

## *Jurisdictional Immunities*

### Student Materials

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- Decided by International Court of Justice in February 2012
- Key topics: making international law (customary international law, peremptory norms); upholding international law (domestic legal enforcement)

### Learning Objectives

- Understand and apply:
  - the two forms of sovereign immunity (absolute and restricted);
  - the difference between commercial acts (*acta jure gestionis*) and sovereign acts (*acta jure imperii*); and
  - the difference between immunity from jurisdiction and immunity from enforcement.
- Analyze and evaluate:
  - limits on the use of domestic courts to enforce international law;
  - the relationship between peremptory norms (*jus cogens*) and customary international law; and
  - what remedies are available to individuals who are the victims of violations of the law of armed conflict.

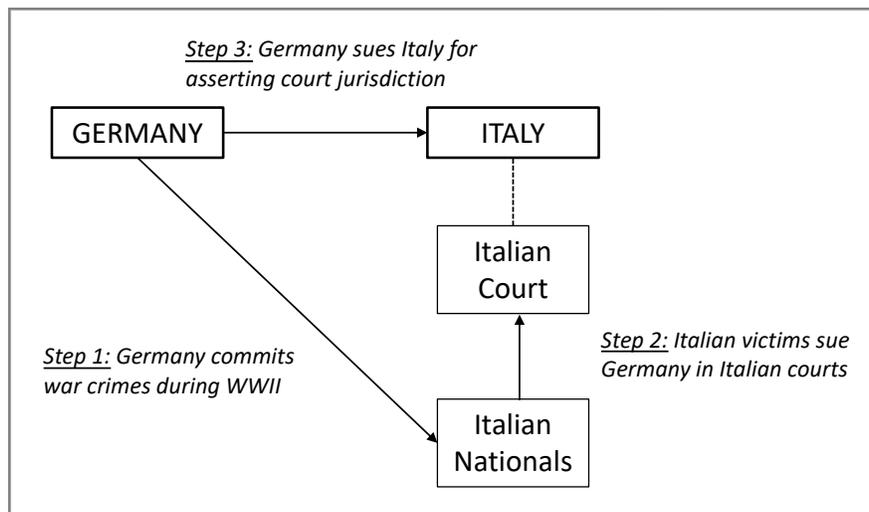
### Background Information

During World War II, the German Nazi government committed numerous war crimes against foreign nationals, including deportation, forced labor, and massacres. The *Jurisdictional Immunities* case at the ICJ stems from two different sets of lawsuits that were filed by victims of the Nazi regime who sought compensation.

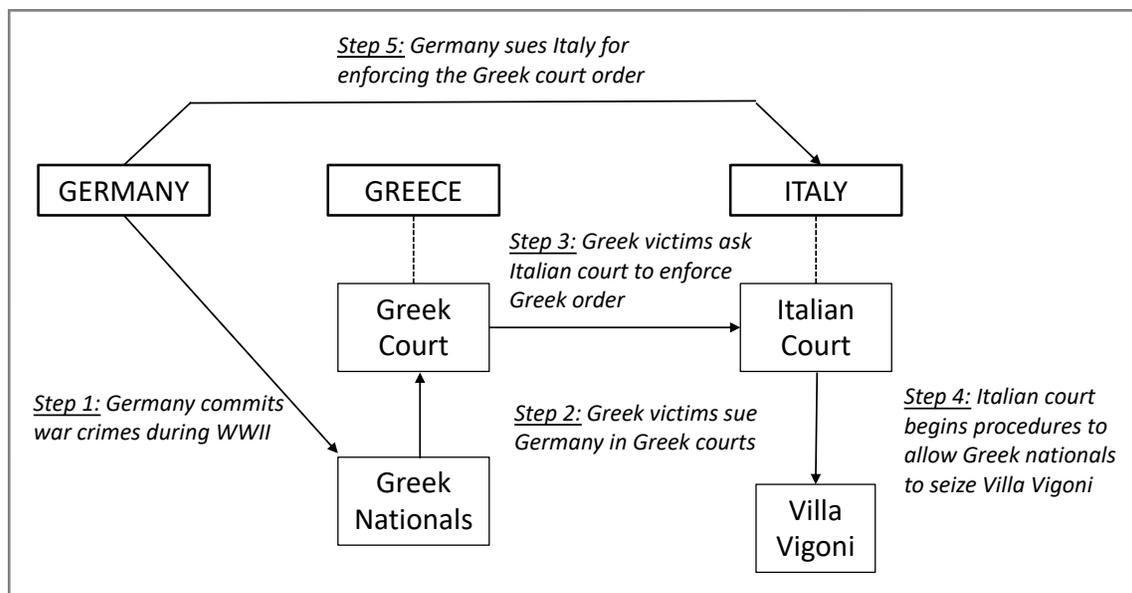
One set of lawsuits involved Italian victims who sued Germany in Italian domestic courts, as shown in Figure 1. When Italian courts allowed this case to proceed, Germany sued Italy at the ICJ. Germany argued that Italy had violated Germany's *immunity from jurisdiction* under international law.

