

AN AMERICAN ANOMALY?  
ON THE ICJ'S SELECTIVE READING OF UNITED STATES PRACTICE  
IN *JURISDICTIONAL IMMUNITIES OF THE STATE*

RICCARDO PAVONI\*

Abstract

*The ICJ's treatment of US practice translates into one of the most controversial aspects of the Jurisdictional Immunities judgment. The Court's approach was elusive and patchy. Certain key decisions by US courts in the field of sovereign immunity were patently neglected, while others were addressed in a misleading manner. This article examines the Court's citations and omissions relating to US practice, with respect to both the jus cogens and tort exception arguments advanced by Italy in defense of its Ferrini jurisprudence denying immunity when the defendant State is accused of egregious breaches of human rights. The article also enquires into the possible reasons at the root of the Court's inadequate assessment of US practice. It takes the view that the Court's dismissive attitude vis-à-vis the anomalous American experience casts doubt over the judgment's reliability and persuasiveness as an accurate reflection of the contemporary law of State immunity.*

Keywords: State immunity; United States practice; *ius cogens*; tort exception.

1. INTRODUCTION

In *Jurisdictional Immunities of the State*,<sup>1</sup> the wealth and variety of legal materials relied on by the International Court of Justice (ICJ) in reviewing the consistency of the Italian *Ferrini* jurisprudence with customary law is certainly remarkable. The Court reiterated the traditional concept of customary rules as a product of the interaction between State practice and *opinio juris*, without losing sight of the importance of treaties and international jurisprudence as wellsprings for confirming and validating customary law.<sup>2</sup> With respect to the sources taken into account as elements of State practice and *opinio juris*, the Court's general approach was comprehensive, insofar as, in principle, it provided a balanced assessment of the legislative, judicial and diplomatic pronouncements of States in matters of sovereign

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\* Associate Professor of International and European Law, University of Siena.

<sup>1</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012.

<sup>2</sup> *Ibid.*, para. 55.

immunity.<sup>3</sup> Instead, it is the specific use or omission by the ICJ of certain significant manifestations of practice that lends itself to criticism and justifies perceptions of biased, policy-driven conservatism. Most importantly, it weakens the persuasive force of the Court's findings.

In this volume, Professor Conforti has already identified a major omission by the Court regarding the existing practice on the test of the availability of alternative individual effective remedies as a precondition for the enjoyment of State immunity in cases involving human rights violations.<sup>4</sup> Here, I will take issue with another anomaly in the Court's judgment, one which should be evident to anyone who is familiar with the practice of the United States of America (US) in the area of State immunity. The ICJ's treatment of US practice is erratic, partial and solely instrumental to corroborating the particular point it had in mind. The extent of this misuse of US practice is such that it can safely be considered as an upshot of the deliberate choice on the part of the Court. Of course, the Court's task was not to adjudge the legality of US practice, but it is equally obvious that this was not a justification for downplaying or concealing the practice of a State that has been one of the most significant players in the development of the contemporary law on sovereign immunity. Therefore, such practice constituted a potentially relevant and influential source for a reliable enquiry into the current state of customary law.

I will first consider whether the unsatisfactory account of US practice in *Jurisdictional Immunities of the State* may be traced to the prevailing characterization of immunity issues as a matter of comity by US courts, thereby challenging the ICJ-backed conception of State immunity as a right sanctioned by a general rule of customary international law (section 2). I will then underscore the omissions and misleading statements of the ICJ regarding US practice in its examination of the alleged *jus cogens* (section 3) and territorial tort (section 4) "exceptions" to State immunity for human rights violations stemming from military activities in times of armed conflict. I will finally observe that the inadequate treatment of US practice in this area calls into question the reliability of the ICJ judgment as an accurate reflection of the contemporary law of State immunity when serious breaches of human rights are at stake (section 5).

## 2. THE NATURE OF STATE IMMUNITY: RULE OR COMITY?

The hesitation shown by the Court in examining US practice may have resulted from the acknowledgement that the US courts adjudge claims of State immunity

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<sup>3</sup> *Ibid.*

<sup>4</sup> See CONFORTI, "The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity", *supra* in this volume.

“as a matter of grace and comity”,<sup>5</sup> thus as claims fraught with political overtones, and not primarily governed by formal rules of positive international law nor by US constitutional requirements. Although one of the declared purposes of the 1976 US Foreign Sovereign Immunities Act (FSIA) was to bring the US legal system in line with customary international law,<sup>6</sup> US courts have continued to refer to “grace and comity” as the basic rationale of State immunity. In its 2004 *Altmann* decision, the US Supreme Court famously reiterated that:

“[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present ‘protection from the inconvenience of suit as a gesture of comity’”.<sup>7</sup>

This obviously is at odds with the ICJ’s approval of the position of the Parties to the *Jurisdictional Immunities* case that sovereign immunity “is governed by international law and is not a mere matter of comity”,<sup>8</sup> and that accordingly, when applicable, immunity is a right prescribed by a general rule of customary international law.<sup>9</sup> This position is accurate to the extent that it is endorsed by the great majority of manifestations of State practice. However, it would have been appropriate for the ICJ to clarify that it is not a universal view, either in State practice (as most glaringly evidenced by US case law) or literature.<sup>10</sup> Indeed,

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<sup>5</sup> US Supreme Court, *Republic of Austria v. Altmann*, 7 June 2004, 541 US 677, ILM, Vol. 43, 2004, p. 1425 ff., p. 1428. The view of State immunity as a matter of comity is usually traced to the seminal opinion of the US Supreme Court Chief Justice Marshall in *Schooner Exchange v. Mc Faddon*, 7 Cranch 116 (1812). Although the Chief Justice never used the term “comity”, he referred to State immunity as a limitation to the exclusive territorial jurisdiction otherwise enjoyed by States, flowing from the latter’s explicit or implicit consent and political considerations: “This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation” (*ibid.*, p. 137). Cf. FOX, *The Law of State Immunity*, 2nd ed., Oxford, 2008, pp. 13-19.

