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ARTICLES

SHORTER ARTICLES, COMMENTS, AND NOTES

VIII. CONCLUSION

The fact that the Court of Justice held the Brussels Convention to be applicable on the facts of *Owusu,* and that it ruled that the *forum non conveniens* doctrine could not be invoked, can surprise few commentators. The arguments as to whether the doctrine should be permitted in principle in such cases are finely balanced; but the arguments based upon textual interpretation of the Convention are not and firmly support the Court of Justice's views. However, the arguments based upon textual interpretation are far more equivocal in the cases upon which the Court of Justice declined to comment, namely, where the alleged competence of the courts of a Non-Contracting State 'reflects' a basis of exclusive jurisdiction which the courts of a Contracting State would have had if the relevant facts had pointed to that State. The decision in *Re Harrods (Buenos Aires) Ltd*[116] and the approach of the English courts pre-*Owusu* show that application of the *forum non conveniens* doctrine in English courts is a habit that dies hard. If the words of the Court of Justice lend no positive support to the survival of the doctrine in these cases, the early signs from the *Konkola* case are that the Court of Justice's silence on the matter may be construed by the English courts as acceptance of the permissibility of continuing to grant stays of proceedings in such circumstances.

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[116] [1992] Ch 72.

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DENYING FOREIGN STATE IMMUNITY FOR COMMISSION OF INTERNATIONAL CRIMES: THE *FERRINI* DECISION

I. INTRODUCTION

The Italian Court of Cassation has recently delivered a judgment of great interest denying State immunity to Germany for commission of crimes under customary international law on the exclusive basis of international law.[1]

The question whether a national court can deny foreign State immunity when the defendant State is accused of serious violations of fundamental human rights has been extensively debated. While national courts have proved to be extremely cautious, the majority of international law scholars have taken the view that in such cases State immunity should be denied.[2]

II. THE BACKGROUND TO THE *FERRINI* CASE

An Italian citizen, by the name of Luigi Ferrini, was captured by Nazi troops on 4 August 1944 in the vicinity of Arezzo. He was deported to Germany, forced to work for some German firms and subsequently was transferred to a concentration camp until 20 April 1945. On 23 September 1998 Ferrini took proceedings against the German Government in Italy's Tribunal of Arezzo seeking damages for the physical and psychological injury suffered as a result of his capture and deportation. Germany pleaded jurisdictional immunity under the customary international rule whereby a State enjoys immunity from jurisdiction before foreign national courts for its sovereign acts (*jure imperii*), as opposed to commercial activities (*jure gestionis*).[3]

The rule providing for State jurisdictional immunity for acts performed *jure imperii* is invariably derived by Italian courts from the international customary law principle '*par in parem non habet imperium*' and applied on the basis of Article 10 (1) of the Constitution, which states: 'The Italian legal system shall conform with the generally recognized rules of international law'. This constitutional norm is understood by both

[1] Judgment No 5044 of 11 Mar 2004, *Ferrini* v *Federal Republic of Germany*. The Italian text of the decision can be read in (2004), 87 Rivista di diritto internazionale 540–51. An English translation will be published in *International Law Reports*. For some comments see N Ronzitti 'Un cambio di orientamento della Cassazione che favorisce i risarcimenti delle vittime', in *Guida al diritto*, 10 Apr 2004, 40 ff; A Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini', in 87 (2004), Rivista di diritto internazionale 643–84; R Baratta 'L'esercizio della giurisdizione civile sullo Stato straniero autore di un crimine di guerra', in (2004), *Giustizia civile* 1203–4. A Grattini 'War Crimes and the State Immunity in the *Ferrini* Decision' in (2005) 3 Journal of Int'l Criminal Justice 224–242; A Bianch 'Ferrini v Federal Republic of Germany' in (2005) 99 AJIL 242–248; P De Serra and F De Vittor 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' in 16 (2005) EJIL 89–112.

[2] The literature is vast. For a general overview and the latest developments see J Bröhmer *State Immunity and the Violation of Human Rights* (Martinus Nijhoff The Hague/Boston/London 1997); A Orakhelashvili 'State Immunity and International Public Order' in (2002) 45 German Yearbk of Int Law 227–67; Lee M Caplan 'State Immunity, Human Rights, and Jus cogens: A Critique of the Normative Hierarchy Theory' in (2003) 97 AJIL 741–81.

