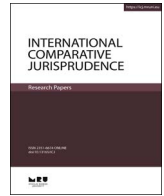


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# International Comparative Jurisprudence

journal homepage: [www.elsevier.com/locate/icj](http://www.elsevier.com/locate/icj)

## Civil actions for damages caused by war crimes vs. State immunity from jurisdiction and the political act doctrine: ECtHR, ICJ and Italian Courts<sup>☆</sup>



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### ARTICLE INFO

#### Keywords:

Civil action  
 Serious violations of human rights  
 Right of access to a court  
 Right to an effective remedy  
 State immunity from jurisdiction  
 Political act doctrine  
 European Convention on Human Rights  
 Italian Constitution

### ABSTRACT

Civil actions for war crimes serve the purposes of obtaining a public acknowledgment of the tort and that of reaffirming the legal binding force of the rules protecting fundamental human rights. However, two main obstacles arise before such actions since the defendant is a State: immunity from jurisdiction and the political act doctrine. The interaction between the Italian Supreme Courts (Corte di Cassazione and Corte Costituzionale), the European Court of Human Rights and the International Court of Justice provides clear examples of the achievements and the remaining challenges in this field, where the right of access to a court and the right to an effective remedy should not be excluded in the name of an absolute sovereignty or of an unaccountable *raison d'État*.

### 1. Introduction

In the past two decades, national courts have examined several types of civil actions concerning serious violations of human rights originating in war crimes. These actions generally concerned a request by the victims or by the victim's heirs, seeking award of compensation for the damages suffered as a result of such violations perpetrated by a State or by its agents. One would ask why are this kind of civil actions important?

According to Dinah Shelton, “[t]he primary function of corrective or remedial justice is to rectify the wrong done to a victim, that is, to correct injustice < ... > Even if human rights violations and money are not commensurable, damages are still justified because an award of damages serves to affirm a public respect for the victim and give public recognition of the wrongdoer's fault in failing to respect basic rights.” (Shelton, 2006, pp.10, 292). Civil actions for war crimes serve, among others, the purposes of obtaining a public acknowledgment of the tort and that of reaffirming the legal binding force of the rules protecting fundamental human rights. In other words, the control by an independent body, which takes on the point of view of the victims, can be considered as necessary in order to implement the protection of human rights. Human rights law is legally binding and enforceable and it is not a mere declaration of principles. This applies even in times of war or in times of emergency: a democracy has to be able to fight against its enemies without

Peer review under responsibility of Mykolas Romeris University.

<sup>☆</sup> This is the publication of the WISE project, commemorating the 70th anniversary WWII end, implemented with the support of 'Europe for Citizens Programme' of the EU.

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<http://dx.doi.org/10.1016/j.icj.2017.02.002>

Available online 28 February 2017

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denying – at least – the hard-core of human rights.

The most common scenario in consideration is the following: an individual brings civil action against a State before a national court alleging that the defendant State committed a flagrant violation of human rights, claiming to be awarded damages. In the light of the experience of the past two decades, such an action can encounter two main obstacles.

On the one hand, if the Defendant State is summoned before a national court of another State (the forum state), the action will be confronted to the *immunity from jurisdiction of the foreign State*.

On the other hand, if the Defendant State is the forum state (i.e. if the action has been lodged before a national court of the State, allegedly the wrongdoer), the action will most likely face an attitude of judicial abdication, known as the political act doctrine/ the act of State doctrine, *acte de Gouvernement, atto politico*.

Several Italian cases offer interesting examples in this regard. In the following, we shall firstly make an overview of the “state of art” as regards the two sets of obstacles mentioned above. Secondly, we shall further the analysis to understand whether these obstacles are compatible with human rights law and to what extent international human rights law can be used in order to overcome them. In this regard, special reference shall be made to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR).

Given that the object of the present analysis is State responsibility for war crime and gross violations of human rights, aspects of criminal prosecution, both at national and international level, aimed at establishing the individual responsibility of the perpetrators with adjacent civil claims are not covered herein. Furthermore, although diplomatic protection could be seen as a tool capable of granting redress to the victims of such violations, especially with regard to states not party to international individual complaints mechanisms (Tomuschat, 2003, p. 218), it cannot fully compensate the lack of access to a court in order to obtain civil regress – diplomatic protection remains a prerogative left to the full discretion of the State which does not constitute an obligation under International law (Sudre, 2015, p. 28; Conforti, 2014, p. 251).

## 2. State’s immunity from jurisdiction and the “Human Rights Exception”

‘It is now universally recognised and accepted that States enjoy immunity by virtue of international law.’ (Yang, 2015, p. 34).

There is no need to detail herein the distinction between *acta iure gestionis* and *acta iure imperii*, which has been developed since the beginning of the XXth century in order to exempt the former from the application of State immunity from jurisdiction (Yang, 2015, pp. 75–196; Conforti, 201, pp. 269– 274). Firstly, the serious violations of human rights which are at the origin of civil actions here to be examined, derive from State acts performed outside the ambit of international trade and economic activities and, thus, cannot easily be exempted from the rule of State immunity as *acta iure gestionis*. Secondly and most importantly, one might consider that the traditional approach based on the distinction between *acta iure imperii* and *acta iure gestionis* is ‘unsuitable to meet the peculiarities of acts, serious violations of human rights, which, by definition, are amenable to neither category and somewhat represent a *tertium genus*.’ (Bianchi, 2003, pp. 155–156).

As concerns the origins of the rule of State immunity from jurisdiction, some authors have underlined that, mostly in common law countries, this rule is rather seen as an exception to the principle of State jurisdiction, regulated firstly by domestic law and based on the courtesy of the forum State who chooses not to exercise its adjudicatory jurisdiction in the view of promoting good relations with the foreign State. On the contrary, according to the common point of view of civil law systems, the immunity rule derives from the principle of State sovereignty – since, according to international law, each State is sovereign and equal to the other States in the international community, no State should exercise jurisdiction (through its national courts) over the acts of another State, insofar as these acts stem out from the sovereign power of the State. In other words, *par in parem non habet imperium* (for a detailed presentation of both theories, see Caplan, 2003, pp. 745–765 ). However, it does not seem crucial to establish herein which is the genuine source of the rule of State immunity from jurisdiction. Indeed, in the cases here analysed, State immunity from jurisdiction has been intended by both national and international courts to represent a customary rule of international law<sup>2</sup> aiming at promoting good relations among States and to avoid interference with the sovereignty of another State.

‘Current international law on State immunity consists of a general presumption of immunity and a number of specified exceptions, which have been formulated almost exclusively in a commercial and trading context.’ (Yang, 2015, p. 426). Yet, in the past years, a growing debate formed around the idea of considering another exception to the rule of State immunity from jurisdiction, in the view of awarding damages to victims of serious violations of human rights committed by a State (see, also for other references, Bianchi, 2003, pp. 169–181; Parlett, 2006, pp. 50–66; Gattini, 2003, pp. 50–66).

A few domestic courts have ruled in cases brought before them in support of this new approach. An important example in this sense was the Greek case concerning the Distomo massacre by the German troops, where the Greek Supreme Court decided that Germany did not enjoy immunity and had to pay compensation to the relatives of the Distomo massacre victims (Greek Supreme Court, 2000; for a detailed analysis of this case see Gattini, 2003, pp. 356–362). In any case, the Italian jurisprudence offers already quite an exhaustive catalogue, which generated significant reactions at international level.

<sup>2</sup> On the 2nd of December 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property was signed, but it has not entered into force so far. Nevertheless, the 2004 UN Convention does not cover ‘such issues as State immunity in respect of human rights violations, the notion of *jus cogens* and its possible effect on State immunity’, since they were and still are subject of intense debate and controversy (Yang, 2015, p. 456). According to some authors, (McGregor, 2006, pp. 437–438) this Convention could even restrict the development of the international law in this area, which we will present further on.

### 3. State immunity from jurisdiction in the Ferrini case: Italian courts v. the ICJ

Between 2004 and 2008, the Italian courts have delivered a number of judgments in which they either awarded damages, to be paid by Germany, to plaintiffs who were victims or heirs of victims of war crimes and crimes against humanity committed by the German Reich during World War II, or recognised similar foreign judgments (for a comprehensive overview of this case law see, [Serranò, 2009, pp. 621–628](#); [Focarelli, 2008, pp. 742–747](#)). In all these cases, the Italian courts found that the rule of immunity from jurisdiction invoked by Germany could not hinder the protection of victims of gross human rights violations.