<sup>6</sup> Cf. Section 1602 FSIA.

<sup>7</sup> *Altmann*, *cit. supra* note 5, p. 1431. The internal quotation refers to the Supreme Court’s earlier decision in *Dole Food Co. v. Patrickson*, 538 US 468, p. 479 (2003).

<sup>8</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 53.

<sup>9</sup> *Ibid.*, para. 56.

<sup>10</sup> See lately, FINKE, “Sovereign Immunity: Rule, Comity or Something Else?”, EJIL, 2010, p. 853 ff. (immunity as a legally binding principle, rather than a rule, subject to domestic variations within the limits set by other principles of international law). See also CAPLAN, “State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory”,

consistently with the above theoretical premise, one would expect a wholesale rejection by the Court of the relevance of US jurisprudence. The latter would never be representative of the sense of legal obligation giving rise to *opinio juris*.<sup>11</sup> Therefore, considering the different vision of the overwhelming majority of States, including Germany and Italy, the Court would simply take note of US practice, but only to discard its ability to affect the state of customary law. On the contrary, the ICJ did not reference the US's general approach to immunity cases as enshrined in prominent decisions such as *Altmann*.<sup>12</sup> This in turn allowed the Court to bypass the problem in question, thereby proceeding, as we shall see in detail, to piecemeal and selective citations from US practice in the next sections of the judgment.

A complete disregard for US practice would have been untenable and legally unsound. It would have meant ignoring the most voluminous, dynamic and vibrant national jurisprudence on international immunities. It is estimated that US court rulings in this area account for over half of all reported decisions.<sup>13</sup> They have at times canvassed cutting-edge solutions which have deeply influenced the further evolution of the law.<sup>14</sup> Despite the (frequently inconsequential) reference to comity as a basis for State immunity, it seems appropriate to review each and any manifestation of US practice, examine the arguments put forward in order to justify particular statements, and accordingly appraise to what extent and in what respects they reflect existing international law and practice. This stands in marked contrast to the uneven treatment of US practice by the ICJ in *Jurisdictional Immunities of the State*.

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AJIL, 2003, p. 741 ff.; and seminally, LAUTERPACHT, "The Problem of Jurisdictional Immunities of Foreign States", BYIL, 1951, p. 220 ff.

<sup>11</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 55. Here the Court highlights the absence of *opinio juris* when States grant immunities more extensively than required by international law. Evidently, this reasoning equally applies when States accord immunities *less* extensively than imposed by international law, regardless of the latter's requirements and only as a matter of domestic law and policy.

<sup>12</sup> Nevertheless, it is submitted that the ICJ was well aware of the *Altmann* decision. It probably paid an unstated tribute to *Altmann* in its holding that contemporary immunity rules applied retroactively so as to cover events – such as the Nazi crimes at issue – that occurred before those rules had come into existence, see *Jurisdictional Immunities of the State*, *cit. supra* note 1, paras. 58 and 93. In *Altmann*, the US Supreme Court had reached the same ground-breaking conclusion, although on the basis of considerations other than those of the ICJ, and unsurprisingly entirely focused on US law.

<sup>13</sup> FOX, *cit. supra* note 5, p. 23.

<sup>14</sup> Just think of the case law on the applicability of the tort exception to *jure imperii* conducts of foreign States, see *infra* section 4.

### 3. *JUS COGENS* AND INTERNATIONAL CRIMES VERSUS STATE IMMUNITY: WHAT HAPPENED TO *AMERADA HESS* AND ITS PROGENY?

A most surprising omission regarding US court practice may be found in the sections of the *Jurisdictional Immunities* judgment dealing with Italy's submissions concerning the legality of removing immunity when the defendant State is accused of breaches of *jus cogens* or serious violations of international humanitarian law. The ICJ first denied that Italy could draw arguments in its favour from an overall appraisal of Greek practice.<sup>15</sup> It then referred to

“a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependant upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated”.<sup>16</sup>

The following paragraph lists case law from Canada, France, Slovenia, New Zealand, Poland and the United Kingdom.<sup>17</sup> US jurisprudence is glaringly absent. This is particularly puzzling, insofar as there exist many US court decisions, predating those quoted by the Court, which have refused to deny State immunity on the basis of the *jus cogens* violations attributed to the defendant State, and more generally, of any violation of international law not sanctioned by one of the exceptions in the FSIA.<sup>18</sup> In addition, and although the story is widely known, one should recall that the “normative hierarchy theory” in the field of State immunity was for the first time sketched out in a pioneering and admirable student article published in the US in 1989.<sup>19</sup> The theory was refined and “imported” into Europe by certain

<sup>15</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 83.

<sup>16</sup> *Ibid.*, para. 84.

<sup>17</sup> *Ibid.*, para. 85. See also *ibid.*, para. 96.

<sup>18</sup> See especially, US Court of Appeals for the Ninth Circuit, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (1992); US Court of Appeals for the District of Columbia Circuit, *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994); US Court of Appeals for the Second Circuit, *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (1997); US Court of Appeals for the Seventh Circuit, *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (2001).