The second set of lawsuits involved Greek victims, as shown in Figure 2. These victims first convinced a Greek court to order Germany to pay compensation. The Greek victims then took the Greek court order to an Italian court, which recognized the Greek court ruling as enforceable in Italy. The Greek victims then began legal proceedings to seize Villa Vigoni, a property in Italy that was owned by the German government, as compensation. Germany argued at the ICJ that Italy had violated Germany's *immunity from enforcement* under international law.

**Figure 1: Understanding Facts from the Italian Lawsuits**



**Figure 2: Understanding Facts from the Greek Lawsuits**



Historically, states possessed *absolute sovereign immunity* under customary international law—domestic courts could not assert judicial authority over a foreign state without its consent. Throughout the twentieth century, states slowly began to weaken this protection. Under current practice, most states grant foreign governments *limited sovereign immunity*—they refuse to grant immunity to foreign states if they are engaging in commercial acts, called *acta jure gestionis*. However, most states continue to grant immunity for sovereign acts, called *acta jure imperii*. Drawing a precise line between these two categories is often difficult. However, war crimes would clearly qualify as sovereign acts.

There is currently no binding international treaty on sovereign immunity. However, the International Law Commission began working on a sovereign immunity treaty in the late 1970s. In 2004, a treaty text, called the UN Convention on Jurisdictional Immunities of States and Their Property, was adopted by the UN General Assembly. In 2007, this treaty was opened for signature. The treaty was not in effect at the time of the *Jurisdictional Immunities* case. Yet most portions of this treaty are arguably part of customary international law, given that the treaty reflects widespread state practice and clearly entails matters of legal obligation (*opinio juris*).

#### Relevant Legal Text

##### UN Convention on Jurisdictional Immunities of States and Their Property (2004)<sup>1</sup>

##### Article 5

A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention.

##### Article 6

A state shall give effect to state immunity under Article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another state and to that end shall ensure that its courts determine on their own initiative that the immunity of that other state under Article 5 is respected.

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<sup>1</sup> Note that this treaty was not directly binding on the litigants. Rather, it was used by the ICJ as evidence of customary international law.

## Article 19

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a state may be taken in connection with a proceeding before a court of another state unless and except to the extent that

- (a) the state has expressly consented to the taking of such measures ...
- (b) the state has allocated or earmarked property for the satisfaction of the claim ... [or]
- (c) ... the property is specifically in use or intended for use by the state for other than government non-commercial purposes and is in the territory of the state of the forum ...

## Judgment

The Court began by summarizing the legal claims of the complainant and respondent.

Germany requests the Court ... to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War; [and] that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German state property situated in Italian territory ...

Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end ...

The Court then provided background information about Germany's actions during World War II towards Italian nationals. It noted that this case did not require it to rule on whether Germany violated international law during World War II. Rather, the Court was asked to rule on whether Italy violated international law by allowing Germany to be sued in Italian domestic courts.

The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the "untold suffering inflicted on Italian men and women in particular during

massacres, and on former Italian military internees” ..., accepts that these acts were unlawful and stated before this Court that it “is fully aware of [its] responsibility in this regard”. The Court considers that the acts in question can only be described as displaying a complete disregard for the “elementary considerations of humanity” ...

