

DENYING REPARATION FOR SLAVE AND FORCED LABORERS
IN WORLD WAR II AND THE ENSUING HUMANITARIAN RIGHTS
IMPLICATIONS: A CASE STUDY OF THE ICJ'S RECENT
DECISION IN *JURISDICTIONAL IMMUNITIES OF THE STATE* (GER.
V. IT.: GREECE INTERVENING)

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I. INTRODUCTION

In August 1944, twenty-two year old Martha Klein was seized by German troops in Hungary and forced to move to Austria where she was taken by train to Ravensbruck, a notorious women's concentration camp.¹ She was forced to live "in a wooden barracks [without] light, heat, insulation from rain, running water, or sewage facilities."² Two thousand five hundred women were expected to share one latrine and one washroom.³ Martha had to sleep with three other women in wooden bunks stacked three tiers high.⁴ The women were only provided with a "bowl of watery potato-skin and grass soup each day and a slice of bread twice a week."⁵ After waking up at 4:00 a.m., Martha was expected to stand at attention for roll call for hours before being shipped off to Siemens' Ravensbruck factory for heavy labor, manufacturing electronics and communications equipment for the German Reich.⁶

The German government refused any compensation or reparation for Martha and thousands of other surviving forced and slave laborers after World War II.⁷ Over forty years later, Martha brought suit in federal court in New Jersey. Unfortunately, the judge dismissed her claim because of international policy implications the judge deemed out of his purview.⁸

Martha's story is not unusual. Thousands of surviving slave and forced laborers from many countries had similar experiences.⁹ Should forced laborers for private German companies be compensated for their labor in light of the gross human rights violations they suffered? The International Court of Justice (ICJ) recently decided a case examining this issue.¹⁰

On February 3, 2012, the ICJ published its much anticipated opinion regarding jurisdictional immunity¹¹ from claims of severe human rights

¹ *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 253 (D.N.J. 1999).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See id.* at 284 (noting that plaintiffs argued the established German legislation did not provide adequate compensation).

⁹ *See, e.g.,* *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Frumkin v. J.A. Jones, Inc.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 461 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Fishel v. BASF Grp.*, 175 F.R.D. 525 (S.D. Iowa 1998).

¹⁰ *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 143 (Feb. 3).

¹¹ Jurisdictional immunity refers to the protection a state is given from a suit being brought against it in another state's courts.

violations arising during World War II between September 1943 and May 1945.¹² The court ruled for Germany, finding that (1) civil claims could not be brought in Italy against Germany for war crimes committed by the German army against Italian nationals, (2) Italy was not allowed to confiscate a German-owned building located in Italy, and used for non-commercial purposes, to satisfy a default judgment in an Italian court against Germany, and (3) judgments obtained in Greece against Germany were not enforceable in Italian courts.¹³ This Note examines this decision and its implications.

First, this Note will address the historical background of restitution to victims after World War II, including previous international human rights cases in Italy regarding jurisdictional immunity. Second, this note will explain this specific case, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, and will summarize the ICJ's findings. The last section will analyze the potential effect of this ruling on future armed conflicts and examine whether damages imposed sixty years after the fact are an effective deterrent against future use of forced labor during armed conflicts. This section will also analyze the limitations of this ruling and the dangers of allowing the ICJ to determine the scope of jurisdictional immunity rather than an international governing body, such as the United Nations (UN).

II. HISTORICAL BACKGROUND

Italy joined World War II in June 1940 on the side of Germany but surrendered to the Allies and declared war on Germany in September 1943, when Mussolini was removed from power.¹⁴ Much of Italy was still occupied by German forces, which massacred and deported many Italian civilians.¹⁵ Germany also took many Italian forces captive, used them as forced labor, and denied them prisoner of war status that would have allowed them to receive compensation.¹⁶ During the war, Germany used approximately 10 million forced laborers in practically every aspect of society, from schools and hospitals to industry and the Schutzstaffel (Germany's version of the Secret Service; also known as the "S.S.").¹⁷

¹² *Jurisdictional Immunities of the State*, 2012 I.C.J. 143.

¹³ *Id.* ¶¶ 107, 120, 133.

¹⁴ GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II*, at 132–33, 616 (1994).

¹⁵ *Id.*

¹⁶ *Jurisdictional Immunities of the State*, 2012 I.C.J. ¶ 21.

¹⁷ Patricia Chappine, *Delayed Justice: Forced and Slave Labor Restitution After the Holocaust*, 46 J. ECUMENICAL STUD. 616, 616 (2011).

A. *Early Restitution*

While the world initially confronted Germany's crimes against humanity in the Nuremberg Trials of 1945, these trials focused on punishing criminal behavior and not on providing restitution to victims of forced labor and concentration camps.¹⁸ A discussion about compensation for victims was first initiated by Konrad Adenauer, the first Chancellor of the Federal Republic of Germany (West Germany) in 1949.¹⁹ The first compensation payment was offered to Israel in 1949: Deutsche Mark 10 Million "as a first direct token that the injustice done to the Jews all over the world has to be made good."²⁰ The following year, the Luxembourg Agreements arranged for West Germany to pay approximately DM 100B to 500,000 Israeli Holocaust survivors internationally.²¹ While these payments were unprecedented, many victims were left with nothing because West Germany would not pay victims in Communist countries.²² These agreements also ignored forced or slave laborers because they were deemed to be reparations under international law and thus were not to be dealt with until after Germany was unified so the country would have an opportunity to recover economically.²³

Germany became a party to many statutory agreements and treaties addressing claims by victims of human rights violations.²⁴ German property was originally seized, but this seizure was terminated in 1946.²⁵ However, the Agreement Respecting Distribution of German Reparation: Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold still obligated Germany to make reparations for Nazi persecution with the amount dependent on Germany's ability to pay.²⁶ The 1953 Agreement on German External Debts (the London Agreement) delayed discussion of these reparations, tolling claims until a final peace treaty was concluded.²⁷ The London Agreement was vague on whether

¹⁸ *Id.* (citing CHRISTIAN PROSS, *PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR*, at viii (1998)).

¹⁹ *Id.*

²⁰ *Id.* at 617 (quoting MARILYN HENRY, *CONFRONTING THE PERPETRATORS: A HISTORY OF THE CLAIMS CONFERENCE 5* (2007) (internal quotation marks omitted)).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *infra* notes 26–27 and accompanying text.

²⁵ Agreement Respecting Distribution of German Reparation, Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, 444 U.N.T.S. 69.

²⁶ Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219.

²⁷ Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3

“reparations” by private parties were to be included.²⁸ In 1953, West Germany initiated a discussion of reparations for individuals and authorized payments to persecuted people under the Federal Compensation Law Concerning Victims of National Socialist Persecution (Bundesentschädigungsgesetz (BEG)).²⁹ However, this law did not include forced laborers in part because many were not considered victims of National Socialist persecution.³⁰ Many forced laborers were also denied compensation because they lacked the necessary territorial link to Germany.³¹

Germany's unification in 1989 revived the potential for reparations for previously uncompensated forced laborers.³² Lawsuits by private parties against Germany proliferated after a German trial court held on November 5, 1997 that the limitations period for forced labor cases was indeed tolled³³ by the London Agreement until after Germany was unified.³⁴ However, these claims were no longer tolled after the Two Plus Four Treaty³⁵ became effective on March 15, 1991.³⁶ The “Two Plus Four Treaty” fashioned German unification by providing a legal foundation and was viewed as a de facto peace treaty.³⁷ Moreover, the German Constitutional Court provided dicta from a ruling on May 13, 1996 indicating that, while public reparations for forced labor were barred, private parties could still assert claims for compensation.³⁸ Thus, a flood of litigation ensued as people who had not been given official compensation and were not afforded the ability to file

[hereinafter *The London Agreement*]; see also Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 507 (2002).