<sup>19</sup> BELSKY, MERVA and ROTH-ARRIAZA, “Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law”, *California Law Review*, 1989, p. 365 ff. The article is preceded by a quotation that, despite the *Jurisdictional Immunities* judgment, seems somewhat prophetic: “[T]he law is like the pants you bought last year for a growing boy, but it is always this year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different” (WARREN, *All The Kings Men* (Bantam Modern Classic ed.), 1968, p. 136)!

authors, especially Andrea Bianchi,<sup>20</sup> and later on glorified by yet other authors, including Alexander Orakhelashvili.<sup>21</sup>

Indeed, the 1989 article became a standard point of reference for courts and scholars dealing with the subject. It was written in the aftermath of the US Supreme Court decision in *Amerada Hess*, a case closely related to norms of *jus cogens*, since it involved an unjustified use of force against a neutral commercial ship *on the high seas* by the Argentine army during the Falkland/Malvinas armed conflict. The Supreme Court declined to lift immunity on account of the violations of international law attributed to the defendant State: “immunity [must be] granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions”.<sup>22</sup> This decision has since represented an insurmountable stumbling block for US courts faced with arguments against the retention of immunity by States accused of egregious violations of international human rights law. Thus, the US jurisprudence upholding State immunity in such cases may be safely characterized as well-settled.<sup>23</sup>

So, why didn’t the ICJ rely on this jurisprudence? Two possible answers exist here. The most elementary answer is that the Court did not consider that customary law could be evinced from US court practice, since the latter is exclusively based on comity and domestic law and policy. However, this would imply a blanket rejection of *all* US practice, while, as shown below, certain expressions of that practice were indeed examined by the Court.

Alternatively, the Court might have reasoned that, US practice *taken as a whole*, does not support the proposition that States are immune from the jurisdiction of other States when they are accused of serious breaches of fundamental rights committed outside of the forum State. As a matter of fact, the US is well-known for its *terrorism exception* to sovereign immunity, whereby foreign States, which are

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<sup>20</sup> BIANCHI, “Denying State Immunity to Violators of Human Rights”, *Austrian Journal of Public International Law*, 1994, p. 195 ff. (also published as “Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights”, in CONFORTI and FRANCONI (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague/Boston/London, 1997, p. 405 ff.).

<sup>21</sup> ORAKHELASHVILI, “State Immunity and International Public Order”, *GYIL*, 2002, p. 227 ff. For a recent reassessment, see PAVONI, “Human Rights and the Immunities of Foreign States and International Organizations”, in DE WET and VIDMAR (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, 2012, p. 71 ff., pp. 74-77, 83-98 (espousing the thesis of the loss of immunity where alternative means for redress are unavailable to victims of fundamental human rights violations, i.e. the thesis flatly rejected by the ICJ in *Jurisdictional Immunities of the State*, *cit. supra* note 1, paras. 98-104, and embraced instead in *ibid.*, Dissenting Opinion of Judge Yusuf, paras. 4-11, 20, 29, 42, 51-59).

<sup>22</sup> *Argentine Republic v. Amerada Hess*, 23 January 1989, 488 US 428 (1989), p. 436.

<sup>23</sup> Notwithstanding the fact that the Supreme Court has never explicitly addressed this question, not even in *Saudi Arabia v. Nelson*, 507 US 349 (1993), a case involving torture abroad which was however entirely argued and decided (in favour of the foreign State) on the basis of the commercial exception to sovereign immunity.

listed by the US Government as States sponsors of terrorism and are accused of torture, extrajudicial killing, taking of hostages or aircraft sabotage, lose their immunity in actions for damages brought by the alleged victims of those acts (or their successors in title).<sup>24</sup> The wrongful act may well have occurred on the territory of a foreign State, but the claimants must be US nationals, members of the US armed forces, US employees, or US contractors. The existence of this legislation was duly acknowledged by the ICJ, but only to be briskly dismissed as an all American anomaly:

“The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged”.<sup>25</sup>

Of course, this observation by the Court implied that the US was in breach of its international obligations. But the key point is that the cursory treatment of the US terrorism exception adversely affects the overall logic and consistency of the Court’s judgment. In the absence of explanations, the above holding gives the impression that the US terrorism exception *does* lend some support to the Italian *Ferrini* jurisprudence. After all, Italian courts were not alone in accepting that immunity may be denied to (at least certain) States accused of serious violations of human rights. True, the US exception provides insufficient support to the *Ferrini* case law, given its nature as unilateral legislation unknown to the rest of the world.

In this connection, it should be noted that the ICJ was probably aware that the enactment of measures along the lines of the US terrorism exception has long been debated in the Canadian Parliament. The latter’s failure to formally approve the various bills proposed over the years on the subject might have provided a further argument for disavowing the relevance of the US exception for the identification of customary law. At any rate, the ICJ was wise enough not to mention these (until then) aborted Canadian legislative initiatives. Indeed, regardless of the conclusions reached by the ICJ a month and a half before, on 13 March 2012 Canada finally adopted its version of the terrorism exception to State immunity<sup>26</sup> and accordingly

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<sup>24</sup> Section 1605A FSIA. The US list of State sponsors of terrorism currently includes Cuba, Iran, Sudan, and Syria.

<sup>25</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 88.