The first and the most relevant case is the Ferrini case which led to a judgment delivered by the United Sections of the Italian Corte di Cassazione ([Corte di Cassazione \(Sezioni Unite civili\), 2004](#)).

#### 3.1. The Ferrini case before the Italian courts and the ruling of the Corte di Cassazione

Mr. Ferrini sued the Federal Republic of Germany before the Arezzo District Court seeking to be awarded compensation for the pecuniary and non-pecuniary damages that he sustained between 1944 and 1945, when he was captured by German troops on Italian territory and forced to work in a warfare factory located in a concentration camp on German territory. Germany contested the jurisdiction of the Italian courts to rule on the case, affirming that the specific activities which constitute the main object of the action, concerned governmental acts performed by a foreign State in the exercise of its sovereignty ([Iovane, 2004, p. 170](#)).

On a preliminary ruling on jurisdiction, while not opposing this assertion, the Corte di Cassazione went further with its reasoning: ‘What the Court has to ascertain is whether sovereign immunity should continue to be granted even with respect to acts which, [...], are of extreme gravity and offend universal values which transcend the interests of individual national communities. These acts are considered as international crimes by current customary international law.’<sup>3</sup> ([Corte di Cassazione \(Sezioni Unite civili\), 2004, para. 7](#)). Hence, the Corte di Cassazione put into balance the customary rule of State immunity from jurisdiction and the rules, which protect fundamental rights. From this point of view, ‘there could be no doubt that deportation and forced labour are crimes of war prohibited by a norm of general international law binding all members of the international community.’ ([Corte di Cassazione \(Sezioni Unite civili\), 2004, para. 7.4](#)).

Where the violations of human rights amount to crimes against humanity/war crimes, they amount to a violation of *jus cogens* and, consequently, the rule of immunity from jurisdiction must be ruled out. *Jus cogens* norms, stated the Corte di Cassazione, ‘prevail over every other norm, whether customary or conventional. Thus, they also prevail over the rule on sovereign immunity < ... >’. The obligation to respect inalienable rights of every human being has attained the rank of a fundamental principle of the international legal order. The emergence of this principle has had repercussions on those other principles that have traditionally shaped international law. This is particularly true with regard to the principle of sovereign equality which lies at the root of immunity from jurisdiction.’ ([Corte di Cassazione \(Sezioni Unite civili\), 2004, para. 9.2](#)).

#### 3.2. Reactions in legal doctrine and of the UK House of Lords on the ruling of Corte di Cassazione in the Ferrini case

Several authors have praised the approach of the Corte di Cassazione and its conclusions as a remarkable example of systematic interpretation of the rule of State immunity in the framework of the other sets of norms of international law, bringing an appreciable contribution for the cause of respect of human rights. In their view, the fact that in its reasoning the Italian Supreme Court did not properly distinguish between internationally wrongful acts of the State and those of individuals, does not undermine the overall coherence of the judgment – all these international rules considered by the Corte di Cassazione express a material value of the international community as a whole, which is focused on the victims of serious violations of human rights regardless of whether the violation was committed by a State, a State organ or an individual. In case of serious violations of human rights, the need to offer an effective protection to the victims cannot but prevail over the rule of State immunity from jurisdiction. In other words, Ferrini is a good example of the application of a “human rights tort exception” (see, among others, [Iovane, 2004, pp. 173–180](#); [Bianchi, 2005, pp. 245–246](#); [Simone, 2006, pp. 529–533](#); [De Sena – De Vittor, 2005, pp. 258–260](#)).

On the way of the contrary, the Ferrini judgment has equally been criticised. Some scholars pointed out that this judgement refers to the notion of *jus cogens* quite in a deductive way. In their view, it is based on the unexplained assumption that the prohibition of war crimes and crimes against humanity (such as the deportation suffered by the applicant) automatically entails, in the current state of customary international law, a derogation of the rule of State immunity from jurisdiction. Far from being a peremptory rule, *jus cogens* would have been rather used by the Italian Supreme Court as a mean to promote a certain evolution in the international law ([Focarelli, 2008, para. 3](#)). More harshly, other scholars stated that the reasoning of Ferrini is ‘unabashedly syllogical and deductive’. ‘The assertion of the automatic prevalence of *jus cogens* over State immunity is a *non sequitur*, because the two sets of rules concern two different perspectives. [...] The incoherence could arise only to the extent that it is either assumed that the right of access to justice constitutes itself a *jus cogens* norm, which it is evidently not, or that a violation of *jus cogens* necessarily entails the right to civil redress.’ ([Gattini, 2005, pp. 236–237](#)).

In this last line of reasoning, the evaluation of the type of behaviour of the wrongdoer which constitutes the cause of action of the

<sup>3</sup> The Corte di Cassazione relies on several international instruments (UN Resolution no. 95-I of 11 December 1946; Article 6b of the London Statute signed on 8 August 1945; UN Resolution establishing the ad-hoc Criminal Tribunals for former Yugoslavia and Rwanda; the Statute of the International Criminal Court), judgments of international courts (for instance the judgment of the Nuremberg Tribunal of 30 September 1946), as well as on the principles of international law adopted by the Commission for International Law in June 1950.

victim (substantive aspect) is not relevant for the purpose of establishing an exception to the (procedural) rule of State immunity from jurisdiction. The echo of the authoritative opinion of Hazel Fox QC is clear: ‘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 of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.’ (Fox, 2002, p. 525).

Furthermore, ruling on a case where victims of torture in Saudia Arabia were seeking for civil damages against this country before English courts, the House of Lords expressed the same criticism to Ferrini judgment and the same arguments contrary to the emergence of a “human-rights/*jus cogens* exception” to the rule of State immunity from jurisdiction (House of Lords, *Case of Jones, Mitchell and Others v. Saudi Arabia*, 2006, especially para. 63).

### 3.3. The Ferrini “principle” of the Corte di Cassazione overruled by the International Court of Justice: analysis and critical remarks

The Ferrini judgment did not remain confined to the doctrinal debate and to the attention of national courts. Indeed, as a consequence of this judgment and few more delivered by the Italian Supreme Court that followed, in December 2008 Germany filed an application instituting proceedings against Italy before the International Court of Justice, arguing that since 2004, the Italian national courts have repetitively disregarded the jurisdictional immunity of Germany as a sovereign State, in violation of international law. Although Germany did not dispute the substance of the facts complained of by the victims, nor that they amounted to a serious violation of human rights, it did however accuse Italy of having violated the international law principle according to which a State cannot and should not exercise jurisdiction over the acts of another State. Therefore, the core legal question presented before the International Court of Justice was that of establishing whether States enjoy full jurisdictional immunity before foreign domestic courts for acts committed by their armed forces in the course of conducting an armed conflict.

Firstly, the International Court of Justice acknowledged that the facts in discussion constituted grave violations of international humanitarian law, but did not find any reason to deny State immunity from jurisdiction: ‘The Court concludes 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.’ (International Court of Justice, *Case on Jurisdictional Immunities of the State*, 2012, para. 91).

Secondly, the ICJ found it necessary to clarify which is the relationship between *jus cogens* and the rule of State immunity, responding to Italy’s argument, according to which there is a conflict between *jus cogens* rules forming part of the law of armed conflict and the rule granting immunity from jurisdiction to Germany. Following this reasoning, Italy contended that, ‘since *jus cogens* rules always prevail over any inconsistent rule of international law, [...] whether contained in a treaty or in customary international law, and since the rule on State’s immunity from jurisdiction before the courts of another State does not have the status of *jus cogens*, the rule of immunity must give way.’ (International Court of Justice, 2012, para. 92). The ICJ disagreed with Italy: ‘In the opinion of the Court <... > no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.’ (International Court of Justice, 2012, para. 93).

Finally, quite a similar answer was given to the “last resort argument” raised by the Italian Government – namely that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. In addition to the emphasis put on the absence of a customary rule providing that the entitlement of a State to immunity is dependent upon the existence of effective alternative means of securing redress (International Court of Justice, 2012, para. 101), the ICJ stated: ‘whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation (International Court of Justice, 2012, para. 100).