²⁸ Vagts & Murray, *supra* note 27, at 507.

²⁹ *Id.*

³⁰ Paul Christoph Bornkamm, *State Immunity Against Claims Arising From War Crimes: The Judgment of the International Court of Justice in the Jurisdictional Immunities of the State*, 13 GER. L.J. 773, 774 (2012); see also *Jurisdictional Immunities of the State* (Ger. v. It.), Counter-Memorial of Italy, 2009 I.C.J. 143, ¶ 2.24 (Dec. 22) (explaining that the territorial link exception of the BEG denied compensation to persecutees who lived outside of Germany when it was enacted in 1953).

³¹ Bornkamm, *supra* note 30, at 774.

³² Vagts & Murray, *supra* note 27, at 508.

³³ See BLACK'S LAW DICTIONARY 1525 (8th ed. 2004) (defining “toll” as “to stop the running of”).

³⁴ Vagts & Murray, *supra* note 27, at 508.

³⁵ Treaty on the Final Settlement with Respect to Germany (with Agreed Minute), Sept. 12, 1990, 1696 U.N.T.S. 124.

³⁶ Vagts & Murray, *supra* note 27, at 508.

³⁷ Anja Hense, *Limitation of Economic Damages as a 'Humanitarian Gesture': The German Foundation 'Remembrance, Responsibility, and the Future,'* 46 J. CONTEMP. HIST. 407, 410–11 (2011).

³⁸ Vagts & Murray, *supra* note 27, at 508–09 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1996, 94 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 315, 330 (Ger.)).

claims under German law were now filing claims, both in Germany and around the world.

B. Litigation of Forced Labor Claims

Former forced laborers saw an opportunity after the German Constitutional Court implied that individual compensation claims for forced labor could be asserted individually against Germany and German companies in German courts.³⁹ Private companies such as Ford Werke, Volkswagen AG, Siemens, Krupp, Daimler-Benz (now Daimler-Chrysler), and Bayer AG were facing immense class action suits, especially in the United States.⁴⁰ Even though many potential plaintiffs were still barred from bringing their claims and litigants faced many difficulties, private German industry was fearful of the economic consequences of litigation.⁴¹

Many potential plaintiffs were still barred from bringing suit in the United States for several reasons. The history of the class action suits filed in the United States exemplifies many of these problems. First, people who were forced to work for the German government could not bring suit under the doctrine of sovereign immunity codified in the Foreign Sovereign Immunities Act of 1976.⁴² However, the only current private company that could avoid a class action under this doctrine is Volkswagen because it was owned by the Labor Front of the Reich, a branch of the Nazi party, during World War II and was not privatized until 1960.⁴³

Second, plaintiffs were unable to bring a claim if the company they labored for during the war no longer existed and was unable to make reparation payments.⁴⁴ This concern was especially great as over fifty years had passed, and the second half of the twentieth century was a tumultuous time for industry.⁴⁵ Additionally, many forced laborers worked for individual employers who had died or partnerships that had dissolved.⁴⁶ Furthermore, many German companies have no presence in the United States that would expose them to liability and are therefore judgment-proof in U.S. courts.⁴⁷

³⁹ Hense, *supra* note 37, at 411.

⁴⁰ *Id.*; Vagts & Murray, *supra* note 27, at 509.

⁴¹ Hense, *supra* note 37, at 411; Vagts & Murray, *supra* note 27, at 509.

⁴² Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611. *See, e.g.*, *Sampson v. Germany*, 250 F.3d 1145 (7th Cir. 2001); *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

⁴³ Vagts & Murray, *supra* note 27, at 510 (internal citation omitted).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 511.

Lastly, many plaintiffs would have been precluded from bringing suit because of postwar peace treaties.⁴⁸ Most peace treaties, including Italy's, prohibited claims by nationals against the German state and German nationals.⁴⁹ Although the original intent was to prevent United States funds for German recovery from disappearing abroad, these agreements prohibited forced laborers from receiving any compensation.⁵⁰

Even those plaintiffs who were able to bring claims faced a long, difficult, and costly litigation process. The first major procedural hurdle was the running of the statute of limitations.⁵¹ Most plaintiffs relied on the 1953 London Agreement to toll claims for private individuals.⁵² However, even this posed a problem as the English and German versions of the treaty (both held to be official) differed. The tolling language in the English version stated that "[c]onsideration of claims arising out of the second World War . . . against the Reich and agencies of the Reich . . . shall be deferred until the final settlement of the problem of reparation."⁵³ Instead of merely referring to "the Reich and agencies of the Reich," the German version stated "Reich und im Auftrag des Reichs handelnde Stellen und Personen," which translates to "The Reich and offices and person acting at the behest of the Reich."⁵⁴ The English version of the statute only tolled claims against Germany and German agencies while the German version also included those acting at the request of the government.⁵⁵ Additionally, even if the London Agreement tolled the statute of limitations, German courts have held that the Two Plus Four Treaty ended the tolling of the statute of limitations.⁵⁶ Thus, the statute of limitations would have resumed in 1991.⁵⁷

A final issue regarding the statute of limitations involved determining the exact limitations period and which law applies when a claim is not brought in the state in which the cause of action occurred—the law of the forum state or the law where the cause of action arose. One U.S. judge decided this issue in favor of the law of the forum state, applying New Jersey, Michigan, or Delaware statutes of limitations on unjust enrichment, which provide for a statute of limitations of three or six years.⁵⁸ Thus, even though this issue was

⁴⁸ *Id.* at 512.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 514–15.

⁵² The London Agreement, *supra* note 27.

⁵³ *Id.* art. 5(2).

⁵⁴ Vagts & Murray, *supra* note 27, at 515 (internal quotation marks omitted).

⁵⁵ *Id.* at 516.

⁵⁶ See discussion *supra* Part II.A (discussing tolling of statute of limitations).

⁵⁷ See discussion *supra* Part II.A (discussing tolling of statute of limitations).

⁵⁸ *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 472–75 (D.N.J. 1999) (implying that victims are only allowed to bring suit within the statute of limitation for the state they are in).

resolved in the United States, the resulting statute of limitations is still unpredictable as it varies based on the forum state.

Not only were victims unaware of whether the statute of limitations prevents their claims, but their claims also may have been precluded by foreign policy. The United States Supreme Court first recognized this as a defense in *Underhill v. Hernandez*,⁵⁹ by finding for the defendant, a Venezuelan general acting on behalf of the government.⁶⁰ German companies could argue that the German Reich took people from their homes and determined their paltry living conditions, not the private companies who merely used their labor. Because judges are often reluctant to get involved in international affairs and view this as an issue that should be resolved among the respective governments, they tend to use any possible means to dismiss the claims.⁶¹

A third problem litigants faced was difficulty certifying an appropriate class.⁶² While many of the cases in the United States purported to include anyone forced to work for a defendant firm, it was difficult to find that there were “common questions of fact and law” that “predominate[d] over any questions affecting only individual members.”⁶³ There were obvious differences in the plaintiffs’ status, working and living conditions, and location, making it difficult for them to be certified as a class under Federal Rule of Civil Procedure 23.⁶⁴

A final problem was substantive; victims often struggled to provide sufficient proof to prevent dismissal of the claim.⁶⁵ Many companies were not clearly marked with corporate logos; many records were destroyed; and often heirs bringing the claim relied on inadmissible hearsay evidence.⁶⁶

⁵⁹ 168 U.S. 250 (1897).

