7-1-2012

The *Ferrini Doctrine*: Abrogating State Immunity from Civil Suit for Jus Cogens Violations

Natasha Marusja Saputo

ARTICLE

The *Ferrini* Doctrine: *Abrogating State Immunity from Civil Suit for Jus Cogens Violations*

Natasha Marusja Saputo*

ABSTRACT

Article 10 of the Italian Constitution incorporates generally recognized principles of international law.[1] Thus, State immunity from civil suit in the domestic courts of another State—a principle generally recognized in international law—would apply in Italy. However, the protection of fundamental human rights is another generally recognized principle in international law and the ostensible conflict between these two principles has resulted in a series of controversial rulings issued by the Italian Court of Cassation. These rulings allow for the abrogation of State immunity from civil suit in the domestic courts of another State for alleged violations of *jus cogens* or peremptory norms[2]—what this paper will refer to as the *Ferrini* doctrine. Although the central premise behind the Court's reasoning appeals to the values underlying international law, it is by no means authoritative under the international law regime in which rules and principles are developed through consensus of what is generally recognized. As such, the Italian Court of Cassation's decisions are not just controversial they are technically unlawful under customary international law. However, such deviation is the sole means through which customary international law changes and evolves. Were the Italian Court of Cassation to make its reasoning logically consistent and, at this initial stage, less sweeping in breadth, the *Ferrini* doctrine arguably has the potential to be effectively exported to other States thereby furthering a change in customary international law on State immunity.

This paper will: (1) provide a brief survey of some of the Italian Court of Cassation's controversial rulings regarding State immunity from civil suit; (2) examine the responses to the decisions from other States and academia to evaluate the validity of such a rule; (3) propose a revised version of the *Ferrini* doctrine which would enhance its viability and impact on customary international law; and (4) reach a conclusion as to whether such a change is advisable.

---

* LL.M., *with Distinction* and *Dean's List Honors,* Georgetown University Law Center, May 2011. Recipient of the Thomas B. Chetwood S.J. Prize. J.D. *Magna Cum Laude*, George Mason University School of Law, May 2010.

1 *See* Art. 10 Costituzione [Cost.] (It.), *available at* http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (English) ("The Italian legal system conforms to the generally recognized principles of international law.").

2 *Jus cogens*, also known as a peremptory norm of international law, is a "norm of general international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 50, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/cod/diplomatic conferences/lawoftreaties-1969/vol/english/confdocs.pdf.

TABLE OF CONTENTS

I. ITALIAN COURT OF CASSATION: DECISIONS ON STATE IMMUNITY FROM CIVIL SUIT

A. FERRINI

Luigi Ferrini filed suit against the Federal Republic of Germany in the Italian Court of Arezzo on September 23, 1998 seeking damages for his 1944 capture in Italy by German armed forces and subsequent deportation and forced labor in Germany.[1] The Court of Arezzo held that the claim was not within the jurisdiction of the Italian courts, finding that Germany was shielded from suit by "the Principle of State immunity" because Ferrini's claim arose from actions "carried out by a foreign State in the exercise of its sovereign powers."[2] The Florence Court of Appeals upheld the lower court's reasoning and dismissed Ferrini's appeal.[3] However, the Italian Court of Cassation reversed, holding that "the Federal Republic of Germany does not have the right to be declared immune from the jurisdiction of the Italian courts."[4]

The Court of Cassation began with the premise that while the existence of State immunity was "beyond question . . . the extent of this principle . . . is gradually becoming more limited."[5] With this in mind the Court framed the issue facing it as:

> [W]hether immunity from jurisdiction is capable of operating even in respect of conduct which . . . is so extremely serious that, in the context of customary international law, it belongs to that category of international crimes which are so prejudicial to universal values that they transcend the interests of individual States.[6]

The Court reasoned that although the "modus operandi" of the exercise of a State's sovereign powers is "beyond censure . . . this does not prevent investigations from being launched into possible crimes committed during the course of the activities."[7] Moreover, under Article 10(1) of the Italian Constitution, violations of fundamental human rights, which constitute international crimes come within the purview of the Italian judiciary.[8] The Court held that deportation and forced labor were, now and at the time of the acts in question, recognized as war crimes and violations of international law by "all civilized nations."[9]

The Court of Cassation asserted that it is increasingly recognized that international crimes "threaten the whole of humanity and undermine the foundations of peaceful international relations" and that human rights are "norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms, including those which relate to State immunity."[10] Reasoning by analogy, the Court concluded that if grave human rights violations constitute crimes under international law for which universal jurisdiction applies, "there is no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes."[11]

---

1 Cass., sez. un. 11 marzo 2004, n. 5044, Foro It., 2004, I, ¶ 1 (It.) [hereinafter *Ferrini*].
2 *Id.* ¶ 1.1.
3 *Id.* ¶ 1.2.
4 *Id.* ¶ 11.
5 *Id.* ¶ 5.
6 *Id.* ¶ 7.
7 *Id.* ¶ 7.1.
8 *Id.*
9 *Id.* ¶ 7.2.
10 *Id.* ¶ 9.
11 *Id.*

According to the Court, divesting States of their immunity for grave human rights violations is logically required given that the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles")[12] prohibits States from abetting situations which lead to violations of international law and affirmatively requires States to use reasonable means to stop the violations.[13] The Court found that recognizing immunity of a State in blatant violation of "inviolable" human rights[14] would undermine the protection of those rights.[15] Fashioning a rule of interpretation the Court held, "[t]here is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence to the norm with the highest status" and that protection of human rights has a higher status than the principle of State immunity.[16]

Seeking to distinguish more recent cases in which courts upheld State immunity, the Court noted that in the case at bar: (1) the act from which the claim arose began in the forum State (Italy); and (2) the act constitutes "an international crime."[17] However, it does not appear that these two distinguishing characteristics are conjunctive prerequisites to the abrogation of State immunity. At the end of its opinion the Court concluded that the fact the act commenced in the forum was irrelevant because as the act constituted an international crime. As a result universal jurisdiction would apply.[18]

The Court further observed that the United States' amendment of its Foreign Sovereign Immunities Act ("FSIA") recognized that courts should not uphold State immunity in cases of human rights violations.[19] The Court criticized the fact that the United States only created an exception to State immunity under the FSIA for US State Department-determined "sponsors of terrorism," finding that such an approach was not in accordance with "the principle of the 'sovereign equality' of States."[20] However, the Court also noted the importance of the United States' acceptance of the primacy of protecting fundamental human rights over the principle of State immunity—the United States had previously been a fierce adherent of "the theory of absolute immunity."[21]

Finally, the Court reasoned by analogy that since functional immunity of State officials is inapplicable in cases involving international crimes, "there can be no valid reason to maintain the immunity of the State and therefore to deny that its responsibility can be enforced before the judicial authority of a foreign State."[22]

B. MANTELLI

On May 29, 2008 the Italian Court of Cassation issued a series of orders that reiterated and expanded its holding in *Ferrini*. The orders held that States accused of international crimes are not immune from civil jurisdiction in the courts of another State.[23] Specifically, the Court denied the Federal Republic of Germany State immunity from civil suit for the deportation and forced labor of Italian citizens during World War II.[24] Despite its citation to a number of State supreme court and international court cases upholding State immunity even in the face of accusations of international crimes, the Court held that these decisions only

---

12 Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 113–14, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentari es/ 9_6_2001.pdf.

13 *Ferrini*, *supra* note 1, ¶ 9 (citing Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts).

14 *Id.* ¶ 9.

15 *Id.* ¶ 9.1.

16 *Id.*

17 *Id.* ¶ 10.

18 *Id.* ¶ 12.

19 *Id.* ¶ 10.2.

20 *Id.*

21 *Id.*

22 *Id.* ¶ 11.

23 Cass. sez. un., 29 maggio 2008, n. 14201, Foro it. 2008, I, ¶ 11 (It.) [Hereinafter *Mantelli*].

24 *Id.*

demonstrated that a human rights exception to State immunity was not, as yet, a definite international custom but that such an exception was in the process of emerging.[25]

With regard to jurisdiction, the Court was even more sweeping in its assertion than in *Ferrini*, holding that the fact that the events giving rise to the suit occurred in Italy only further supported Italian jurisdiction over the case, rather than constituting its primary basis.[26] Indeed, any ambiguity left behind after *Ferrini* regarding whether the violative conduct had to have occurred within the forum has been dispelled as a result of these orders which clearly indicate that the Court believes there is no such requirement for jurisdiction.

C. LOZANO

In *Italy v. Lozano*, the Italian Court of Cassation addressed whether it had jurisdiction over a U.S. soldier who had killed an Italian civilian and injured two others at a checkpoint in Iraq.[27] While ultimately holding that it did not have jurisdiction because the incident did not amount to a war crime, the Court postulated, albeit in *obiter dictum*, that a State agent who commits international crimes while acting in his official capacity may lose immunity for both himself *and* the State for which he was an agent.[28] Such a position would be consistent with the logic of State immunity that the Italian Court of Cassation advocated since its decision in *Ferrini*. As one commentator noted, "it makes no sense to remove the immunity from foreign criminal jurisdiction for state agents and then maintain state immunity for the same acts."[29] In concluding that a State agent who commits international crimes loses immunity, the Court based its decision not only on Italian case law but also on the principle that immunity must give way to allow prosecution for violations of *jus cogens*.[30] This is the same reasoning the Court used to remove State immunity in cases like *Ferrini*, i.e., in the event of conflict, *jus cogens* principles prevail over other customs or rules of international law such as State immunity.

D. CIVITELLA

In an October 10, 2006 ruling the Military Court of First Instance of La Spezia found the Federal Republic of Germany (FRG) to be jointly and severally liable as a civilly responsible party with criminal defendant Max Joseph Milde for the massacre of the Italian town of *Civitella* on June 29, 1944.[31] The judgment was subsequently affirmed on appeal and ultimately the Italian Court of Cassation, acting as the court of last resort, rejected the FRG's appeal on October 21, 2008.[32]

Civitella was a procedurally unique case. Italian criminal procedure allows a civil action to be brought within a criminal trial.[33] This civil action may be brought against the criminal defendant himself and/or a

---

25 *Id.*

26 *Id.* ¶ 12.

27 Two of the Italians were unarmed intelligence officers who had just successfully completed a mission to rescue an Italian journalist was kidnapped and held hostage by Iraqi insurgents. One of the intelligence officers was killed the other was injured along with the rescued journalist. The intelligence officers were regarded as civilians because they were unarmed and not engaged in armed hostilities. Antonio Cassese, *The Italian Court of Cassation Misapprehends the Notion of War Crimes: the Lozano Case*, 6 INT'L CRIM. JUST. 1077, 1078 (2008). Although *Lozano* was a criminal case it involved a civil plaintiff which is allowed under Article 74 of Italian Criminal Procedure.

28 Cass., sez. un. 24 luglio 2008, n. 31171, Foro it. 2008 II, (it.) available at http://www.cicr.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d972ce6850f24bbbc1257561003a6d58/$FILE/Italy%20v.%20Lozano%202008.pdf [hereinafter Lozano].

29 Cassese, *supra* note 27, at 1082.

30 *Lozano*, *supra* note 28, ¶ 14.

31 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, 597-98 (2009).

32 *Id.* at 598; Codice di procedura penale [C.p.p] art. 74 (It.). This was also the procedural posture in Lozano. See Lozano, *supra* note 28.

33 Ciampi, *supra* note 31, at 599.

party that may be held civilly liable for the harm the crime caused.[34] In *Civitella*, criminal proceedings were brought against the individual defendant and then the FRG was joined as a civil defendant.[35] Conversely, in *Ferrini*, the case was entirely civil and only against the FRG.[36] Moreover, unlike *Ferrini*, in which the Court of Cassation was only making a ruling on jurisdiction while the case was pending in a court of first instance, in *Civitella*, the Court heard the case as a court of last instance which allowed it a wider scope of review.[37] Another interesting procedural facet was that the facts ascertained in the criminal case against the individual defendant were applied to the FRG in the civil portion without its objection thus making the factual finding *res judicata*.[38]

Regarding the applicability of State immunity, the Court drew on its decision in *Ferrini* which held that immunity for acts *jure imperii*—acts of sovereign power such as actions in wartime—is abrogated if it is so serious a violation of human rights that it constitutes a crime under international law.[39] The Court in both cases referred to this principle as a "limitation" on restrictive State immunity.[40] The Court asserted that this was a trend in Italian case law.[41] In response to the contention that *Ferrini* and other Italian decisions do not establish international consensus on the issue of State immunity and that State immunity has been upheld by the supreme courts of other States, the Court averred that the solution to the apparent conflict between the international principles of State immunity and respect and protection of fundamental human rights will not be decided by a tally of how many cases retained or abrogated immunity.[42] Rather, the "qualitative consistency" of these rulings with customary rules and hierarchy of values in international law must be considered.[43] To some extent it is a balancing test which gives primacy to *jus cogens*.[44] This approach led the Court to conclude that violations of fundamental human rights constitute a crossing of the Rubicon whereby a State abdicates its sovereign immunity.[45]

II. ANALYSIS OF THE *FERRINI* DOCTRINE

A. HOW FAR AFIELD IS *FERRINI*?

Perhaps the central problem with the Italian Court of Cassation's assertion that State immunity must be abrogated in cases of fundamental human rights violations is that it is not in conformity with international practice:

> All national and international final decisions exclusively based on international law have hitherto invariably affirmed the immunity rule even in cases of alleged international crimes amounting to breaches of *jus cogens*. Certain international rules may be peremptory, but it does not follow that their alleged violation by one state allows courts of another state to deny immunity to the former—especially when practice supporting the non-immunity rule is lacking or uncertain.[46]

However, the Italian Court of Cassation purported to base *Ferrini* and its progeny on international law. In order to evaluate whether a State that has violated *jus cogens* can be subject to civil suit in the courts of

---

34 Codice penal [C.p.] art. 185 (It.).
35 Ciampi, *supra* note 31, at 600.
36 *Id.*
37 *Id.*
38 *Id.* at 601.
39 *Id.* at 602.
40 *Id.*
41 *Id.*
42 *Id.* at 603.
43 *Id.*
44 *Id.*at 603-04.
45 *Id.*at 604.
46 Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 AM. J. INT'L L. 122, 125-26 (2009).

another State, it is instructive to look to the traditional sources of international law: State practice—including international agreements—and secondary sources.[47]

i. State Practice

The only multilateral treaty regarding State immunity, the European Convention of State Immunity, as well as its Explanatory Report, is devoid of any reference to *jus cogens* violations.[48] The Inter-American Draft Convention on Jurisdictional Immunity[49] and the International Law Commission's Draft Articles on Jurisdictional Immunity of States and Their Property[50] have not yet entered into force. Importantly, neither contains any references to *jus cogens* violations.[51] Indeed, neither the International Law Commission's Draft Convention[52] nor the United Nations Convention on Jurisdictional Immunities of States and Their Property[53] lists loss of sovereign immunity as a legal consequence of committing acts that are wrongful under international law.