[3] For the 'estrictive' approach see generally H Fox *The Law of State Immunity* (OUP Oxford 2002)

Italian courts and scholars as imposing on courts an obligation 'automatically' and 'directly' to apply the whole of international customary law exactly as if it were Italian law. Furthermore, as this 'reference' to general international law is provided for by a constitutional norm, customary international law overrides both previous and subsequent ordinary legislation and even constitutional law when the international customary rule to be applied came into existence before the entry into force of the Constitution.[4] On the assumption that there is an international rule on foreign State jurisdictional immunity,[5] it would have emerged long before 1948 when the Italian Constitution entered into force.

On 3 November 2000 the Tribunal of Arezzo dismissed the suit for lack of jurisdiction, holding that the acts of which Germany was accused, ie deportation and forced labour, were indisputably acts performed '*jure imperii*'. Ferrini appealed against this decision, but the Court of Appeal of Florence confirmed the previous judgment. Ferrini challenged this second decision before the Court of Cassation exclusively on the point of jurisdiction. On 21 March 2004, by ruling 'a sezioni unite' ('United Divisions'), this Court reversed the Court of Appeal's judgment and denied State immunity to Germany. The Court thus transferred the case again to the Tribunal of Arezzo for examination of the merits.

III. THE COURT'S DECISION

Let us briefly examine the three main arguments put forward by the plaintiff and the reasoning followed by the Court of Cassation (hereinafter the 'Court').

To begin with, the plaintiff claimed that the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters applied and took precedence, as a treaty, over the customary international law rule providing for State jurisdictional immunity. According to the plaintiff, Italian courts had jurisdiction under the 1968 Brussels Convention over a 'civil' proceeding involving payment of compensation and should thus have denied State immunity to Germany. The Court rejected this argument by recalling that, according to the well-established case law of the Court of Justice of the European Communities, the 1968 Brussels Convention does not apply when one of the parties is a State exercising its governmental authority. Nor was it necessary, according to the Court, to refer the question to the Court of Justice of the European Communities for a preliminary ruling as the previous case law of this Court was unequivocal.[6]

[4] cf the decision No 48 by the Italian Constitutional Court of 18 June 1978 in the *Russel* case (in C Focarelli *Digesto del diritto internazionale* (Editoriale Scientific Naples 2004) 1108–10, recently confirmed by the Court of Cassation in a decision of 3 Aug 2000, ibid 833–8). According to this decision international customary rules which emerged before the entry into force of the Constitution would always take precedence over constitutional norms, whereas international customary rules which emerged after the entry into force of the Constitution would take precedence over all constitutional norms except for the 'supreme constitutional principles' as identified by the Constitutional Court by way of interpretation. This view has been generally criticized by maintaining that *all* international customary rules take precedence over constitutional norms except for the 'supreme constitutional principles' mentioned by the Constitutional Court, without any regard to the moment in which the rule has emerged (cf B Conforti *Diritto internazionale* (Editoriale Scientific Naples 2002).

[5] For the minority view that foreign State jurisdictional immunity is not the object of an international customary rule see recently Lee M Caplan *State Immunity* 745–65.

[6] §§2.1 and 3.

In the second place, the plaintiff claimed that the immunity rule invoked by Germany did not reflect customary international law and was not applicable in the Italian legal system under Article 10 (1) of the Constitution. The Court of Cassation rejected this argument by ruling that the norm on jurisdictional immunity of foreign States, although eroded over time, does reflect customary international law and is automatically operative within the Italian legal system under Article 10 (1) of the Constitution.[7]

Finally, the plaintiff claimed that even assuming that a customary international rule existed and did entitle Germany to jurisdictional immunity, no such immunity should be granted to Germany in as much as the acts which the defendant State was accused of amounted to a violation of *jus cogens*. On this point, the Court accepted the plaintiff's argument.

