

STATE IMMUNITY FROM EXECUTION
THE LANDMARK JUDGMENT OF THE INTERNATIONAL
COURT OF JUSTICE ON THE
“*JURISDICTIONAL IMMUNITIES OF THE STATE*” CASE
(GERMANY VERSUS ITALY)

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ABSTRACT

In its judgment on the “Jurisdictional Immunities of the State” case, the International Court of Justice found that Italy breached its obligations under international law not only for violating Germany’s immunity from jurisdiction but also for violating Germany’s immunity from execution. The Court found that Italy breached Germany’s immunity from execution in taking measures of constraint against Villa Vigoni, a German property situated in Italian territory which hosts a German-Italian cultural centre. This paper addresses the issue of State immunity from execution through the study of the above-mentioned judgment of the International Court of Justice and a related analysis of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004 by the General Assembly but still awaiting entry into force.

INTRODUCTION

The legal doctrine of State immunity from jurisdiction and execution evolved significantly in State practice during the twentieth century despite the absence of a universal treaty or a decision of an international court on the subject. This development was enhanced by the adoption by the United Nations General Assembly, in 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention), which, though not yet in force,¹ has served since then as an important guideline for courts, and in fleshing out customary international law. However, it was not until the landmark judgment rendered by the International Court of Justice in “*Jurisdictional Immunities of the State*”, in 2012, in which the World Court had the opportunity to identify and interpret rules of customary international law regarding State immunity in a dispute between Germany and Italy, that key aspects of those rules were clarified. While the International Court of Justice dealt both with immunity from jurisdiction and immunity from execution in the above judgment, this paper specifically addresses only the latter.

2. THE *FERRINI* AND *DISTOMO* CASES AND THEIR RELATION TO THE VILLA VIGONI ISSUE

In September 1998, Luigi Ferrini instituted proceedings against Germany before Italian courts claiming compensation for the injuries and damages suffered from his arrest and deportation to Germany in August 1944, where he was detained and

¹ According to Article 30 of the UN Convention, it shall enter into force after being ratified by 30 States. As to this day, the UN Convention has been ratified by 22 States. United Nations, United Nations Convention on Jurisdictional Immunities of States and Their Property, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en>.

subjected to forced labour until the end of the war. In November 2000, the Court of Arezzo granted immunity from jurisdiction to Germany. Ferrini appealed this decision at the Court of Appeal of Florence which upheld Germany's immunity. However, in March 2004, the Italian Court of Cassation denied immunity to Germany, on the basis that immunity should not be upheld when the act of the foreign State constituted an international crime. The case was then referred back to the Court of Arezzo and later to the Court of Appeal of Florence in February 2011, which then condemned Germany to pay compensation to Ferrini.²

Germany had previously been denied immunity from jurisdiction in proceedings instituted by Greek claimants before Greek courts concerning the massacre committed by German armed forces in the village of Distomo during the Second World War. The Court of First Instance of Livadia, in September 1997, condemned Germany to pay compensation to the successors of the victims of the massacre. This judgment was confirmed by the Greek Supreme Court in May 2000 but was never enforced in Greece due to the lack of authorization from the Minister of Justice, a requirement to enforce a judgment against a foreign State in Greece.³

The claimants then sought to enforce the Greek judgment in Germany, but the German Federal Supreme Court ruled, in June 2003, that the Greek decisions had been rendered in breach of Germany's immunity from jurisdiction and for that reason could not be recognized and enforced in Germany. The claimants thereafter instituted proceedings against Greece and Germany before the European Court of Human Rights, which found their claims to be inadmissible.⁴

At that juncture, the claimants of the *Distomo* case sought to enforce the judgment in Italy. In June 2006, the Court of Appeal of Florence granted the *exequatur*,⁵ declaring the judgment of the Court of First Instance of Livadia that condemned Germany to pay compensation to the Greek claimants for serious violations of international humanitarian law enforceable in Italy.⁶

Following that decision, a legal charge against Villa Vigoni, a real estate property belonging to Germany located near Lake Como and serving as a German - Italian

² Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 27.

³ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 30.

⁴ J. Craig Barker, "Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in Germany v. Italy", International Community Law Review 15, no. 4 (2013), p. 425.

⁵ Approximately one year earlier, the Court of Appeal of Florence had already declared enforceable in Italy the order contained in the judgment regarding Germany's obligation to reimburse the claimants' legal expenses for the judicial proceedings in Greece. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 33.

⁶ The Court of Cassation confirmed the ruling of the Court of Appeal of Florence in January 2011. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 34.

