Non corrigé
Uncorrected

CR 2011/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2011

Public sitting

held on Monday 12 September 2011, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning* Jurisdictional Immunities of the State (Germany *v.* Italy: Greece intervening)**

VERBATIM RECORD

ANNÉE 2011

Audience publique

tenue le lundi 12 septembre 2011, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire relative aux* Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))**

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
	Judge *ad hoc*	Gaja
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
M. Gaja, juge *ad hoc*

M. Couvreur, greffier

The Government of the Federal Republic of Germany is represented by:

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor emeritus of Public International Law at the Humboldt University of Berlin,

as Agents;

Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,

Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,

as Counsel and Advocates;

Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,

Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division, Federal Foreign Office,

Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Mr. Gregor Schotten, Federal Foreign Office,

Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Donate Arz von Straussenburg, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

as Advisers;

Ms Fiona Kaltenborn,

as Assistant.

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

S. Exc. Mme Susanne Wasum-Rainer, ambassadeur, directeur général des affaires juridiques et conseiller juridique du ministère fédéral des affaires étrangères,

S. Exc. M. Heinz-Peter Behr, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas,

M. Christian Tomuschat, ancien membre et président de la Commission du droit international, professeur émérite de droit international public à l'Université Humboldt de Berlin,

comme agents ;

M. Andrea Gattini, professeur de droit international public à l'Université de Padoue,

M. Robert Kolb, professeur de droit international public à l'Université de Genève,

comme conseils et avocats ;

M. Guido Hildner, chef de la division du droit international public au ministère fédéral des affaires étrangères,

M. Götz Schmidt-Bremme, chef de la division du droit international en matière civile, commerciale et fiscale au ministère fédéral des affaires étrangères,

M. Felix Neumann, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

M. Gregor Schotten, ministère fédéral des affaires étrangères,

M. Klaus Keller, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

Mme Susanne Achilles, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

Mme Donate Arz von Straussenburg, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

comme conseillers ;

Mme Fiona Kaltenborn,

comme assistante.

The Government of the Italian Republic is represented by:

H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,

as Agent;

Mr. Giacomo Aiello, State Advocate,

H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Luigi Condorelli, Professor of International Law, University of Florence,

Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and University of Paris II (Panthéon-Assas),

Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,

Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser, Permanent Mission of Italy to the United Nations,

as Counsel and Advocates;

Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs, Ministry of Foreign Affairs,

Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and Western Europe, Directorate-General for the European Union, Ministry of Foreign Affairs,

Mr. Roberto Bellelli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,

Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,

Mr. Mel Marquis, Professor of Law, European University Institute, Florence,

Ms Francesca De Vittor, International Law Researcher, University of Macerata,

as Advisers.

Le Gouvernement de la République italienne est représenté par :

S. Exc. M. Paolo Pucci di Benisichi, ambassadeur et conseiller d'Etat,

comme agent ;

M. Giacomo Aiello, avocat de l'Etat,

S. Exc. M. Franco Giordano, ambassadeur de la République italienne auprès du Royaume des Pays-Bas,

comme coagents ;

M. Luigi Condorelli, professeur de droit international à l'Université de Florence,

M. Pierre-Marie Dupuy, professeur de droit international à l'Institut universitaire de hautes études internationales et du développement de Genève et à l'Université de Paris II (Panthéon-Assas),

M. Paolo Palchetti, professeur associé de droit international à l'Université de Macerata,

M. Salvatore Zappalà, professeur de droit international à l'Université de Catane, conseiller juridique à la mission permanente de l'Italie auprès de l'Organisation des Nations Unies,

comme conseils et avocats ;

M. Giorgio Marrapodi, ministre plénipotentiaire, chef du département juridique du ministère des affaires étrangères,

M. Guido Cerboni, ministre plénipotentiaire, coordinateur pour les pays d'Europe centrale et occidentale à la direction générale de l'Union européenne au ministère des affaires étrangères,

M. Roberto Bellelli, conseiller juridique à l'ambassade d'Italie au Royaume des Pays-Bas,

Mme Sarah Negro, premier secrétaire à l'ambassade d'Italie au Royaume des Pays-Bas,

M. Mel Marquis, professeur de droit à l'Institut universitaire européen de Florence,

Mme Francesca De Vittor, chercheur en droit international à l'Université de Macerata,

comme conseillers.

The Government of the Hellenic Republic is represented by:

Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion University of Athens,

as Agent;

H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the Netherlands,

as Deputy-Agent;

Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University of Athens,

as Counsel and Advocate;

Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,

as Counsel.