Since the acts which Germany was accused of were undoubtedly performed '*jure imperii*',[8] as being 'acts of war', the question in the case, according to the Court, was whether foreign State jurisdictional immunity is operative even when the State is accused of such 'extremely serious' acts as crimes under customary international law,[9] 'insofar as they affect universal values which transcend the interests of individual state communities'.[10]

The Court examined a number of international and national legal materials in order to establish whether deportation and forced labour are crimes under international customary law, or more precisely war crimes, and concluded affirmatively.[11] The Court then observed that the granting of immunity to States accused of such acts 'manifestly contrasts with all these legal data', to the extent that 'it hinders, rather than furthers, values whose protection must be considered fundamental for the international

[7] §5.

[8] The Court emphasized that 'acts of war', which were considered 'political' in nature and non justiciable by the Court of Cassation itself in the recent Order No 8157 of 5 June 2002 given in the *Markovic* case, do not preclude courts to ascertain the commission of crimes carried out during war operations on the basis of the Italian legal system (§7.1). The *Markovic* Order is published in C Focarelli *Digesto* 299–30. For a comment see N Ronzitti 'Azioni belliche e risarcimento del danno' in (2002) 85 Rivista di diritto internazionale 682–90.

[9] In this regard, the Court pointed out that a previous decision given by the Court of Cassation itself (No 530 of 3 Aug 2000, above at n 4) and those delivered in the *McElhinney* case by the Irish Supreme Court on 15 Dec 1995 and by the European Court of Human Rights on 21 Nov 2001, all granting State immunity notwithstanding an alleged violation by the defendant State of human rights, were not relevant because of lack of the 'extreme gravity' typical of customary international crimes.

[10] §7.

[11] §§7.2–8.3. The Court referred to the 1945 Statute of the Nuremberg Tribunal, the decision rendered by the Nuremberg Tribunal on 30 Sept 1946, the UN General Assembly Resolution No 95-I of 11 Dec 1946, the 1950 Principle No VI laid down by the UN International Law Commission, the UN Security Council resolutions No 827/93 of 25 May 1993 and No 955/94 of 8 November 1994, the 1998 Statute of the International Criminal Court, the German Law of 2 Aug 2000 providing for compensation for those who had been deported to Germany and subjected to forced labour and the *Prefecture of Votiotia* decision delivered on 4 May 2000 by the Greek Supreme Court. To be sure, the Court criticized the Greek Supreme Court's argument based on the 'implied waiver' stating that waiver cannot be ascertained in the abstract and that it is unlikely that a State accused of having committed such serious acts waives immunity (§8.2). As is well known the *Prefecture of Voiotia* decision was reversed on 28 June 2002 by the Greek Supreme Court itself which granted immunity from execution to Germany; cf E Vournas 'Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations' in (2002) 21 New York Law School Journal of International and Comparative Law 629–53.

community as a whole'.[12] According to the Court, 'no doubt such antinomy must be resolved by giving priority to the rules of higher rank'.[13] The Court went on to argue that:

> respect for the inviolable rights of the human being amounts today to a fundamental principle of the international legal system . . . and this principle cannot but affect the scope of other traditional principles of international law, such as that on the 'sovereign equality' of States to which the granting of State immunity from foreign civil jurisdiction is linked.

International customary rules, no less than treaty rules, 'cannot be interpreted detached from one another, as they supplement and affect one another in their application'.[14] It is thus 'not relevant' ['non vale opporre . . .'], according to the Court, that a derogation from the immunity principle is not provided for by any existing rules, as was stated in both the *Al-Adsani* decision by the European Court of Human Rights on 21 November 2001 and the *Houshang Bouzari* decision by the Canadian Superior Court of Justice in Ontario of 1 May 2002.[15] Nor is it conclusive, the Court pointed out, that a view contrary to the denial of immunity was actually taken by these two courts, as well as by Lord Hutton in the *Pinochet (3)* decision handed down by the House of Lords on 24 March 1999, for in these cases, unlike in the *Ferrini* case, the alleged crimes had been committed in a State other than the forum State.[16] In sum, in the opinion of the Court an 'explicit rule' enabling a court to deny foreign State immunity, at least when the alleged crimes were committed in the forum State, is simply not necessary, given the higher and overriding rank of customary rules on international crimes.

