



American Model United Nations  
**ICJ Justice**

A CONCURRING OPINION was written and signed by Justice Kroll

I am in concurrence with the finding of jurisdiction handed down by the Court in the majority opinion. However, I would like to include additional interpretations pertaining to the use of *jus cogens* and *erga homines* in this case.

It is evident that the *Distomo Massacre Case (Distomo)* and *Ferrini v. Federal Republic of Germany (Ferrini)* are examples of cases in which a preemptory norm, or *jus cogens*, was violated. Under international law, most cases pertaining to the violation of *jus cogens* result in the determination that they may be tried under any court under the principle of *erga homines*. However, as the Court has previously decided, civil cases are not instances in which *erga homines* automatically applies. Despite this, even if *erga homines* did automatically apply to civil cases, it remains to be seen whether the instances in the case before the Court can be reasonably considered violations of *jus cogens*.

For *jus cogens* to be violated three criteria must be realized. An aggressor party must have committed an action which violates *jus cogens* against a victim party. For a *jus cogens* violation to be tried in a court of law, either domestic or international, the aggressor party must still exist, the action must have unequivocally happened, and the victim party must also exist. This means that courts only have temporal jurisdiction over *jus cogens* violations cases. If an aggressor party no longer exists, it cannot be tried against. Similarly, if a victim party does not exist, it cannot possibly try a *jus cogens* violation.

Cases against individuals by individuals can closely follow this rule without any interpretation difficulties of the requirement for three criteria. An individual party, either aggressor or victim, does or does not exist. Cases involving states in any way come with some difficulty. Inherently, states can change dramatically over time. In most instances in the present world, the state is an agency relationship between citizens, the principals of the agency, and the state itself, the agent. Whenever a state is tried in a court of law and ordered to follow the directions of courts, the principals of the agency of the state are, through an extension of the agency relationship, ordered to follow the direction of the courts. Therefore, while the state is an individual party, it most closely resembles a social union of individuals, and as the individual principals of the agency of the state are exchanged over time through death, birth, or citizenship shifts, the agent of such principals, the state, also changes.

If a state changes to no longer represent at least a majority of the principals it had when it violated *jus cogens*, or was a victim of a *jus cogens* violation, it cannot be recognized as either the aggressor party or victim party to a *jus cogens* violation action, respectively. However, not all states change with equal frequency or intensity. Some states can maintain an agency based on a majority of principals at a certain point in time longer than

other states can. Because of the above arguments, temporal jurisdiction cannot be determined using a time schedule. It must be up to the discretion of courts to determine how much a state's agency relationship has changed, with respect to its principals.

In the case before the Court today, Germany is a significantly different state than it was over sixty years ago. Thus, even though the state named by the word 'Germany' in World War II committed crimes against Italian and Greek nationals, that particular state embodying particular principals no longer exists. Therefore, a *jus cogens* violation against Germany cannot be tried in a court of law. Because of this, *erga homines* cannot possibly be used to assert Italy's jurisdiction to decide the *Distomo* and *Ferrini* cases and others similar to them.

Justice Kroll

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A CONCURRING AND DISSENTING OPINION was written and agreed to by Justice Berman and Justice Hathaway.

We concur with the majority decision regarding ICJ jurisdiction, as well as the opinion regarding the German property seized by the Italian Government. Our dissent stems from the jurisdiction of the Italian Courts to entertain the cases against the Federal Republic of Germany.

We emphasize the difference between trying a state and an individual. In this case, the Federal Republic of Germany is on trial, and as such the interpretation of Princeton Principle 1 (1) must be interpreted differently. As a state party the Federal Republic of Germany cannot be punished the same way as an individual in a criminal case, the criminal punishment of a state must be made through civil jurisdiction. As such we interpret the term "criminal jurisdiction" as stated in the Princeton Principle 1 (1) as including civil cases brought against states.

Because of these *jus cogens*, or preemptory norms, are applicable in this case, thus giving the Republic of Italy universal jurisdiction to try these cases. We assert that customary international law determines that universal jurisdiction supersedes sovereign immunity.

The Princeton Principles establish that universal jurisdiction is "based solely on the nature of the crime, without regard to where the crime was committed...the nationality of the victim, or any other connection to the state exercising such jurisdiction." Thus we believe the Italian Courts have jurisdiction over the claims brought forth by both the Greek and Italian claimants.

Thus, we believe the Court should have found in favor of the Republic of Italy, and the act of bringing these cases to domestic Italian Courts does not violate the jurisdictional immunities of the state of Germany.

*Justice Berman*

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*Justice Hathaway*

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