There is a dearth of State court decisions directly adopting the *Ferrini* doctrine or following a similar course of reasoning. In addition to the Italian Court of Cassation's decisions, the decisions of national courts in Greece refusing to recognize State immunity for violations of *jus cogens* while notable "do not (yet) support a *jus cogens* exception to the principle of State immunity."[54]

---

47 *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (laying out the sources of international law as: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."); Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987) (providing that "[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal system of the world.").

48 *See* European Convention on State Immunity, *opened for signature* May 16, 1972, 1495 U.N.T.S. 181, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/074.htm; EXPLANATORY REPORT: EUROPEAN CONVENTION ON STATE IMMUNITY, *available at* http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm.

49 Inter-American Draft Convention on Jurisdictional Immunity of States, Jan. 21, 1983, 22 I.L.M. 292 (1983) [hereinafter Inter-American Draft Convention].

50 Rep. of the Int'l Law Comm'n: Draft Articles on Jurisdictional Immunities of States and Their Property, 43d Sess., April 29-July 19, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10, pt. 2 (1991) [hereinafter ILC Draft Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/engl ish/draft%20articles/4_1_1991.pdf.

51 *See* Inter-American Draft Convention, *supra* note 50; ILC Draft Articles, *supra* note 51.

52 *See* ILC Draft Articles, *supra* note 50.

53 U.N. Convention on Jurisdictional Immunity of States and Their Property, adopted on 2 December 2004 by the U.N. GAOR; *see also,* U.N. GAOR, 59th Sess., U.N. Doc. A/59/49 Vol. I., (Sept. 14 –Dec. 23 2004).

54 Thomas Giegerich, *Do Damages Claims Arising From* Jus Cogens *Violations Override State Immunity from the Jurisdiction of Foreign Courts? in* The Fundamental Rules of the International Legal Order: *Jus Cogens* and Obligations *Erga Omnes* 203, 222 (Christian Tomuschat and Jean-Marc Thouvenin, eds. 2006). (During World War II, German forces massacred a Greek village. Greek survivors and victim's families brought civil suits against Germany in November 1995. On October 30, 1997, the District Court of Livadeia awarded judgment for the plaintiffs, holding that a State, which violated jus *cogens* norms cannot invoke State immunity. Germany appealed this decision to the Areios Pagos (Greek Supreme Court), which affirmed the lower court's judgment, holding that breaches of peremptory norms cannot be *jure imperii* (sovereign acts) and that by violating such norms a State tacitly waives its immunity. [Note, that this reasoning is different from *Ferrini* doctrine which does not rely on tacit waiver of immunity to assert jurisdiction. *See infra* note 252.] However, the plaintiffs were unable to attach any of Germany's assets within Greece because under Article 923 of the Greek Civil Code, the Greek Justice Minister is required to approve such attachment and he refused. Meanwhile, a Special High Court was convened to address the matter and held that Germany was immune from suit because there was not yet a *jus cogens* exception under customary international law to State immunity. The plaintiffs appealed to the European Court of Human Rights claiming, *inter alia*, that the Justice Minister's refusal to authorize attachment of German assets violated Article 6 paragraph 1 of the European Convention by denying them access to the courts. The ECHR held that while the plaintiffs' access to the courts may have been restricted, the restriction was justified to maintain good relations between States, and the restriction was proportional because there was not yet a *jus cogens* recognized exception to State immunity in customary international law.); Kerstin Bartsch & Björn Elberling,

The only State with national legislation that comes close to denying immunity to States for *jus cogens* violations is the United States.[55] As the Court in *Ferrini* admitted, this example is not entirely instructive given the restrictive and politically motivated conditions placed on this revocation of immunity.[56] Moreover, the national legislation of a single State does not constitute the uniform and universal practice of States that would be indicative of consensus on the issue.[57] Although "State practice is insufficient to support" a *jus cogens* exception to State immunity this merely indicates "States do not recognize an *obligation* to make such an exception, and not necessarily that they do not consider themselves entitled to do so."[58]

ii. Secondary Sources

Secondary sources such as legal opinions and the writings of scholars are mixed on the question of abrogating State immunity for *jus cogens* violations. The European Court of Human Rights' main dissenting opinion in *Al-Adsani v. United Kingdom*[59] has received much attention by proponents of the revocation of State immunity for violations of *jus cogens* as the *Al-Adsani* dissenters concluded that in the event of a conflict between *jus cogens* and State immunity, *jus cogens* should predominate and immunity should be superseded.[60] However, it was only a dissenting opinion. Documents regarding State immunity produced by the Institut de Droit International and the International Law Association do not contain any provisions for violations of *jus cogens*.[61] Finally, academic sources seem to be evenly split on the question.[62]

From this survey of the traditional sources of international law, the *Ferrini* doctrine does seem far afield of international law as it currently stands. However, international law is not static. If the *Ferrini* doctrine can be shown to have a logical basis, in addition to its strong moral appeal, it is quite possible that *Ferrini* and its progeny constitute the first step in the process of significant changes in international law which will have wide-ranging implications for State immunity especially for actions taken during wartime.

Jus Cogens *vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the* Kalogeropoulou et al. v. Greece and Germany *Decision*, 4 GERMAN L.J. 478, 478-83 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04No05/PDF_vol_04_no_05_477-491_european_bartsch_elberling.pdf.

55 *See,* 28 U.S.C. § 1605A(a)(1) ("A foreign state shall not be immune . . . 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 if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."); Notably, although U.S. courts may have jurisdiction over the State, for the most part the assets of the State are still protected from attachment in execution of any judgment; *See generally,* 28 U.S.C. §§ 1610, 1611.

56 *Ferrini supra* note 1, at ¶ 10.2.

57 Giegerich, *supra* note 54, at 203, 216.

58 *Id.*

59 Al-Adsani v. The United Kingdom, 35763/97 Eur. Ct. H.R. (2001). In Al-Adsani a dual British and Kuwaiti citizen alleged he was tortured on orders of the Kuwaiti Government. He brought suit in English court asserting damages. However, when the English courts held that Kuwait was entitled to immunity Al-Adsani filed suit against the United Kingdom in the European Court of Human Rights on the grounds that by affording Kuwait immunity the United Kingdom failed to protect his right against being tortured and having access to the courts in violation of the European Human Rights Convention.

60 *Id*. Dissent ¶ 3.

61 Resolution of L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction & Enforcement (Basle, September 2, 1991), *reprinted in* ANDREW DICKINSON ET AL., STATE IMMUNITY 206 (2004), *available at http://www.idi-iil.org/idiF/resolutionsF/1991_bal_03_fr.PDF* (French); International Law Association Revised Draft Articles for a Convention on State Immunity (Buenos Aires, August 14-20, 1994).

62 Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, 18 EUR. J. INT'L L. 955, 964 (2007) (discussing differing views on violations for *jus cogens*).

B. THE NATURE OF STATE IMMUNITY

For the purposes of this paper, it will be assumed that State immunity is a rule of customary international law and not a matter of discretion. However, it is instructive to briefly inquire into the nature of State immunity. Is it really an obligation of customary international law? If so, then there are two propositions involved: (1) State immunity is a rule of law not executive discretion; and (2) State immunity is a universal rule of international law, not subject to municipal variations.[63] While State immunity "is generally recognized by States" there is an "alternative school of thought" which holds that State immunity is within the discretionary authority of a State's executive branch unless such immunity is manifested in legislation.[64]

Recent rulings by the U.S. Supreme Court may indicate that it follows this alternative school of thought—regarding State immunity as purely a matter of executive discretion.[65] The U.S. Supreme Court's view is puzzling since the legislative history of the FSIA demonstrates that a primary purpose of the legislation was to adopt a set standard in order to avoid *ad hoc*, case-by-case determinations of immunity.[66] Nevertheless, in *Republic of Austria v. Altman*,[67] the Court held that the anti-retroactivity doctrine did not bar the FSIA from applying retroactively because, *inter alia*, such application would not alter the legal rights of States but rather would only alter political protection the United States may, in its discretion extend to other States.[68] *Altman* is thus, arguably indicative of the U.S. Supreme Court's current view of State immunity.[69]

The theory of reciprocity may tend to support the discretionary characterization of State immunity.[70] If a State will only recognize the immunity of those States that afford it immunity then surely this is indicative of a discretionary principle. However, the principle of State immunity is increasingly included in international conventions and national legislation with the consequence that any power of the executive over the recognition of State immunity is greatly curtailed.[71] Additionally, the increasing recognition that access to courts is a human right[72] also serves to limit courts in their recognition of State immunity if it "has no legitimate aim and is disproportionate."[73]

---

63 HAZEL FOX, THE LAW OF STATE IMMUNITY 13 (2008).

64 *Id.*

65 *Beaty v. Iraq*, 129 S. Ct. 2183, 2194 (2009) (State immunity is a reflection of present political realties and is not something upon which States can rely in their dealings with each other); *Republic of Austria v. Altman*, 541 U.S. 677, 696 (2004) (State immunity is the product of political realities and courts have historically deferred to the decisions of the political branches of government on questions of State immunity); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (State immunity is "a gesture of comity between the United States and other sovereigns").

66 *The Revised State-Justice Bill On Foreign Sovereign Immunity: The Time For Action*: *Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Gov't. Relations of the H. Comm. on the Judiciary*, 94th Cong. 33–35 (1976) (statement of Monroe Leigh, State Department Legal Adviser, that FSIA would alleviate the burden of having to make decisions of State immunity on a case-by-case basis); *Charles T. Main Int'l Inc., v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 (C.A. Mass. 1981) ("one objective of FSIA…was to end the practice whereby the State Department was expected to file, on a case-by-case basis, 'suggestions of immunity,' to which the courts would normally defer.").

67 *Altman*, 541 U.S. at 677.

68 *Id.* at 696.

69 FOX, *supra*, note 63, at 15.

70 *Id.*

71 *Id.* at 16.

72 *See* G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar. 23, 1976) ("Each State Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."); Euro. Consult. Ass., *European Convention on Human Rights*, 6th Sess., art. 6(1) (1950) ("In the determination of his ***civil rights*** and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.") (Emphasis added).

73 FOX, *supra* note 63, at 16.

Although the absence of protest by a State whose immunity has been abrogated by a national court of another State may support the notion that State immunity is discretionary, such an inference is "questionable."[74] This is because a protest is "implicit and is made by a refusal to appear."[75] Additionally, "the instances of protest or acquiescence are motivated by considerations too various to support immunity as either a rule of law or a discretionary privilege."[76]

Aside from the United States, all other civil and common law jurisdictions have rejected State immunity as a mere "gesture of comity."[77] Even the controversial *Ferrini* decision acknowledged that State immunity is a rule of international law.[78] Moreover, it is likely that once the United Nations Convention on Jurisdictional Immunities of States and Their Property comes into force it will further undermine the alternative school of thought which regards State immunity as a matter of executive discretion.[79] Indeed, the chapeau of the Convention (although non-binding) expressly provides that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law."[80] Thus, proceeding with the assumption that State immunity is a rule of international law, what is its position with regard to other rules of international law?