To reinforce the point, the Court stated that the traditional distinction between acts performed *jure imperii* and acts performed *jure gestionis* is increasingly inadequate with respect to disputes on tort liability. The Court observed that, according to a general 'trend', State immunity cannot be invoked for injuries caused by an act of omission carried out in the forum State regardless of its *jure imperii/jure gestionis* character. However, the Court cautiously refrained from affirming that this trend

[12] §9.1. The Court emphasized that international crimes 'threaten humanity as a whole and jeopardize the very foundations of international co-existence' to the extent that they are 'an exceptionally serious . . . violation of fundamental rights of the human being whose protection is guaranteed by peremptory norms which place themselves at the top of the international legal system and override any other rules, whether they be conventional or customary'. Evidence of this would be provided, according to the Court, by the special regime governing international crimes, eg the fact that they are not covered by the statute of limitations and that they are protected through civil and criminal universal jurisdiction and their repression is made obligatory by some treaty rules such as Art 146 of the Fourth Geneva Convention on the protection of civilians in times of war. The Court also recalled Art 41 of the ILC Draft Articles on State Responsibility relating to the consequences of serious violations of international law. The gravity and special regime of international crimes are inferred by the Court by making appeal to a number of authorities and rules, including Art 40, para 2, of the ILC Draft Articles on State Responsibility, to the *Furudzija* and *Kupreskic* decisions by the Tribunal for the former Yugoslavia and to the *Al-Adsani* decision by the European Court on Human Rights (§9).

[13] §9.1.

[14] On this central point the Court expressly referred to the minority's view taken in the *Al-Adsani* case and on the *Furudzija* decision where the opinion was held that 'the victim [of torture] could bring a civil suit for damage in a foreign court' (§155). As is well known the majority in the *Al-Adsani* case had sustained that the *Furudzija* decision was not relevant as referring to State officials rather than to States as such (§61).

[15] §9.2.

[16] §10.

reflects international customary law and confined itself to recalling that this view was taken in the *Prefecture of Voiotia* case and that 'the existence' of some national provisions excluding State immunity in case of torts committed (even *jure imperii*) in the forum State 'in any event . . . hinders the criterion based on the nature of the tortuous act from still being considered of a general character'.[17] The inadequacy of the *jure imperii/jure gestionis* criterion and the precedence of fundamental human rights over State immunity is also supported, according to the Court, by the 1996 US amendment to the Foreign Sovereign Immunities Act concerning terrorist crimes and by a number of decisions recently rendered by US courts condemning foreign States on that basis.[18]

A 'final point' is made by the Court concerning the 'functional' immunity of State organs. Such immunity cannot now be invoked, the Court recalled, when a State organ is accused of having committed an international crime. Since the 'functional' immunity is aimed at avoiding a foreign State from being sued, despite its own immunity, by means of suing its organ, it follows, according to the Court, that there is no reason why immunity should be granted to the State, and not to the State organ, when the proceedings deal with international crimes.[19]

In a short final passage the Court additionally emphasized that Italian courts would have had jurisdiction on the basis of the universal jurisdiction principle applicable to international crimes even if the alleged crimes had not been committed in Italy.[20]

IV. CRITICAL REMARKS

No doubt the *Ferrini* decision is to be welcomed to the extent that it is intended to deter States from committing international crimes. It is issued, as previously noted, after many attempts had been made by a number of scholars to demonstrate that foreign States accused of international crimes should not enjoy immunity. It is also particularly relevant today to the United Kingdom in the light of the recent *Jones* decision of 28 October 2004 by the Court of Appeal and in view of the forthcoming House of Lords' ruling.[21]

Having said that, some critical remarks are worth making. Some might question whether deportation and forced labour are international crimes belonging to *jus cogens*,[22] or whether what might currently be *jus cogens* has retrospective effect to a time when the concept of *jus cogens* was still to be developed,[23] or whether State immunity does reflect customary international law.[24] Criticism might also be made as

[17] To this end, the Court recalled the British State Immunity Act (s 5), the Canadian State Immunity Act (s 6), the Basle Convention on State immunity (Art 11), the US Foreign States Immunity Act (s 1605, 5), the South-African Foreign States Immunity Act (s 3), the Australian Foreign States Immunity Act, as well as Art 12 of the Draft on State immunity developed by the UN International Law Commission (§10.1).