Cultural Centre, was registered in June 2007 in Italy.⁷

3. MEASURE OF CONSTRAINT AGAINST VILLA VIGONI: THE LANDMARK DECISION OF THE INTERNATIONAL COURT OF JUSTICE

In December 2008, Germany instituted proceedings against Italy before the International Court of Justice on the three following issues. Germany requested the World Court to find Italy in breach of its obligations under international law for: (i) failing to respect Germany's immunity from jurisdiction in civil claims brought before Italian courts by individuals seeking reparation for damages caused by German armed forces during the Second World War; (ii) declaring enforceable in Italy decisions rendered by Greek courts condemning Germany to pay compensation for violations of international humanitarian law committed during the Second World War; and (iii) *taking measures of constraint against Villa Vigoni, a German real estate property located in Italy*.⁸

This paper addresses the issue of State immunity from execution⁹, which guarantees the protection of State property situated in the territory of another State from measures of constraint. It focuses on the question of the legality of the measure of constraint taken against Villa Vigoni and the International Court of Justice's conclusions on the rules of customary international law applicable to State immunity from execution.

3.1. DISTINCTION BETWEEN STATE IMMUNITY FROM JURISDICTION AND FROM EXECUTION

State immunity comprises both immunity from jurisdiction and immunity from execution. While the former prevents the courts of one State to exercise jurisdiction over another State, the latter prevents the taking of a measure of constraint by one State over property of another State.¹⁰

The International Court of Justice stated that the rules of customary international law regarding immunity from jurisdiction and immunity from enforcement "are distinct, and must be applied separately".¹¹ Furthermore, the immunity from

⁷ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 35; The Italian government had issued a decree in April 2010 suspending the legal charge registered against Villa Vigoni until a decision was rendered in the proceedings before the International Court of Justice. Andrea Gattini, "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?", Leiden Journal of International Law 24, no. 1 (2011), p. 177.

⁸ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 37.

⁹ The expressions "immunity from execution" and "immunity from enforcement" are used interchangeably in this paper.

¹⁰ Jean-Marc Thouvenin, "Gel de fonds des banques centrales et immunité d'exécution", in: Immunities in the Age of Global Constitutionalism, ed. Anne Peters et al. (Leiden: Brill Nijhoff, 2015), p. 211.

¹¹ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 113.

enforcement enjoyed by States regarding their property located on foreign territory goes beyond their immunity from jurisdiction. Thus, even when the State is not entitled to immunity from jurisdiction in a proceeding before a foreign court and a judgment is rendered against it, this does not mean that measures of constraint can be immediately taken against its property situated on the territory of the forum State or on that of a third State without first considering the specific rules of immunity from enforcement to which the foreign State might be entitled.¹²

Even though States can waive both their immunity from jurisdiction and their immunity from execution, it cannot be presumed *a priori* that when a State waives its immunity from jurisdiction it has also waived its immunity from enforcement.¹³ Thus, if a State waives its immunity from jurisdiction before a court of another State, which could be done by any of the means listed in article 7 of the UN Convention¹⁴ but does not expressly waive its immunity from enforcement, no measure of constraint can be taken against properties belonging to that State based solely on its consent to the jurisdiction of the foreign court.¹⁵

In conclusion, a waiver of immunity from enforcement and consequently the consent to the taking of measures of constraint against its own property cannot be implied in a waiver of immunity from jurisdiction.¹⁶

3.2. PRE-JUDGMENT AND POST-JUDGMENT MEASURES OF CONSTRAINT

The UN Convention addresses State immunity from execution in connection with proceedings before a court and sets out rules for pre-judgment¹⁷ and post-judgment¹⁸

¹² Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 113.

¹³ Robert Kolb; Thiago Braz Jardim Oliveira, “Le Droit des Immunités Juridictionnelles Etatiques et l’Arrêt de la Cour Internationale de Justice dans l’Affaire Italo-Allemande”, Swiss Review of International and European Law 23, no. 2 (2013), p. 250.

¹⁴ Article 7: “1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding”.

¹⁵ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 113.

¹⁶ Article 20: “Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint”.

¹⁷ Article 18: “No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: (a) the State has expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding”.

¹⁸ Article 19: “No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless

measures of constraint against State property. While the former can only be taken with the express consent of the foreign State, the latter is subject to an additional exception, namely that measures of constraint may be taken only against State property that is not in use for a government non-commercial purpose.¹⁹

The legal charge registered against Villa Vigoni by Italy was a post-judgment measure of constraint, taken for the satisfaction of a judgment rendered by Greek courts, enforceable in Italy due to the granting of the *exequatur* by Italian courts. For that reason, Germany argued that the rules set out in article 19 of the UN Convention should be applied, as they reflect customary international law on the matter.²⁰

The International Court of Justice decided not to rule on the customary nature of all provisions of article 19 but found that at least one of the following conditions had to be satisfied before a measure of constraint could be taken against property belonging to a foreign State for the satisfaction of a judgment, namely: “*that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that the State has allocated the property in question for the satisfaction of a judicial claim*”.²¹

The International Court of Justice concluded that Villa Vigoni was clearly being used for governmental non-commercial purposes, as it hosted a cultural centre whose aim was to promote cultural exchanges between Germany and Italy and for this reason did not fall within the exception to immunity from execution.²² Moreover, Germany

and except to the extent that: (a) the State expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed”.

¹⁹ Anthony Aust, *Handbook of International Law*, (Cambridge: Cambridge University Press, 2005), p. 173.

²⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, para. 115.

²¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, para. 118; The International Court of Justice also referred to State practice from Germany, Switzerland, the United Kingdom and Spain in support of this conclusion. J. Craig Barker, “International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy) Judgment of 3 February 2012”, *International and Comparative Law Quarterly* 62, no. 3 (July 2013), p. 748; There is a general understanding that while States enjoy immunity from execution for property in use for sovereign purposes, they do not enjoy immunity from execution for property in use for commercial purposes. Anne Van Aaken, “Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution”, in *Immunities in the Age of Global Constitutionalism*, ed. Anne Peters et al. (Leiden: Brill Nijhoff, 2015), p. 165.

²² Hazel Fox, “When Can Property of a State be Attached to Enforce a Foreign Judgment Given against it in Another Country? Some Guidance in the ICJ Judgment in the *Jurisdictional Immunities*

had never consented to the legal charge registered against Villa Vigoni nor had it allocated the property for the satisfaction of judicial claims.²³ Therefore, none of the conditions set out by the International Court of Justice for the existence of an exception to immunity from execution had been met and, for this reason, no measure of constraint could be taken against the German property.²⁴

For the above reasons, the International Court of Justice found that the registration of a legal charge against Villa Vigoni constituted a violation by Italy of the immunity from enforcement to which Germany was entitled under customary international law.²⁵

4. STATE PROPERTY PRESUMED TO BE IN USE FOR GOVERNMENT NON-COMMERCIAL PURPOSES

Additionally to the rule of customary international law on State immunity from execution identified by the International Court of Justice, the UN Convention presents a list of categories of State property that are presumed to be in use for government non-commercial purposes and, therefore, should be immune from measures of constraint.²⁶ They are: “(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; (b) property of a military character or used or intended for use in the performance of military functions; (c) property of the central bank or other monetary authority of the State; (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale”.²⁷ Among the State property listed in the UN Convention, bank accounts of embassies are the most common targets of creditors seeking enforcement of judgments against a foreign State.²⁸ However, their efforts seeking measures of attachment against funds from those bank accounts are usually denied by national courts, as in State practice there is a presumption that those bank accounts are used for sovereign

Case”, in *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas*, ed. Rüdiger Wolfrum et al. (Leiden: Brill Nijhoff, 2016), p. 50.

²³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, para. 119.

²⁴ Stefania Negri, “Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning *Jurisdictional Immunities of the State (Germany v. Italy)*”, *International Community Law Review* 16, no. 1 (2014), p. 135.

²⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, para. 120.

²⁶ Anne Van Aaken, “Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution”, in *Immunities in the Age of Global Constitutionalism*, ed. Anne Peters et al. (Leiden: Brill Nijhoff, 2015), p. 162.

²⁷ Article 21 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

²⁸ Cedric Ryngaert, “Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors”, *Leiden Journal of International Law* 26, no. 1 (2013), p. 73.

purposes and thus are immune from any measure of attachment.²⁹ This presumption can be rebutted by creditors who in this case are required to prove that a diplomatic mission's bank account is being used for commercial purposes.³⁰ However, most courts require that creditors demonstrate the exclusive commercial use of the bank account in order that any measure of constraint can be taken against its funds.³¹

CONCLUSIONS

The International Court of Justice concluded that at least one of the following conditions has to be satisfied before a measure of constraint can be taken against property belonging to a foreign State for the enforcement of a judgment: (i) that the property is not in use for an activity pursuing government non-commercial purposes; (ii) that the State gives its express consent to the measure of constraint against its own property; or, (iii) that the property is allocated by the State for the satisfaction of a judicial decision.

The International Court of Justice found that Villa Vigoni was clearly being used by Germany for government non-commercial purposes, as it was the seat of a cultural centre. Moreover, Germany had not consented to the legal charge registered against Villa Vigoni nor had allocated Villa Vigoni for the satisfaction of a judicial decision. Thus, as none of the conditions above had been satisfied, no measure of constraint could have been taken against the German property. For this reason, the International Court of Justice found that the legal charge registered against Villa Vigoni violated Germany's immunity from execution.

The UN Convention, whose many provisions are considered to reflect customary international law, played an important role in the judgment of the International Court of Justice. This landmark decision clarified the issue of State immunity from execution and may from now on serve as basis for future decisions on the matter.

²⁹ Cedric Ryngaert, "Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors", *Leiden Journal of International Law* 26, no. 1 (2013), p. 74.

³⁰ One can argue, as the French Court of Cassation found in a judgment rendered in 1995 (*Iran v. Dumez*), that if the funds of the bank account surpasses the funds needed to the maintenance of the embassy's regular public functions this surplus could be subject to attachment. Robert Kolb; Thiago Braz Jardim Oliveira, "Le Droit des Immunités Juridictionnelles Etatiques et l'Arrêt de la Cour Internationale de Justice dans l'Affaire Italo-Allemande", *Swiss Review of International and European Law* 23, no. 2 (2013), p. 251.

³¹ Cedric Ryngaert, "Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors", *Leiden Journal of International Law* 26, no. 1 (2013), p. 75.