Again, the core argument of the ICJ revolves around the conclusion that the rules protecting human rights and the rule of State immunity from jurisdiction operate at different levels, material, respectively procedural. Therefore, these rules are not in conflict. Consequently, the principle of State immunity from jurisdiction remains valid and cannot suffer any “human rights exception”.

This line of reasoning endorsed by the ICJ has been considered ‘extremely formalistic’ (Pisillo Mazzeschi, 2012, p. 313). One might easily admit that, insofar as the ICJ does not even embark in the attempt of striking a fair balance between immunity and human rights (Laval, 2012, 156–157; see also the dissenting opinion of the Judge Yusuf, para. 28–29), the argument of lack of conflict between the two different sets of rules is an easy way to mark the attempt of the Italian Supreme Court to provoke an important change in the international law as an isolated wishful “avant-gardism” (Laval, 2012, pp. 157–158; Ciampi, 2012, pp. 28–29). As a result, the rules prohibiting war crimes and gross violations of human rights, which in theory should be at the hard-core of international law, are voided of any practical effect (Pisillo Mazzeschi, 2012, p. 315; Conforti, 2014, p. 276).

## 4. State immunity from jurisdiction and the right to access a court in the case-law of the ECtHR

Can the conclusion of the ICJ, reported in the last paragraph, be considered consistent with the right of access to a court as

acknowledged by international law (for a negative answer see [Pisillo Mazzeschi, 2012, pp. 317–320](#))? More precisely, and turning towards a specific European instrument concerning the protection of human rights: can the rule of State immunity from jurisdiction be considered compatible with the right of access to a court, as protected by Art. 6 para. 1 of the ECHR? The European Court of Human Rights has been called to rule on this issue several times.

#### 4.1. Key-cases of the ECtHR

In 2001, the Grand Chamber stated in the case of [Al-Adsani v. the United Kingdom \(2001\)](#) that there had been no violation of the right to access to a court by striking out of proceedings on ground of State immunity.

The case concerned the civil action for damages for acts of torture, initiated by a dual British/Kuwaiti national who served as a pilot in the Kuwaiti Air Force during the Gulf War, against the Government of Kuwait and other individuals. The part of the proceedings filed against the Kuwaiti Government was struck out on the ground that the Kuwaiti Government was entitled to State immunity. The applicant's appeal was further dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused.

The Strasbourg Court agreed that the prohibition of torture was part of *jus cogens*, nevertheless, by granting immunity of jurisdiction to Kuwait, the British courts did not infringe Art. 6 para. 1 of the ECHR. This is because immunity from jurisdiction is considered a restriction on the right of access to a court, which pursues a legitimate aim (promoting comity and good relations between States) and cannot be regarded as disproportionate, since it reflects a generally recognised rule of public international law.

A few years later, the ECtHR reaffirmed the findings developed in the Al-Adsani case, in a case against France similar to the Ferrini case ([Grosz v. France, 2009](#)). The case concerned the application by a French national before an employment tribunal for an order requiring the German State to make him an award as payment for the work carried out during his twenty-four months forced labour and compensation for the damage he had sustained on account of his working conditions, between 1943 and 1945. The applicant's action was declared inadmissible on the basis of the principle of immunity from jurisdiction. The court of appeal upheld the judgment and the Cour de Cassation dismissed an appeal by the applicant on points of law.

In declaring inadmissible the application of Mr. Grosz, the Strasbourg Court confirmed its position as regards measures taken by a State which reflected the generally recognised rules on State immunity not to be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6, para. 1, of the Convention. This conclusion, conceded the Court, is valid in the current state of international public law and 'does not exclude a development in the future of customary international law or treaties.'

More recently, in the case of *Jones and Others vs. the United Kingdom* the Strasbourg Court not only confirmed the validity of the principles stated by the Grand Chamber in Al-Adsani, but clearly ruled out the need to revisit that approach.

Invoking Article 6 of the ECHR, the applicants complained against the striking out by national courts, of their civil claims alleging torture on account of the immunity invoked by the defendant State (the Kingdom of Saudi Arabia) and its officials. On the express request of the applicants, the Court examined whether there was a need to revisit the approach of the Grand Chamber in the Al-Adsani case and thus, relinquish the present case to the Grand Chamber. The Court was of the opinion that '[i]n elaborating the relevant test under Article 6 § 1 in its Al-Adsani judgment, the Court was acting in accordance with its obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part.' ([Jones and Others v. the United Kingdom, 2014, para. 195](#)).

What is more, the Strasbourg Court emphasised that 'the recent judgment of the International Court of Justice in *Germany v. Italy* [...] – which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised.' ([Jones and Others v. the United Kingdom, 2014, para. 198](#)).

#### 4.2. Critical analysis

*Jones and Others v. the United Kingdom* proves that Prefecture of Voiotia, Ferrini and other similar national judgments have not provoked the foreseen change of the ECtHR's approach regarding State immunity from jurisdiction, which was desirable in the view of several scholars ([Milano, 2008, pp. 1089–1093](#); [McGregor, 2006, p. 439](#)). Since the narrow opening left by *Grosz v. France* to possible developments in international law has been firmly closed by the ICJ in the case [International Court of Justice \(2012\)](#), the Al-Adsani "principle" has been reinforced – no need, in the ECtHR's view, to relinquish Jones and Others to the Grand Chamber and re-discuss Al-Adsani.<sup>4</sup>

The Al-Adsani "principle" had disclosed a similar debate to the one we have reported above (para. 2.2) about the Ferrini judgment of the Italian Supreme Court and the consequent judgment of the ICJ on Jurisdictional Immunities of the State (para 2.3).

In the view of a robust minority of judges in Al-Adsani as well as of several authoritative scholars (see, for instance, [Sudre, 2005, p. 28](#)) the "conventionality" of the foreign State's immunity from adjudicatory jurisdiction on civil actions arising from torture, utterly contradicts the affirmed nature of *jus cogens* of the prohibition of torture, since this rule is voided of any practical effect.

<sup>4</sup> In the light of the position adopted by the ECtHR in *Jones and Others v. the United Kingdom*, referred in the text, one might dispute that the authority of the ICJ judgment in *Jurisdictional Immunities of the State* did not operate in the framework of the ECtHR's activity (for this prediction see, on the contrary, [Bianchi, 2012, p. 308](#)).

According to other scholars, the apparent contradiction of *Al-Adsani* might be explained, also in the field of the ECHR, having in mind the different nature of the two sets of relevant rules: immunity entails a procedural bar to the right of access to a court, while the other rules which are allegedly part of *jus cogens* are substantial ones (Zarbiev, 2004, p. 641).

In our view, in the cases examined by the ECtHR, it seems that victims of torture, as well as victims of war crimes or other serious violations of human rights, were precluded from seeking justice and obtaining an appropriate redress as a result of the application of State immunity from jurisdiction. Though, in the ambit of the ECHR, a more suitable legal instrument to take into account the seriousness of the violation and the need for redress to victims might be the right to an effective remedy, enshrined in Article 13 ECHR, rather than the right of access to a court, protected by Article 6 para. 1, ECHR.

It is also true, though, that, as a matter of principle, the right to an effective remedy as well as the positive obligations arising from some substantial provisions of the ECHR (such as Articles 2, 3, 8) applies within the jurisdiction of the State party to the Convention and, as stated by the ECtHR in *Al-Adsani v. United Kingdom* (para. 38), does not entail that a State party to the ECHR has to offer redress to the victim of a violation perpetrated by another State (for this remark see also Zarbiev, 2004, pp. 628–629; Kloth, 2010, p. 74). On the way of the contrary, a State can be found responsible of a violation of the prohibition of torture enshrined in Article 3 ECHR for the indirect *refoulement* of an alien, if it does not ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced (*Hirsi Jamaa and Others v. Italy*, 2012, para. 146–147) – in this scenario, the violation of the Convention by the defendant State is related to the acts of another State, which might not be party to the ECHR.