[18] §10.2.

[19] §11.

[20] §12.

[21] Cf <http://www.courtservice.gov.uk/judgmentsfiles/j2871/jonesandmitchell-v-saudi_arabia.htm>.

[22] The Court based its reasoning mainly on the fact that forced labour and deportation are provided for by statutes of international criminal tribunals, without any references to actual State practice. One could be wondering whether, as a consequence, all crimes falling within these statutes should be *automatically* regarded as *customary* international crimes having a *jus cogens* character.

[23] See A Zimmermann 'Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks' in (1994–5) 16 Michigan Journal of Int Law at 437.

[24] cf n 5.

to the correct 'restrictive' approach to be taken on matters of State immunity with special regard to the 'tort exception' when the challenged acts were committed in the forum State.[25] One might criticize the Court's reasoning about State immunity in terms of State officials' immunity,[26] as well as the Court's final remark on the principle of universal jurisdiction.[27] Further, the unpredictable amount of compensation to be paid for massive violations of human rights, in particular for violations of the laws of war, could suggest that settlement should be left to governments rather than to courts.[28] We confine ourselves to some general remarks *de lege lata* and *de lege ferenda*.

(A) *De lege lata*, the *Ferrini* decision simply does not reflect existing international customary law. This was confirmed by the Court itself when it expressly stated that the denial of immunity does not stem from a new customary rule, but from the higher rank of the existing rules on international crimes and, indirectly, when it failed to unequivocally assert that the 'tort exception' for international crimes committed in the forum State has actually emerged as an international customary norm.[29] On the other hand,

[25] It is hard to see what real relevance the 'tort exception' has in the Court's reasoning. The Court reinforced its apparently 'absolute' notion of *jus cogens* essentially by making appeal to the 'tort exception' provided for by some national legislation. This appeal to the 'tort exception' seems to be aimed at distinguishing the *Ferrini* case from most of the previous cases, where immunity was actually granted by other courts, and emphasizing that immunity can be denied only in specific and limited circumstances. But the reference to the principle of universal jurisdiction in order to justify the denial of State immunity for out-of-forum crimes as well (cf below, n 27) sharply contrasts with this aim. Apart from that, one would expect a *jus cogens* rule to prevail in all circumstances without any need to be 'reinforced' by some other rules. In fact, the Court itself stated that there was no need to prove the existence of a new rule, given the higher rank of *jus cogens*. But if this rule does not exist, or if at least this rule is not relevant to the decision of the case, *a fortiori* this same rule cannot be proved to be the one stemming from the 'tort exception'. One can thus understand why the Court was reluctant to unequivocally state that the 'tort exception' reflects an international customary rule. In fact, the applicability of the 'tort exception' to acts '*jure imperii*' is controversial. See R Garnett 'The Defence of State Immunity for Acts of Torture' in (1997) 18 Australian Yearbook of Int Law 116–18, and n 29.

[26] It is true that a State organ acts on behalf of its State and that it is the State in fact which acts, as the Court emphasized to justify that the same regime should apply. However, it is one thing to deny immunity to a State official when it is no longer in office; it is another thing to deny immunity to the State as such. Actually, apart from what is provided for by statutes of international criminal tribunals, national courts do grant immunity even to State officials as long as they are in office, presumably on the very assumption that in this case it is the State, more than the individual, to be dealt with. This point has been recently emphasized in the Court of Appeal's *Jones* decision, §23.

[27] This principle traditionally applies to individuals, not to States, and the distinction between State organs and States as such is still relevant (cf n 26). Furthermore, the Court affirmed that on the basis of the principle of universal jurisdiction State immunity can be denied even if the alleged crimes were not committed in the forum State, thus contradicting the part of the decision where it stated that in the *Ferrini* case, unlike in other previous cases, the denial of immunity was justified because (and supposedly *only because*) the alleged crimes were committed in the forum State (cf n 25). Finally, jurisdiction and immunity are two different concepts and one cannot automatically infer the latter from the former: cf J Bröhmer *State Immunity* 37–41 and 195, and n 30.

[28] See the considerations by J Bröhmer, *State Immunity* 203–14.

