

## Does International Law Shelter States from Accountability?

By Sharon Weill<sup>1</sup>

*Recent developments in national amnesty laws and questions of state immunity demonstrate yet again that state sovereignty is a major obstacle to accountability.*

Regrettably, States' power to protect themselves and to ensure impunity has continued to grow in recent years. This paper discusses two recent examples of this political trend: The far-reaching reaction to Judge Baltasar Garzón's legal decision not to apply the 1977 Spanish Amnesty Law to crimes against humanity committed during the Franco regime, and the recent International Court of Justice (ICJ) ruling on State immunity according to which a State is immune from jurisdiction before foreign national courts, even in cases involving civil responsibility for international crimes. It also briefly notes relevant legal developments in the European Court of Human Rights and the US Supreme Court.

### I. National Amnesty laws and the indictment of Judge Baltasar Garzón in Spain

Spain has held a reputation for combating impunity of international crimes since it issued the famous arrest warrant for Augusto Pinochet, the former army general and President of Chile, in 1998. Until very recently, Spain's national legislation on universal jurisdiction granted victims of international crimes direct access to Spanish courts, circumventing State prosecution authorities, and without requiring any connection between Spain and the case.<sup>2</sup> According to Article 146 of the Fourth Geneva Convention, universal jurisdiction does not require any such connection; it is justified solely by the gravity of the crimes, as Israel spelled out in the 1961 Eichmann case.

In universal jurisdiction cases, Spanish courts, including its Supreme Court, have consistently declared amnesties granted by foreign states invalid, as occurred in the cases of Pinochet and Miguel Angel Cavallo.<sup>3</sup> However, unlike foreign citizens, former officials' of the Spanish Franco regime have been shielded from investigation and prosecution by a 1977 Spanish Amnesty Law.

In an unprecedented ruling, Judge Garzón, who issued the original arrest warrant against Pinochet, decided on 16 October 2008 that the Spanish Amnesty Law does not apply to crimes against humanity committed by the Franco regime, since under international law such crimes cannot be shielded by amnesty laws.<sup>4</sup> Following a 2006

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<sup>2</sup> The law was modified one year ago to introduce the following restrictions, which demonstrates states' tendency to limit accountability: "Notwithstanding whatever may be provided in other treaties and international conventions ratified by Spain, the Spanish courts shall only have jurisdiction over the above crimes when it has been duly shown that the alleged responsible are present in Spain, or that the victims are of Spanish nationality, or that there is some demonstrated relevant link with Spain and that, in any event, there is no other competent country or international tribunal where proceedings have been initiated that constitute an effective investigation and prosecution, in the event, of the punishable facts."

<sup>3</sup> See paragraph 24 of the [application of Judge Garzón to the ECtHR](#). Miguel Angel Cavallo is an Argentine officer charged in Spain with genocide and torture committed during military rule in Argentina from 1976-1983. During Argentina's 'dirty war', it is estimated that 30,000 persons disappeared.

<sup>4</sup> Audiencia Nacional, *Juzgado Central de Instrucción No. 5*, Diligencias Previas Proc. Abreviado 399/2006 V (Judgment of 16 October 2008). Jurisdiction was assumed, *inter alia*, over crimes committed by Franco and his high command during the war and the post-war period in respect of 'crimes against the state,' which

petition by family members and associations representing victims of the Franco regime, Judge Garzón opened a criminal investigation into alleged crimes against humanity committed during the Spanish civil war and the Franco dictatorship between 1936 and 1951. In his ruling, he cited international jurisprudence, the Spanish Constitution, and judgments of the Spanish Supreme Court, which has ruled that international law shall provide the interpretation for the enforcement of crimes against humanity.

Judge Garzón's ruling attracted considerable controversy. The court's jurisdiction was denied on appeal. Then, following a criminal complaint filed by the right-wing political organisation 'Manos Limpias' in April 2010, Judge Garzón was indicted on charges of *prevaricación*, which allows Spanish judges to be prosecuted for unjust judgments.<sup>5</sup> Judge Garzón was suspended from his judicial functions, and has faced allegations that he abused his judicial authority. The criminal trial began in Spain on 24 January 2012. Judge Garzón has since brought a case before the European Court of Human Rights challenging the lawfulness of his criminal prosecution.<sup>6</sup>

Gabriela Knaul, the UN Special Rapporteur on the Independence of Judges and Lawyers, declared that:

"It is regrettable that Judge Garzón could be punished for opening an investigation which is in line with Spain's obligations to investigate human rights violations in accordance with international law principles... Supposed errors in judicial decisions should not be a reason for the removal of a judge and, even less, for a criminal proceeding to be launched... Autonomy in the interpretation of the law is a fundamental element in the role of a judge and for progress in human rights... No judge may fear to be independent in his or her functions."<sup>7</sup>

On 27 February 2012, Judge Garzon was acquitted. However, the Amnesty Law remains in effect for Spanish crimes committed by the Franco regime.<sup>8</sup> While Spain has provided legal jurisdiction for international crimes committed elsewhere, crimes that occurred in Spain remain immune from prosecution. Ironically, Franco's crimes can now only be prosecuted outside of Spain, under universal jurisdiction.