C. INTERNATIONAL HIERARCHY

That there is a hierarchy with respect to rules of customary international law has been recognized by international bodies.[81] Moreover, that *jus cogens* or peremptory norms trump those lower in the hierarchical scheme has also been recognized by international bodies. In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia[82] referring to the prohibition on torture concluded that:

> Because of the importance of the values it protects . . . a peremptory norm or jus cogens, [] is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[83]

Similarly, under Article 41 of the Draft Articles, States are prohibited from recognizing the lawfulness of a situation created by a serious breach of a peremptory norm of general international law and may not "render aid or assistance in maintaining that situation."[84] Upholding the immunity of a State that has violated

---

74 *Id.*
75 *Id.*
76 *Id.* at 18.
77 *Id.*
78 Andrea Bianchi, Ferrini v. Federal Republic of Germany, 99 AM. J. INT'L 242 (2005).
79 FOX, *supra* note 63, at 19.
80 G.A. Res. 59/38, U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/38, Annex (Dec. 2, 2004).
81 *Conclusions of the Work of the Study Group on the Fragmentation of International Law*, Rep. of the Int'l Law Comm'n, 58th Sess., May 1−June 9, July 3−Aug. 11, 2006, ¶ 251(6), U.N. Doc. A/61/10, Supp. No. 10 (2006), *available at* http://untreaty.un.org/ilc/reports/2006/2006report.htm.
82 The International Criminal Tribunal for the Former Yugoslavia's charter contains a mandate that the Tribunal only apply customary international law. The International Criminal Tribunal for Rwanda has the same mandate. Thus, the law underlying the decisions of these tribunals is regarded as an authoritative source of customary international law. *See Doe v. Exxon*, 2011 U.S. App. LEXIS 13934, *60 (D.C. Cir. July 8, 2011) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006); *Abagninin v. AMVAC Chem. Corp.,* 545 F.3d 733, 739 (9th Cir. 2008); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1293 (11th Cir. 2002)).
83 Prosecutor v. Furundzija, Case No. IT-95-17, Judgment, ¶ 153 (Dec. 10, 1998) (footnotes omitted).
84 Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 56th Sess., Apr. 23−June 1, July 2−Aug. 10, 2001, art. 41(2), U.N. Doc. A/56/10, Supp. No. 10 (2001) ("No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40 [peremptory norm of general international law], nor render aid or assistance in maintaining that situation.").

a peremptory norm arguably assists in maintaining the volatile situation since immunity is often a green light for impunity. This would be true even if the recognition of immunity took place years or even decades after the event since during the violation the State would be confident that its actions were immunized. Thus, while upholding State immunity may not itself be a violation of *jus cogens*, it becomes a violation to the extent that recognition of immunity assists in allowing the violation to continue[85] which, pursuant to Article 41, a State has a duty, in cooperation with other States, to bring to an end.[86]

It would seem that the abrogation of State immunity to allow for civil suits is arguably permitted under the Draft Articles. As discussed above, Article 41 precludes a State from recognizing a situation arising from a serious breach of a peremptory norm and prohibits a State from rendering assistance to the maintenance of such a situation. Upholding State immunity would arguably do both and therefore, is prohibited. Moreover, under Article 48 even a State that has not been directly injured may invoke the responsibility of the offending State if the obligation violated was "owed to the international community as a whole."[87] Thus, to the extent that the *Ferrini* doctrine were only to apply to violations of *jus cogens* norms that also constitute *erga omnes* obligations, the doctrine's application would comport with Article 48 even if the State invoking the doctrine was not the directly injured State. Moreover, under Article 48, the State invoking the violator's responsibility can demand reparations "in the interest of the injured State or of the beneficiaries of the obligation breached."[88] The *Ferrini* doctrine would simply allow the forum for such reparations to be the domestic courts of the vindicating State.

However, there are at least two reasons why reliance on the Draft Articles in support of the *Ferrini* doctrine may be misplaced. First, under both Articles 48 and 54, a non-injured State entitled under to invoke the responsibility of the offending State may only take "*lawful* measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."[89] Technically, *Ferrini*'s abrogation of State immunity is not lawful under international law. Second, the Draft Articles may have been intended to apply on a strictly State-to-State level.[90] Even assuming *arguendo* that abrogation of State immunity for violations of peremptory norms is lawful i.e., in compliance with the hierarchy of norms in international law, it is possible that Article 54 still precludes the Draft Articles from being a source of support for the *Ferrini* doctrine.

Article 54 refers to "reparation in the interest of the injured State or of the beneficiaries of the obligation breached."[91] But, Article 54 ties back to Article 48, which allows for action by a non-injured State for violations of peremptory norms *owed to all States*, i.e., *erga omnes* obligations.[92] Thus, the beneficiaries of the reparations sought are States not individuals. Indeed, the examples of such lawful measures contained in the Commentary to Article 54 are all collective actions by States and refer to "the protection of the collective interest."[93] Specifically with respect reparations, the Commentary avers that actions taken under Article 48 are to be done "in the interest of the injured States, if any, or of the

---

85 Orakhelashvili, *supra* note 62, at 964, 967.

86 Rep. of the Int'l Law Comm'n, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, 56th Sess., Apr. 23−June 1, July 2−Aug. 10, 2001, art. 41(1), U.N. Doc. A/56/10, Supp. No. 10 (2001) ("States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [peremptory norm of general international law].") [Hereinafter *Commentaries*].

87 *Id.* art. 48(1)(b).

88 *Id.* art. 48(2)(b).

89 *Id.* art. 54.

90 The failure of the Draft Articles to provide standing to non-governmental organizations or other non-state actors in the context of invoking State responsibility suggests that the Draft Articles were intended to apply strictly State-to-State. *See, e.g.*, Marjan Ajevski, *Serious Breaches, The Draft Articles on State Responsibility and Universal Jurisdiction*, 1 EUR. J. LEGAL STUD. 12 (2008), *available at* http://www.ejls.eu/4/51UK.htm (arguing that failure to give NGOs and non-state actors standing ignores an important development in the field of international law).

91 *Commentaries*, *supra* note 86, art. 54.

92 *Id.* art. 48.

93 *Id.* art. 54 §§ 3-4, 6-7.

beneficiaries of the obligation breached."[94] Once again, the action is justified only insofar as "it provides a means of protecting the community or collective interest at stake."[95] This strongly indicates that States rather than individuals are the concern of the Draft Articles. It would be a challenge to explain how abrogating State immunity to permit private civil suits benefits the collective interest of States[96] because allowing civil suits by individuals against a violator State facilitates reparation in the interest of those individuals rather than the State. Nevertheless, relying on the Draft Articles for direct support of the *Ferrini* doctrine is tenuous at best even though the Draft Articles, like the *Ferrini* doctrine, are premised on a hierarchy of international law.

International legal scholar Hazel Fox has serious concerns about the hierarchical approach to international law whereby *jus cogens* rules prevail over State immunity. In a rhetorical examination of such a proposition, Fox observes:

> A *jus cogens* norm is said to invalidate or render ineffective other rules of international law. Is this effect solely with regard to rules, which directly contradict the substantive law contained in the superior norm? […] State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method settlement.[97]

Fox cites the International Court of Justice ("ICJ") decision in *Congo v. Rwanda* as well as the House of Lords' decision in *Jones v. Saudi Arabia* in support of the proposition that such a hierarchy between *jus cogens* and State immunity does not exist.[98] The ICJ held that:

> 'the erga omnes character of a norm and the rule of consent to jurisdiction are two different things', and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character . . . cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.[99]

Applying this precedent the House of Lords concluded that, "The International Court of Justice has made plain that a breach of a *jus cogens* norm of international law does not suffice to confer jurisdiction."[100]

International legal scholar Andrea Gattini summarizes the argument of scholars who favor the denial of State immunity for violations of *jus cogens* or *erga omnes* obligations as follows: "peremptory norms, such as those protecting human rights, prevail over 'simple' customary rules, such as that granting state immunity; no legal effects can be therefore attached to acts which are null and void because of their inconsistency with peremptory norms."[101] Gattini characterizes this argument as an oversimplification of international law, which is neither logically sound nor practicable. That *jus cogens* do not take precedence over State immunity is not an example of incongruity in international law because, Gattini posits, access to

---

94 *Id.* art. 48 § 12(emphasis added).
95 *Id.* art. 48 § 12 (emphasis added).
96 However, the argument could be made that the possibility of such suit may, in some cases, serve as a deterrent, which arguably benefits the collective interest. *See* Orakhelashvili, *supra* note 62, at 956.
97 FOX, *supra* note 63, at 151.
98 *Id.* at 155 (citing Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6 (Feb. 3) and Jones v. Saudi Arabia, [2006] UKHL 26, (June 14)).
99 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, ¶ 64 (Feb. 3).
100 FOX, *supra* note 63, at 155 (quoting Lord Bingham in Jones v. Saudi Arabia, [2006] UKHL 26, ¶ 24 (June 14)).
101 Andrea Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3 J. INT'L CRIM. JUST. 224, 234-235 (2005).

justice is not a *jus cogens* norm nor does a violation of *jus cogens* carry a right to civil redress.[102] According to Gattini, "there is no evidence in international practice, or logical necessity, for the loss of state immunity to ensue" as a result of a State's violation of a peremptory norm.[103] Neither does Gattini view Article 41 of the Draft Articles as requiring such an outcome. A State's duty to not recognize the legality of a situation created by a serious breach of a peremptory norm of international law would, in Gattini's opinion, refer only to a "continuing violation" and moreover, the refusal to abrogate State immunity is not tantamount to "toleration or condonation of a peremptory international law norm."[104] Rather, such a refusal is simply the expression of the belief that domestic judiciaries are not the proper forum to address such matters.[105]

A problem underlying the Italian Court of Cassation's cases applying and expanding upon the *Ferrini* doctrine is the Court is not clear as to whether only *jus cogens* norms or some undefined set of fundamental principles are hierarchically superior to other international law rules such as State immunity.[106] International legal scholar Carlo Focarelli contends that the ease with which the Court moves between rules and values demands scrutiny.[107] In order for a value to have legal force, Focarelli wants the Court to demonstrate: (1) the value the Court contends underlies the rule actually does underlie the rule; (2) what makes this value have legal effect; (3) why these legal effects can trump existent legal rules; and (3) why these legal effects alter the "standard operation" of State immunity.[108] Indeed, the fact that in general, States regard the "norms concerning international crimes as peremptory" yet still allow State immunity in the face of allegations of international crimes "may well denote . . . that states do not ascribe the power to deny state immunity to the peremptory character of these norms."[109] While the Court found it incongruous that State immunity is denied for *jure gestionis* actions under the "commercial exception" but upheld for actions by States that constitute international crimes, Focarelli argues that under international law, what is important is that "the generality of states supports the former exception but not the latter."[110] Furthermore, Focarelli notes that the Court's values reasoning is a decidedly new innovation given that until the *Ferrini* decision, Italy was part of the generality of States adhering to what the Court now contends is an "incongruous" approach to State immunity.[111]

Perhaps the Italian Court of Cassation simply recognized that a new perspective is required. Courts' reliance on the old justifications for State immunity artificially elevates the status of such immunity and precludes fresh considerations of the principles that underlie it.[112] For example, State immunity is connected with notions of State sovereignty and if this is the case then the concept of State immunity should develop and evolve just as the concept of State sovereignty has.[113] As international legal scholar Lorna McGregor argues, adhering to a concept of State immunity from the 17th century anachronistically places States above the law—a position entirely inconsistent with the current framework of international law.[114] Similarly, the principle of *parem non habet jurisdictionem*[115] has no place in the context of international crimes which

---

[102] *Id.* at 236-37; *see also* Giegerich, *supra* note 54, at 227 (noting that *jus cogens* and State immunity are directly contradictory only if "victims of the *jus cogens* violations are entitled to an effective remedy in the courts of another State," which is a "dubious" proposition).

[103] Gattini, *supra* note 101, at 236.

[104] *Id.*

[105] *Id.*

[106] Focarelli, *supra* note 46, at 128.

[107] *Id.*; *see also* Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the* Ferrini *Case*, 16 EUR. J. INT'L L. 89, 100 (2005) (noting the Ferrini Court's preoccupation with values).

[108] Focarelli, *supra* note 46, at 128–29.

[109] *Id.* at 129.

[110] *Id.*

[111] *Id.*

[112] Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 912 (2008).

[113] *Id.* at 915-16.

[114] *Id.* at 916.

[115] Concept that a State could not be forced to be a party to in the domestic courts of another State.

have been recognized as impacting all States such that "all States can be held to have a legal interest in their protection."[116] Moreover, McGregor contends, at this point in history, it does not offend the dignity of a State to be subject to the rule of law but rather, submission to the rule of law enhances the dignity of a State.[117] Nevertheless, State immunity continues to preclude many suits against States.

i. Dichotomies

In order to explore some of the reasons why States are treated differently imagine a violation of fundamental human rights has occurred, torture for example. Under existing customary international law, State immunity which extends to agents of the State acting in their official capacity and within the scope of their duties, called functional immunity, can be abrogated leaving these officials subject to both criminal prosecution and civil suit.[118] However, under existing customary international law, the State itself retains its immunity from suit.[119] The retention of State immunity could possibly be justified under at least three different dichotomies.

A. PROCEDURE/SUBSTANCE

Some courts appear to justify recognition of State immunity on the dichotomy between substance (*jus cogens*) and procedure (immunity). Under this reasoning immunity concerns procedure, i.e., what forum is competent to hear the claim, *not* substantive immunity, i.e., whether there is a cause of action at all. Thus, when a court invokes State immunity as the basis for dismissing a claim against a foreign State this is jurisdictional not substantive.

McGregor aims to undermine the justifications for upholding State immunity for States alleged to have engaged in *jus cogens* violations such as torture.[120] Three seminal cases upholding State immunity in the face of torture allegations from the ICJ,[121] the European Court of Human Rights,[122] and the British House of Lords[123] all employed what McGregor contends is a false distinction between procedure and substance.[124] In essence, these courts asserted that State immunity from jurisdiction is simply a procedural bar, which does not have any impact on the substance of the legal claim.[125] If this is the case then, as the House of Lords averred, State immunity "does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement."[126] However, as McGregor points out, this incorrectly assumes that there is another viable forum to bring these claims.[127] Consequently, jurisdictional immunity

---

[116] McGregor, *supra* note 112, at 916 (quoting Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 199, ¶ 155 (Jul. 9) (citing Barcelona Traction, Light and Power Company Limited, Second Phase, Judgment, 1970 I.C.J. 32, ¶ 33 (Feb. 5))).

[117] McGregor, *supra* note 112, at 917.

[118] Hazel Fox, *State Immunity and the International Crime of Torture*, 2 E.H.R.L.R. 142, 143-44 (2006).