Turning to Article 6, para. 1, ECHR, in the author's view the restriction to the right of access to a court resulting from State immunity from jurisdiction seems *prima facie* disproportionate if the victim did not have access to another remedy neither at international level nor at national one, in the foreign State or in the forum of the wrongdoer State (in these terms, for instance, Szymczak, 2008, p. 165). Yet, it results from the cases reported above that, as concerns the interference of the rule of State immunity on the right of access to a court, the test of proportionality carried out by the ECtHR is practically absorbed by the assumption that the immunity is provided by a well-established rule of international law, aiming at promoting good relations among the States and the respect of each State's sovereignty (on a critical note, see Sudre, 2005, p. 26; Milano, 2008, pp. 1075–1080; Szymczak, 2008, pp. 165–166). In other words, this weak (or merely apparent) proportionality test should be explained by the absence of alternatives open to the State whose courts have applied the rule of (the foreign) State immunity from jurisdiction (Zarbiev, 2004, p. 634–635). Indeed, if the ECtHR found that the acknowledgment of State immunity from jurisdiction amounts to a violation of Article 6, para 1, ECHR, it would force members States to the Convention to violate a customary rule of international law (Szymczak, 2008, p. 167; Milano, 2008, p. 1066–1071).

However, the recent ruling of the ECtHR, in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, despite not dealing directly with State immunity from jurisdiction, brings some doubts over the above-mentioned argument (see para. 8 hereunder). Furthermore, such a denial of access to justice endorsed by the ECtHR could entail the absolute irresponsibility of the State for international crimes and other serious violation of human rights perpetrated (see, *mutatis mutandis*, Vonsy, 2008; in different terms see Kloth, 2010, p. 75<sup>5</sup>), equally resulting in an inconsistency with international law. In other words, in its proportionality test the ECtHR should take into account not only the international customary rule of State immunity from jurisdiction but also the other above-mentioned norms of international law. These two sets of norms might be of a different nature, but this does not seem sufficient to exclude the latter from the proportionality test.

In the current state of the case law of the ECtHR, and apart from the case *Al-Dulimi and Montana Management Inc. v. Switzerland*, some scholars assume that it would fall to national courts to start a change in the application of State immunity from jurisdiction and, consequently, in the international customary law, helping the ECtHR to take a 'braver' approach regarding the compatibility of State immunity with Article 6, para 1, ECHR (Szymczak, 2008, p. 168, see also Milano, 2008, pp.1089–1092). Is it still possible after the ruling of the ICJ in *Germany v. Italy*?

## 5. "Back home again": the remedial approach of the Italian Corte Costituzionale v. State immunity from jurisdiction

An affirmative answer to the question asked in the conclusion of the last paragraph has been authoritatively foreseen (Conforti, 2014, p. 277) given that national courts do not exactly correspond to the State actors which are commonly involved in the international arena and do not necessarily share the point of view of the ICJ<sup>6</sup>. Actually, the issue of the relation between protection of victims of serious violations of human rights and the rule of State immunity has not been settled yet, at least from an Italian point of view: as advocated by several scholars (Palombino, 2013, pp. 189–200; Cataldi, 2013) the rule of customary international law as detected by the ICJ in Jurisdictional Immunities of the State had to be confronted, before being accepted in the Italian legal system, with the doctrine of "counter-limits".

<sup>5</sup> Kloth correctly notes that, as a result of the application of State immunity from jurisdiction in *Al-Adsani vs the United Kingdom*, '[t]hose acts remained a breach of international law, but the claim arising from that breach could not be brought before a British court'. But his conclusion does not seem convincing: '[h]ence immunity does not equal impunity (in particular because in the present context criminal proceedings were not at issue)'. On the contrary, in this case State immunity from jurisdiction in a civil action, endorsed by the Grand Chamber of the ECtHR, has denied even a minimum level of reproach and sanction of such a serious violation of human rights.

<sup>6</sup> In its inspiring article, Andrea Bianchi concluded that the judgment of the ICJ in the case *Germany v. Italy* would have become part of 'the *habitus* of state actors of international law' (Bianchi, 2012, p. 308).

Italy was ordered by the ICJ in its judgment on [International Court of Justice, Case on Jurisdictional Immunities of the State \(2012\)](#) to enact appropriate legislation or resort to other methods of its choosing, to ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoyed under international law, cease to have effect.

Consequently, Italy enacted legislative changes aimed at conforming to the ICJ's judgment. In accordance with Law no. 5 of 14th of January 2013, the Italian domestic courts had to comply with the ICJ's judgment and thus, deny their jurisdiction in actions for damages for crimes against humanity, committed *iure imperii* by the Third Reich on Italian territory. Reopening proceedings, as for the judgement denying Germany immunity from the Italian court's jurisdiction, which had the effect of *res judicata*, were introduced too. Therefore, the issue in discussion seemed to be finally dealt with in the Italian legal order, in a manner consistent with the case law of the ICJ and ECtHR.

Yet, in January 2014, the Florence District Court raised before the Corte Costituzionale, two questions of constitutionality of Article 3 of the newly enacted law and of Article 1 of Law no. 848 of 17th of August 1957 (on the execution of the United Nations' Charter and, consequently, on the binding effect of the ICJ's judgements).

### 5.1. The judgment no. 238 of 2014 of the Corte Costituzionale

While not contesting the interpretation given by the ICJ ([International Court of Justice, 2012](#)) to the customary rule of immunity of States from civil jurisdiction of other states for acts considered *iure imperii*, however, the Corte Costituzionale could not ignore the fact that it was called to rule over the issue of a conflict between the international law norm incorporated and applied in the domestic legal order (as interpreted in the international legal order) and the norms and principles of the Italian Constitution.

In light of the principle of protecting fundamental human rights and the principle of effective judicial protection, 'in so far as the international law of immunity of States from the civil jurisdiction of other States includes acts considered *iure imperii* that violated international law and fundamental human rights' ([Corte Costituzionale, 2014, para. 3.5](#)) and 'to the extent that international law extends immunity to actions for damages caused by such serious violations' (Corte Costituzionale, judgment no. 238 of 2014, conclusions), the Corte Costituzionale did not accept this rule to have entered the Italian legal order.

Furthermore, the Italian constitutional judges found the impugned Italian law to be contrary to the Constitution, in particular to Articles 2 and 24 protecting fundamental rights and the right to a court, 'exclusively to the extent that it obliges the Italian judge to comply with the judgment of the ICJ of 3rd of February 2012, which requires the Italian courts to deny their jurisdiction in cases of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights' ([Corte Costituzionale, 2014](#)).

In reaching this conclusion, the Italian Corte Costituzionale reduced the scope of the rule of State immunity from jurisdiction, with effects in the Italian legal system. 'At the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law itself, as it already happened, the Corte Costituzionale observes, at the beginning of the XIXth century when the absolute customary international rule of State immunity from jurisdiction undertook a progressive evolution by virtue of national jurisprudence (originally Italian and Belgian) up to the identification of *acta jure gestionis* as the relevant limit ([Corte Costituzionale, 2014, para 3.3](#)).

### 5.2. Right to access a court or right to an effective remedy?

The ruling of the Corte Costituzionale on State immunity from jurisdiction has been extensively commented. Yet, the author would like to analyse herein an aspect which seems to have been neglected so far: is the judgment no. 238 of 2014 a triumph of the right to access a court, enshrined in Article 24 of the Italian Constitution?

In order to answer to this question, it has to be recalled, on the one hand, that in the case-law of the Italian Corte Costituzionale the protection of the right of access to a court is usually not dependent on the nature or the importance of the cause of action in the case under examination. For instance, the lack of access to a court of an inmate, in the view of questioning the prison director's censorship on pornographic magazines, has been judged contrary to Article 24 of the Italian Constitution ([Corte Costituzionale, 1999](#))! Indeed, in the Italian legal system, once the substantial/material law has acknowledged a right, Article 24 of the Italian Constitution acknowledges the right to have access to a court seeking for the protection of this right, irrespectively of its nature or importance (see, among others, [Oriani, 2008, p. 17](#); [Comoglio, 1970, pp. 161–169](#)).

On the other hand, in the judgment no. 238 of 2014, the Italian Corte Costituzionale recognises an exception to the rule of State immunity from jurisdiction insofar as the right to access a court, enshrined in Article 24 of the Italian Constitution, serves the purpose of protecting victims of war crimes and crimes against humanity. Quite remarkably, in the text of the judgment no. 238 of 2014 the expression "right of access to a court" is never alone but always goes, hand in hand, with "protection of human rights".