⁶⁰ *Id.* (holding that where a U.S. citizen was detained in Venezuela by a general in military control of Bolívar, the U.S. citizen was not entitled to compensation because the general’s acts were those of the Venezuelan government and not subject to jurisdiction in U.S. courts as a matter of foreign relations).

⁶¹ See, e.g., *Frumkin v. J.A. Jones, Inc.*, 129 F. Supp. 2d 370 (D.N.J. 2001) (dismissing the case under the political question doctrine and the doctrine of international comity); *Iwanowa*, 67 F. Supp. 2d at 461 (dismissing the case because of the tolling of the statute of limitations); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing the case under the political question doctrine); *Fishel v. BASF Grp.*, 175 F.R.D. 525 (S.D. Iowa 1998) (dismissing the case for lack of personal jurisdiction over the defendants); *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (dismissing the case under the Foreign Sovereign Immunities Act).

⁶² Vagts & Murray, *supra* note 27, at 519.

⁶³ FED. R. CIV. P. 23(b)(3).

⁶⁴ Vagts & Murray, *supra* note 27, at 520–23; FED. R. CIV. P. 23.

⁶⁵ Vagts & Murray, *supra* note 27, at 527–28.

⁶⁶ *Id.*

Thus, it was extremely difficult for a plaintiff to prevail, as U.S. judges dismissed cases for a variety of substantive and procedural reasons.⁶⁷

Despite these difficulties and the fact that many plaintiffs were still barred by the statute of limitations, German companies wanted to avoid the major financial risks associated with large class action suits. Companies were afraid such cases would damage their public image in the United States, in turn damaging the business of their subsidiaries.⁶⁸ Furthermore, a loss in court could be especially damaging, as preclusion would lead to losses in other cases as well.⁶⁹

Liability concerns were especially important in the 1990s when these claims were being brought. That decade was an extremely competitive time for international industry, and many German companies were planning major expansions in the United States.⁷⁰ German companies did not know whether the legal actions would lead to sanctions or legislative measures taken in the United States. German industries were afraid these potential claims could hang over their heads indefinitely, leading to risk and uncertainty in the market.⁷¹ Germany and the United States entered into talks about a potential collective compensation settlement that would provide “‘legal closure’, which was seen as an indispensable condition for any payments to former slave and forced laborers.”⁷²

C. *The German Foundation ‘Remembrance, Responsibility, and the Future’*

Even though Germany had already paid out an estimated sum of \$100 billion to victims since World War II, Germany sought legal closure for itself and its private companies through the establishment of the foundation *Erinnerung, Verantwortung, Zukunft*⁷³ (the Foundation), which promised an additional \$5 billion to over one million survivors of forced labor.⁷⁴ The terms of the Foundation were negotiated by representatives from the United States, Germany, other European countries, the Jewish Claims Conference,

⁶⁷ See, e.g., cases cited *supra* note 61.

⁶⁸ Hense, *supra* note 37, at 412.

⁶⁹ See 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 1987) (explaining the effects of preclusion on subsequent claims).

⁷⁰ For example, VW was about to introduce the Beetle; Daimler-Benz was about to merge with Chrysler; and Siemens was heavily investing in American expansion. See Hense, *supra* note 37, at 412.

⁷¹ *Id.* at 413.

⁷² *Id.*

⁷³ *Erinnerung, Verantwortung, Zukunft* translates to Remembrance, Responsibility, Future.

⁷⁴ William Drozdiak, *Germany Creates Fund to Pay Forced Laborers*, WASH. POST, July 18, 2000, at A3, available at 2000 WLNR 9051839.

and the German Economy Foundation Initiative.⁷⁵ Corporate contributions were capped at 1% to 1.5% of their annual sales for each company, irrespective of their gains from the use of forced labor.⁷⁶ This gave the corporations a reprieve from the economic threat of major class action lawsuits, while only imposing a minimum economic burden on a miniscule percentage of their annual sales.⁷⁷

The German Parliament (*Bundestag*) passed a law establishing the Foundation with funds from the government and private companies in August of 2000.⁷⁸ The law provided that Germany could declare legal peace when all litigation in the United States was dismissed.⁷⁹ Once peace was declared on May 30, 2001 and all litigation was dismissed in the United States, certain provisions of the Foundation law were activated, and payments began the next month.⁸⁰ The law was supposed to be the “exclusive avenue to recovery from the German government or German industry for injuries arising out of the Nazi labor program,”⁸¹ but there was still litigation pending in other countries, besides the United States, for those still excluded from Foundation payments or those not willing to accept a small settlement.⁸²

While many appreciated the apology and acceptance of responsibility by German President Johannes Rau,⁸³ the Foundation unfortunately did not provide the comprehensive relief it promised. First, claims had to be filed within one year and payments were capped at DM 15,000 for slave laborers and at DM 5,000 for forced laborers.⁸⁴ Furthermore, these maximum payments were reserved for only the most aggrieved in each group, as there were insufficient funds for all victims.⁸⁵

Second, many of the requirements were difficult to prove, such as the requirement that anyone who suffered property loss had to prove that their property or bank accounts were “confiscated with essential, direct, and harm-causing collaboration of German enterprises,” and that value was then

⁷⁵ Hense, *supra* note 37, at 415.

⁷⁶ *Id.* at 423.

⁷⁷ *Id.*

⁷⁸ Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 1, 3 (2002).

⁷⁹ *Id.* at 4.

⁸⁰ *Id.* at 4, 22.

⁸¹ *Id.* at 22.

⁸² Hense, *supra* note 37, at 423.

⁸³ Chappine, *supra* note 17, at 620.

⁸⁴ Adler & Zumbansen, *supra* note 78, at 14, 22.

⁸⁵ Hense, *supra* note 37, at 420.

transferred into what is today German territory.⁸⁶ This was difficult for victims to prove, as many bank records were not meticulously kept during the war and many were destroyed.⁸⁷

Additionally, the Foundation excluded anyone who had been a prisoner of war, unless they were in a concentration camp or part of another specific group, because prisoners of war “may, according to the rules of international law, be put to work by the detaining power.”⁸⁸ Despite previously denying former Italian military internees prisoner-of-war status, the German government denied them compensation under the Foundation because they were, in fact, prisoners of war and therefore no public international law gave them an individual right of compensation for forced labor.⁸⁹ In this way, the German government suddenly changed their terminology to avoid compensating victims.

D. Previous Developments and Cases in Italy and Greece

The case history from the United States resembles the case history in other countries, except other countries did not drop all pending cases after the adoption of the Foundation as the United States did.⁹⁰ At that time cases were still pending in Italy, and the Italian court had to determine whether it would grant Germany immunity.