However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the parties regarding the applicable law. In particular, both parties agree that immunity is governed by international law and is not a mere matter of comity.

The Court then described the relevant law for the case. No relevant international treaty was directly binding on the two states. Instead, the Court must rule based on customary international law. It briefly described the components of customary international law.

As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight states parties to the European Convention on State Immunity of 16 May 1972 ... (hereinafter the “European Convention”), Italy is not a party and the Convention is accordingly not binding upon it. Neither state is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the “United Nations Convention”), which is not yet in force in any event ...

It follows that the Court must determine ... the existence of “international custom, as evidence of a general practice accepted as law” conferring immunity on states and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be “a settled practice” together with *opinio juris* ... In the present context, state practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign state is immune, the legislation of those states which have enacted statutes dealing with immunity, the claims to immunity advanced by states before foreign courts and the statements made by states, first in the course of the extensive study of the subject by the

International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by states claiming immunity that international law accords them a right to such immunity from the jurisdiction of other states; in the acknowledgment, by states granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by states in other cases of a right to exercise jurisdiction over foreign states ...

The Court then proceeded to a discussion of the topic of state immunity.

Although there has been much debate regarding the origins of state immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of state immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of states” ... That conclusion was based upon an extensive survey of state practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of states on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, states generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other states to respect and give effect to that immunity.

The Court considers that the rule of state immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of states, which ... is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each state possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the state over events and persons within that territory. Exceptions to the immunity of the state represent a departure from the principle of sovereign equality ...

The Court noted that the complainant and respondent states recognized a difference between commercial acts (*acta jure gestionis*) and sovereign acts (*acta jure imperii*). Both states agreed that Germany’s actions during World War II were sovereign acts (*acta jure imperii*). The Court noted that this classification did not imply that Germany’s acts were legal.

Many states (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii* ...

The Court is not called upon to address the question of how international law treats the issue of state immunity in respect of *acta jure gestionis*. The acts of the German armed forces and other state organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy ... recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful.

The Court considers that the terms “*jure imperii*” and “*jure gestionis*” do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a state, especially private and commercial activities (*jus gestionis*). To the extent that this distinction is significant for determining whether or not a state is entitled to immunity from the jurisdiction of another state's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.

Both the complainant and the respondent agreed the international law “generally” gives states immunity for sovereign acts (*acta jure imperii*). However, Italy argued that Germany did not have immunity in the specific circumstances of this case for three reasons.

Both parties agree that states are generally entitled to immunity in respect of *acta jure imperii* ... It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a state (and other organs of that state acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a state is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts ...

[Italy argues] that the denial of immunity [by the Italian courts] was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (*jus cogens*). Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort ...

The Court then examined Italy's first argument: that states are not entitled to immunity for "serious violations of the law of armed conflict." The Court agreed the Germany committed crimes during World War II. However, the Court argues that state practice does not suggest that states lose their sovereign immunity for "serious violations" of human rights or armed conflict law. So the Court rejects Italy's first argument.

The first strand is based upon the proposition that international law does not accord immunity to a state, or at least restricts its right to immunity, when that state has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943–1945). In the present case, the Court has already made clear ... that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign state is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the state actually having committed a serious violation of international human

rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the state had committed such wrongful acts were to be sufficient to deprive the state of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim.

That said, the Court must nevertheless inquire whether customary international law has developed to the point where a state is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no state practice which might be considered to support the proposition that a state is deprived of its entitlement to immunity in such a case ... In addition, there is a substantial body of state practice from other countries which demonstrates that customary international law does not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required state immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected ...

Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented,

Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the state is entitled to invoke the defence of sovereign immunity . . . While Italy acknowledges that in this area the law of state immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity--- namely a rule denying immunity with respect to every claim for compensation arising out [of] international crimes ...