In other words, and getting back for a moment to the case of Jones, Mitchell and Others, the line of reasoning followed by the UK House of Lords kept separated the two terms of the duo *jus* and *remedium*, as in the 'worst tradition' which is deemed to characterize only the civil law systems ([Consolo, 2009, p. 338](#)). This approach is not questioned by the ECtHR (as concerns the compatibility of State immunity from jurisdiction with Article 6, para. 1, ECHR) and has been openly endorsed by the ICJ in *Jurisdictional Immunities of the State* ([Consolo & Morgante, 2012, p. 602–603](#)). Well, it seems that the Italian Corte Costituzionale, a court of a civil law system, has rejected the separation between *jus* (rules prohibiting war crimes and crimes against humanity, rules acknowledging fundamental human rights) and *remedium* (right to access a court), undertaking a remedial approach.

## 6. A universal jurisdiction of the Italian Courts on civil actions originating from international crimes?

The affirmation, in the Italian legal system, of the right to an effective remedy in cases of acts of a foreign State constituting an international crime in breach of inviolable human rights, cannot be considered absolute yet. Firstly, the ruling of the Italian Corte Costituzionale has been authoritatively interpreted in the sense that the derogation to the customary rule of State immunity from jurisdiction should be admitted only when victims did not have access to another remedy (Conforti, 2015, p. 356). Secondly, given the risk for the position of the Italian Corte Costituzionale to come into conflict with Italy's obligations under International law (especially with regard to the ICJ's ruling), the Italian judges have adopted a cautious, yet conciliatory attitude: even if the immunity from jurisdiction of the foreign State has not been acknowledged, they urge the latter and the claimants to reach a friendly settlement of the case (Iovane, in press, para. 3 and 4).

Thirdly, in the Ferrini judgment (as stressed by several scholars: Iovane, 2004, pp. 183–191; De Sena – De Vittor, 2005, p. 258; Bianchi 2005, p. 256; Gattini, 2005, p. 231) the Corte di Cassazione noted that international crimes, such as the deportation suffered by the applicant, are not subject to statutes of limitation and that they trigger the applicability of the principle of universal jurisdiction. On these grounds, in the Corte di Cassazione view, there was no doubt that the principle of universal jurisdiction was applicable in the case under examination, despite its being a civil case (Corte di Cassazione (Sezioni Unite civili), 2004, in fine). Thus, the reasoning based on the coincidence between *forum State* and *locus commissi delicti*, which could have been relevant to exclude Germany's immunity from jurisdiction on the basis of the tort exception, played an ancillary role also to this effect: 'It has been observed that the facts which are at the origin of the action, took place partially in Italy. But it is sufficient to note that, since these facts amount to international crimes, the jurisdiction [of the Italian courts] should be in any case affirmed due to the principle of universal jurisdiction' (Corte di Cassazione (Sezioni Unite civili), 2004, para. 12).

A more recent judgement of the Corte di Cassazione (2015) might contradict the last conclusion. In this case, the applicant, most likely relying on the Italian court's attitude concerning State immunity from jurisdiction, asked the recognition of a judgement delivered by the U.S. District Court for the District of Columbia. In this judgement, the Islamic Republic of Iran was found responsible of a terrorist attack perpetrated in Israel and was condemned to pay damages, amounting to 250 million of dollars, to the relatives of an American national killed on this occasion.

On the one hand, the Corte di Cassazione, relying on the Corte Costituzionale's judgement no. 238 of 2014, confirmed that the recognition of the U.S. court judgment against the Islamic Republic of Iran could not be refused on the basis of the international customary rule of State immunity from jurisdiction, since this rule cannot be applied in the Italian legal system to a civil action originating from a terrorist attack constituting an international crime, perpetrated in violation of fundamental rights.

On the other hand, the Corte di Cassazione recalled that a foreign judgement can be recognized in Italy insofar as it has been delivered by a court whose jurisdiction *ratione loci* could be established according to the criteria set forth by the Italian law. In the case under examination, the Corte di Cassazione concluded that neither the residence of the defendant or of its representative (the Islamic Republic of Iran did not have a diplomatic representation in U.S. since 1979) nor the *forum commissi delicti* could justify the jurisdiction of the U.S. District Court for the District of Columbia, the nationality of the claimant not being a valid criterion according to the Italian law<sup>7</sup>. Thus, the possibility of establishing the jurisdiction of the U.S. District Court for the District of Columbia on the principle of universal jurisdiction has not been considered by the Corte di Cassazione.

Unfortunately, victims of serious human rights violations may face strong obstacles also when initiating proceedings before the national courts of the very State responsible for the damaging acts. In such cases, doctrines of judicial abdication may come into play and case a self-restraint attitude of national courts.

## 7. Doctrines of judicial abdication (political act doctrine, *acte de Gouvernement*, *atto politico*): rationale and criticism

When called to rule upon civil actions regarding war crimes or other serious violations of human rights, committed by the national authorities, domestic courts do not encounter the same difficulties as in the scenario described in the previous paragraphs, that is, when having to examine civil claims brought against another State. Indeed, by exercising their judiciary role, domestic courts do not risk to place the government in a delicate situation vis-à-vis other States, since the defendant State is not a foreign State and the case under examination should mostly concern national issues (Pisillo Mazzeschi, 2003, p. 246).

However, it is precisely this characteristic that may lead the courts to adopt a certain degree of "judicial abdication", also known as the doctrine of political act/act of State or *acte de Gouvernement* or *atto politico*. Several scholars have analysed and profoundly criticized the rationale behind this doctrine, generally applied by national courts in matters pertaining to national defence and foreign affairs (an exhaustive analysis and discussion has been recently provided by Amoroso, 2015, para. II-V).

<sup>7</sup> According to the "Terrorist exception to the jurisdictional immunity of a foreign State" to the 1976 U.S. Foreign Sovereign Immunities Act (28 U.S. Code § 1605A), a foreign State which has been designated as a sponsor of terrorism, shall not be immune from the jurisdiction of courts of the United States in any case in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act 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. Provided that the foreign state has been afforded a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration, the U.S. court shall hear such a claim if the claimant or the victim was a national of the United States, a member of the armed forces or otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment.



According to the first rationale of the political act doctrine, the limitation of judiciary power arises from the principle of separation of powers. More precisely, national courts normally do not have any competence to carry out actions of national defence and foreign affairs policy, but it is generally the task of the political bodies of the State. Therefore, national courts do not have to interfere with the acts of political bodies in those fields. This rationale met strong criticism with regard to actions for damages lodged by victims of violations of fundamental rights, since the principle of separation of powers equally implies a certain degree of mutual influence and control between state powers in order to avoid arbitrary acts. Furthermore, the civil actions here considered are not aimed at submitting political decisions to judicial review in order to quash or block such decisions, but are aimed at the award of compensation for the damages suffered by the victims.

Secondly, the political act doctrine has been justified as a non-justiciability argument in the field of national defence and foreign policy because of the lack of legal criteria to be used by the courts when deciding on a case. The argument that, for this purpose, international humanitarian law and human rights law lack binding force was strongly criticized, given that at least human rights law usually become part of the legal system of a given State and fulfil the precise purpose of recognising fundamental rights to the benefit of individuals. That is for instance, the case of the ECHR, which is binding on the member States of the Council of Europe, to the point of directly recognising the rights enshrined thereof. Furthermore, by virtue of the Member State's obligations as signatories of the ECHR and in conformity with the principle of subsidiarity of the European human rights protection system, nation courts of the member States have the duty to protect individuals' human rights from arbitrary state actions. In addition to the foregoing (as observed by Stern, 2006, pp. 78–80), the doctrine of political act has already been refused, as concerns the judicial abdication on civil actions directed against a foreign State, if the act of the foreign State amounts to a flagrant violation of fundamental principles of international law.

Thirdly, another explanation of the political act doctrine resides in the need for a prudential judicial self-restraint of courts in order not to place the State in delicate situations when exercising its foreign policy. In other words, all institutions of the same State should obey by the principle “speak with one voice” and thus, the judiciary power does not have to get involved in political issues, nor become an instrument in the political arena. But, if in the political arena, amongst other issues, also individuals' rights are at stake, the judiciary cannot be denied to perform its duty irrespectively of the political implications. Moreover, awarding damages to victims of fundamental rights violations is the less intrusive possible intervention of the judiciary.

## 8. The application of the doctrine of *atto politico* in the Markovic case

A clear application of the doctrine of *atto politico* is provided by the Markovic case, originating in the death of several persons during a NATO air strike on the headquarters of Radio Televizije Srbije (RTS) in Belgrade in April 1999.