While Italy has no specific legislation regarding foreign states' immunity, Italian courts have slowly restricted immunity regarding acts of a foreign state that are viewed as *acta iure imperii*⁹¹ in civil cases where plaintiffs were victims of serious humanitarian law violations.⁹² The Italian courts do this through a *jus cogens*⁹³ exception, discussed in the *Ferrini* case and its progeny.

The *Ferrini* case was revolutionary, as it provided a new avenue through which Italian victims could seek justice.⁹⁴ In that case, the court held for the

⁸⁶ *Id.* (internal quotation omitted).

⁸⁷ *Id.*

⁸⁸ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 26 (Feb. 3).

⁸⁹ *Id.* ¶¶ 21, 26.

⁹⁰ Adler & Zumbansen, *supra* note 78, at 4, 22.

⁹¹ *Acta iure imperii* are acts that are “[an] exercise of sovereign power.” Ryszard Piotrowicz, *The State of State Immunity: Germany Defeats Italy at the ICJ*, 86 AUSTL. L.J. 230, 230 (2012).

⁹² Elena Sciso, *Italian Judges’ Point of View on Foreign States’ Immunity*, 44 VAND. J. TRANSNAT’L L. 1201, 1201 (2011).

⁹³ BLACK’S LAW DICTIONARY (8th ed. 2004) (defining *jus cogens* as “a mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted”).

⁹⁴ Christian Tomuschat, *The International Law of State Immunity and Its Development by*

first time that Germany could not rely on sovereign immunity as a defense when a grave human rights violation occurred on Italian soil.⁹⁵ The plaintiff, Luigi Ferrini, was captured by the German army in Arezzo, Italy, on August 4, 1944, when he was twenty-eight years old.⁹⁶ He was deported to Germany and forced to work in the armaments industry.⁹⁷ In 1998, he filed a claim with the Court of Arezzo (*Tribunale di Arezzo*), which rejected his claim based on a lack of jurisdiction.⁹⁸ The Court of Appeal of Florence (*Corte di Appello di Firenze*) affirmed the lower court's ruling in January 2002.⁹⁹ Later, the Italian Court of Cassation (*Corte di Cassazione*) granted his claim because the "conduct of [Germany] amount[ed] to an international crime that infringes universal values of the international community as a whole and rules of *jus cogens*."¹⁰⁰

Even though no other country follows the *Ferrini* precedent, including appellate courts in Australia, New Zealand, and the United Kingdom,¹⁰¹ Italy upheld this decision in a line of cases decided in 2008.¹⁰² On May 29, 2008, the Court of Cassation held in fourteen cases that "states accused of international crimes do not enjoy immunity from civil jurisdiction in other states' courts under customary international law."¹⁰³ While acknowledging there was no specific exception for denying foreign states immunity for acts *jure imperii* that violated *jus cogens*, the Court did note that "a principle restricting the immunity of a state that has committed crimes against humanity can be presumed to be in the process of emerging."¹⁰⁴ It went on to hold that Germany was not immune from suit because of the particular circumstances of extremely egregious human rights violations originating in Italy, not in Germany.¹⁰⁵ In this way, Italy prevented Germany from claiming sovereign immunity for violations committed *in Italy*.

National Institutions, 44 VAND. J. TRANSNAT'L L. 1105, 1115 (2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Sciso, *supra* note 92, at 1207 n.24.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1207 n.23.

¹⁰¹ Tomuschat, *supra* note 94, at 1133; Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 240–41.

¹⁰² Bradley & Helfer, *supra* note 101; Beth Stephens, *Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses*, 44 VAND. J. TRANSNAT'L L. 1163, 1172–74 (2011).

¹⁰³ Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 AM. J. INT'L L. 122, 122–23 (2009).

¹⁰⁴ *Id.* at 124.

¹⁰⁵ *Id.* at 125.

However, there were a few differences between *Ferrini* and the Court of Cassation's rulings in 2008. First, deportation and forced labor were no longer referred to as "war crimes," but in the later cases were designated as "crimes against humanity."¹⁰⁶ Second, the 2008 cases did not refer to the statute of limitations or jurisdiction in a civil suit.¹⁰⁷ Lastly, the fact that these crimes originated in the forum state was treated as an aside in the 2008 cases, rather than a central argument as in *Ferrini*.¹⁰⁸ These changes made it easier for other forced laborers to file suit against Germany in Italy.

III. CASE ANALYSIS

On December 23, 2008, Germany filed proceedings against Italy with the ICJ, alleging that Italy violated Germany's sovereign immunity by allowing civil claims for human rights violations that occurred during World War II from September 1943 to May 1945.¹⁰⁹

Germany also claimed Italy violated its sovereign immunity by enforcing Greek judgments in Italy and confiscating Villa Vigoni, German state property, to pay the Greek judgments.¹¹⁰ Italy counter-claimed for reparations owed to Italian victims for violations of international humanitarian law, but this claim was dismissed by the ICJ on July 6, 2010 because it was outside the jurisdiction on the court.¹¹¹ Although Italy failed to contest the dismissal, the ICJ did in fact have jurisdiction over the claim under Article 1 of the European Convention for the Peaceful Settlement of Disputes, which became enforceable on April 18, 1961, as the claim clearly related to an "international legal dispute" between two states.¹¹²

¹⁰⁶ *Id.* at 126.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143, ¶¶ 1, 15 (Feb. 3).

¹¹⁰ *Id.* ¶ 15.

¹¹¹ *Id.* ¶ 38; Jurisdictional Immunities of the State (Ger. v. It.), Counter-Claim, 2010 I.C.J. 310, ¶¶ 30–31 (July 6).

¹¹² Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 41 ("The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.").

A. *Greek Judgments Enforced in Italy*

On June 10, 1944, German forces occupying Greece entered the Greek village of Distomo, massacred over 200 innocent Greek civilians, and burned the village in revenge for an attack on an SS unit.¹¹³ Relatives of the victims filed a claim against Germany for compensation on November 27, 1995 before the Court of First Instance of Livadia, Greece.¹¹⁴ The court entered a default judgment against Germany two years later on September 25, 1997 for approximately \$30 million, stating that Germany did not have jurisdictional immunity for a breach of *jus cogens*, such as gross rights violations.¹¹⁵ Three years later the Hellenic Supreme Court of Greece dismissed Germany's appeal on the grounds that it lacked jurisdictional immunity.¹¹⁶ However, the judgment was not enforced because the Greek Minister of Justice refused the authorization required under Article 923 of the Greek Code of Civil Procedure.¹¹⁷

Because both Greece and Germany refused to comply with the court's ruling, the plaintiffs resorted to other means of recovery for their tort claims. First, they applied to the European Court of Human Rights (ECHR).¹¹⁸ The ECHR held that Germany had sovereign immunity, so the plaintiffs' claim that Germany and Greece violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms was inadmissible.¹¹⁹ Next, the plaintiffs tried to recover in Germany, but the German courts refused to recognize the default judgments because they were in violation of Germany's sovereign immunity.¹²⁰ After this failure, the

¹¹³ *Id.* ¶ 30; Bornkamm, *supra* note 30, at 774.

¹¹⁴ Ilias Bantekas, *State Responsibility in Private Civil Action-Sovereign Immunity-Immunity for Jus Cogens Violations-Belligerent Occupation-Peace Treaties*, 92 AM. J. INT'L L. 765 (1998); Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 30.

¹¹⁵ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 30; Bantekas, *supra* note 114, at 765–67.