[29] One might argue that an international customary rule authorizing State immunity for international crimes committed in the forum State does exist and conclude that the outcome of the *Ferrini* decision was correct apart from the Court's reasoning about *jus cogens*. In fact, in some cases involving serious crimes committed in the forum State, like in *Letelier* and in *Liu* (in 63 Int Law Reports 378–90, and 101 Int Law Reports 519–35), State immunity was denied. Besides, courts of States where provisions such as s 5 of the British State Immunity Act of 1978 are in force would presumably deny State immunity even if the alleged crime is characterized as an act performed *jure imperii*. However, national judicial practice denying State immunity for crimes committed in the forum State is extremely scarce and the compatibility of legislative 'tort exceptions', understood as applying even to acts *jure imperii*, to customary international law, is far from being proved. It is worth noting that the United Nations Convention of Jurisdictions and Immunities of States and their Property adopted by the UN General Assembly on 9 Nov 2004 does not explicitly provide for an exception to State immunity where the defendant State is accused of international crimes. The *Ferrini* decision itself supposes that a corresponding international customary law rule has not emerged, or else the whole reasoning about *jus cogens* would be useless. In any event, the question whether the *Ferrini* decision reflects existing customary international law remains as regards out-of-forum international crimes.

the *jus cogens* character of an existing rule, as distinct from finding a new rule, should be demonstrated; but no specific practice exists which supports the notion that deportation and forced labour, or international crimes in general, are the object of a *jus cogens* rule *with the specific effect* of denying State immunity. National courts have generally granted immunity in such cases, which implies either that no rule to this effect exists or that the *jus cogens* rules on the alleged international crimes do not have the specific effect of removing State immunity.[30] In our view one cannot bypass this *specific* judicial practice by simply inferring a generic and all-purpose *jus cogens* character (implying, inter alia, a derogation from inter-temporal law) from some practice existing in other fields of international law.[31] The Court itself denied that *jus cogens* has an overriding effect for no matter what legal purposes when it rejected the notion that a violation of *jus cogens* necessarily implies a waiver of consent, as was held by the Greek Supreme Court in the *Prefecture of Voiotia* case.[32]

(B) *De lege ferenda*, the *Ferrini* decision might be seen as a first step towards developing a new international customary rule, or conferring a *jus cogens* character on deportation and forced labour (and more generally on international crimes) with the specific effect of denying State immunity, provided other national courts follow its example in the future. From this perspective, the decision is aimed at paving the way for a change in international customary law or in the effects of *jus cogens* on State immunity; whether future national decisions and State practice will follow this initial step must be awaited. However, the question arises as to what kind of practice will be needed in order to prove that State immunity can be lawfully denied under international law. It must be a *generalized* practice, not just some practice by a group of States, such as Western States. The question is then whether these States will allow, as a new 'rule' equally applicable to all States, that they may be sued in other States' courts by individuals accusing them of having committed international crimes, regardless of the complaints' soundness on the merits.[33] Will the United States allow, for example, as a new international customary rule or as an effect of *jus cogens*, that it may be sued by Japanese victims in Japanese courts for the Nagasaki and Hiroshima bombing in 1945,

[30] This point was made by the Court of Appeal in the *Jones* case by stating the 'the *jus cogens* nature of the prohibition on torture did not mean either necessarily or (as yet) in general practice that a State should no longer be treated as enjoying immunity' and by referring to the distinction correctly drawn by H Fox (n 3) p 525, between substantive and procedural issues as well as between jurisdiction and immunity (§17).

[31] For a detailed analysis of international *jus cogens* along the lines of what is said in the text see C Focarelli *Le contromisure nel diritto internazionale* (Giuffrè Milan 1994) 471–93.

[32] cf n 11.