With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a state which the United States government has “designated as a state sponsor of terrorism” ... The Court notes that this amendment has no counterpart in the legislation of other states. None of the

states which has enacted legislation on the subject of state immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

It is also noticeable that there is no limitation of state immunity by reference to the gravity of the violation or the peremptory character of the rule breached in ... the United Nations Convention ... The absence of any such provision ... is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration ... The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, states did not consider that customary international law limited immunity in the manner now suggested by Italy.

The European Court of Human Rights has not accepted the proposition that states are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law ...

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. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the state itself from the jurisdiction of the courts of other states; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the state is not in issue in the present case.

The Court then examined Italy's second argument: that states are not entitled to immunity for violations of peremptory norms (*jus cogens*). The Court discusses the meaning of peremptory norms and argues that sovereign immunity is not a "derogation" from a peremptory norm or from an obligation to make reparation for a legal violation. Additionally, the Court finds no state practice to support Italy's claim. The Court therefore rejects Italy's second argument.

The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943--1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one state

immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one state to accord immunity to another. In the opinion of the Court, however, 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 ... For the same reason, recognizing the immunity of a foreign state in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation ...

In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943–1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of state immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing state to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of state immunity concerns only the latter; a decision that a foreign state is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of states as a whole as one from which no derogation is permitted.

To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application ...

In addition, this argument about the effect of *jus cogens* displacing the law of state immunity has been rejected by the national courts ... The judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on state immunity ... has limited immunity in cases where violations of *jus cogens* are alleged.

Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on state immunity was not affected.

Finally, the Court examined Italy's third argument: that states are not entitled to immunity when victims cannot secure compensation using other means. However, the Court argues that no state practice supports Italy's third argument. The Court therefore rejects it.

The third and final strand of the Italian argument is 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. Germany's response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-state arrangements under which, reflecting the economic realities of the time, no Allied state received compensation for the full extent of the losses which its people had suffered ...

The Court notes that Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by

Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour ... The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities ...

The Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the state practice from which customary international law is derived that international law makes the entitlement of a state to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in ... the United Nations Convention ...

The Court therefore rejects Italy's argument that Germany could be refused immunity on this basis.

The Court notes that the Italian governments can continued negotiations with Germany to seek remedies for Italian nationals. However, the Court concludes that Germany is immune from the jurisdiction of Italian domestic courts.

In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims [in the domestic lawsuits against Germany] could be the subject of further negotiation involving the two states concerned, with a view to resolving the issue ...

The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations [that Italy owed] to Germany ...

The Court then noted that several Greek nationals—who had sued Germany in Greek domestic courts—were attempting to enforce a Greek judgment by seizing Villa Vigoni. The Court finds that Villa Vigoni is not a property being used for commercial purposes. Therefore, the Court argues, the property is

immune from execution. That is, Italian courts may not allow Greek nations to seize the Villa Vigoni using Italian court procedures.

[In] 2007, certain Greek claimants [made] a legal charge against Villa Vigoni, a property of the German state located near Lake Como ... Germany argued before the Court that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law ... Before considering whether the claims of the Applicant on this point are well-founded, the Court observes that the immunity from enforcement enjoyed by states in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same states before foreign courts. Even if a judgment has been lawfully rendered against a foreign state, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the state against which judgment has been given can be the subject of measures of constraint on the territory of the forum state or on that of a third state, with a view to enforcing the judgment in question. Similarly, any waiver by a state of its jurisdictional immunity before a foreign court does not in itself mean that that state has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity ... are distinct, and must be applied separately ...

In support of its claim on the point under discussion here, Germany cited the rules set out in Article 19 of the United Nations Convention. That Convention has not entered into force, but in Germany's view it codified, in relation to the issue of immunity from enforcement, the existing rules under general international law. Its terms are therefore said to be binding, inasmuch as they reflect customary law on the matter ...

It suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign state: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the state which owns the property has expressly consented to the taking of a measure of constraint, or that that state has allocated the property in question for the satisfaction of a judicial claim ...

It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy ... Before the Court, Italy described the activities in question as a “centre of excellence for the Italian-German co-operation in the fields of research, culture and education”, and recognized that Italy was directly involved in “its peculiar bi-national ... managing structure”. Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.