¹¹⁶ Areios Pagos [A.P.] [Supreme Court] 111/2000 (Greece), *translated in* 129 I.L.R. 513 (Hellenic Supreme Court 2004); Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 30. It is worth noting that the Hellenic Supreme Court referred a case involving claims from a German invasion of the Greek village of Lidoriki in 1944 to the Special Supreme Court. On September 17, 2002, the Special Supreme Court held Germany had sovereign immunity. *See* Margellos v. Federal Republic of Germany, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), *translated in* 129 I.L.R. 525 (2002) (Hellenic Special Supreme Court 2002); Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 36.

¹¹⁷ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 30.

¹¹⁸ Bornkamm, *supra* note 30, at 775.

¹¹⁹ Kalogeropoulou & Others v. Greece & Germany, 2002-X Eur. Ct. H.R. 417, 428–29; Jurisdictional Immunities of the State, 2010 I.C.J. ¶ 31.

¹²⁰ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 32; Bornkamm, *supra* note 30, at 775.

Greek plaintiffs tried to recover in Italy following the *Ferrini* decision.¹²¹ On May 22, 2005, the Court of Appeal of Florence held that the judgment was enforceable in Italy for the plaintiffs' judgment on the merits, as well as their legal expenses.¹²² On January 12, 2011, the Italian Court of Cassation upheld the lower courts' rulings.¹²³

Meanwhile, on June 7, 2007, the Greek Claimants levied a legal charge claiming ownership of the Villa Vigoni, a German state property near Lake Como.¹²⁴ However, judgment against the property was stayed under Decree-Law No. 63 of April 28, 2010, Law No. 98 of June 23, 2010, and Decree-Law No. 216 of December 29, 2011 because of pending applications before the ICJ.¹²⁵

Germany requested the ICJ find that Italy violated Germany's sovereign immunity by allowing civil claims to be brought in Italy against Germany, by taking measures against German state property located in Italy, and by declaring Greek judgments enforceable in Italy.¹²⁶

B. Italy's Arguments and the ICJ's Decisions

While Germany admits that its conduct was unlawful,¹²⁷ it does not believe there should be unlimited liability for its leaders, as that would lead to "incalculable financial dimensions" involving the "thousands or perhaps even millions of victims" of the conflict.¹²⁸ To determine whether there was financial liability for the human rights violations, the ICJ applied customary international law (CIL),¹²⁹ which requires "a settled practice" and supporting court opinions.¹³⁰ The ICJ spends the majority of its decision discussing

¹²¹ Bornkamm, *supra* note 30, at 775.

¹²² Jurisdictional Immunities of the State, 2012 I.C.J. ¶¶ 33–34; Bornkamm, *supra* note 30, at 775–76.

¹²³ Jurisdictional Immunities of the State, 2012 I.C.J. ¶¶ 33–34; Bornkamm, *supra* note 30, at 775–76.

¹²⁴ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 35.

¹²⁵ *Id.*; Bornkamm, *supra* note 30, at 776.

¹²⁶ Jurisdictional Immunities of the State, 2012 I.C.J. ¶¶ 15–17, 37.

¹²⁷ *Id.* ¶ 53.

¹²⁸ Chimene I. Keitner, *Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity*, AM. SOC'Y INT'L L. INSIGHTS, Feb. 14, 2012, at 1, available at <http://www.icj-cij.org/docket/files/143/16644.pdf> (quoting Jurisdictional Immunities of the State (Ger. v. It.), Memorial of the Federal Republic of Germany, 2002 I.C.J. 143, ¶ 75 (June 12)).

¹²⁹ CIL was applied because Italy was not a party to the European Convention on State Immunity of May 16, 1972, and neither Germany nor Italy were parties to the United Nations Convention on the Jurisdictional Immunities of States and their Property of December 2, 2004. Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 54.

¹³⁰ *Id.* ¶ 55 (citing North Sea Continental Shelf Case (Ger./Den./Ger. v. Neth.), 1969 I.C.J. 44, ¶ 77 (Feb. 20)).

Italy's arguments against granting sovereign immunity for civil claims brought in Italy. Next, the ICJ discusses the issues of constraining German state property in Italy and the enforceability of Greek judgments in Italy.¹³¹

1. Italy's Arguments Against Granting Germany Sovereign Immunity for Civil Claims Brought in Italy

The ICJ first considered whether Italy erred in denying Germany sovereign immunity for the civil claims brought in Italy on the following grounds: (1) under CIL, immunity for an *acte jure imperii* does not extend to a tort committed in the forum state (the territorial tort principle); and (2) regardless of where the act happened, no state should be entitled to immunity where there are severe violations of international humanitarian law with no other prospect of redress.¹³²

The ICJ did not find that the territorial tort principle granted immunity under CIL because the civil claims were viewed as *acte jure imperii*.¹³³ They dismissed this argument and found against the Italian forced laborers.¹³⁴ The territorial tort principle originally arose in the context of insurable risks, such as traffic accidents with foreign state vehicles, and is usually limited to *acta jure gestionis*.¹³⁵ The reasoning behind this limitation—that insurance companies should not be able to benefit from the state's immunity—does not apply to war-time claims where no insurance is involved.¹³⁶ Additionally, the Court found no other country extended the territorial tort to war damages except for the *Ferrini* line of cases in Italy and the recent *Distomo* case in Greece.¹³⁷ While denying Italy's territorial tort argument, the ICJ left open the issue of whether granting immunity for *acta jure imperii* in general, besides those committed during wartime, was part of CIL.¹³⁸

Next, the ICJ evaluated Italy's argument that Germany should not be given sovereign immunity for civil claims involving severe human rights violations.¹³⁹ Italy's argument can be divided into three parts—the gravity of the violation, the presence of a *jus cogens* exception, and the last resort argument.¹⁴⁰

¹³¹ *Id.* pts. IV–V.

¹³² *Id.* ¶¶ 52–108.

¹³³ *Id.* ¶¶ 62–79.

¹³⁴ *Id.*

¹³⁵ *Id.* ¶ 64; Bornkamm, *supra* note 30, at 776. *Acta jure gestionis* are “non-sovereign acts of the state, especially private and commercial activities.” Piotrowicz, *supra* note 91.

¹³⁶ Bornkamm, *supra* note 30, at 776.

¹³⁷ Jurisdictional Immunities of the State, 2012 I.C.J. ¶¶ 70–79.

¹³⁸ *Id.* ¶ 65.

¹³⁹ *Id.* ¶¶ 80–108.