### 8.1. The Markovic case before the Italian courts and in the analysis of the legal doctrine

Ten nationals of the former Serbia and Montenegro, close relatives of persons killed as a result of this air strike, brought actions for damages before the Italian district court of Rome because they considered Italian involvement in the relevant military operations more extensive than that of the other NATO members, given that Italy had provided major political and logistical support, such as the use of its air bases. As to the cause of action, the applicants invoked that the air strike on the headquarters of RTS in Belgrade amounted to a violation of the Protocol I to the Geneva Convention since it concerned a non-military target (the Serbian TV station) and aimed at killing civilians. Consequently, they alleged that the death of their relatives was also contrary to Articles 2 and 15, para. 2, ECHR, since it did not result from a lawful act of war<sup>8</sup>.

Pursuant to the defendants' (the Office of the Prime Minister and the Defence Ministry) request for a preliminary ruling on the issue of jurisdiction, the Corte di Cassazione held that the Italian courts had no jurisdiction on such a case.

Firstly, the Corte di Cassazione found that the impugned act was an act of war; since such acts were a manifestation of political decisions, no court possessed the power to review the manner in which that political function was carried out.

Secondly, the Corte di Cassazione held that the instruments of international law on which the applicants relied (Protocol I to the Geneva Convention and ECHR), did not acknowledge any right to civilians during armed conflict but, as rules of international law, regulated only the relations between States. Nor the legislation, that had given effect to these instruments of international law in the Italian legal system, expressly afforded to the injured parties a right to claim reparation from the State for damage sustained as a result of a violation of the rules of international law. In sum, no right of the victims could be derived from these rules of international law vis-à-vis acts of war, due to their nature of *atto politico*.

Thus, the Corte di Cassazione used the first two rationale of the political act doctrine, which have been discussed above, to justify its decision on the Markovic case.

Having in mind this ruling, prominent scholars reaffirmed that the doctrine of *atto politico* is absurd in a democracy, given the role of the judiciary vis-à-vis the executive power and the necessity for accountability of the latter (Focarelli 2007, pp. 51–54; Conforti, 2014, p. 280). As concerns, namely, the second argument used by the Corte di Cassazione, it can be disputed that the

<sup>8</sup> According to Article 15, para. 1, ECHR, 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. However, Article 15, para. 2, ECHR stated that '[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision'. On the enchainment of Articles 2 and 15, para. 2, ECHR with IHL, see Ronzitti, 2007, pp. 98–100 ; Costa and O'Boyle, 2011, pp. 114–118.

Geneva Convention and its Protocols contains rights of the victims of an armed conflict (on this issue see [Pisillo Mazzeschi 2003](#), pp. 342–345; [Frulli 2003](#), 412 ss; [Ronzitti, 2007](#), pp. 109–111; [Bruno 2009](#), pp. 4–5). On the contrary, it cannot be affirmed that the ECHR does not contain rights having a direct effect for individuals ([Sudre, 2015](#), p.191; as concerns the Italian legal system, see, [Conforti 2014](#), pp. 337-345; [Conti, 2003](#), pp. 643–648, with special reference to the right to life acknowledged by Article 2 ECHR). Indeed, in 2005, the Italian Supreme Court openly stated that ‘law no. 848 of 4 august 1955 for the ratification and implementing of the ECHR, introduced into the domestic legal system the fundamental rights < ... > provided in the first part of the ECHR < ... > . The direct effect and compulsory nature of the norms of the Convention as a result of ratification of the international legal instrument, has been already been acknowledged by this court.’ ([Corte di Cassazione, 2005](#), pp. 7-8).

In the light of the above criticism, addressed both towards the political act doctrine and its application by the Italian Corte di Cassazione in *Markovic*, the following question inevitably arises: are these doctrines of judicial abdication compatible with the rights protected in the European Convention on Human Rights?

## 8.2. The ruling of the ECtHR on the *Markovic* case: critical aspects

The ruling of the ECtHR on the *Markovic* case provides an answer to the question asked at the end of the last paragraph.

After the decision of the Corte di Cassazione, the applicants complained before the ECtHR of a breach of the right to life (Art. 2 ECHR), the right to access a court (Art. 6 ECHR), the right to freedom of expression (Art. 10 ECHR), the right to an effective remedy (Art. 13 ECHR) and of the prohibition of abuse of right (Art. 17 ECHR).

In a first phase, a chamber of the Court delivered a decision on the admissibility of the complaints, declaring the complaints raised under Articles 2, 10, 13 and 17 inadmissible ([Markovic and Others v. Italy, 2003](#)). With regard to the allegation of a violation of the right to life as a result of an act of war, the Court applied the same conclusion from its ruling in the case of [Bankovic and Others v. Belgium and Others \(2001\)](#) which concerned the same events in Belgrade. Thus, the Court considered the complaint to be incompatible *ratione loci*, since the alleged violation took place outside the Italian jurisdiction, understood as not within the ambit of territorial state sovereignty. As concerns the complaint raised under Article 13 ECHR, the Court considered it to be absorbed by the complaint raised under Article 6 ECHR, which was declared admissible. Subsequently, the Chamber decided to relinquish the admissible part of the case to the Grand Chamber. Therefore, the Grand Chamber was called to examine the case only from the angle of the complaint raised under Article 6 ECHR (violation of the right of access to a court).

In its judgement of 2006, the Grand Chamber started by noticing that this was the first time the Italian courts were called to rule on a similar issue and none of the existing precedents could be read either in favour, or against the applicants’ position. In any event, Art. 6 was applicable to the applicants’ case, since the proceedings concerned a genuine and serious dispute over the existence of a right to which the applicants claimed to be entitled under the civil law, at least on arguable grounds ([Markovic and Others v. Italy, 2006](#), para. 100–102).

However, the Grand Chamber found that there had been no violation of the right to access a court. It first and foremost noted that the applicants were able to bring their complaints before the domestic courts and the answer of the Corte di Cassazione was clear enough. ‘Consequently, it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a “right” to reparation under the law of tort existed in such circumstances. Even if the applicants’ assertion is correct that, as a result of changes in the case-law<sup>9</sup>, it has been possible to claim such a right since 2004, this does not justify the conclusion that such a right existed before then.’ ([Markovic and Others v. Italy, 2006](#)). Therefore, the Grand Chamber disagreed with the applicants’ assertion that the ruling of the Corte di Cassazione represented immunity, either *de facto* or in practice, but rather simply showed the extent of the courts’ powers of review of acts of foreign policy such as acts of war.

In conclusion, ‘the applicants’ inability to sue the State was the result not of immunity but of the principles governing the substantive right of action in domestic law. At the relevant time, the position under the domestic case-law was such as to exclude in this type of case any possibility of the State being held liable.’ ([Markovic and Others v. Italy, 2006](#), para. 114).

Unfortunately, the reasoning of the Grand Chamber is not praiseworthy for the clearest and most convincing of all, but rather reveals a certain degree of confusion between procedural bars and aspects of material law, which only to a certain extent can be explained by the intrinsic ambiguity of the doctrine of *atto politico* ([Randazzo 2007](#), p. 3; [Vonsy, pp. 729-732](#); [De Santis di Nicola, 2013](#), para. 17–23).

Above all, assuming that in the *Markovic* case and as a result of the decision of Corte di Cassazione, the applicants were confronted with a restriction of their right of access to a court (Article 6 para. 1, ECHR), the Grand Chamber failed to provide a convincing explanation on the proportionality of this restriction. Indeed, the Grand Chamber did not touch upon the issue of the limits to political action of a State vis-à-vis the rule of Law; the Grand Chamber did not even attempt to define the political nature of such acts, which should justify the lack of judicial review; the Grand Chamber did not take into account the difference between the decision to take part to the military operations against Serbia and the decision to strike the RST in Belgrade; the Grand Chamber did not consider that the purpose of the applicants’ action ‘was not to have an act of government set aside. Their aim was simply to obtain compensation for the remote consequences of the political act concerned, consequences that were purely potential and unrelated to the purpose of the acts (in these terms the dissenting opinion of judge Zagrebelsky and Others; see also [Frulli 2003](#), p. 409 ss; [De Stefani, 2007](#), pp. 110–113; [Focarelli 2007](#), p. 53; [Vonsy, 2008](#), pp. 734–735).