Victims of international crimes are entitled to a remedy; accountability is both a moral and legal necessity. All the valid reasons which convinced the international community to establish individual criminal responsibility for international crimes should apply even more strongly when governments commit crimes against humanity against their own citizens. Since Judge Garzón's 2008 ruling was a step forward in combating impunity, we must join together in condemning both the attacks against Garzón and the

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under Articles 23.2, 23.4 and 65.1 of the Ley Organica Judicial corresponds to the jurisdiction of the Audiencia Nacional, carried out in the context of and connected to crimes against humanity.

<sup>5</sup> The crime of *prevaricación* is defined in Article 446 of the Spanish Criminal Code: "The judge or magistrate who, knowingly, dictates an unjust sentence or resolution".

<sup>6</sup> The application was filed on 24 March 2011. It is available at [http://www.interights.org/userfiles/Garzon\\_ECHR\\_Application\\_final\\_full.pdf](http://www.interights.org/userfiles/Garzon_ECHR_Application_final_full.pdf)

<sup>7</sup> "Spain: UN experts express concern over implications of Judge Garzón case", UN OHCHR, [Press release, 8 February 2012](#).

<sup>8</sup> See press release of the [European Center of Constitutional and Human Rights, 27 February 2012](#), at [www.ecchr.de/index.php/garzon-case.html](http://www.ecchr.de/index.php/garzon-case.html)

Spanish Amnesty Law which continues to protect alleged perpetrators of crimes against humanity.

## II. State Immunity v. Accountability

- **The International Court of Justice decision in Germany v. Italy**

In the innovative 2004 *Ferrini* decision, the Italian Court of Cassation allowed Italian victims of Nazi crimes to claim reparations directly from Germany via Italian national courts, thereby abrogating Germany's State immunity. Italy's highest court held that Italian courts had jurisdiction to hear these claims since they constituted a violation of *jus cogens*, fundamental principles in international law. This overstepping of Germany's State immunity created a new exception to the rule of State immunity from civil lawsuits. According to the Italian Court of Cassation, the international community has made it clear that State officials can no longer invoke immunity to evade criminal prosecution for international crimes. To maintain legal coherence, the Court argued, immunity shall not apply to States that abrogate their civil responsibility, as there would be no reason to uphold the immunity of the State while denying the immunity of its officials.

Following this landmark ruling and subsequent lawsuits, Germany initiated proceedings before the International Court of Justice (ICJ) to revoke the Italian court's decision as a violation of customary international law. Neither country denied international crimes were committed; the issue was whether Germany was sheltered from Italian courts' jurisdiction by customary international law, or whether *jus cogens* violations create an exception to the general immunity.

By allowing reparations to be pursued in *Ferrini*, the Italian Court implicitly granted individuals a right of reparation. Indeed, Italy was explicit before the ICJ that it had abrogated Germany's immunity because of the specific issue at stake: ensuring reparations and access to justice for Italian WWII victims. Without rejecting the immunity, the victims would be denied justice.

Regrettably, although predictably – not a single state practice lent support to the Italian position<sup>9</sup> – the ICJ sided with Germany. On 3 February 2012, it ruled that States have *the right* to immunity from foreign courts, even if the case concerns allegations of international crimes.<sup>10</sup>

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<sup>9</sup> The Italian Court of Cassation mainly based itself on the Greek *Distomo* case (1997), yet that case was ultimately overruled. In the *Distomo* case, the Greek Supreme Court held in May 2000 that a Greek court could exercise jurisdiction over civil claims related to World War II crimes on the grounds that a country that committed war crimes must be deemed to have waived its sovereign immunity. Yet, the judgment could not be enforced in Greece because of the denial of consent of the Ministry of Justice to enforce this decision against German State property in Greece. Then, in a parallel case, the Greek Special Supreme Court, empowered to decide cases involving the interpretation of international law, ultimately ruled that the law had been wrongly interpreted. The case went on to Strasbourg on the grounds that the claimants were being deprived of a remedy, contrary to Article 6(1) of the Convention, where the European Court of Human Rights held, applying *Al-Adsani*, that international law does not allow an exception to State immunity for civil claims resulting from international crimes. The European Court did recognize the possibility that customary international law might develop in this direction in the future. *Kalegoropoulou v Greece and Germany*, European Court of Human Rights No. 50021/00 (12 December 2002), p. 10. Quite surprisingly, the legal saga did not end there. After *Ferrini*, on 2 May 2005, the Court of Appeal of Florence declared the Greek *Distomo* decision as being enforceable in Italy. This decision was confirmed by the Court of Cassation in May 2008.