[119] *Id.*

[120] McGregor, *supra* note 112, at 906.

[121] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf ("Immunity from criminal jurisdiction and individual criminal responsibility are quire separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.").

[122] Al-Adsani v. United Kingdom, 35763/97 Eur. Ct. H.R. ¶ 48 (2001) (asserting that "[t]he grant of [State] immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.").

[123] Jones v. Saudi Arabia, [2006] UKHL 26 (June 14).

[124] McGregor, *supra* note 112, at 906-07.

[125] *Id.* at 907.

[126] Jones v. Saudi Arabia, [2006] UKHL 26 ¶ 24 (June 14).

[127] McGregor, *supra* note 112, at 908; *see also* Christopher Keith Hall, *The Duty of States Party to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT'L L. 921 (2008), *available at* http://www.ejil.org/pdfs/18/5/246.pdf (regarding the possibility of an affirmative right to redress under Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

becomes substantive immunity because realistically the domestic fora of the offending State are unlikely to either allow the suit or provide a fair hearing.

When redress within the State where the *jus cogens* violation occurred is not available discretionary diplomatic protection is far from promising.[128] Diplomatic protection, under which a State agrees to pursue an individual's claim, is not a comparable substitute given that the decision to pursue the claim is at the sole discretion of the State and foreign policy concerns monopolize the State's considerations.[129] Not only does the individual have no right to diplomatic protection but even if diplomatic protection is used to pursue the claim, the individual has no entitlement to any damages collected.[130] In essence, the individual's claim becomes that of the State and thus, the State is under no obligation to pay the individual from any damages the State is able to collect.

Arguably then, in such a milieu the recognition of State immunity despite allegations of *jus cogens* violations is tantamount to a free pass and likely "contributes to, justifies, and may even constitute the resulting impunity."[131] Moreover, casting State immunity as a procedural rule is a false construct of neutrality which serves only "to steer attention away from the deeper question of the legitimacy of immunity."[132] Quite simply, "procedural rules cannot be used to evade substantive obligations, as this would defeat the core basis for *jus cogens* norms such as the prohibition of torture, by facilitating unlawful derogation."[133]

B. STATE/INDIVIDUAL

Arguably, if a norm such as the prohibition on torture has achieved exalted status as a peremptory norm it seems illogical to abrogate traditional rules of State immunity to allow criminal and civil suits to proceed against State officials but disallow the abrogation of traditional rules of State immunity to allow such suits against the State itself. However, a crucial difference may lie in the fact that the functional immunity of State officials is abrogated for criminal suits and such suits proceed against the officials as *individuals* whereas State immunity for the *State* itself is still maintained despite the criminal suit against the State's agents.

International legal scholars Pasquale De Sena and Francesca De Vittor take a critical look at the Italian Court of Cassation's apparent approval of the notion that abrogation of State immunity is a logical extension of the trend toward abrogating the "functional immunity" of State officials who commit international crimes.[134] De Sena and De Vittor conclude that the Court was far afield of traditional jurisprudence in this perspective since "the question of sovereign immunity tends to be kept well *apart* from the question of individual responsibility for international crimes."[135] Gattini expands on this point by asserting that the trend toward stripping immunity from State officials who violate international law does not logically lead to stripping the immunity of the States themselves.[136] This is because the punitive aspect of criminal law is "ill suited for states" which would lead to confusion and uncertainty.[137]

Punishment, Hall argues that such a right to redress exists despite the recent decisions of Bouzari v. Islamic Republic of Iran and Jones v. Saudi Arabia).

[128] McGregor, *supra* note 112, at 908.

[129] *Id.* at 909-10.

[130] *Id.* at 910-11.

[131] *Id.* at 911; *accord* Orakhelashvili, *supra* note 62, at 957 ("Impunity is the implication of the deprivation of the only available remedy.").

[132] *Id.* at 912.

[133] *Id.* (citing Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, 18 EUR. J. INT'L L. 955 (2007).

[134] De Sena & De Vittor, *supra* note 107, at 104-05.

[135] *Id.* at 109.

[136] Gattini, *supra* note 101, at 239.

[137] *Id.*

Fox asserts that *the* purpose of State immunity is to channel prosecution of claims "to the courts of the state in whose service the officials act or on whose behalf the transaction was performed."[138] However, Fox notes that the differentiation between the actions of individual officials acting on behalf of the State and actions of the State itself has facilitated the erosion of the broader concept of State immunity[139] evidenced by the fact that individuals may be held liable under international law for violations of human rights.[140] Nevertheless, international law does not recognize the capacity of a State to commit crimes.[141] Remedy for aberrant State action is through a State-to-State system of "restitution and reparation."[142]

Nevertheless, while criminal responsibility for States is admittedly problematic the *Ferrini* doctrine addresses *civil* liability not criminal. Indeed, States have already agreed to forgo their immunity and be subject to civil proceedings with resulting damage awards in high-stakes contexts such as investor-State arbitration. Setting aside for a moment the neutral international fora in which such proceedings take place, the practice indicates that the civil legal process is capable of fairly straight-forward transfer and application to suits against States.

Moreover, if the actions, torture or war crimes for example, violate *jus cogens* then the individual/State distinction is arguably dispelled because such violations "cannot constitute acts *jure imperii*, or acts of sovereignty."[143] In other words, because violations of *jus cogens* cannot constitute sovereign acts the State does not enjoy immunity for such acts and is thus no different than an individual committing such acts. However, the argument that State immunity in either case "must be rejected as necessarily leading to impunity" since victims "have no other option to vindicate their rights" does not necessarily follow. [144] Even assuming redress is not possible in the fora of the violating State, abrogation of functional immunity of State officials both in the criminal and civil context allows victims to vindicate their rights. Thus, from a logical standpoint if violations of *jus cogens* do not constitute sovereign acts the State itself does not enjoy immunity for such actions. However, as will be discussed *infra*, as a practical matter it is unclear why it would be necessary or even advantageous for the State to be held liable when State officials are subject to both civil and criminal legal processes.

C. CIVIL/CRIMINAL

Nevertheless, the distinction between criminal and civil suits may hold yet another reason for different rules when it comes to State immunity. The civil/criminal distinction is one recognized by the House of Lords in the majority opinion in *Al-Adsani*. In *Al-Adsani* the House of Lords attempted to further distinguish the procedural versus substantive effects of a *jus cogens* violation in terms of whether the proceeding was criminal or civil:

> While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not . . . the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[145]

---

[138] Fox, *supra* note 118, at 143.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 144.
[142] *Id.*
[143] Orakhelashvili, *supra* note 62, at 969.
[144] *Id.*
[145] Al-Adsani v. The United Kingdom, 35763/97 Eur. Ct. H.R. ¶ 101 (2001).

However, what this purported dichotomy fails to explain is why substance (*jus cogens*) trumps procedure (immunity) in criminal cases but not civil.[146] Indeed, the joint dissent refutes the majority's distinction between criminal and civil proceedings as a false one:

> It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition on torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.[147]

The *Al-Adsani* dissent's approach appears to be in-line with the reasoning employed by the Court of Cassation in *Ferrini* and its progeny.

Setting aside the practical obstacles to holding a State criminally liable, as a logical matter, that a violation of a *jus cogens* norm, such as the prohibition on torture, would justify the abrogation of traditional rules of State immunity for criminal proceedings makes sense because as a peremptory norm, its violation undermines the safety of all people. Conversely, permitting civil suits against the State for such violations would permit only certain individuals to reap material benefit from a harm that has affected all people.[148] In short, civil suits serve too limited a purpose, whereas criminal prosecution benefits all people.

Criminal prosecution represents condemnation at a State-level, with the State holding the wrongdoer accountable for harm done to society. If, as proposed below, the *Ferrini* doctrine—a civil remedy—would be applicable only to violations of *jus cogens* that also constitute *erga omnes* obligations, since global harm is the reason for abrogating State immunity there should be global benefit. Granted, the existence of a criminal remedy is not mutually exclusive with the existence of a civil one. For example, under the U.S. system, victims of crime are able to pursue civil cases against alleged wrongdoers even if the putative defendants had been found innocent in a criminal case.[149] However, as a practical matter, given existing customary international law against State criminal responsibility, there would only be a civil remedy for *jus cogens* violations meaning that only a select group of individuals would recover for a harm that is regarded as so grave because of its impact on all people. As discussed above, States *qua* States cannot be held criminally liable under international law. Because there is not, as yet, any principled means to impose criminal liability on a State only a limited number of individuals would benefit even though the very basis for the cause of action is due to the universality of the harm. In short, it would be ironic and incongruous to extend a novel cause of action in a novel forum for the exclusive benefit of a select group of people for a harm that has been done to the whole world. However, this is arguably a normative policy consideration. Thus, as a logical matter, there is no reason why the criminal/civil nature of the putative proceedings against a State should be dispositive as to the existence of State immunity for *jus cogens* violations.

ii. Conclusion on Dichotomies

The joint dissent in *Al-Adsani* considered the possible dichotomies discussed above and dismisses them in favor of a straight-forward rule derived from systematic reasoning—State immunity is simply abrogated when it comes to *jus cogens* violations. The joint dissent contended that the failure of the *Al-Adsani* majority to reach this conclusion is the result of faulty reasoning. First, the majority accepted that the prohibition on torture is a *jus cogens* rule.[150] Thus, as any *jus cogens* rule, "it is hierarchically higher than any other rule of

---

[146] Orakhelashvili, *supra* note 62, at 965.

[147] Al-Adsani v. The United Kingdom, 35763/97 Eur. Ct. H.R. ¶113 (2001) (Rozakis, Caflisch, Js., dissenting).

[148] This shortcoming is also present in civil suits against individual State officials. However, the abrogation of State officials' functional immunity both civilly and criminally for international wrongs is already established. This paper seeks to address the propriety of such abrogation for States.

[149] This is possible due to the nature of the lower burden of proof needed for a finding of liability in a civil case.

[150] Al-Adsani v. The United Kingdom, 35763/97 Eur. Ct. H.R. ¶ 111 (2001) (Rozakis, Caflisch, Js, dissenting).

international law" such that in the event a *jus cogens* rule conflicts with a rule that does not have *jus cogens* status, the *jus cogens* rule prevails and renders the conflicting rule "null and void."[151] Second, the majority did not deny that State immunity is not a *jus cogens* rule.[152] Consequently, "the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."[153] Without disputing the majority's characterization of State immunity as a "procedural bar" the dissent averred that in the face of a *jus cogens* rule, "the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect."[154] Quite simply, State immunity is entirely inapplicable in cases of *jus cogens* violations regardless of the variety of dichotomies that could possibly be drawn in an attempt to preclude such a result. Thus, assuming there is a hierarchy of international law, as a matter of logical reasoning there is no principled reason why State immunity should stand in the face of *jus cogens* violations.

Notably, an authoritative statement on just where the state of international law is with respect to this issue has been made. The FRG filed in the ICJ seeking a declaration that the decisions in Italian cases such as *Ferrini* and *Civitella* violate international law and consequently, Italy must take action to ensure such judgments are unenforceable and that such suits will not be entertained in the future.[155] When this article was initially penned the case was still pending. However, on February 3, 2012 the ICJ handed down the perhaps unsurprising decision which concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[156] Nevertheless, the decision does not render the Ferrini Doctrine moot. Indeed, the ICJ's conclusion itself contains the operative language—"customary international law *as it presently* stands."[157] As previously discussed, customary international law is not static and *Ferrini* and its progeny may very well continue to influence the contours of this evolving body of law.

D. JURISDICTIONAL QUESTIONS

The Court in *Civitella* was concerned that if sovereign immunity were upheld despite violations by the State of fundamental human rights, individuals would be precluded from bringing suit and human rights would not be effectively protected.[158] Thus, the Court concluded that individuals must be given access to the courts to seek compensation for damages suffered as a result of fundamental human rights violations.[159] But even assuming that State immunity is inapplicable in cases of *jus cogens* violations, a tribunal entertaining a claim must still assert some basis of jurisdiction over the State. However, the Court in *Civitella* was not clear on the basis of jurisdiction for such suits. Like in *Ferrini*, the Court analogized to universal jurisdiction for international criminal cases.[160]

---

[151] *Id.* ¶ 111–12.

[152] *Id.* ¶ 112 (arguing that because states may waive their immunity, immunity cannot be a *jus cogens* rule because *jus cogens* rules protect "the basic values of the international community, [and] cannot be subject to unilateral or contractual forms of derogation from their imperative contents.").

[153] *Id.*

[154] *Id.*

[155] Jurisdictional Immunities of the State (Ger. v. It.), Application, ¶ 14 (Dec. 23, 2008), http://www.icj-cij.org/docket/files/143/14923.pdf#view=FitH&pagemode=none&search=%22application of the federal republic of germany%22.

[156] Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶ 91 (Feb. 3, 2012).

[157] *Id.* (emphasis added).

[158] Ciampi, *supra* note 31, at 603–04.

[159] *Id.*

[160] *Id.* at 605.