<sup>26</sup> Justice for Victims of Terrorism Act, Part I of the Safe Streets and Communities Act, Bill C-10, 13 March 2012. See the blog posts by HARRINGTON, EJIL: *Talk!*, 28 March 2012, available at: <[www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act](http://www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act)>, and PROVOST, *ibid.*, 29 March 2012, available at: <<http://www.ejiltalk.org/canadas-alien-tort-statute>>. On 7 September 2012, the Canadian Government announced that Iran and Syria have been included in the list of States supporters of terrorism envisaged by the legislation in question; concomitantly, Canada closed its Embassy in Iran and declared *persona non gratae* all Iranian diplomats in Canada, accordingly instructing them to leave its territory within five days, see <<http://www.cbc.ca/1.1034444>>.

amended its State Immunity Act (SIA). The new section 6.1 SIA withdraws immunity to foreign States accused of terrorist activities (or complicity thereof) carried out *on and after 1 January 1985*, provided they have been listed as States supporters of terrorism by the Canadian Government. When the loss or damage to the plaintiff are suffered in the foreign State, the latter must be afforded a “reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration”.<sup>27</sup> The Canadian exception is otherwise broader than its US counterpart, especially in two respects. First, active standing is enjoyed not only by Canadian nationals and residents, but also by foreigners, when the action has a “real and substantial connection” to Canada.<sup>28</sup> Second, the amendments make significant inroads into the rules on immunity from execution, going as far as to allow enforcement measures against *jure imperii* property of States supporters of terrorism, with the only apparent exceptions being military property and cultural property.<sup>29</sup>

In short, the US is no longer alone with its terrorism exception, as the latter now finds a robust counterpart across the northern US border. What was perceived as a US “exception” now becomes a North American peculiarity, one which is too simplistic to bluntly dismiss as an anomaly, as it also raises the intriguing question of the possible emergence of a regional custom.<sup>30</sup>

In this context, the ICJ would have been on safer ground if it had relied upon the US *Amerada Hess* decision and its progeny. This would have clarified that the US terrorism amendment has not induced US courts to rethink their original position, which at times had also been framed in terms of international law, on the maintenance of immunity for serious violations of human rights. The amendment has therefore been applied – among many difficulties – only to a subset of States identified through an eminently political process. As a result, the Court’s emphasis on the isolation of the Italian *Ferrini* jurisprudence would have appeared more credible and thoroughly argued.

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[www.international.gc.ca/media/aff/news-communications/2012/09/07c.aspx?lang=eng&view=d](http://www.international.gc.ca/media/aff/news-communications/2012/09/07c.aspx?lang=eng&view=d); <<http://www.international.gc.ca/media/aff/news-communications/2012/09/07a.aspx?view=d>>.

<sup>27</sup> Section 2(4)(4) of the Justice for Victims of Terrorism Act (*ibid.*).

<sup>28</sup> Section 2(2) of the Justice for Victims of Terrorism Act (*ibid.*).

<sup>29</sup> Section 12(1)(b) and (d) SIA. See also the new Section 12.1 SIA, setting up mechanisms for affording governmental assistance to creditors of judgments against listed States in order to identify and locate the latter’s property within Canadian jurisdiction.

<sup>30</sup> See, however, beyond the North American region, the most interesting, recent Israeli decision of the District Court of Be’er-Sheva, *Yosefov v. Egypt*, 13 February 2011, CC (BS) 5006-08, International Law in Domestic Courts (ILDC) 1771 (IL 2011), paras. 14-17, which spoke of a “tendency” in State practice to remove the immunity of terror-supporting States, and came to the ultimate conclusion that Egypt, not being one such State, enjoyed immunity with respect to a compensation claim arising from its alleged complicity in missile strikes from the Gaza Strip into Israeli territory. Arguably, an *opinio juris sive necessitatis* on the imperative to fight against terrorism, including by denying State immunity in damages actions brought by the victims of State-sponsored terrorist acts, is slowly emerging, at least among the courts of States most seriously affected and threatened by terrorism.

The same applies to Canada's case. The 2012 terrorism exception will allow civil suits only against States designated as supporters of terrorism by the Government and pursuant to the various conditions established by the legislation recalled above. For the rest, Canadian courts will be able to follow their existing substantial jurisprudence that denies a human rights derogation from State immunity.<sup>31</sup> However, for proceedings involving torture abroad, Canada will face an inconvenient situation. Indeed, in another crucial development postdating the *Jurisdictional Immunities* judgment, the Committee against Torture approved its concluding observations about Canada's Sixth Report<sup>32</sup> on the implementation of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The observations relating to Article 14 CAT on civil redress for victims of torture read as follows:

“The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, mainly due to the restrictions under provisions of the State Immunity Act (art. 14).

The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim. In this regard, *it should consider amending the State Immunity Act to remove obstacles to redress for all victims of torture*”.<sup>33</sup>

Whatever their different status, function and pedigree, we are therefore witnessing a spectacular clash between international institutions: on the one hand, the ICJ with its firm endorsement of State immunity irrespective of the human rights breaches at stake; on the other, the Committee against Torture which urges State

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<sup>31</sup> Ontario Superior Court of Justice, *Bouzari v. Iran*, 1 May 2002, [2002] O.T.C. 297, affirmed by Ontario Court of Appeal, 30 June 2004, 243 D.L.R. (4th) 406; Ontario Superior Court of Justice, *Arar v. Syria and Jordan*, 28 February 2005, 28 C.R. (6th) 187; Superior Court of Québec, *Kazemi (Estate of) v. Iran*, 25 January 2011, [2011] QCCS 196, affirmed by Québec Court of Appeal *sub nomen Iran v. Hashemi*, 15 August 2012, [2012] QCCA 1449; Ontario Superior Court of Justice, *Steen v. Iran*, 1 November 2011, 108 O.R. (3d) 301. Similarly to the US Supreme Court, the Supreme Court of Canada has never explicitly addressed the problem of State immunity versus human rights. It has rather taken an ambiguous stance in this respect: on the one hand, it has denied *certiorari* in the *Bouzari* case, [2005] 1 S.C.R. vi; on the other, it has offered certain *obiter dicta* that seem to leave the issue open. See lately, referencing ongoing doctrinal debates on the relationship between State immunity and *jus cogens* norms such as the ban on torture, *Kuwait Airways Corporation v. Iraq*, 21 October 2010, [2010] 2 S.C.R. 571 (*per* LeBel J.), para. 24: “I need not determine here whether the *SIA* is exhaustive [...] or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution”.