<sup>10</sup> ICJ, Immunities of the State (Germany v. Italy: Greece intervening) - Judgment of 3 February 2012.

Thus, international law maintains a strict division between individual and state immunity and between civil and criminal responsibility. Former officials can be charged by foreign national courts in criminal cases and will not enjoy immunity in cases of international crimes, as ruled in the UK Pinochet case<sup>11</sup>, yet the State cannot be held responsible in civil cases before the courts of third-party states. Naturally, from the victims' perspective these are fictional divisions that serve only the interests of the responsible state.

- **European Court of Human Rights (ECtHR)**

A claim similar to *Ferrini* was submitted in the UK. The victim sought reparations from Saudi Arabia having allegedly been subjected to torture there. In 2006, the House of Lords rejected the case on the grounds of State immunity, directly rejecting *Ferrini*.<sup>12</sup> The case is now pending before the ECtHR, although the ICJ ruling has diminished the likelihood of success.<sup>13</sup>

- **The United States – The *Samantar* case**

In the US, the Alien Tort Statute provides national legislation allowing victims to seek remedy for international crimes through universal jurisdiction. The victims in the *Samantar* case referenced that statute in seeking redress for torture and extrajudicial killings from the former Somali Prime Minister, who they argued possessed command responsibility and control over the military forces committing the abuses in the 1980s. The US Supreme Court was asked to determine whether the Foreign Sovereign Immunities Act extends to an individual acting in his official capacity on behalf of a foreign state or solely to the State itself.<sup>14</sup> Interestingly, the Zionist Organization of America and the Kingdom of Saudi Arabia both submitted briefs to the Supreme Court supporting the Somali dictator, despite the groups having no link to Somalia or to the case, aside from their narrow self-interest in upholding State immunity.

Saudi Arabia argued in its brief that:

“Saudi Arabia has been and is a pivotal ally of the United States ... In light of the possibility that litigation in US courts will be used as a means to harass or embarrass Saudi Arabia and its officials in other matters (even as the political branches of the United States work toward even stronger diplomatic and economic ties with Saudi Arabia), Saudi Arabia retains a strong interest in the issues of sovereign immunity raised here.<sup>15</sup>

The brief of the Zionist Organization of America stated that:

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<sup>11</sup> Regina v. Bow Street Metropolitan Stipendiary Magistrate et al, Ex parte Pinochet Ugarte (No. 3) ([2000] 1 AC 147 (UK House of Lords); *ILR*, Vol. 119, p. 136).

<sup>12</sup> *Jones v. Saudi Arabia*, UK House of Lords (2006), para. 22. The House stated, regarding *Ferrini*, that ‘one swallow does not make a rule of international law’.

<sup>13</sup> European Court of Human Rights, *Jones v UK and Mitchell & Ors v UK*, Application Numbers: 34356/06 and 40528/06 (pending).

<sup>14</sup> *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010)

<sup>15</sup> [Brief of the Kingdom of Saudi Arabia as Amicus Curiae in Support of Petitioner \(7 December 2009\)](http://www.scotusblog.com/wp-content/uploads/2009/12/Yousuf-Amicus-Saudi-Arabia.pdf), pp. 2-3 <<http://www.scotusblog.com/wp-content/uploads/2009/12/Yousuf-Amicus-Saudi-Arabia.pdf>>.

“The decision of the Fourth Circuit that permits civil lawsuits to be brought against current and former government officials notwithstanding the immunity that their governments have under the Foreign Sovereign Immunities Act will, if not reversed by this Court, encourage the institution of many unfounded lawsuits in United States courts against present and former government officials of the State of Israel.”<sup>16</sup>

The Obama Administration argued that, despite “having a strong interest in promoting human rights,”<sup>17</sup> it believes that issues of immunity are within the purview of the executive, and not the judicial branch; the Supreme Court agreed in its decision of 2010. While the 1976 Foreign Sovereign Immunities Act was ruled inapplicable to current or former officials of foreign nations, common law immunity, the scope of which is defined by the State, could be asserted.

***States must represent the interests of the people. As an active civil society, it is our responsibility to continuously demand accountability, until the people's voice prevails over the regime's self-interest, so that States change their rigid positions on immunity and that international law reflects this change.***

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<sup>16</sup> Brief of the Zionist Organization of America, The American Association of Jewish Lawyers and Jurists, Agudath Israel of America, and the Union of Orthodox Jewish Congregations of America in Support of Petitioner (7 December 2009), p. 2. <<http://www.scotusblog.com/wp-content/uploads/2009/12/Yousuf-Amicus-Zionist-Organization.pdf>>.

<sup>17</sup> Brief for the United States as *Amicus Curiae* supporting affirmance at <[http://www.scotusblog.com/wp-content/uploads/2010/01/08-1555\\_us-amicus-supporting-affirmance.pdf](http://www.scotusblog.com/wp-content/uploads/2010/01/08-1555_us-amicus-supporting-affirmance.pdf)>.