In short, the argument is that *jus cogens* norms take precedence over "the non-mandatory customary international rule" of State immunity.[161] The universal jurisdiction argument included in this approach appears to be supported by Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which conspicuously omits any territorial limitation when it declares that States Parties must have a civil remedy for victims of torture.[162] However, the United States explicitly stated upon its ratification of the Convention that it read Article 14 to only require States Parties to have a civil remedy for acts of torture committed in territories under its own jurisdiction.[163] Such a reading was rejected by the ICJ which held that "[T]he rights and obligations enshrined in the Convention [Against Torture] are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention."[164] This supports the proposition that the predominant basis of jurisdiction, i.e., territoriality, might not limit jurisdiction when it comes to *erga omnes* obligations, at least when the applicable convention is silent or ambiguous. However, this holding does not necessarily mean States can exercise universal jurisdiction over *erga omnes* obligations—it is likely that some nexus with the forum State is required. Indeed, even an attempt to analogize and extend universal criminal jurisdiction under the Resolution on Criminal Jurisdiction adopted by the Institut de Droit International is also problematic since such jurisdiction requires several prerequisites including substantial connection with the forum State.[165] Fox asserts that the *Ferrini* Court's extension of the exception to immunity for extraterritorial acts was based on the gravity of the violation but that the Court's "reasoning lacks legal precision" and abolishes the traditional distinction between individual official actors and the State "more by reference to moral values than legal concepts."[166]

Ferrini's assertion of jurisdiction was somewhat shaky given the holding in *Al-Adsani* that the abrogation of State immunity in civil suits based on torture that had occurred outside the forum State was not yet generally accepted in international law.[167] *Ferrini* attempted to distinguish *Al-Adsani* by noting that the harm in *Ferrini* commenced in Italy—the forum State—when Ferrini was abducted from Italy in order to be sent into forced labor in Germany.[168] However, the *Civitella* case was much more straightforward. The massacre that formed the basis for the suit occurred in Italy, the victims bringing suit were Italian citizens, and Italy was the forum for the suit.[169] Thus, the case fit squarely within the classic jurisdictional category of *locus commissi delicti*.[170] However, the Court did not cite such a basis for jurisdiction in its opinion. An argument could be made that the failure to cite this basis for jurisdiction in combination with the analogy to universal criminal jurisdiction indicates that "the Court did not intend to limit the principle of non-immunity to breaches of human rights committed on the territory of the state of the forum."[171] However, as discussed below, reliance on the traditional basis for jurisdiction, especially for such a novel new rule, is advisable.

---

[161] Fox, *supra* note 118, at 152.

[162] 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, ¶ 1, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

[163] 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html.

[164] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11).

[165] L'Institut de Droit International, International Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Aug. 25, 2003, in 71-II L'Institut de Droit International, Annuaire de l'Institut de Droit International (2006), *available at* http://www.idi-iil.org/idiE/navig_chon2003.html.

[166] Fox, *supra* note 118, at 156. *See also* De Sena & De Vittor, *supra* note 107, at 100 (noting the *Ferrini* Court's preoccupation with values).

[167] Al-Adsani v. The United Kingdom, 35763/97 Eur. Ct. H.R. ¶¶ 61, 66 (2001).

[168] *Ferrini supra* note 1, at ¶ 10.

[169] Ciampi, *supra* note 31, at 601–604.

[170] The place where the wrong occurred.

[171] Ciampi, *supra* note 31, at 606.

Pure universal jurisdictional is a powerful tool that when employed unilaterally by a State based on its domestic legislation outside the implementing framework of an international treaty, is frowned upon.[172]

However, the ostensible conflict between jurisdiction and immunity may be the result of a faulty baseline. According to McGregor, State immunity from suit in the domestic courts of another State was historically a much more flexible concept—an exception to the forum's jurisdiction—especially "in cases of torture and crimes under international law."[173] Thus, by beginning an evaluation of a case with an inquiry into whether State immunity precludes suit is erroneous. Rather, the forum needs to establish whether it has jurisdiction and only after this has been established need it address the possible application of State immunity.[174] International legal scholar Thomas Giegerich appears to hold a similar view, citing the *Lotus* Principle[175]—under international law what is not prohibited is permitted—to assert that there is a general right of every State to adjudicate claims in its courts, even those involving extraterritorial events, subject to only a few limitations imposed by international law.[176] Traditionally, sovereign immunity has been one such limitation on the territoriality principle.[177] As such, the forum State would ostensibly bear the burden of proof for jurisdiction, the respondent State would then bear of the burden of proof for sovereign immunity, and then the forum State would bear the burden of proof for an exception to sovereign immunity.[178] Giegerich finds this burden of proof construct to be circular given that it rests "on two uncertain premises"—the broad jurisdiction of States over extraterritorial events and broad State immunity subject only to limited exceptions.[179] Since international law is based on consensus, Giegerich points out that despite its weaknesses, the burden of proof construct is a "pragmatic expedient" and absent a showing that a deviation from established international law has gained universal acceptance, the general rules will continue to apply.[180]

Although it is not one of those general rules, those who would seek to revoke State immunity for violations of *jus cogens* or *erga omnes* obligations often invoke universal civil jurisdiction.[181] Such a concept is not dissimilar from the Alien Tort Statute ("ATS") in U.S. law.[182] However, even the ATS recognizes State immunity—civil suits cannot be brought against States for violations of international law.[183] While Gattini does not dispute that an *erga omnes* obligation "endows every state with a legal

---

[172] *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 15 (Feb. 14) (asserting that "at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute [international] crimes, whoever their authors and victims and irrespective of the place where the offender is to be found."). *See also id.* ¶ 81 (asserting that a State "has neither any obligation . . . or any entitlement under international law to pose as prosecutor for all mankind, in other words, to claims the right to redeem human suffering across national borders and over generations."). *But see id.* ¶¶ 45-46 (noting that although there is no established State practice of pure universal jurisdiction this does not prove it would be unlawful since States are not required to legislate up to the full scope of jurisdiction under international law and that the existence of subsidiary universal jurisdiction in international treaties "opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality").

[173] McGregor, *supra* note 112, at 915.

[174] *Id.* at 914.

[175] 1927 P.C.I.J. (ser. A) No. 10 (Sept.7).

[176] Giegerich, *supra* note 54, at 209.

[177] *Id.*

[178] *Id.* at 210.

[179] *Id.* at 210–11.

[180] *Id.* at 211.

[181] Gattini, *supra* note 101, at 237.

[182] 28 U.S.C. § 1350 (2011). The Alien Tort Statute gives U.S. District Court jurisdiction to hear claims for violations of international law or a treaty to which the United States is a party. The only jurisdictional tie to the United States is that the plaintiff must serve process within the United States or its territory. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). The U.S. Supreme Court has held the ATS is a jurisdictional grant only. The substantive cause of action arises from a violation of a norm of customary international law at the time the ATS was enacted in 1780, namely, those recognized by Blackstone: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

[183] *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442–43 (holding that the "the FSIA provides the sole basis for obtaining jurisdiction over a foreign State" in U.S. courts and consequently, unless an exception allowing suit exists under the FSIA, claims against States under the ATS are not cognizable). Whether corporations are subject to suit under the

interest for its respect" this legal interest is circumscribed to a certain form and content.[184] Even though there is a dearth of "relevant international practice," Gattini implies that even in international law there may very well need to be "a link between the forum state and the subject-matter."[185] However, according to De Sena's and De Vittor's analysis of *Ferrini*, the fact that at least part of the plaintiff's injuries were sustained while he was in the forum State was neither dispositive nor controlling as to the question of jurisdiction.[186] Refutation of this type of jurisdictional nexus as a prerequisite was made clear in *Mantelli*. What had greater bearing on jurisdiction was that the alleged wrongdoing constituted "international crimes" and violated the "peremptory rule protecting human rights."[187]

The invocation of international crimes carries with it the concept of universal criminal jurisdiction. Gattini finds fault with the tendency to equate universal *civil* jurisdiction with universal *criminal* jurisdiction. First, Gattini argues, "the principle of universal criminal jurisdiction is far from certain."[188] Second, with the exception of *forum loci commissi delicti*, the traditional grounds of criminal jurisdiction differ markedly from those of civil jurisdiction.[189] Third, universal criminal jurisdiction applies to *individuals* and is not analogous to a proposed universal civil jurisdiction against *States*.[190] Indeed, as a preface to her discussion of universal jurisdiction, Fox points out that while all *jus cogens* norms are also *erga omnes* obligations, not all *erga omnes* obligations are *jus cogens* norms.[191] Although international conventions relating to international crime impose obligations on States Parties to extradite alleged offenders for prosecution in what is known as subsidiary universal jurisdiction or *aut dedere aut judicare* (prosecute or extradite) jurisdiction, Fox asserts that "the existence of a wider universal jurisdiction to exercise an obligation *erga omnes* over acts committed outside the territory of the forum State is of a controversial nature and unsupported by custom."[192]

However, those who support abrogation of immunity for *jus cogens* violations point to Article 41 of the Draft Articles to assert that the obligation not to recognize the violation of a peremptory norm would be defeated if immunity was afforded the offending State.[193] Fox suggests the possibility that extraterritorial jurisdiction could be exercised only when remedies within the offending State are refused or unavailable to victims.[194] Moreover, to avoid the "total judicial chaos" which would likely result unless such extraterritorial jurisdiction is properly defined, Fox suggests that the forum State should be required to have a "jurisdictional link" such as both the forum and respondent States being parties to the same international conventions involving respect of human rights.[195] While a jurisdictional link to the forum is not

---

ATS is subject to a Circuit split. *Compare Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that "under the ATS, domestic law, i.e., federal common law, supplies the source of law on the question of corporate liability. The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal system throughout the world."); *with Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (holding that "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." Consequently, claims against corporations do not allege violations of the law of nations and are thus not cognizable under the ATS.).

184 Gattini, *supra* note 101, at 237–238.

185 *Id.* at 238.

186 De Sena & De Vittor, *supra* note 107, at 95, 97.

187 *Id.* at 95, 97 (2005); *accord Mantelli*, *supra* note 23, ¶ 11.

188 Gattini, *supra* note 101, at 238.

189 *Id.*

190 *Id.* at 238–239.

191 Fox, *supra* note 118, at 157.

192 *Id.*; *See also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 ¶ 9 (noting that no treaty "has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction in absentia is unknown to international conventional law.").

193 Fox, *supra* note 118, at 158.

194 *Id.*

195 *Id.*

incompatible with a narrow reading of the *Ferrini* doctrine,[196] the type of link suggested by Fox is incompatible for at least two reasons. First, if the *Ferrini* doctrine is applicable for violations of *jus cogens*, by definition these are peremptory norms binding on all States. Thus, whether or not a State is party to a particular convention codifying that norm is irrelevant; the State is still bound. Second, predicating jurisdiction upon adherence to a convention would import language and reasoning which were absent in the decisions of the Court of Cassation. By simply giving *Ferrini* and its progeny a narrow reading a viable principle emerges without artificial additives. As discussed *infra*, with respect to the question of jurisdiction, a narrow reading of these cases results in a conventional approach to jurisdiction based on traditional grounds recognized under international law, most notably territoriality and passive personality.

E. CONSEQUENCES

Allowing civil suits to proceed against a State for *jus cogens* violations is perhaps most problematic from a practical consequences standpoint. Giegerich asserts that under the principle of sovereign immunity, allowing civil suits for *jus cogens* violations would wreak havoc on international relations and "create a judicial chaos of overlapping and contradictory claims to jurisdiction undermining the international rule of law."[197]

According to Giegerich, hierarchical preemption "would have intolerable consequences" not the least of which would be the erosion of protection of diplomatic property from attachment in execution of a judgment.[198] Is this concern that the long-standing rule of immunity for diplomatic property would be swept aside by the *Ferrini* doctrine justified? Even the United States, which under its amendments to the FSIA, allows for civil suits against State sponsors of terrorism, has a clear policy against the attachment of diplomatic property.[199] Indeed, the U.S. Government itself often intervenes in cases to prevent such attachment.[200] Of course, the U.S. policy is arguably based not so much on principle rather than practical reciprocity concerns given that the United States owns a considerable amount of prime real estate abroad as part of its diplomatic missions. Logically however, if *jus cogens* violations are serious enough to abrogate the lower rule of State immunity then it would also trump what is arguably a lower rule of immunity for diplomatic property. Given the jealously with which States guard their diplomatic property, it is likely that even if the *Ferrini* doctrine is accepted, States, out of reciprocity concerns, will continue to uphold immunity of diplomatic property. Aside from diplomatic property, nationalized or majority nationally-owned businesses with assets abroad could also be subject to attachment. If the State has sole or majority interest in a business, it is often considered an instrumentality of the State and consequently would be vulnerable to attachment for any judgments rendered against the State.[201] Overall, despite these two possible targets of attachment, claimants will be unlikely to recover even if there is a judgment in their favor.[202] This angst over a sea change with respect to diplomatic property or other State-owned assets is very likely unnecessary. And moreover, as discussed *infra*, this inability to execute judgments is perhaps one of the most salient reasons why, as a normative matter, the *Ferrini* doctrine is unsound.

The *Ferrini* doctrine is assailed by numerous other arguments citing the potential for negative consequences. For example, it is likely that courts will be hugely disadvantaged in ascertaining the factual

---

196 *See infra* Section III Rule Formulation.

197 Giegerich, *supra* note 54, at 203, 208.

198 *Id.* at 227.

199 28 U.S.C. §§ 1610, 1611 (2006).

200 *See, e.g,. Hegna v. Islamic Republic of Iran*, 287 F. Supp. 2d 608 (D. Md. 2003) (describing U.S. Government's motions to quash writs of attachment in FSIA case against properties located in the U.S. owned by Iran were granted), *aff'd*, 376 F.3d 226 (4th Cir. 2004).

201 *See, e.g.*, 28 U.S.C. § 1603 (b) (2006) (defining an "agency or instrumentality of a foreign state" as, *inter alia*, a business "a majority of whose shares . . . is owned by a foreign state or a political subdivision thereof").