<sup>9</sup> Reference is made, here, to the *Ferrini* judgement of the Corte di Cassazione.

## 9. Further developments in the case law of the ECtHR: towards an overruling of Markovic and a review of the compatibility of State immunity from jurisdiction with Article 6, para. 1, ECHR?

Going further with the examination, the subsequent case law of the Strasbourg Court fails from shedding light on the question and could even be seen as a confirmation of the need for an overruling of Markovic, while adding also some arguments to reconsider the compatibility of State immunity from jurisdiction with Article 6, para. 1, ECHR.

Firstly, in spheres of governmental action other than foreign policy or military action, similar doctrines of judicial abdication have lately been considered contrary to the right to access a court protected by Article 6, para 1, ECHR (*Melikyan v. Armenia*, 2013)<sup>10</sup>.

Secondly and most importantly, reference has to be made to two cases against Switzerland which concerned different sanctions and prohibitions imposed on the applicants under national legislation implementing UN Security Council Resolutions aimed at fighting against terrorism, by black-listing supporters of terrorist organisations.

### 9.1. Cases of *Nada v. Switzerland* and *Al-Dulimi and Montana management Inc. v. Switzerland*

The first case, *Nada v. Switzerland*, was relinquished to the Grand Chamber, who examined the complaints raised by an Egyptian national living in Campione d'Italia, an Italian enclave of about 1.6 square kilometres surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by a lake. In compliance with several UN Security Council resolutions adding the name of the applicant to a blacklist of persons suspected of being associated with the Taliban and al-Qaeda, Switzerland enacted the Swiss Federal Taliban Ordinance. As an effect, he was not allowed to enter or transit through Switzerland.

The applicant submitted many requests to the Swiss authorities for the deletion of his name from the list, but the Federal Court had dismissed his appeal without examining the merits of his complaint. Before the Strasbourg Court he complained, *inter alia*, of a violation of his right to liberty (Article 5 ECHR) and his right to respect for private and family life, honour and reputation (Article 8 ECHR). He also held that he had no effective remedy in respect of those complaints (Article 13 ECHR).

After dismissing the preliminary objections raised by the Government, the Grand Chamber went ahead with examining the applicant's complaint raised under Article 8 of the Convention. In short, without determining the question of the hierarchy between the obligations arising under the Convention, on the one hand, and under the UN Charter, on the other, the Grand Chamber found that the restrictions imposed on the applicant's freedom of movement for a considerable period of time had not struck a fair balance between his right to the protection of his private and family life and the legitimate aims pursued, given that Switzerland enjoyed a certain level of discretion among the various possible models for transposition of those resolutions into its domestic legal order (*Nada v. Switzerland*, 2012, para. 175–199).

However, what is particularly interesting about this judgment of the Grand Chamber, is its ruling with regard to the complaint regarding the lack of an effective remedy to redress the above violation. Thanks to having found a violation of Article 8 ECHR, the Grand Chamber considered this complaint to be arguable as well, and went further to ascertain whether the applicant had, under Swiss law, an effective remedy by which to complain of the breaches of his Convention rights: 'The Court observes that the applicant was able to apply to the national authorities to have his name deleted from the list annexed to the Taliban Ordinance and that this could have provided redress for his complaints under the Convention. However, those authorities did not examine on the merits his complaints concerning the alleged violations of the Convention. In particular, the Federal Court took the view that whilst it could verify whether Switzerland was bound by the Security Council resolutions, it could not lift the sanctions imposed on the applicant on the ground that they did not respect human rights <... >. The Federal Court, moreover, expressly acknowledged that the delisting procedure at United Nations level, even after its improvement by the most recent resolutions, could not be regarded as an effective remedy within the meaning of Article 13 of the Convention.' (*Nada v. Switzerland*, 2012, para. 210–211). Thus, the Court dismissed the preliminary objection raised by the Government as to the non-exhaustion of domestic remedies and, ruling on the merits, found that there has been a violation of Article 13 ECHR, taken in conjunction with Article 8 ECHR.

A more recent case (*Al-Dulimi and Montana Management Inc. v. Switzerland*), arising from a similar scenario to that having originated the case of *Nada*, raises even more questions as to the coherence of the Court's case law on the issues here discussed.

The applicants, an Iraqi national and the company that he managed, were placed on a UN 'black list' pursuant to several UN Security Council resolutions, ordering states to freeze and confiscate all funds, financial assets and economic resources that came from Iraq. The Swiss Federal Council adopted an order freezing the applicants' assets in Switzerland and subsequently, another order for initiating confiscation proceedings. The applicants' request to have their names removed from the list and their assets unfrozen were dismissed, the national courts refusing to examine the requests on the merits.

A Chamber of the ECtHR (*Al-Dulimi and Montana Management Inc. v. Switzerland*, 2013) found a violation of the right to access a court (Art. 6, para. 1, ECHR) applying the principle of equivalent protection and, consequently, underlining the absence of an effective and independent judicial review at the UN level. The ECtHR acknowledged that the refusal of Swiss courts to examine the request of the applicants on the merit had pursued a legitimate aim, namely to ensure effective domestic implementation of the obligations arising from the Security Council Resolution. However, it held that there was no reasonable relationship of

<sup>10</sup> The case of *Melikyan v. Armenia* concerned the refusal by national courts to examine the merit of a claim challenging the decision of the executive power concerning the privatisation and sale of a State company. The refusal was based on a provision of Armenian law, according to which the court shall terminate the proceedings, if 'the dispute is not subject to be examined by the courts'.

proportionality between that aim and the means employed, the applicants' inability to challenge the confiscation measure for several years, being difficult to accept in a democratic society.

This conclusion for a violation of Article 6, para. 1, ECHR was reached with a small majority (four votes for and three votes against). The dissenting judges (Lorenzen, Raimondi and Jočiene) expressed their wish to solve the conflict between ECHR and the UN-Charter in favour of the latter by the adoption, *mutatis mutandis*, of the Al-Adsani principle. Furthermore, one of the judges of the majority (Sajó) affirmed in his partially dissenting opinion that the UN-Security Council Resolution should prevail over the ECHR, with a *jus cogens* exception which was not relevant in the case under examination since access to a court or tribunal, particularly in civil proceedings, is not part of *jus cogens* (for an analysis of the Chamber judgement and, namely, of the dissenting opinions see [Ratniece – Istrefi, 2015, pp. 382–389](#)).

Following the request of the Swiss Government, the Al-Dulimi and Montana Management Inc. case was referred to the Grand Chamber ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016](#)), which slightly amended the reasoning leading to the conclusion for the violation of the right to access a court (Article 6, para. 1, ECHR).

As concerns the issue of the conflict between the obligations arising from the UN Security Council resolutions and the ECHR (namely, that of ensuring access to a court), the Grand Chamber stated that '[t]here was in fact nothing in the relevant UN Resolutions understood according to the ordinary meaning of the language used there in – that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions [...]. Moreover, the Court does not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment' ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016, para. 143](#)).

Even if the right of access to a court is not considered 'to be among the norms of *jus cogens* in the current state of international law' ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016, para. 136](#)), the Grand Chamber underlines that access to a court offering the guarantees enshrined in Article 6 para. 1 ECHR is an essential tool to avoid the arbitrariness, which constitute the negation of the principle of the rule of law, being 'one of the fundamental components of European public order' ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016, para. 145](#)). 'This will necessarily be true in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels < ... > . In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention' ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016, paras. 146–147](#)).

The intervention of national courts to avoid the arbitrariness is crucial, the Grand Chamber concludes, in the light of the widespread and consistent criticism regarding the UN sanctions system, namely the procedure for the listing of individuals and legal entities and the manner in which delisting requests are handled ([Al-Dulimi and Montana Management Inc. v. Switzerland, 2016, para 153](#), where the Grand Chamber seems to tacitly apply the principle of the 'equivalent protection' – for this remark, see the concurring opinion of judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, paras. 54-56).

