are *not* strictly tailored to the specific characteristics of the *Ferrini* case, as they have to do with the *general* evolution of international law over the past 50 years on the protection of human rights and the need to uphold the primacy of this value over other principles within the international legal system. Within these limits, we can restate the importance of the *Ferrini* case and its potential for creating a significant precedent, ranging even, and perhaps *especially*, beyond the *specific* sector which forms its backdrop.

<sup>90</sup> Such authorization, the absence of which made it impossible to carry out the *Voiotia* judgment (see *supra* note 10), was envisaged in Italy by law No. 1263 of 15 July 1926, but this law was declared invalid by the Constitutional Court by decision No. 329 of 15 July 1992: 75 *Rivista di diritto internazionale* (1992) 395.

<sup>91</sup> See *supra* note 43, concerning the agreement whereby the 'Erinnerung, Verantwortung und Zukunft' Foundation was established (see also *Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution*, 35 *ILM* (1996) 193, signed by the United States and Germany after the *Prinz* case). On this point see also De Vittor, *supra* note 2, at 606; and Gattini, 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages', 1 *J Int'l Crim J* (2003) 348.