<sup>32</sup> Doc. CAT/C/CAN/6 (22 June 2011).

<sup>33</sup> Doc. CAT/C/CAN/CO/6 (25 June 2012), para. 15, emphasis added.

Parties to the CAT to ensure, if necessary by legislation (as with Canada), that their practice on State immunity does not hinder the provision of remedies and reparation to *all* victims of torture.

#### 4. TERRITORIAL TORTS IN ARMED CONFLICT, STATE IMMUNITY AND THE US JURISPRUDENCE: BETWEEN EMASCULATION AND NEGLECT

If it is likely that reliance on the US *Amerada Hess* jurisprudence would have strengthened the judgment's conclusions as to the inadmissibility of a *jus cogens* "exception" to State immunity, much more problematic was the Court's inaccurate treatment of US practice relating to the territorial tort exception. Such practice was indeed capable of bolstering Italy's arguments in this connection. Italy submitted that the tort exception also covered *jure imperii* acts of foreign States, including those performed by military forces in times of armed conflict, and that therefore the assertion of jurisdiction by Italian courts over the Nazi crimes committed, in whole or in part, on Italian territory was in line with international law.<sup>34</sup>

Without being compelled to do so, the ICJ saw it fit to first discuss the applicability of the tort exception to *acta jure imperii* generally considered. It is here that a misleading quote to US *diplomatic* practice appears with a view to showing that Germany's thesis confining the tort exception to *acta jure gestionis* was not isolated. The Court mentioned certain statements made in 2004 before the Sixth Committee of the General Assembly by the US delegate about the final draft text of the UN Convention on State Immunity<sup>35</sup> and its Article 12 on the tort exception. The Court recalled the US delegate's declaration that Article 12 "must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*",<sup>36</sup> because a different course of conduct "would be contrary to the existing principles of international law".<sup>37</sup>

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<sup>34</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 62. Indubitably, given the inconclusiveness of existing practice, this was the strongest argument advanced by Italy, and indeed the one most extensively covered by the judgment (*ibid.*, paras. 62-79). Cf. the number of paragraphs devoted to the gravity-of-crimes argument (*ibid.*, paras. 81-91), the *jus-cogens* argument (*ibid.*, paras. 92-97), and the alternative-remedies argument (*ibid.*, paras. 98-104). It is in this connection that Judge *ad hoc* Gaja referred to a "grey area" where "States may take different positions without necessarily departing from what is required by general international law", *ibid.*, Dissenting Opinion of Judge *ad hoc* Gaja, para. 9 (see also, *ibid.*, para. 10). Judge Gaja's Dissent is entirely addressed at the Court's alleged mistreatment of the tort exception.

<sup>35</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, General Assembly Resolution A/59/38, not yet in force.

<sup>36</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 64. The US statement may be read in UN Doc. A/C.6/59/SR.13, para. 63.

<sup>37</sup> *Ibid.*

This is at best an incomplete account of US practice in this area. It omits, here too, to acknowledge that US courts were forerunners in asserting jurisdiction over acts of foreign States of an indisputable *jure imperii* nature and performed on American soil. Thus, in the landmark *Letelier* decision,<sup>38</sup> immunity was denied, pursuant to the tort exception in the FSIA, in a case involving a political assassination carried out in Washington DC by intelligence officers instructed by Pinochet's military *junta*. Similarly, in *Liu*,<sup>39</sup> State immunity was lifted in relation to the murder of a journalist executed in California by two gunmen acting on the orders of the Director of China's Defense Intelligence Bureau. To my knowledge, these decisions have never been disproven in the ensuing jurisprudence of US courts, nor objected to by any State.

The above Court's reference to the US delegate's statement merely shed light on the clash of views on this important issue between the executive and judicial branches of the US Government.<sup>40</sup> However, by only mentioning a part of the story at this juncture of its decision, the Court ducked what is probably the most significant judicial practice on the application of the tort exception to *jure imperii* acts, thereby paving the way for unreasonable doubts on the compatibility with international law of domestic proceedings concerning such torts.<sup>41</sup> Nor should one overlook that here the Court only told the *diplomatic* side of the story, something which may be taken to express a very controversial preference for the manifestations of practice coming from the executive branch of Governments.

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<sup>38</sup> US District Court for the District of Columbia, *Letelier v. Chile*, 11 March 1980, 488 F.Supp. 665.

<sup>39</sup> US Court of Appeals for the Ninth Circuit, *Liu v. China*, 29 December 1989, 892 F.2d 1419.

<sup>40</sup> Careful observers of the judicial practice on State immunity were already aware of this American disagreement over the scope of the tort exception, see DICKINSON, "Status of Forces under the UN Convention on State Immunity", ICLQ, 2006, p. 427 ff., p. 431, note 23. Moreover, in the *Schreiber* case, the US Government acted as *amicus curiae* before the Supreme Court of Canada for the sole purpose of arguing against the applicability of the tort exception to *jure imperii* acts (*Schreiber v. Germany and Canada*, 12 September 2002, [2002] 3 S.C.R. 269, para. 30). As recalled by the ICJ (*Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 64), the Supreme Court authoritatively ruled in the opposite direction (*Schreiber*, *ibid.*, paras. 32-37).