202 Giegerich, *supra* note 54, at 203, 208.

and legal issues involved given that respondent States will more than likely refuse to participate.[203] As noted above, and discussed further *infra*, execution of a judgment will likely be an uphill battle if not a quixotic quest. While judgments can serve other functions such as publicizing atrocities or contributing to the establishment of facts for the historical record these auxiliary goals of suit are not well achieved through a default judgment.

Additionally, Giegerich sees the potential for serious disequilibrium within the system as only wealthy and powerful States would have the resources and clout to serve as fora for such suits which "raises the question of whether a *jus cogens* exception to sovereign immunity really serves the international rule of law or only the interests of powerful States."[204] This consequence would be somewhat limited if, as proposed *infra*, those States adopting the *Ferrini* doctrine were required to apply it to all States equally not just a select few like the United States does under the FSIA.

Finally, the prospect of individual suits with enormous amounts of damages would be an impediment to "a comprehensive diplomatic solution which does justice to all the victims" of a particular *jus cogens* violation.[205] Indeed, De Sena and De Vittor aver that the *Ferrini* doctrine's balancing between State immunity and the protection of human rights in which human rights win[206] carries with it two "inherent" conclusions: (1) universal civil jurisdiction; and (2) no statutory limitation on damage.[207] Without elaboration they reason that these outcomes are the natural "consequences of the prevailing *value* recognized in the protection of human rights."[208] Nevertheless, even if there is a flood of civil litigants seeking enormous damages, payment of those judgments, absent a radical and unlikely change in the immunity laws surrounding State property, is unlikely to be realized.

Not all scholars have such a negative assessment of the practical consequences of the *Ferrini* doctrine. International legal scholar Annalisa Ciampi acknowledges that a major criticism of the *Ferrini* and *Civitella* cases is that such decisions will open a floodgate of litigation.[209] Citing five reasons, Ciampi flatly contends that the risk of such a litigation onslaught occurring is vastly overblown.[210] First, as noted above, the ability to bring a civil suit against a foreign State and be awarded damages does not mean that recovery will be possible given that the limitation on immunity from suit does not extend to immunity from attachment of assets.[211] Thus, if judgments are unlikely to be satisfied, many potential plaintiffs may simply not file suit unless the moral or emotional victory will be adequate compensation for the time and money invested in such a suit.

Second, the abrogation of State immunity is just one condition precedent of many to establish liability of the State, not the least of which is jurisdiction. Ciampi notes that a jurisdictional nexus between the harm and the forum State will likely be required since universal jurisdiction in civil cases is highly controversial.[212] Moreover, given the serious nature of the violations alleged the burden of proof even for a civil case will likely be quite onerous.[213]

Third, an individual or private cause of action for such a suit must exist either at international law or at international law as interpreted and applied in the forum State.[214] States adopting the *Ferrini* doctrine would

---

[203] *Id.*
[204] *Id.*
[205] *Id.* at 208–09.
[206] De Sena & De Vittor *supra* note 107, at 89, 102–03.
[207] *Id.* at 103.
[208] *Id.*
[209] Ciampi, *supra* note 31, at 597, 609.
[210] *Id.*
[211] Indeed, the Greek Government refused to authorize attachment of German property in Greece to satisfy a civil judgment against FRG handed down by the Greek Supreme Court.
[212] Ciampi, *supra* note 31, at 597, 610.
[213] *See* Application of the Convention of the Prevention and Punishment of the Crime of Genecide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶¶ 209–10 (Feb. 26) (requiring that allegations of grave crimes such as genocide be "clearly established" and "a high level of certainty appropriate to the seriousness of the allegation").
[214] Ciampi, *supra* note 31.

have to have domestic legislation creating a private right of action for *jus cogens* violations because international conventions reflective of *jus cogens* norms do not explicitly confer such a right and have not typically been interpreted as doing so.[215]

Fourth, there may be formal agreements between States, which preclude such suits entirely.[216] However, whether such agreements will be effective at precluding suit is questionable. For example, in *Civitella*, the FRG argued that Italy had waived its rights and the rights of its citizens to compensation from Germany or German citizens for damages incurred during WWII under the Peace Treaty of February 10, 1947 and the Bonn Agreement of June 2, 1961 under which Italy waived the rights of itself and its citizens to claim damages from the FRG for events occurring between September 1, 1939 and May 8, 1945.[217] In *Civitella*, the Court rejected this argument, interpreting the Peace Treaty not to apply to the FRG because it not a party to the Treaty and because the Treaty applied only to material damages not emotional or moral ones.[218] Similarly, the Bonn Agreement did not preclude suit because it applied only to suits pending at the time of the Agreement, not to those which began after the Agreement was executed.[219]

Finally, the international or forum State statutes of limitations may preclude suit.[220] For example, Italy has a five-year statute of limitations on tort claims, unless the tort also constitutes a crime in which case the criminal statute of limitations for that crime would apply.[221] Crimes for which the punishment is life imprisonment have no statute of limitations.[222] In *Ferrini* the plaintiffs were unable to recover because the statute of limitations had already run on their claim.[223] In *Civitella*, however, murder is punishable by life imprisonment and consequently, no statute of limitations applied so the plaintiffs were not barred from recovery.[224] These five factors constitute considerable restraints holding back the floodgates of litigation. As Ciampi concludes, "Lifting immunity is only one dimension of individuals' attempts to obtain compensation for international crimes in domestic courts."[225]

The fear that abrogation of immunity will open the floodgates of litigation may also be exaggerated. However, the argument that the threat of civil litigation may serve as a deterrent, at least for States with attachable assets abroad, leading to fewer violations and consequently, less litigation[226] is doubtful. Given the serious nature of the violations for which suit would be permitted, the possibility of a civil suit judgment giving the State pause is far-fetched. Such a prospect would be ludicrous to a State bent on genocide because the State would not plan for any potential claimants to even survive. Moreover, the doctrine of *forum non conveniens* can be used to deflect cases from national courts to the courts of another State or an international forum.[227] However, this assumes that these alternate fora actually exist. The States where the violations allegedly occurred are unlikely to provide a forum and international bodies are not certain to take up the case. Thus, these suits may end up in national courts after all.

Nevertheless, the *Lozano* decision may somewhat serve to quell the fear that the abrogation of State immunity will open the floodgates of litigation. The Court of Cassation was very specific about the type of

---

[215] *See* Giegerich, *supra* note 54 (discussing the German-Greek example, where the Greeks weren't able to attach German assets because under the Greek Civil Code "the Greek Justice Minister is required to approve such attachments and he refused." This demonstrates that the courts had to comply with domestic law and that there are no inherent rights of actions for *jus cogens* violations.).

[216] Ciampi, *supra* note 31, at 611.

[217] *Id.*

[218] *Id.* at 612.

[219] *Id.* (noting that while these interpretations are not "formally binding" they are likely to be followed by lower courts and pave the way for Italian courts to entertain more claims against FRG by Italian citizens).

[220] *Id.* at 613.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] Orakhelashvili, *supra* note 62, at 956.

[227] *Id.* at 956–57.

action, which would justify its assertion of jurisdiction in this case—war crimes.[228] Moreover, the court gave a narrow definition of what constitutes a war crime by limiting it to "grave breaches of international humanitarian law of armed conflict" which are both intentional and part of a plan, policy, or "large-scale commission of such crimes."[229] The Court's holding in *Lozano* that only war crimes would justify jurisdiction is compatible with the assertion of jurisdiction in *Ferrini* and *Civitella* since the causes of action in those cases stemmed from actions which would constitute war crimes as defined in *Lozano*. Thus, from these cases it is possible to hypothesize that there may be an objective substantive limitation on the type of actions for which Italian Court of Cassation would exercise civil jurisdiction under its emerging *jus cogens* exception to State immunity. However, such a limitation on the *Ferrini* doctrine, i.e., civil jurisdiction only for war crimes, is arguably inconsistent with the Court's assertion that a State's immunity from civil suit in the domestic courts of another State should be abrogated for international crimes because international crimes include much more than war crimes.[230] While, *Ferrini*, *Lozano*, and *Civitella* all involved actions that constituted war crimes this does not necessarily mean the Court's doctrine is thus limited, especially since the decisions themselves seem to quite clearly intend a much broader purview under which domestic courts could assert civil jurisdiction over a foreign State. However, as discussed *infra*, it is prudent to give these decisions a narrow reading under which the *Ferrini* doctrine would be limited to war crimes that are well-defined under international law—to wit, grave breaches of the four Geneva Conventions.

It is quite possible that, as some scholars contend, concerns that the abrogation of State immunity from civil suit will have significant negative consequences are "more imaginary than real."[231] There may not even be a marked decline in bilateral relations between States as the result of such suits. Indeed, the abrogation of the FRG's immunity in civil suits in Italian and Greek courts did not cause long-term irreparable damage to bilateral relations between the States.[232]

Despite the existence or non-existence of such consequences, for proponents of the abrogation of State immunity for *jus cogens* violations such concerns cannot be allowed to impact the assessment of the hierarchy of norms—the lifeblood of the *Ferrini* decision and its progeny—because this hierarchy is "an issue of legal science."[233] The question then becomes can *Ferrini* and its progeny be distilled into a doctrine that in addition to its moral attractiveness also has a sound and reasoned legal basis?

III. RULE FORMATION

Under the Italian Constitution, generally recognized norms of international law are fully applicable so long as they do not breach the essential foundations of the Italian legal system, which includes the protection of fundamental human rights.[234] Italy is not a party to the Basel Convention on State Immunity nor is it a party to the United Nations Convention on Jurisdictional Immunity of States and Their Property.[235] Moreover, Italy has no legislation on State immunity.[236] Therefore, Italian courts must determine the

---

[228] *See* Cassese, *supra* note 27, at 1083 ("The court holds that this customary rule does not apply because the act performed by Lozano was not a war crime.").

[229] Cassese contends that this definition is incorrect and under-inclusive. *Id.* at 1083–1087.

[230] *See id.*, at 1084-1087 (Cassesse asserts that the Court confuses *war crimes* with *grave breaches of the Geneva Conventions and the First Additional Protocol*. In fact, he argues that it is "well established that the latter are simply a sub-category of the former." Cassesse lists other possible definitions of war crimes and how acts not being defined as "'odious or inhuman' acts" could still constitute crimes.).

[231] Orakhelashvili, *supra* note 62, at 956.

[232] *Id.*

[233] *Id.* at 957.

[234] Art. 10 Costituzione ¶ 6 [Cost.] (It.).

[235] The United Nations Convention on Jurisdictional Immunity of States and Their Property is not yet in force. United Nations Treaty Collections, UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITY OF STATES AND THEIR PROPERTY (2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

[236] Ciampi, *supra* note 31, at 608.

applicability of such immunity and are bound by the Constitution to consider generally recognized norms of international law.[237] The Court of Cassation's decisions in *Ferrini* and its progeny represent a value-oriented approach to reconciling State immunity and the protection of fundamental human rights, which are both principles of international law.[238]

From their analysis, De Sena and De Vittor conclude that the *Ferrini* Court placed special emphasis on the nature of the alleged wrongdoing.[239] The Court's willingness to use "international crimes" and "*jus cogens*" interchangeably[240] indicated to De Sena and De Vittor that the Court was advocating the abrogation of State sovereignty whenever the wrongdoing was "contrary to *universal values* shared by the whole international community" because "these *values* represent the fundamental principles of the international legal system."[241] According to De Sena and De Vittor, the Court's decision was the incarnation of what had been an ethereal academic legal theory—"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."[242] However, as Giegerich points out, only a select number of rules or principles "clearly belong in the *jus cogens* category" and it is even more uncertain what the consequences would be for violating *jus cogens*.[243] Furthermore, while there is consensus that a State's sovereign acts enjoy immunity, with some exceptions,[244] there is not agreement as to what constitutes a sovereign act nor as to what the exceptions are with regard to sovereign acts.[245]

This uncertainty in international law manifests itself in what Focarelli observes to be the Court's inconsistent reasoning. For example, according to the Court, the principle of State immunity and the principle that international crimes pose a threat to all of humanity coexist in international law.[246] When conflict erupts between these principles, priority must be given to the "higher-ranking rules"—those relating to international crimes. Given the gravity of these crimes, the Court inferred an exception to State immunity.[247] Although the Court acknowledged that there was no clear international custom abrogating civil immunity of a State for such crimes, this did not mean that there was a custom of permitting such immunity.[248] According to Focarelli, this position is a precarious one, which serves to convolute the Court's reasoning.[249] Under Article 10(1) of the Italian Constitution, only "generally recognized" principles of international law are applicable within the Italian legal system. Thus, if an exception to State immunity does not yet enjoy customary status, it is not part and parcel of the Italian legal system and consequently, cannot trump a principle that is, e.g., State immunity.[250] However, by holding that this non-immunity rule trumps State immunity the Court asserted that non-immunity for such crimes is in fact an established rule in direct contradiction of its own admission a few lines earlier that such a rule was only emerging.[251]

Compounding the problem is the Court's ambiguity as to the exact substantive grounds for invocation of the *Ferrini* doctrine. The Court changes its vocabulary with regard to the offenses for which State immunity from civil suit would be abrogated both within and across its decisions from fundamental human rights violations to international crimes.[252] Whether this is deliberate or the result of laxity is not certain but it seems likely that the Court is desirous that a considerable expanse of offenses

---

[237] *Id.*
[238] *Id.*
[239] De Sena & De Vittor, *supra* note 107, at 110.
[240] *Id.* at 100.
[241] *Id.* at 99–100.
[242] *Id.* at 101.
[243] Giegerich, *supra* note 54, at 206.
[244] *Id.*
[245] *Id.* at 207.
[246] *Mantelli*, s*upra* note 23, at ¶ 11.
[247] *Id.*
[248] *Id.*
[249] Focarelli, *supra* note 46, at 127.
[250] *Id.* at 127–28.
[251] *Id.* at 128.
[252] *Ferrini, supra* note 1.

which would justify such abrogation. From a moral standpoint it is laudable that the Court desires to extend the availability of effective redress for serious offenses. Conversely, from a legal standpoint the fact remains that the Court is in essence a rogue actor eschewing established international law in an attempt to expound a new rule.