[33] For a critical analysis of international custom in the current culturally divided world see J Patrick Kelly 'The Twilight of Customary Law' in (1999–2000) 40 Virginia Journal of International Law 449–543.

or by Iraqis in Iraqi courts for the ill-treatment (amounting to 'torture' according to the International Committee of the Red Cross) of Iraqi prisoners in Abu-Ghraib in 2003, or by current detainees in Guantanamó Bay in their national courts for serious violations of human rights? Will a European State, such as Italy or the United Kingdom, allow that it may be sued by an Arab citizen in Saudi Arabia's courts for inhuman and degrading treatment when such serious violation of human rights has been established by the European Court of Human Rights? Will former colonial European States accept that they may be sued in the United States by Africans for slavery (a crime today generally viewed as belonging to *jus cogens*) committed during their colonial age?[34] Serious doubts seem reasonable. While a 'one way' practice from Western States might appear desirable, the legal question is that such partial practice—which might be challenged even by Western States should they happen to be accused of international crimes in other Western States' courts[35]— is not sufficient for a customary rule to be considered established, unless one simply holds (going back to the past) that international law is the law of only the 'civilized nations' as self-identified by the most powerful States.

CARLO FOCARELLI*

[34] Cf Ryan M Spitzer 'The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery?' in (2002) 35 Vanderbilt Journal of Transnational Law at1341.

[35] For the strong protest by Germany against the denial of immunity from execution consequent to the *Prefecture of Voiotia* decision of 4 May 2000, and for the subsequent reversal of this ruling, cf E Vournas *Prefecture of Voiotia* (n 11) at 649.

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THE CONTINUING DEBATE ON A UN CONVENTION ON STATE RESPONSIBILITY

At its 59th session in 2004, the General Assembly revisited the question of what should be done with the Articles on Responsibility of States for Internationally Wrongful Acts ('the Articles'), adopted by the International Law Commission ('ILC') in 2001. By Resolution 59/35, adopted by consensus on 2 December 2004 on the recommendation of the Sixth Committee,[1] the General Assembly once again resolved to defer further consideration and any decision on the final form of the Articles, postponing the matter to its 62nd session in 2007. It also asked the Secretariat to prepare a compendium of jurisprudence and State practice to assist the Assembly in its consideration of the topic at that time.

I. BACKGROUND TO THE DEBATE IN THE SIXTH COMMITTEE

At its 56th session in 2001, the Sixth Committee had considered what action to take in relation to the final Articles contained (together with the accompanying Commentaries) in the Report of the ILC on its 53rd session.[2]

The question was a controversial one even before the Articles were finally adopted on second reading in August 2001. Significant divisions existed within the ILC as to what course of action should be recommended to the General Assembly. Some members strongly supported the immediate convening of a diplomatic conference in order to conclude a convention based on the Articles. Others, including the Special Rapporteur, were of the view that the General Assembly should simply take note of the Articles, and that any decision as to the preparation of an international convention on the subject should be deferred for a period of years in order to allow States to become familiar with the Articles in practice. A compromise was reached: the ILC recommended to the General Assembly that it take note of the Articles and annex them to a resolution, deferring to a later stage the question whether an international conference should be convened with a view to concluding a convention on the topic.[3]

[1] General Assembly Resolution 59/35, 2 Dec 2000; UN Doc A/RES/59/35, adopted at the 65th plenary meeting of the General Assembly (see UN Doc A/59/SR.65). For the report of the Sixth Committee, see UN Doc A/59/505.

[2] For the Articles and Commentaries see *Report of the International Law Commission on the Work of its Fifty Third Session*, UN Doc A/56/10, Ch IV. The Articles and Commentaries are reproduced with an introduction and accompanying analytical apparatus in James Crawford *The ILC's Articles on State Responsibility; Introduction, Text and Commentaries* (CUP Cambridge 2002); versions have been produced in French (*Les articles de la C.D.I. sur la responsabilité de l'Etat; Introduction, texte et commentaires* (Pedone Paris 2003)) and Spanish (*Los artículos de la Comisión de Derecho Internacional sobre la responsabilidad internacional del Estado: introducción, texto y comentario* (Dykinson Madrid 2005)); a Chinese version is in press.

[3] *Report of the International Law Commision on the Work of its Fifty Third Session* (n 2), (§§72–3); for the record of the debate within the ILC, see UN Doc A/CN.4/SR.2709 (9 Aug 2001). See also J Crawford, J Peel, and S Olleson 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 EJIL 963, 969–70. The recommendation by the ILC followed the precedent set by the General Assembly in relation to the ILC's draft articles on the topic of nationality and State succession. The ILC had recom-

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