<sup>41</sup> In *Iran v. Hashemi* (*cit. supra* note 31), the Québec Court of Appeal was evidently struggling with the interpretation of the ICJ's holdings on the tort exception. At one point, it stated that, in light of the ICJ judgment, the tort exception in the SIA "deviates from customary international law" (*ibid.*, para. 61, see also para. 58). In another, more prudent passage, it sought to distinguish the case from the dispute before the ICJ, with the consideration that the latter concerned a situation denoted by "a strong element of *acta jure imperii* (belligerent action in time of war) [...], which element may not have been as tangible and preponderant in the plaintiff's case" (*ibid.*, para. 51). But the *Hashemi/Kazemi* case involves the systematic torture and ensuing death of a journalist in Iran, allegedly carried out within governmental premises, by State agents, and with the participation or connivance of high-ranking government officials, allegedly including Iran's incumbent Head of State!

At any rate, to completely set aside *Letelier* should have appeared unsustainable to the Court. And indeed, this decision was unexpectedly resuscitated in connection with the Court's discussion of the wording of the FSIA's tort exception. After shifting its attention to the core issue at stake, i.e. whether the territorial tort exception may apply to wartime activities carried out by the armed forces and associated organs of foreign States, the ICJ took note of the FSIA's tort exception's silence in this respect. It then recalled that, nevertheless, the FSIA establishes a "discretionary function" exception to its tort exception,<sup>42</sup> in the apparent belief that "discretionary function" might be taken to denote any exercise of governmental authority (including, chiefly, in the military field), that is *acta jure imperii*. It is here that the ICJ granted that the latter conclusion was disavowed by the *Letelier* decision.<sup>43</sup> As a matter of fact, the *Letelier* Court famously held:

"There is no discretion to commit, or to have one's officers or agents commit, an illegal act [...]. Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law".<sup>44</sup>

Undeterred by this jurisprudence, the ICJ observed:

"However, the Court is not aware of *any case* in the United States where the courts have been *called upon* to apply *this provision* to acts performed by the armed forces and associated organs of foreign States *in the course of an armed conflict*".<sup>45</sup>

The Court did not refer to US cases where claims based on the tort exception and relating to wartime acts of foreign States were *rejected*. It instead professed its unawareness of any US court having even been *called upon* to apply the tort exception to such situations.<sup>46</sup> The most important decision ignored by this holding is again *Amerada Hess*, a case squarely involving a belligerent act performed by

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<sup>42</sup> Pursuant to which the tort exception does not cover "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" (Section 1605(a)(5)(A) FSIA).

<sup>43</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 71.

<sup>44</sup> *Letelier v. Chile*, *cit. supra* note 38, p. 673.

<sup>45</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 71, emphasis added.

<sup>46</sup> For the sake of clarity, the Court should have recalled that an obvious reason for the purported lack of claims against wartime acts by foreign States on US soil is the absence of armed conflicts affecting US territory since the end of World War II. With respect to the terrorist attacks of 11 September 2001, the jurisprudence recalled in the text appears consistent with litigation against foreign States (e.g., Saudi Arabia) which were allegedly complicit in those atrocities.

the Argentine forces during the Falkland/Malvinas armed conflict. The Liberian corporations that owned and operated the oil tanker bombed by the Argentine army actually invoked the tort exception, alleging that certain effects or damage arising from the wrongful act at stake occurred on US soil. The US Supreme Court dismissed this argument, because the belligerent action had taken place on the high seas. Thus, whatever the consequential adverse effects in the US, the tort exception did not provide jurisdiction over the foreign State, because it “covers only torts occurring within the territorial jurisdiction of the United States”.<sup>47</sup> The Supreme Court did not even allude to the possibility of rejecting the same argument on the grounds that the foreign State’s conduct was of a military nature.<sup>48</sup>

Moreover, the ICJ should have been conscious that there is a thin line separating cases, such as *Letelier* and *Liu*, which call into question crimes committed abroad by the defense intelligence agencies of a State (and *a fortiori* of a militarized State such as Pinochet’s Chile), and those involving the armed forces of the same State acting in the context of an armed conflict. The distinction, if any, appears rather formalistic, may give rise to abuses,<sup>49</sup> and lends further support to those who are unable to identify a proper rationale for the armed conflict exception to the territorial tort principle.<sup>50</sup> The pursuit of official intelligence activities is “quintessentially a sovereign act”<sup>51</sup> no less than wartime decisions and actions by foreign States.

Whereas the above holding reflects an incorrect description of US practice, the latter is macroscopically at variance with the ICJ’s concluding statement in the same paragraph of the *Jurisdictional Immunities* judgment. Not satisfied with the preceding observation on the alleged absence of US case law examining the tort exception in respect of claims arising from wartime activities, the ICJ considerably broadened its perspective and declared:

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<sup>47</sup> *Amerada Hess*, *cit. supra* note 22, pp. 439-441.

<sup>48</sup> For a similar precedent, see US District Court for the Eastern District of New York, *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F.Supp.2d 423 (2001) (rejecting the applicability of the tort exception only because the impugned conduct of a foreign State’s agency, i.e. deportation of thousands of Jews to concentration camps during World War II, occurred entirely outside US territory, *ibid.*, pp. 430-431).