## 9.2. Possible impact on the doctrine of 'atto politico' and on the rule of State immunity from jurisdiction, in the light of articles 6, para. 1, and 13 ECHR

The ruling of the ECtHR on the case of Al-Dulimi and Montana Management Inc. has to be compared with the ECtHR's case law on State immunity from jurisdiction, examined above (para. 3). In those cases, the proportionality of the restriction of access to a court caused by State immunity was (at least implicitly) justified by the need for the members States to the Convention to comply with international law; in Al-Dulimi and Montana Management Inc., the ECtHR requests a member State to provide individuals with access to its court for the purpose of reviewing a measure adopted in application of a UN-Resolution and avoiding its possible arbitrariness.

It is true that, according to the Grand Chamber ([Al-Dulimi and Montana Management Inc., 2016](#)), this obligation does not contradict the obligations arising from the relevant UN-Resolution, but it seems that, coming to this conclusion, the Grand Chamber had stretched the possibilities of a harmonised interpretation beyond the plain text and the general understanding of the relevant UN Security Council Resolutions: quite on the contrary, nobody had ever doubted the UN system of sanction excluded any control by national courts (for this remark, see the concurring opinions of judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov paras. 45-53; judge Keller, paras. 3 to 8; judge Kuris, para. 3). In other words, the degree of contradiction between the ECtHR's case law on State immunity from jurisdiction and [Al-Dulimi and Montana Management Inc. v. Switzerland \(2016\)](#) depends on how convincing is the statement of the latter judgment excluding the above-mentioned conflict between the obligations arising from the UN Security Council resolutions and the ECHR. On the contrary, one might agree that, despite its conciliating wording, the conclusion reached by the Grand Chamber clearly proves that such a conflict exists and that the ECtHR has solved it in favor of the ECHR – 'if the legal reasoning is fragile, the message is not: the Court is determined not to accept UN sanctions without adequate procedural guarantees, including "appropriate judicial scrutiny" (in these terms the concurring opinion of judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov para. 58).

Above all, one cannot underestimate the fact that in *Al-Dulimi and Montana Management Inc. v. Switzerland*, the Grand Chamber rejected the argument based, *mutatis mutandis*, on *Al-Adsani v. the United Kingdom* (2001) and advocated by a strong minority of the Chamber's judges as well as by the Swiss Government, according to which even a total barrier to access a court can be accepted in the light of another fundamental rule of international law.

On the contrary, as stressed in the dissenting opinion of judge Nussberger, the *Al-Adsani* approach has been followed by the ECtHR in *Stichting Mothers of Srebrenica and Others v. the Netherlands* (2013) in order to exclude that immunity from jurisdiction of Dutch courts, awarded to the United Nations, entailed a violation of Article 6, para. 1, ECHR. In this decision (para. 154), the ECtHR held as follows: 'since operations established by UN Security Council Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the UN. To bring such operations within the scope of domestic jurisdiction would mean to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the UN in this field, including with the effective conduct of its operations.' In *Al-Dulimi and Montana Management Inc. v. Switzerland* (2016), judge Nussberger notes, 'the interaction between UN law and Convention law poses the same problems. The consequences of not interpreting the Convention in line with UN law are also the same. Nevertheless, this time the Court has come to the opposite conclusion'. In sum, insofar as *Al-Adsani v. the United Kingdom* (2001) was applied, *mutatis mutandis*, in *Stichting Mothers of Srebrenica and Others v. the Netherlands* (2013) and insofar as *Al-Dulimi and Montana Management Inc. v. Switzerland* (2016) departed from *Stichting Mothers of Srebrenica and Others v. the Netherlands* (2013), it results that *Al-Dulimi and Montana Management Inc. v. Switzerland* (2016) contradicts *Al-Adsani v. the United Kingdom* (2001) on the compatibility of an absolute State immunity from jurisdiction with article 6, para 1, ECHR.

The case of *Al-Dulimi and Montana Management Inc.* is also relevant as to the compatibility of the political act doctrine with Article 6, para. 1, ECHR: the courts of a member State have to examine the merit of a national measure resulting from the State's foreign policy deciding to join the United Nations and to respect the UN Security Council Resolutions. Recalling the third rationale of the political act doctrine (para. 6 above), one can observe that this obligation under the ECHR might place the State in a delicate situation in the international arena! Why it would be more embarrassing for a State if, a few years after the litigious events, its courts awarded compensation to the victims of serious violations of human rights perpetrated by the very same State?

Moreover, the ECtHR judgement in the *Nada* case is a clear and final ruling of the Grand Chamber on the State's obligation to offer an effective remedy in the view of redressing the violations of the Convention, which might be caused by, acts resulting from the State's membership to the United Nation. In the light of *Nada v. Switzerland*, can one assume that there is no need for an effective remedy when the violations of the Convention are caused by State acts resulting from discretionary decisions taken in the foreign policy or military sphere?

It is true that Article 13 ECHR applies, as a matter of principle, only to violations of the Convention perpetrated on the territory of the member State, but one cannot undermine the recent ECtHR case law on the extra-territorial effect of the Convention in case of armed intervention abroad of a member State (see, above all, *Al-Skeini and Others v. UK*, para 130-150), the Court coming 'closer to accepting that jurisdiction [in the meaning of Article 1 ECHR] can be established through the mere use of force by state agents than ever before (*Czech*, 2015, p. 399).

In sum, there is room to acknowledge that victims of a ECHR violation are entitled to have access to an effective remedy and to obtain sufficient redress from the member State author of the violation, even if the violation has been perpetrated out of its territory during an armed conflict. If, and to which extent, the national remedy can be replaced by an international settlement between the States in conflict or forms of redress is not an issue to be analysed herein (see, for this perspective, *Gattini*, 2003, pp. 364-367; *Ronzitti*, 2007, pp. 112-113, 127-132).

## 10. Conclusions

The application of State immunity from jurisdiction and the refusal of any "human rights/*jus cogens* tort exception" can entail for victims of war crimes or other serious violations of human rights being definitely precluded from seeking justice and obtaining appropriate redress.

More particularly, even assuming that State immunity from jurisdiction constitute a procedural bar to right to access a court, while the rules prohibiting war crimes and other serious violations of human rights are substantial ones, the position undertaken by the ICJ in *International Court of Justice, Case on Jurisdictional Immunities of the State* (2012) can lead to the denial of all sort of protection to the victims and voiding the aforesaid substantial norms of their assumed peremptory effect.

The ECtHR considers that foreign State immunity from jurisdiction on civil actions for war crimes and other serious violations of human rights is not a disproportionate restriction of the right to access a court (Article 6, para. 1, ECHR). Yet, given that in such cases the test of proportionality carried out by the ECtHR is practically absorbed by the assumption that immunity is provided by a well-established rule of international law, one could question to which extent the purposes of comity and respect of sovereignty have to prevail necessarily and irrespectively of the lack of any other way of redress for the victims. Furthermore, the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* could break the coherence of the reasoning of the ECtHR in this field.

The judgment no. 238 of 2014 of the Corte Costituzionale can be seen at least as an attempt to contribute to an evolution of the international law on the relations between State immunity and protection of human rights. However, the affirmation, in the Italian legal system, of the right to an effective remedy in cases of acts of a foreign State constituting an international crime in breach of inviolable human rights is not absolute, given that the case law of Corte di Cassazione does not indisputably support the principle of universal jurisdiction on such actions.

By exercising their judiciary role, domestic courts do not risk to place the government in a delicate situation vis-à-vis other States when called to rule upon civil actions regarding war crimes and other serious violations of human rights committed by the national authorities. In this scenario, doctrines of judicial abdication such as the *atto politico* are not justified in a democratic regime.

Thus, the rulings of *Corte di Cassazione* (2002) and *ECTHR* (2006) on the Markovic case have to be firmly criticised, insofar as they amount to a denial of the self-executing nature of international human rights law and endorse a disproportionate restriction to the victim's right to access a court in the view of obtaining pecuniary compensation.

Taking into account the subsequent case law of the ECHR, there is room to acknowledge that victims of a ECHR violation are entitled to have access to an effective remedy and to obtain sufficient redress from the member State, author of the violation, even if the violation had been perpetrated out of its territory during an armed conflict.

In conclusion, the *raison d'État* 'has little time for law, still less for the "rule of law", which one can scarcely conceive of without there being a possibility of having access to the courts' (in these terms the dissenting opinion of judge Zagrebelsky and Others to *Markovic and Others v. Italy*, 2006). In the current state of international law, the right to an effective remedy seems the most manageable legal tool, not only to protect the victims of war crimes and serious human rights violations, but also to ensure a certain degree of State accountability.

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