Nevertheless, the *Ferrini* doctrine can be saved by simply narrowing the Court's reasoning to its core and requiring a more precise articulation of the rule. *Ferrini* and its progeny all involved incidents that occurred during war.[253] This is no aberration. Indeed, the abrogation of State immunity pursuant to the *Ferrini* doctrine as originally annunciated in *Ferrini* is most likely to come up in the context of war and, as discussed below, under a narrow reading of the *Ferrini* line of cases the only context in which such abrogation could arise.

The *Ferrini* doctrine will be most successful if its application is as straightforward as possible both in applicability and substance. This entails two propositions. First, abrogation of State immunity under the *Ferrini* doctrine should be applicable to all States or none. Each State can choose whether it will accept the *Ferrini* doctrine[254] but if it does then it must be applied to all States—no picking and choosing reminiscent of the United States under the FSIA. Second, the *Ferrini* doctrine, at least for now, must only apply to grave breaches of international humanitarian law as provided in the four Geneva Conventions. This substantive limitation reflects the narrowest reading of the *Ferrini* line of cases. Moreover, the four Geneva Conventions enjoy universal acceptance and their principles constitute *jus cogens* that are also *erga omnes* obligations.[255]

This proposal limiting applicability and substance are interrelated and stem from the fact that the players in international law are States.[256] Under the narrowest reading of the *Ferrini* line of cases abrogation of State immunity is based on violation of a *jus cogens* norm that is an *erga omnes* obligation.[257] The duty to abide by a *jus cogens* norm is a duty of a *State* and that duty is owed to all *States*—not individuals.[258] Thus, as the duty owed to all States has been violated each State may decide for itself what the consequences will be for the violating State. However, a foundational principle of international law is the equality of States. Thus, there should be equality between States when it comes to the consequences for an *erga omnes* obligation. If a State chooses abrogation of State immunity from civil suit as a consequence it must apply that consequence to all States that commit such a violation.

A. APPLICABILITY

Arguably, this all-or-nothing application would appear to undermine the argument that the *Ferrini* doctrine does not threaten to open the floodgates of litigation because States can enter into agreements precluding suit entirely. While such agreements would preclude a flood of litigation it would also circumvent *Ferrini*'s all-or-nothing application thus allowing for politically motivated application as States enter such agreements with their allies to the exclusion of their foes. However, as an initial matter, by limiting the *Ferrini* doctrine's application to grave breaches of the four Geneva Conventions, the number of potential cases is inherently limited to causes of action arising during an international armed conflict. And

---

253 *Id.*

254 *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 42 (D.C. Cir. 2011) ("International law itself . . . does not require any particular reaction to violations of law . . . . Whether and how [a State] should react to such violations are domestic, political questions") (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245–46 (2d ed. 1996)); *Tel-Oren v. Libya*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) ("the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.").

255 Barcelona Traction, Light & Power Co. Ltd. 1970 I.C.J. 3.

256 This paper argues that the *Ferrini* doctrine has the potential to change the customary international law with respect to State immunity *not* that individuals have a right to sue a State civilly. Indeed, to the extent that the Court of Cassation bases its decision on an individual right to sue this paper does not agree.

257 *Ferrini, supra* note 1.

258 Barcelona Traction, *supra* note 255.

although a sizable category, it is still much smaller than under a broad reading of the *Ferrini* doctrine, which would make any violation of fundamental human rights potentially actionable. Moreover, if the *Ferrini* doctrine is substantively limited to grave breaches of the four Geneva Conventions, any such arrangement precluding civil suit could be limited in a principled and reasoned way to formal peace treaties or settlement agreements rather than allowing preclusion based on any bilateral or multilateral agreement.[259] In fact, such formal resolution is much more likely in the context of an international armed conflict.

Another argument against an all-or-nothing application of the *Ferrini* doctrine is that it takes away an important foreign policy bargaining chip insofar as a State could not selectively abrogate State immunity on an *ad hoc* political basis. While this is true, as a practical matter *ad hoc* abrogation of State immunity arguably does more to drive a wedge between States rather than serve as a means of pressure for certain desired behavior and ultimate rapprochement. For example, the United States has abrogated Iran's immunity from civil suit by deeming it a State-sponsor of terrorism.[260] To date there are over fifty-two outstanding judgments against Iran amounting to over $75 billion in compensatory and punitive damages.[261] This enormous amount in default judgments is a major obstacle to normalization of relations between the United States and Iran.[262] Thus, the loss of immunity as a bargaining chip may actually lead to more effective foreign policy strategies.[263] And of course, as a matter of *realpolitik*, if a State wants to make *ad hoc* determinations as to State immunity it will do so. However, in order for the *Ferrini* doctrine to gain ground as a principled approach to the issue of State immunity it must be articulated as an all-or-nothing standard for the States who choose to adopt it.

B. SUBSTANCE

With regard to substance, this paper proposes that the *Ferrini* doctrine should be limited to its most narrow holding, i.e., abrogating State immunity from civil suit in the domestic courts of another State only for violations of international humanitarian law as reflected by grave breaches of the four Geneva Conventions. This paper counsels against a broader reading of the *Ferrini* doctrine for at least two reasons. First, the proposition that a State could non-consensually lose its immunity from civil suit in the domestic courts of a foreign State for violations of international obligations is novel. Thus, any case or line of cases purporting to do just that should be limited to their facts. *Ferrini* and its progeny all involved violations of international humanitarian law that constituted grave breaches of the Geneva Conventions. Thus, the substantive grounds for abrogation of State immunity should be limited to such breaches. Indeed, the Court in *Lozano* held that as the alleged conduct did not amount to a war crime the Court had no jurisdiction.[264] Second, unlike other *jus cogens* norms that also constitute *erga omnes* obligations, grave breaches of the four Geneva Conventions are universally accepted and any variations in their application and interpretation

---

[259] It is important to note that States could not enter into agreements to immunize from *criminal* prosecution individuals who had violated the Geneva Conventions.

[260] *In Re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 128–29 (D.D.C. 2009).

[261] Josh Gerstein, *Legal Judgments Soaring Against Iran*, THE NEW YORK SUN (Apr. 3, 2006), http://www.nysun.com/national/legal-judgments-soaring-against-iran/30230/.

[262] *See* U.S. CONST. amend. V. (mentioning that the United States cannot nullify the judgments without compensation because the plaintiffs have a property interest in those judgments.) *Cf. id*. (noting that the 5th Amendment requires "just compensation.") Thus, if "just compensation" is fair market value, it is unlikely the fair market value of these judgments is their face value given that there is no reasonable likelihood of every recovering anything let alone the face value. Thus, actually nullifying the judgments may be a viable option for the United States Government insofar as the fair market value compensation for the judgments would be little to nothing.

[263] *See In Re Islamic Republic of Iran Terrorism Litigation*, *supra* note 260 (noting that the State sponsor of terrorism exception to the FSIA has not deterred terrorist activity and has hampered the Executive Branch's ability to handle sensitive foreign policy issues).

[264] *Lozano*, *supra* note 28 at ¶¶ 7-8.

among States is limited.[265] Quite simply, States cannot challenge their obligation to abide by the four Geneva Conventions and their ability to alter the scope of their obligation is nearly non-existent.

Indeed, the potential for the *Ferrini* decision and its progeny to effect a change in customary international law has serious implications for State action *jure imperii* during times of war. Thus, it should come as no surprise that many States, especially dominant or nuclear powers more willing to throw their weight around militarily, would be opposed to such a change. Ironically, the U.S. amendments to the FSIA were cited in the *Ferrini* decision as indicative of an emerging recognition of a human rights exception to sovereign immunity.[266] However, the FSIA amendments, as the Court itself acknowledged in *Ferrini*, are highly political and clash with the international principle of State equality.[267] Quite simply, the United States is comfortable with abrogating the immunity of States of its choosing for actions of its choosing but would likely be vehemently opposed to being subject to the international system envisioned by the Italian Court of Cassation. Indeed, if the United States refuses to submit to the International Criminal Court, largely out of a concern for the implications it would have for U.S. actions taken in wartime,[268] it is unlikely the United States would be amenable to a rule that allowed civil suits in the domestic courts of another State for those same actions. Nevertheless, the *Ferrini* doctrine, rogue though it may be, is arguably more aligned with fundamental principles of International law than the U.S. amendments to the FSIA.

C. JURISDICTION

Limiting *Ferrini* and its progeny to their facts also resolves another obstacle inherent in a broader reading, that of jurisdiction. Reading *Ferrini* broadly, Fox views the decision as advocating the abolishment of the current dualistic system in favor of "a single regime of responsibility where a grave violation of a fundamental human right amounting to an international crime is established."[269] What this vision overlooks, according to Fox, is that without the State's consent to jurisdiction the claim will "remain largely unrecognized and unenforceable."[270] Only the United States has directly abolished State immunity in its

---

[265] Admittedly, there are other *jus cogens* norms that also constitute *erga omnes* obligations. *Barcelona Traction* annunciated several categories of *erga omnes* obligations: aggression; genocide; and the basic rights of the human person, most notably slavery and racial discrimination. Moreover, such obligations are arguably well-defined in conventions that have quasi-universal acceptance such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention to Suppress the Slave Trade and Slavery, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While there are several notable human rights treaties that do enjoy quasi-universal acceptance, variations among States as to exactly what those provisions protect are significant. Conversely, grave breaches of the Geneva Conventions—universally accepted treaties—are clearly defined. Although variation in interpretation and application between States is inevitable, any such variation is likely to be far slighter than interpretation and application of international human rights conventions such as the Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights. Indeed, the significant differences between States as to the scope of the protections of these human rights conventions call into question whether or not they are even truly quasi-universal. *See* Barcelona Traction, Light & Power Co. Ltd. 1970 I.C.J. 3, ¶ 34 (holding that *erga omnes* obligations regarding the protection of human rights are those that "have entered the body of general international law" or those "conferred by international instruments of a *universal* or *quasi-universal* character.") (Emphasis added). Having the *Ferrini* doctrine apply to violations of all these obligations is not only unnecessary given the ability to narrow the *Ferrini* doctrine by limiting it to its essential holding but also would thwart the exportation of this nascent doctrine beyond Italian borders.

[266] *Ferrini*, *supra* note 1, at ¶ 10.2.

[267] *Id.*

[268] *See* Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. TIMES, Sept. 7, 2002, *available at* http://www.nytimes.com/2002/09/07/international/europe/07COUR.html?pagewanted=all (reporting that the United States cited protection of its soldiers from suit as a reason not to submit to the International Criminal Court's jurisdiction); Barbara Crossestte, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, *available at* http://www.nytimes.com/2002/04/12/international/12COUR.html?pagewanted=all (reporting that the United States feared that as a military power it would be vulnerable to prosecution).

[269] Fox, *supra* note 118, at 144.

[270] *Id.*

amendments to the FSIA.[271] Fox finds this legislation to be an unsatisfactory approach to the issue, characterizing it as "arbitrary," "manipulat[ive]," and "partisan."[272] Thus, aside from domestic legislation purporting to authorize jurisdiction over another State, how does a violation of *jus cogens* confer jurisdiction to one State over another? Jurisdiction is a crucial issue but one that does not destroy the legal viability of the *Ferrini* doctrine. Indeed, by simply limiting *Ferrini* and its progeny to their facts, it is clear that civil jurisdiction by the domestic courts of a State over another State that has committed a grave breach of any of the four Geneva Conventions can only occur when one of the traditional bases[273] of jurisdiction is present: subjective or objective territoriality; nationality; or passive personality.[274]

By giving a narrow reading to *Ferrini* and its progeny a logically consistent and arguably legally defensible rule emerges. A conservative formulation of substantive and procedural aspects of the rule limited to well-established and universally accepted international law ironically increases the potential for its ultimate purpose of radically altering the customary international law of State immunity.

IV. CONCLUSION: VIABILITY AND IMPACT

The *Ferrini* decision and its progeny mark a seminal line of cases given its potential to force States to reevaluate their stance on the issue of State immunity. Rather than attempting to discover an existent rule of international law that abrogates State immunity in these situations, the Italian Court of Cassation should accept its role as a trendsetter. However, this makes the Court's decisions deviations from established international law and therefore "unlawful."[275] As such, it is eminently important for the Court to clearly articulate its reasoning in a rational and precise way in order to persuade other States to accept the *Ferrini* doctrine for what it is—a proposed new rule of international law. The narrow reading proposed by this paper would do much to advance the legitimacy of the doctrine thereby increasing the likelihood that it will effect a change in customary international law on State immunity. However, just because there can be a change in customary international law on State immunity based on the *Ferrini* doctrine does not mean that such a change is advisable.

Why should individuals be allowed to bring civil suits against a State especially if the abrogation of State officials' functional immunity for *jus cogens* violations is already well-established? Even assuming the violating State does not provide an adequate forum it is unclear why the abrogation of function immunity of State officials by the domestic courts of a foreign State is not sufficient—why must the State itself have its immunity stripped? There are three possible reasons. First, there is a moral argument. Quite simply it means more to victims to have a judgment against a State than a mere individual. But, this is far from a compelling justification. Second, suing the State directly avoids the possible difficulty of identifying the individual

---

[271] *Id.* at 151.