¹⁴⁰ *Id.*

First, the ICJ considered whether the gravity of the violation should deprive Germany of immunity.¹⁴¹ The Court determined that the gravity of the offense should not influence a determination of immunity.¹⁴² Making jurisdictional immunity turn on the gravity of the claim would require the national court to make a judgment on the merits of gravity before determining jurisdiction.¹⁴³ This would allow immunity to be refuted by a careful drafting of the claim and could potentially eliminate sovereign immunity in all tort claims.¹⁴⁴ Although this would push the court towards upholding immunity, the ICJ also looked to CIL and found no gravity limitation in the European Convention, the United Nations Convention, or the draft of the Inter-American Convention.¹⁴⁵

Next, the court decided whether the *jus cogens* violations by Germany conflicted with sovereign immunity.¹⁴⁶ However, the ICJ has previously held that a *jus cogens* violation does not confer jurisdiction that a court would not otherwise possess.¹⁴⁷ Thus, even if the acts alleged in Italian court were violations of *jus cogens*, CIL for sovereign immunity would still not be affected.¹⁴⁸

Lastly, the ICJ addressed Italy's argument that the complaint in Italian courts was the victims' "last resort" for any compensation.¹⁴⁹ While the ICJ noted that Germany has taken steps to make reparations, it expressed "regret" that Germany still excludes the majority of Italian military prisoners, having denied them prisoner-of-war status at the relevant time and then later viewed them as prisoners-of-war (making them ineligible for later reparations).¹⁵⁰ However as unfortunate that may be, the ICJ did not see any basis in CIL for denying immunity because there is no "effective alternative means of securing redress."¹⁵¹ The ICJ did not find any of these three arguments, taken individually or jointly, sufficient to deny Germany sovereign immunity from civil claims in Italy, and thus held that Italy had wrongly denied Germany the immunity to which it was entitled under CIL.¹⁵²

¹⁴¹ *Id.* ¶¶ 81–91.

¹⁴² *Id.* ¶ 91.

¹⁴³ *Id.* ¶ 82.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 89.

¹⁴⁶ *Id.* ¶¶ 92–97.

¹⁴⁷ *Id.* ¶¶ 94–95 (relying on *Armed Activities on the Territory of the Congo (Congo v. Rwanda)*, New Application: 2002, 2006, I.C.J. 6, ¶¶ 64, 125 (May 28) and *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶¶ 58, 78 (Feb. 14)).

¹⁴⁸ *Id.* ¶ 97.

¹⁴⁹ *Id.* ¶¶ 98–103.

¹⁵⁰ *Id.* ¶ 99.

¹⁵¹ *Id.* ¶¶ 101–102.

¹⁵² *Id.* ¶¶ 105–108.

2. *Italy's Arguments Against Germany's Sovereign Immunity in Satisfying a Judgment from a Foreign State*

Second, the ICJ considered Italy's claim that it should not grant Germany sovereign immunity in regards to actions taken against the Villa Vigoni, a German state property in Italy, because CIL does not provide immunity from such actions.¹⁵³ The court noted that CIL governing enforcement immunity is broader than jurisdictional immunity.¹⁵⁴ A state may waive its jurisdictional immunity without waiving its right to enforcement immunity.¹⁵⁵ Thus, the ICJ can rule on enforcement immunity without determining whether the Greek court violated Germany's sovereign, jurisdictional immunity.¹⁵⁶ Germany argued that the United Nations Convention has codified CIL in Article 19, which states that

no post-judgment measure of constraint . . . against property of a State may be taken in connection with a proceeding before a court of another State unless and except . . . (a) the State has expressly consented to the taking . . . (b) the State has allocated or earmarked property for the satisfaction of the claim . . . or (c) it has been established that the property . . . [is used] for other than government non-commercial purposes and is in the territory of the State of the forum. . . .¹⁵⁷

The ICJ held that it is clear Germany uses the Villa Vigoni for non-commercial governmental purposes and therefore Italy has violated Germany's sovereign immunity under CIL by taking measures against the Villa Vigoni.¹⁵⁸

3. *Italy's Arguments in Favor of the Enforceability of Greece's Judgments in Italy*

Lastly, the ICJ examined whether Italy should have enforced Greece's judgments or granted Germany sovereign immunity.¹⁵⁹ The Court noted that this was a difficult question distinct from the other two above.¹⁶⁰ This

¹⁵³ *Id.* ¶¶ 109–120.

¹⁵⁴ *Id.* ¶ 113.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ¶ 114.

¹⁵⁷ *Id.* ¶¶ 115–116.

¹⁵⁸ *Id.* ¶¶ 119–120.

¹⁵⁹ *Id.* ¶¶ 121–133.

¹⁶⁰ *Id.* ¶ 124.

question turns on whether a third state can enforce a judgment from a court in one foreign state against the government of another, where that foreign court has examined the sovereign immunity of the foreign state.¹⁶¹ The ICJ considered whether Italy respected Germany's sovereign immunity by initiating *exequatur* proceedings against Germany.¹⁶² However, by instituting these proceedings, Italy exercised jurisdiction over Germany and the Italian courts should have determined whether they would have been qualified to hear the claim in the first place.¹⁶³ The ICJ held that it did not matter whether Greece had jurisdiction over Germany. The fact that Italy would not have had jurisdiction over Germany was sufficient. Germany was entitled to sovereign immunity.¹⁶⁴

To summarize, the ICJ held that Italy violated Germany's sovereign immunity by allowing civil claims for violations of international humanitarian law committed by the German Reich between 1943 and 1945, by "taking 'measures of constraint' against the Villa Vigoni," and by enforcing Greek judgments for the German Reich's violations of international humanitarian law in Greece.¹⁶⁵ Additionally, the ICJ held that Italy must ensure its decisions contrary to this ruling are rendered ineffective.¹⁶⁶

C. Dissents

Three judges, Judge Yusuf, Judge ad hoc Gaja (appointed by Italy), and Judge Cançado Trindade, filed dissenting opinions. Judge Yusuf disagreed with the majority's focus on "whether . . . immunity is applicable to acts committed by the armed forces of a State . . . in the course of conducting an armed conflict."¹⁶⁷ Instead, Judge Yusuf focused on Italy's argument that Germany has an obligation to make reparations for international human rights violations where the victims have no other means of redress.¹⁶⁸

Judge Yusuf relied on principles of international humanitarian law found in documents such as a United Nations General Assembly resolution, which provides a victim of a gross violation of international human rights law with

¹⁶¹ *Id.* ¶¶ 127–128.

¹⁶² *Id.* *Exequatur* proceedings are only to enforce an existing judgment, not to determine the merits of the claim.

¹⁶³ *Id.* ¶¶ 127–130.

¹⁶⁴ *Id.* ¶¶ 131–132.

¹⁶⁵ *Id.* ¶ 139.

¹⁶⁶ *Id.*

¹⁶⁷ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 6 (Feb. 3) (dissenting opinion of Judge Yusuf).

¹⁶⁸ *Id.* ¶¶ 12–20.

“access to an effective judicial remedy.”¹⁶⁹ He noted that courts are slowly eroding sovereign immunity by creating exceptions to jurisdictional immunity, “such as the tort exception, the employment exception, and the intellectual property exception.”¹⁷⁰ Because these victims did not have access to any other means of redress, Judge Yusuf found no violation of Germany’s sovereign immunity.¹⁷¹

Judge ad hoc Gaja disagreed with the majority’s view that the territorial tort principle does not apply to human rights violations committed by hostile armed forces in the forum state’s territory.¹⁷² He noted that just because military activities may injure people en masse does not mean they should be exempt from jurisdiction.¹⁷³ While Judge ad hoc Gaja indicated he would not support an exception from jurisdiction for torts perpetrated outside the forum state,¹⁷⁴ he did not find that every exercise of jurisdiction by the Italian courts was a breach of sovereign immunity under international law.¹⁷⁵

Lastly, Judge Cançado Trindade, former President of the Inter-American Court of Human Rights, wrote a lengthy dissent detailing his disagreement with all of the majority’s holdings.¹⁷⁶ In his concluding twenty-six point summary of his argument, he noted that state immunity is a privilege and cannot be an abstraction of international law.¹⁷⁷ The law should be human-centered, not state-centered.¹⁷⁸ Judge Cançado Trindade did not want a state to be able to murder its own population or that of another state and then simply claim sovereign immunity to avoid liability, as sovereign immunity was not designed for that purpose.¹⁷⁹ Judge Cançado Trindade also noted that because these acts were violations of *jus cogens*, the distinction between *acte jure gestionis* and *acte jure imperii* is irrelevant, as that distinction was not meant to provide immunity for clear violations of international humanitarian law.¹⁸⁰

¹⁶⁹ *Id.* ¶¶ 30–31 (quoting Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶¶ 11–12, U.N. Doc. A/RES/60/147 (Dec. 16, 2005)).