<sup>49</sup> FINKE, *cit. supra* note 10, p. 863, note 49 (outlining how artificial and risky it is to make a distinction between territorial torts committed by officers belonging to civil intelligence agencies as opposed to defense or military intelligence agencies). Notably, the ICJ’s discussion (and rejection) of the applicability of the tort exception in respect of wartime activities not only related to the armed forces of a foreign State, but also to “other organs of State working in co-operation with those armed forces”, *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 65. Later on, the Court referred to the armed forces and “associated organs” (*ibid.*, paras. 69 and 71) of foreign States, and finally, and most broadly, to the armed forces “and other organs” (*ibid.*, paras. 77-78) of a State.

<sup>50</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, Dissenting Opinion of Judge *ad hoc* Gaja, para. 9.

<sup>51</sup> *Ibid.*, Separate Opinion of Judge Koroma, para. 4.

“Indeed, in none of the seven States in which the legislation contains no general exclusion for the acts of armed forces, have the Courts been *called upon* to apply *that legislation* in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict”.<sup>52</sup>

Confining our discussion to the core subject-matter of the ICJ’s reasoning, i.e. cases strictly concerning *jure imperii* wartime acts attributable to the armed forces of foreign States,<sup>53</sup> the foregoing holding implies that the courts of those seven States (US, Canada, Australia, South Africa, Israel, Japan, and Argentina) have never even been seized by any such disputes on the basis of *any provision* in the respective immunity statutes, let alone asserted jurisdiction over them. This is especially oblivious to US jurisprudence.<sup>54</sup> Other than the *Amerada Hess* decision, it entirely forgets the US Holocaust and World War II litigation against foreign States, including Germany,<sup>55</sup> namely a “most pertinent”<sup>56</sup> jurisprudence that frequently relates to facts and crimes identical or similar to those of the *Jurisdictional Immunities* case. True, the failure to quote cases such as *Princz* and *Sampson* only makes the holding in question inaccurate. Although these decisions do not address the tort exception, they are anyhow in line with the Court’s *ultimate* finding that States are entitled to immunity in proceedings relating to claims arising from wartime wrongful acts by their armed forces.<sup>57</sup>

But the same does not apply to another line of US jurisprudence where the courts have asserted jurisdiction over acts of expropriation and looting carried out by the armed forces and other authorities of foreign States in the context of armed conflicts.<sup>58</sup> These cases arise from the expropriation exception in the FSIA which,

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<sup>52</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 71, emphasis added.

<sup>53</sup> *Ibid.*, para. 72.

<sup>54</sup> A most pertinent precedent may also be found in Argentine case law, see Supreme Court of Justice of the Nation, *Coronel v. Ministry of Defense and United Kingdom*, 9 November 2000, Fallos de la Corte Suprema, Vol. 323, p. 3386 ff. (upholding the UK’s immunity in a claim for reparation for the sinking of an Argentine warship by UK forces during the Falkland/Malvinas armed conflict). For Israel, see lately, *Yosefov v. Egypt*, *cit. supra* note 30 (affording immunity to Egypt in relation to its alleged involvement in deadly missile strikes from the Gaza Strip into Israeli territory).

<sup>55</sup> *Princz*, *cit. supra* note 18; *Sampson*, *ibid.*; for another example calling into question France’s immunity for its alleged involvement in the systematic spoliation of Jewish property during World War II, see US District Court for the Southern District of New York, *Freund v. Republic of France*, 592 F.Supp.2d 540 (2008).

<sup>56</sup> *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 73.

<sup>57</sup> *Ibid.*, para. 78.

<sup>58</sup> The most pertinent decisions for our purposes are *Altmann*, *cit. supra* note 5; US Court of Appeals for the District of Columbia Circuit, *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934 (2008); US District Court for the District of Columbia, *de Csepel v. Hungary*, 808 F.Supp.2d 113 (2011). For the expansion of this jurisprudence to situations which are not imme-

provided certain conditions are fulfilled, withdraws immunity when “rights in property taken in violation of international law are in issue”.<sup>59</sup> This is a well-known anomaly in the US legal system, i.e. an *unicum vis-à-vis* the existing legislation and practice of other States.<sup>60</sup> It allows the removal of State immunity for acts that in many cases, i.e. at least those involving outright and direct expropriations by State agents or with their complicity, may be safely classified as an expression of sovereign authority.<sup>61</sup>

In my view, this is the most regrettable and indefensible omission of the ICJ in respect of US practice, because the decisions at hand would have clearly buttressed the Italian position on the tort exception. As in the Italian cases, the US expropriation litigation at stake concerns wrongful acts by military personnel of foreign States, or other State organs “working in co-operation with those armed forces”,<sup>62</sup> that may constitute crimes under international law.<sup>63</sup> Second, when the immediate subject-matter of such litigation is the wrongful appropriation of civilian and cultural property in time of war by foreign armed forces and associated State organs acting in the performance of their official duties, they unquestionably relate to *acta jure imperii* undertaken in situations of armed conflict. Third, whenever US courts have refused to exercise jurisdiction over such cases, they have done so on the basis of considerations and notions different from a purported need to grant absolute im-

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diately relevant here (i.e. the alleged taking of property forming the subject-matter of the dispute did not, *unlike the original expropriatory acts*, occur in the context of an armed conflict), see US Court of Appeals for the Ninth Circuit, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, ILM, Vol. 49, 2010, p. 1492 ff.; US District Court for the District of Columbia, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (2005), 517 F. Supp. 2d 322 (2007).

<sup>59</sup> Section 1605(a)(3) FSIA.

<sup>60</sup> FOX, *cit. supra* note 5, pp. 350, 372, 598.