[272] *Id.*; *See also* De Sena & De Vittor, *supra* note 107, at 103 (asserting that the Court in *Ferrini* recognized that the US legislation was not a particularly useful model since it was not in accordance with international legal principles because only countries singled out by the US as state sponsors of terrorism were liable to suit which is not consistent with the principle of "sovereign equality of States."); *See also* Gattini, *supra* note 101, at 230 (asserting that the Court in *Ferrini* was reticent about citing US cases under the exception to FSIA as examples to bolster the Court's own reasoning: "the dubious value of those judgments is indirectly admitted by the Court itself on account of the unilateral nature and political overtones of the U.S. approach.").

[273] While it is possible that the protective principle of jurisdiction could be invoked, this form of jurisdiction is arguably controversial given its uncertain contours. Moreover, this principle does not need to be invoked to find a traditional basis of jurisdiction in any of the cases from the *Ferrini* line. The same reasoning applies with respect to universal jurisdiction.

[274] Subjective territorial jurisdiction gives the State jurisdiction over conduct that occurs in the State's territory. *Ferrini*, *supra* note 1; *See also* Focarelli, *supra* note 46, at 130 (discussing Italy's jurisdiction over conduct that began in Italy); Ciampi, *supra* note 31, at 597–98 (2009) (discussing Italy's jurisdiction over conduct that occurred in Italy). *See also Lozano*, *supra* note 28 (noting that objective territorial jurisdiction gives the State jurisdiction when the effects of the conduct occur in the State's territory. Nationality gives the State jurisdiction over conduct by the State's nationals. Passive personality gives the State jurisdiction for conduct carried out against the State's nationals. Usually, this conduct is seriously harmful and/or committed on the basis of nationality.).

[275] Focarelli, *supra* note 46, at 130.

officials were responsible for the harm. However, pinpointing the responsible parties is required in any civil case.[276] Just because pegging the State would be expedient does not mean it is just. Moreover, there is no principled reason why the identification of wrongdoers for cases involving violations of *jus cogens*—an incredibly serious allegation—should be legally easier than for a "routine" wrongful death or other personal injury claim. Third, the State has deep pockets while it is likely that the government official does not. Facially, this is a weak argument. The victim is stuck with the tortfeasor; if you can't get blood out of a stone too bad, the victim is out of luck. On the other hand, in cases with government officials the State actually provided the individuals with the funding, resources, and authority to carry out the violations. Thus, there is a much stronger argument that the State's deep pockets should be available to provide redress for those injuries since the State's pockets were involved in facilitating them. Although this third argument carries some heft, it is unlikely to outweigh the other prominent considerations that counsel against the *Ferrini* doctrine.

There are three principal reasons why the *Ferrini* doctrine, even the narrow version proposed above, is an unwise proposition. First, the gravity of a determination that a State is liable, even civilly, for violations of *jus cogens* cannot be overstated. However, the *Ferrini* doctrine would allow such momentous determinations based on international law to be made in trial level domestic courts. As the State's appearance is unlikely, default judgments would be routine. Default judgments are particularly inappropriate in this context given the heinous nature of the wrongs alleged and the potential ramifications of such violations on a State-to-State level. After all, violations of *jus cogens* that are *erga omnes* constitute a breach of obligations owed to every State. Thus, States themselves have the primary—and some may argue the exclusive—interest in such violations. Even if a State were to appear, in countries such as the United States, liability for international wrongs would be decided by lay citizens in the form of juries rather than learned jurists. Additionally, this decentralized method of decision-making could result in incongruous outcomes with some courts finding liability and others not finding liability even within the same State.[277] In short, the *Ferrini* doctrine places the power to make a crucial determination as to an international obligation in the hands of innumerable municipal domestic tribunals. This decentralized, provincial method of determination is inappropriate given the international character of: (1) the nature of the duty (*jus cogens*) as binding on all States; and (2) to whom the obligation is owed (*erga omnes*), i.e., to all States. While each State has the authority to determine what its reaction will be to another State's violation of *jus cogens*, the initial determination that there has been a violation should be an international one. This determination should arguably be made by the concerned States themselves, the international community through a collective resolution, or a ruling of an international judicial body such as the ICJ.[278]

---

[276] *See, e.g.*, *In Re Petition of Sheila Roberts Ford*, 170 F.R.D. 504 (M.D. Ala. 1997) (acknowledging that a putative civil plaintiff seeking discovery to provide her with sufficient evidence to bring suit against law enforcement officials for the shooting death of her father was in a "Catch 22" because such discovery was unavailable prior to filing suit but that without such discovery she lacked sufficient facts to determine who were the appropriate defendants: "Indeed, she must feel that, under the rules established by our civil justice system, a law enforcement officer can get away with murder. This court has no answer for her . . .").

[277] At least in U.S. courts this could lead to offensive nonmutual collateral estoppel. A State that actually appeared and litigated would only have to be found liable once and then all other putative plaintiffs could piggy-back off that finding of liability so that the only question before the court would be that of damages. However, it seems highly unlikely that offensive nonmutual collateral estoppel could be applied to a State given the U.S. Supreme Court holding in *United States v. Mendoza*, 464 U.S. 154 (1984) (explaining that offensive nonmutual collateral estoppel could not be applied against the United States). In *Mendoza* the Court reasoned that:

The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government…Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the Government to abandon virtually any exercise of discretion in seeking to review judgments unfavorable to it. *Id.* at 162–63.

[278] Indeed, Common Article II of the four Geneva Conventions provide that if there is disagreement as to the existence of grave breaches then the parties should submit the dispute to an umpire. The International Committee of the Red Cross' authoritative Commentaries provide that such a dispute should be submitted to the ICJ. 1 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: FIRST GENEVA CONVENTION FOR THE AMELIORATION OF THE

Second, on the individual State level, a determination that another State has violated *jus cogens* is a political question. Thus, the judiciary should decline to entertain a claim—civil or otherwise—absent a determination on the issue of liability of the foreign State for a violation of *jus cogens* by the executive branch with substantial deference by the judiciary to that determination. Some have argued that Article 2 of the Institut de Droit International's Resolution on The Activities of National Judges and the International Relations of Their State[279] ("the Resolution") undermines the political question doctrine.[280] Article 2 provides:

> National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law.

Even assuming that the Resolution constitutes a persuasive authority, its articles must be read in context, i.e., a direction to the national courts of States to determine the compliance of their *own* State with international law. Moreover, Article 7 explicitly endorses the existence of a political question doctrine,[281] at least the form such doctrine takes in the United States, by allowing deference to "the ascertainment of facts pertaining to the international relations of the forum State or other States."[282] Indeed, such an ascertainment constitutes "*prima facie* evidence of the existence of such facts."[283]

As the proposed narrow reading of the *Ferrini* doctrine would only apply to grave breaches of the four Geneva Conventions, determination as to the method of compensation does not create an issue merely of treaty interpretation for which courts have competence.[284] Rather, the four Geneva Conventions create no such private right of action,[285] thus, to the extent that a State adopts the *Ferrini*

CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 374-79 (1952); 2 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: SECOND GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 271-72 (A.P. de Heney trans., 1960); 3 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: THIRD GENEVA CONVENTION FOR THE RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 630-33 (A.P. de Heney trans., 1960); 4 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 603-06 (Ronald Griffin and C.W. Dumbleton trans., 1958).

279 Institut De Droit Int'l, *The Activities of National Judges and the International Relations of their State, Art. 7*, Res. Session of Milan (Sept. 7, 1993), http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF.

280 Micaela Frulli, *When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The* Marković *Case*, 1 J. INT'L CRIM. JUST. 406, 412–13 (2003).

281 Institut De Droit Int'l, *supra* note 279, at Art. 7(3): National courts should be able to defer to the Executive, in particular the organs responsible for foreign policy, for the ascertainment of facts pertaining to the international relations of the forum State or other States. The ascertainment of international facts by the Executive should constitute *prima facie* evidence of the existence of such facts. The legal characterization of the facts should be reserved for the judiciary alone; *Id.*

282 *Id.* art. 7(1).

283 *Id.* art. 7(2).

284 *See id.* art. 5(3) ("National courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international tribunal and avoiding interpretations influenced by national interests.").

285 *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (referring to the Third Geneva Convention and concluding "[i]t is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities."). *See also Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006) (citing footnote 14 of *Johnson v. Eisentrager* as support for the conclusion that the Geneva Conventions do not confer a private right of action. On appeal, the Supreme Court's plurality opinion did not reach the issue of whether the Geneva Conventions confer a private right of action because as part of the law of war covered by the Uniform Code of Military Justice which was the source of authority for the military commission slated to try Hamdan). *But see id.* at 717 (Thomas, J., dissenting) (arguing that the Geneva Conventions do not confer a private right of action. "The judicial non-enforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanism and this, too is part of the law of war."). *See also id.* at 716 (Thomas, J., dissenting) (stating that while compliance with the laws of war are part of the UCMJ, "it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable on their own accord."); *Cf. Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J. concurring) (noting

doctrine there would have to be some implementing legislation recognizing that cause of action. However, the initial determination as to whether there has been a grave breach is, at the very least, a determination that should be reserved to the executive.[286] Indeed, such a determination goes beyond mere State immunity, a jurisdictional issue, to implicate the Act of State Doctrine, a substantive issue.[287] It would be disastrous to foreign policy and international relations to have *ad hoc* decentralized determinations of whether another State's actions constitute a violation of international law.

Third, allowing civil suits against States is a hollow privilege because unless radical changes are made to State immunity with respect to State assets, plaintiffs will never meaningfully collect on these judgments if they are able to collect at all. The issue of immunity from suit is wholly separate from the issue of immunity from attachment and execution. Perhaps the starkest example of this is the Victims of Terrorism judgments in the United States stemming from the State sponsor of terrorism exception to the FSIA. In a lengthy and impassioned opinion, Chief Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia systematically laid out the problems with the private litigation model.[288] The Court decried the fact that "the overwhelming majority of successful FSIA plaintiffs with judgments against Iran still have not received the relief that our courts have determined they are entitled to under the law"[289] and noted "the resistance of the Executive Branch to legislation permitting the execution of court judgments through assets of state sponsors of terrorism."[290] Even assuming there were enough Iranian assets within the United States to satisfy the more than one thousand plaintiffs[291] and billions of dollars in judgments, the assets are often "held by certain large financial institutions that are in fact agencies or instrumentalities of other foreign nations, which are in and of themselves subject

---

that the Hague Conventions had never been regarded as creating a private right of action and speculating that "[i]f they were so regarded the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals . . . Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly . . . Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. It is for these reasons that the Conventions are best regarded as addressed to the interests and honor of belligerent nations, not as raising the threat of judicially awarded damages at war's end."). *But see* 3 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: THIRD GENEVA CONVENTION FOR THE RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 630-33 (A.P. de Heney trans., 1960) (noting that "So far this commentary has dealt only with the relationship between prisoners of war and the belligerents in whose hands they are. What, then, is the position when the violations are the consequence of an agreement signed by the State of origin of the prisoners of war? Would it not be possible for the State of origin to be prosecuted by the prisoners of war who have suffered prejudice, in those countries at least in which individual rights may be maintained before the courts? It would seem that the reply to this question must be in the affirmative.").

[286] *See Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) ("Agreement with foreign nations for the punishment of war criminals, insofar as it involves aliens who are the officials of the enemy or members of its armed services, is a part of the prosecution of the war. It is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done. It falls as clearly in the realm of political decisions as all other aspects of military alliances in furtherance of the common objective of victory.").

[287] The Act of State doctrine is a prudential doctrine, which is "compelled by neither international law nor the Constitution." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964). The classic formulation of the doctrine provides:
Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Supreme Court has held that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

[288] *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 246.

[289] *Id.* at 120.

[290] *Id.* at 121, 125–26 (emphasizing the negative impact allowing such suits to proceed and the subsequent court battles over attachment have had on the Executive Branch's foreign policy objectives by the Court).

[291] *Id.* at 120.

to sovereign immunity under the FSIA."[292] Given the limited assets held by a State abroad, plaintiffs who win the race to the courthouse will be the most likely to realize their judgments to the exclusion of other "equally deserving victims" who are left with nothing.[293] Due to the inability to collect on judgments, the private litigation route is an illusory remedy giving victims false hope—a "meaningless kabuki dance."[294] In short, it is counterproductive and cruel to allow such suits. Counterproductive, by allowing judicial resources to be expended issuing judgments incapable of execution and likely to constrain the foreign policy prerogative of the executive. Cruel, by giving victim-plaintiffs a scheme of justice that is merely a Potemkin village.

As a normative matter, the political implications identified above counsel against such a doctrine. There is likely good reason that other States have not gone the route of the United States with its *ad hoc* abrogation of State immunity for civil suit or responded favorably to the *Ferrini* line of cases out of Italy—it just does not make sense legally or politically to allow civil suits for violations of international law—war crimes or otherwise. While the February 2012 ICJ decision dealt a blow to the *Ferrini* doctrine it was not fatal. There is little reason to believe that the Italian courts which were brazen enough to expound the doctrine and continue to apply and even expand upon it in the face of opposition will be cowed into conformity. Moreover, the ruling while influential in the development of international law is—by the ICJ's own statutory provision regarding the sources of international law—only a secondary source,[295] State practice is far more important. Thus, regardless of the ICJ's decision in *Germany v. Italy* if the *Ferrini* doctrine is able to gain traction, customary international law on State immunity may undergo a change. Thus, while the *Ferrini* doctrine has potential to impact customary international law on State immunity the legal and practical implications of doing so are far from positive.

---

[292] *Id.* at 122.
[293] *Id.* at 124.
[294] *Id.* at 129.
[295] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060.