¹⁷⁰ *Id.* ¶ 44.

¹⁷¹ *Id.* ¶ 51.

¹⁷² Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 9 (Feb. 3) (dissenting opinion of Judge ad hoc Gaja).

¹⁷³ *Id.*

¹⁷⁴ *Id.* ¶ 11.

¹⁷⁵ *Id.* ¶ 12.

¹⁷⁶ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143 (Feb. 3) (dissenting opinion of Judge Cançado Trindade).

¹⁷⁷ *Id.* ¶ 302.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* ¶ 305.

¹⁸⁰ *Id.* ¶¶ 306, 309.

IV. ANALYSIS AND CASE IMPLICATIONS

The issues surrounding reparations for gross human rights violations during World War II are *still* being litigated over sixty years after the fact. First, Germany's reparations and Foundation program were clearly insufficient and used technicalities in labeling to avoid compensating certain groups of victims.¹⁸¹ Second, the ICJ appears to be shying away from the current trend of restrictive immunity, particularly in cases with severe human rights implications, leaving victims with no reliable or reasonable means of reparations. Lastly, this retreat from restrictive jurisdiction could potentially have a huge effect on the United States' Foreign Sovereign Immunities Act of 1976 (FSIA).¹⁸² The United States should take the lead in adopting legislation restricting immunity for gross violations of human rights because the potential implications are enormous.

A. Germany's Insufficient and Incompetent Reparations and Foundation

Germany's efforts to make complete reparations were insufficient and dictated by the economic concerns of its large corporations. While Germany was obligated to make reparations for victims after World War II, the London Agreement delayed reparations until peace was finalized.¹⁸³ Discussion on reparations was revived only after the "Two Plus Four" Treaty fashioned legal peace.¹⁸⁴ Because Germany did not recognize forced laborers in their reparation settlements, private companies, such as Ford Werke and Bayer AG, faced immense class action suits, particularly in the United States.¹⁸⁵

To ease the strain of extensive litigation on private industry, Germany created the Foundation to be the exclusive remedy for any reparations claims.¹⁸⁶ However, the Foundation was clearly insufficient, refusing to provide a real apology and requiring that participating companies only pay a maximum of 1% to 1.5% of their annual sales.¹⁸⁷ These insufficiencies forced victims to try other avenues for reparations, catalyzing the line of Italian cases leading up to the ICJ case.¹⁸⁸ Often victims are less concerned

¹⁸¹ See *supra* Part II.C.

¹⁸² 28 U.S.C. §§ 1602–1611 (2006).

¹⁸³ See *supra* Part II.A.

¹⁸⁴ Hense, *supra* note 37, at 410–11; see also *supra* Part II.A.

¹⁸⁵ See, e.g., *Sampson v. Germany*, 250 F.3d 1145 (7th Cir. 2001); *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

¹⁸⁶ Adler & Zumbansen, *supra* note 78, at 22; Hense, *supra* note 37, at 419–20.

¹⁸⁷ Hense, *supra* note 37, at 423.

¹⁸⁸ See *supra* Part II.

with the monetary amount, than they are with having their case heard and their plight acknowledged. By ignoring victims' pain and suffering, Germany may have inadvertently encouraged litigation by those who still felt slighted.

Additionally, Germany engaged in procedural technicalities to avoid compensating certain classes of victims. The ICJ

consider[ed] that it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.¹⁸⁹

Hopefully, the ICJ's surprise and regret will encourage action and lead to further reparations agreements to ensure that these severe human rights violations are addressed. Even if Germany no longer feels morally responsible and does not feel the necessity of a sincere apology, it should still make reparations as an example for other countries. The ICJ should not downplay human rights violations by not holding a country responsible.

B. The ICJ's Failure to Recognize an Emerging Trend of Restrictive Immunity Leaves Victims with No Reliable Reparations

By ignoring the current trend in national courts towards restrictive immunity, the ICJ leaves victims with no reliable means of reparations. International tribunals appear to have a more expansive view of sovereign immunity than national courts do, a phenomenon that can be seen, for example, in cases where the ECHR has refused to grant jurisdiction.¹⁹⁰ Nevertheless, these cases in the ECHR were decided by narrow majorities,¹⁹¹ and the court recognized an international trend towards limiting sovereign immunity for civil claims caused by an act or omission in the forum state.¹⁹²

¹⁸⁹ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 143, ¶ 99 (Feb. 3).

¹⁹⁰ Sciso, *supra* note 92, at 1214–17; Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The Civitella Case*, 7 J. INT'L CRIM. JUST. 597, 614 (2009) ("The law of state immunity today is complex, but it is submitted that the general trend is towards restrictive immunity.").

¹⁹¹ Sciso, *supra* note 92, at 1215, 1217 (citing *Kalogeropoulou v. Greece*, 2002-X Eur. Ct. H.R. 415, 436 and *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 103 as examples of 9–8 decisions).

¹⁹² *Id.* at 1217.

Unfortunately, the ICJ did not take this opportunity to recognize this international trend and did not hold Germany liable for serious human rights violations. By refusing to rule on a territorial tort exception,¹⁹³ the ICJ effectively barred many victims from any recovery. In CIL, the territorial tort principle works to hold insurance companies liable despite any claim of sovereign immunity by the foreign state.¹⁹⁴ Even if the foreign country could claim sovereign immunity, it is not allowed to do so for a tort committed in the forum state if it carries insurance for that tort. The ICJ refused to extend this tort exception to all civil claims by a foreign state in the forum country.¹⁹⁵

The territorial tort exception should be expanded to include un-insurable claims as well, in part because it would be absurd to require countries to carry "human rights insurance" like they carry vehicle insurance. If countries were liable for human rights violations, there would be an incentive to create such an insurance pool. However, not only would it be impossible to force every country to purchase such insurance, there would be no way to manage such a pool or enforce its obligations.

In addition to difficulties of collecting from every country in the world, having an insurance program providing reparations for victims of human rights violations may create a moral hazard, allowing countries to commit whatever atrocities they desire without concern for the costs of future liability. However, in spite of its shortcomings, a human rights violations insurance pool appears to be the only opportunity future victims will have for any reparations for torts committed by states in foreign territory.

If a country knew that it would be liable for human rights violations, even its most vicious leaders may make more thoughtful decisions, not wanting to threaten their national economy or impose economic uncertainty on their national industry. When industry faces uncertainty, particularly uncertainty involving large class action lawsuits, its value drops. In an increasingly global and competitive market, companies need every advantage they can get. Uncertainty from potential class action suits could upset a state's corporations and have detrimental effects on the state's economy. Political leaders would most likely consider these economic effects when making decisions regarding human rights violations, as they want to preserve their economy and not threaten their companies' global presence.¹⁹⁶

¹⁹³ Bornkamm, *supra* note 30, at 776.