<sup>61</sup> For the purposes of squaring the expropriation exception with the *acta jure imperii* versus *jure gestionis* dichotomy, certain US courts have at times *unjustifiably* considered that violations of international law are not sovereign acts (US Court of Appeals for the Ninth Circuit, *Altmann v. Republic of Austria*, 317 F.3d 954 (2002), p. 967), or that coherence with the dichotomy would be preserved by Section 1605(a)(3)’s requirement that the foreign State/State agency possessing the expropriated property be engaged in commercial activity in the US (*Cassirer, cit. supra* note 58, p. 1497). See also *Altmann, cit. supra* note 5, Dissenting Opinion of Kennedy J. joined by Rehnquist C.J. and Thomas J., p. 1442 ff. (struggling with the characterization of expropriatory acts for the purposes of sovereign immunity: “[t]he FSIA has no public act/private act distinction with respect to certain categories of conduct, such as expropriations”, p. 1452, see also pp. 1447-1448).

<sup>62</sup> *Ibid.*, para. 65.

<sup>63</sup> See Arts. 46, 47 and 56 of the Regulations annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land (1907); Art. 8(2)(a)(iv) of the Rome Statute of the International Criminal Court (1998); and, with respect to cultural property, Art. 15(1)(c) and (e) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

munity for wartime acts carried out by the armed forces of foreign States.<sup>64</sup> Fourth, and most importantly, the US cases at issue refer to crimes/*acta jure imperii* committed *outside* of the forum State, e.g. in countries that were occupied by the Nazi forces during World War II. As confirmed by the ICJ's reasoning,<sup>65</sup> this provides an *a fortiori* argument for defending the applicability of the tort exception to war crimes committed *in* the forum State.

In short, the Court was plainly wrong when, in relation to the territorial tort exception, it held that “[t]he only State in which there is any judicial practice which appears to support the Italian argument [...] is Greece”.<sup>66</sup> Clearly, the US practice outlined above provided robust support to the Italian position that wartime military activities are generally caught by the tort exception, much more so than the limited and oscillating Greek jurisprudence.

## 5. CONCLUSION

In 2011, when the proceedings before the ICJ were ongoing, the Italian Supreme Court reaffirmed the *Ferrini* jurisprudence in the strongest terms and accordingly denied Germany's immunity in the *exequatour* proceedings relating to the damages awarded to the victims of the Distomo massacre by the Greek courts.<sup>67</sup> For the first time, the Supreme Court conducted an extensive review of US practice with a view to showing that the Italian judicial stance in the field of State and human rights was not isolated.<sup>68</sup> Indeed, several elements of US practice were regarded as consistent with the Italian decisions. After referring to *Altmann* as a judgment “with profound constitutional significance”,<sup>69</sup> the Court outlined the two main lessons to be taken from the US experience: first, that experience endorses a conception of State im-

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<sup>64</sup> See US Court of Appeals for the Second Circuit, *Whiteman v. Dorotheum GmbH & Co KG and Republic of Austria*, 431 F.3d 57 (2005) (political question and deference to the executive branch's foreign policy determinations); US Court of Appeals for the Second Circuit, *Garb v. Republic of Poland*, 440 F.3d 579 (2006) (expropriated property located outside of US territory and owned by the foreign State itself, not by one of its agencies or instrumentalities); US Court of Appeals for the Second Circuit, *Orkin v. Swiss Federation*, 2011 U.S. App. LEXIS 20639 (no State or State agency involved in a Nazi-era taking of property).

<sup>65</sup> “State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, *even if* the relevant acts take place on the territory of the forum State”, *Jurisdictional Immunities of the State*, *cit. supra* note 1, para. 77, emphasis in “even if” added.

<sup>66</sup> *Ibid.*, para. 76.

<sup>67</sup> Court of Cassation, *Federal Republic of Germany v. Autonomous Prefecture of Vojotia*, 20 May 2011 No. 11163, ILDC 1815 (IT 2011).

<sup>68</sup> *Ibid.*, paras. 37-40.

<sup>69</sup> *Ibid.*, para. 39.

munity as a domestic issue governed by a mix of legal, political and comity considerations; second, it demonstrates the fallacy of the absolute dichotomy of *acta jure imperii* and *acta jure gestionis*.

This decision was probably rendered too late in the day to be able to modify the mainstream opinion that the whole *Ferrini* saga is a case of unilateral jurisprudence essentially based on the primacy of *jus cogens* over customary immunity rules, and only supported by a Greek precedent eventually overruled. It is unfortunate that, in *Jurisdictional Immunities of the State*, the ICJ conformed to that mainstream thinking. The ICJ, as an impartial observer of State practice, should have addressed the US experience in a comprehensive and convincing manner. On the contrary, its treatment of US practice was elusive, partial and enigmatic. Therefore, the apparently rigorous survey and appraisal of State practice contained in the judgment is weakened by the inadequate examination of a chiefly important national jurisprudence in the area of sovereign immunity.

This is not to suggest that a different outcome for the case would necessarily have resulted from an appropriate consideration of US practice. Nor even in relation to the problem of the scope of the tort exception, where massive support for the Italian position unquestionably comes from US case law. The Court could have always found arguments for refuting the various US precedents as based on comity or, alternatively, as insufficient evidence of the correctness of the Italian submissions. Failing that, the Court's elusive and patchy review of US practice translates into one of the most unsatisfactory aspects of the *Jurisdictional Immunities* judgment, one which glaringly casts doubt on its nature as an accurate reflection of the contemporary law of State immunity and fundamental human rights.