¹⁹⁴ *Id.*

¹⁹⁵ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 64.

¹⁹⁶ It is important to note this argument would not be as salient for a country with a weak economy, but would be especially pertinent to developing countries that often depend on emerging companies for their economic growth and support. These arguments have merit but are outside the scope of this Note.

The ICJ should have taken this opportunity to enunciate a bright-line rule abolishing sovereign immunity for gross human rights violations. Although immunity may be seen as furthering “orderly international relations,” “it also blocks accountability and denies redress” to victims of violations of *jus cogens*.¹⁹⁷ Opponents of a bright-line test may worry this would require the court to make a determination on the merits of whether the action at issue constitutes a gross human rights violation before granting jurisdiction and actually hearing the case. This would mean that a court might spend a long time determining the facts of the case and whether there was a gross human rights violation only to discover that it lacked jurisdiction. An easy way to fix this problem would be to allow individuals to bring a case directly before the ICJ or establish another forum for victims of human rights violations, especially for cases where the violations are obvious and admitted by the perpetrating state (as in this case, where Germany admitted its liability).¹⁹⁸ Because victims are not allowed to bring a case individually before the ICJ, they are forced to rely on their country to do so. This puts too much power in the hands of the country, rather than the victims who suffered. There is no reason why victims should be denied reparations for gross human rights violations, particularly where the perpetrating state has admitted its error but taken insufficient action for reparations. The international community should not support such failures.

C. Because of the ICJ’s Ruling, the FSIA May Be in Jeopardy and the United States Should Take the Lead in Protecting Victims of Human Rights Violations

The United States should take the lead in protecting individuals from human rights violations by amending the FSIA to include such violations. As a result of the ICJ’s decision not to restrict sovereign immunity, the U.S. FSIA may be in jeopardy because it restricts foreign states’ sovereign immunity for tortious acts or omissions that occur in the United States.¹⁹⁹ The FSIA denies foreign states immunity from suits seeking damages for a tortious act or omission resulting in personal injury, death, or damage to or loss of property occurring in the United States.²⁰⁰ Additionally, in 1996 the United States amended the FSIA to include the Antiterrorism and Effective Death Penalty Act, which provides further exceptions to sovereign immunity, stating:

¹⁹⁷ Stephens, *supra* note 102, at 1183.

¹⁹⁸ Jurisdictional Immunities of the State, 2012 I.C.J. ¶ 52.

¹⁹⁹ 28 U.S.C.A. § 1605 (2006); Sciso, *supra* note 92, at 1217.

²⁰⁰ 28 U.S.C.A. § 1605(a)(5) (2008).

a foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act. . . .²⁰¹

The language in both these sections seems outside the scope of immunity provided for by the ICJ and could easily be classified as a territorial tort exception for un-insurable claims, which was not allowed in this case. If American citizens had been deported by a foreign state and forced to live in horrendous conditions while performing slave labor, those victims could bring a claim in the United States under the FSIA.

It is also interesting to note that in 1789 the United States enacted the Alien Tort Statute, which provides jurisdiction in the United States for any civil action brought by an alien for a tort committed “in violation of the law of nations [(*jus cogens*)] or a treaty of the United States.”²⁰² United States courts have, incorrectly, refused to extend an exception from immunity in cases of human rights violations. By readdressing these rulings, the United States can take the lead in fighting gross human rights violations. Precedent for such a reevaluation already exists. In 1985, a district court found that Congress implied an exception in the FSIA for violations of international law even though it was not explicitly stated.²⁰³ The Second Circuit also upheld an international law exception to the FSIA, was overturned by the Supreme Court in *Argentine Republic Amerada Hess Shipping Corp.*²⁰⁴ The Supreme Court held the FSIA was intended to be comprehensive and did not include an international law exception.²⁰⁵ The Ninth Circuit considered whether there should be a *jus cogens* exception to sovereign immunity for torture under the commercial exception of the FSIA.²⁰⁶ Even though the court appeared to want to impose liability on Argentina, it was constrained by the *Amerada* case and unable to deny Argentina sovereign immunity despite the

²⁰¹ 28 U.S.C.A. § 1605A(a)(1) (2012).

²⁰² *Id.* § 1350.

²⁰³ *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990) (“[FSIA] should be read, then, not to extend immunity to clear violations of universally recognized principles of international law.”).

²⁰⁴ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

²⁰⁵ *Id.* at 434; Ved P. Nanda & David K. Pansius, *No International Law Exceptions*, in 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:33 (2012).

²⁰⁶ *Sideman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992); Nanda & Pansius, *supra* note 205; Marc Rosen, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT'L & COMP. L. 461, 493 (1998).

fact that a torture allegation was more serious than the international law rules discussed in *Amerada*.²⁰⁷

Unfortunately, United States courts are still constrained by the *Amerada* rule and construe the FSIA to grant immunity to a foreign state, even when it violates CIL. Congress contemplated a “human rights exception” to the FSIA,²⁰⁸ but all the bills creating a sovereign immunity exception to the FSIA for human rights violations, either at home or abroad, were defeated.²⁰⁹ The legislative branch needs to take a stand in this area as it alone can change the status quo. Congress needs to pass an amendment to the FSIA prohibiting violations of human rights that amount to breaches of *jus cogens*. Congress already refuses to grant sovereign immunity when the tort occurs in the United States, so it is only common sense that there should be no immunity for such acts if they occur outside the United States.²¹⁰ For example, an Italian citizen injured by Germans in the United States deserves no less protection than an Italian citizen injured by Germans in Italy. Congress should address the *Amerada* decision and should amend the FSIA to deny foreign states sovereign immunity for torts and human rights violations that they commit outside the United States.

The potential implications of granting sovereign immunity for gross violations of human rights are enormous. Essentially, countries are given free rein to invade other countries, commit gross human rights violations, and then claim sovereign immunity if their victims ever try to hold them responsible. For example, would anyone allow the United States to get away with enslaving Iraqis during Operation Iraqi Freedom and then denying those victims reparations for those injustices? The international community would be up in arms if that were to happen. Why is it acceptable for Germany during World War II but not the United States in the Iraq War? While liability must cease at some point, all countries should be held to the same standards, particularly when it comes to *jus cogens*.

V. CONCLUSION

The United States must take a stand in front of the global community and deny sovereign immunity to states that have committed gross violations of human rights. Unfortunately the ICJ did not seize its opportunity to follow the current CIL trend and create precedent by allowing civil claims to be

²⁰⁷ *Siderman de Blake*, 965 F.2d at 718–19.

²⁰⁸ Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary and Possible?*, 86 AM. SOC’Y INT’L L. PROC. 338 (1992).

²⁰⁹ Rosen, *supra* note 206, at 494–95. See, e.g., H.R. REP. NO. 934-103 (1993).

²¹⁰ Scott A. Richman, *Siderman de Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Noms?*, 19 BROOK. J. INT’L L. 967, 994–95 (1993).

brought against Germany in other states for atrocities committed in those states by the Third Reich. Germany has not made proper reparations over sixty years after the fact and punishment is long overdue. Holding Germany liable will act as a deterrent against future human rights violations. Martha, and others like her, should have an opportunity for compensation for the great wrongs they have suffered.