Le Gouvernement de la République hellénique est représenté par :

M. Stelios Perrakis, professeur des institutions internationales et européennes à l'Université Panteion d'Athènes,

comme agent ;

S. Exc. M. Ioannis Economides, ambassadeur de la République hellénique auprès du Royaume des Pays-Bas,

comme agent adjoint ;

M. Antonis Bredimas, professeur de droit international à l'Université nationale et capodistrienne d'Athènes,

comme conseil et avocat ;

Mme Maria-Daniella Marouda, maître de conférences en droit international à l'Université Panteion d'Athènes,

comme conseil.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today for the start of one week's hearings in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*.

I recall that, since the Court included upon the Bench no judge of Italian nationality, Italy exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Giorgio Gaja.

Article 20 of the Statute provides: "Every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously." Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Although Mr. Gaja has already served as a judge *ad hoc* and made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court provides that he must make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of Mr. Gaja before inviting him to make his solemn declaration.

Mr. Giorgio Gaja, of Italian nationality, is Professor at the Faculty of Law of the University of Florence and a former Dean of that Faculty. He has held numerous other teaching posts around the world including at the European University Institute and the University of Paris I, and has also lectured at The Hague Academy of International Law. Mr. Gaja has been a Member of the International Law Commission since 1999 and is a member of the Institut de droit international. He was counsel to the Italian Government before the Court in the *Elettronica Sicula S.p.A. (ELSI)* case and has sat as judge *ad hoc* in a number of other cases, namely, the case concerning *Legality of Use of Force* involving Serbia and Montenegro and Italy, the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*, the case concerning *Territorial and Maritime Dispute* between Nicaragua and Colombia and the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (preliminary objections phase) between Georgia and the Russian Federation.

I shall now invite Mr. Gaja to make the solemn declaration prescribed by the Statute and I request all those present to rise. Mr. Gaja.

M. GAJA: «Je déclare solennellement que j'exercerai tous mes devoirs et attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you, Judge Gaja. Please be seated. I take note of the solemn declaration made by Mr. Giorgio Gaja and declare him duly installed as judge *ad hoc* in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*.

*

I shall now recall the principal steps of the procedure so far followed in this case.

On 23 December 2008, Federal Republic of Germany filed in the Registry of the Court an Application instituting proceedings against the Italian Republic in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law".

As a basis for the jurisdiction of the Court, Germany, in its Application, invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich".

By an Order of 6 July 2010, the Court decided that the counter-claim presented by Italy was inadmissible as such, under Article 80, paragraph 1, of the Rules of Court. By the same Order, the Court authorized Germany to submit a Reply and Italy to submit a Rejoinder, and fixed 14 October 2010 and 14 January 2011 respectively as the time-limits for the filing of those pleadings; those pleadings were duly filed within the time-limits so prescribed.

On 13 January 2011, Greece filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In its Application, Greece stated, in particular, that

"its intention [was] to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic-Greek) Tribunals and Courts on occurrences during World War II and enforced . . . by the Italian Courts". In its Application, Greece further indicated that it "[did] not seek to become a party to the case".

By an Order of 4 July 2011 the Court, considering that Greece had sufficiently established that "it has an interest of a legal nature which may be affected by the judgment that the Court will hand down in the main proceedings", authorized it to intervene in the case as a non-party. The Court further fixed the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court, namely, 5 August 2011 for the written statement of Greece and 5 September 2011 for the written observations of Germany and Italy on that statement.

The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated 1 September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved "its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings".

*

Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. After consulting the Parties and Greece, the Court has decided to do the same with the written statement of the intervening State and the written observations of Germany on that statement. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website from today.

*

I note the presence at the hearing of the Agents, counsel and advocates of the two Parties and of Greece. In accordance with the arrangements on the organization of the procedure which have been declared by the Court, the hearings will comprise a first and a second round of oral argument by the Parties and a single round of oral observations by Greece with respect to the subject-matter of its intervention. Germany will present its first round of oral argument this morning and Italy will do so tomorrow morning, with each Party having a maximum speaking time of three hours. Greece will take the floor after the first round of oral argument by the Parties, on Wednesday 14 September, between 10 a.m. and 12 noon, to give its oral observations on the subject-matter of its intervention. The Parties will then present their second round of oral argument, with Germany addressing the Court on Thursday 15 September, between 10 a.m. and 12.30 p.m., and Italy on Friday 16 September, between 2.30 p.m. and 5 p.m. Let me recall that the Parties have been given additional time for their second round of oral argument in order to present their observations with respect to the subject-matter of the intervention.

*

Germany, which will be heard first, may, if so required, in this first sitting of the first round of oral argument, avail itself of a short extension of time beyond 1 p.m., in view of the time taken up by my introductory words. I now give the floor to Her Excellency Ms Susanne Wasum-Rainer to take the floor.

Ms WASUM-RAINER:

1. Mr. President, distinguished Members of the Court, as Legal Adviser of the German Federal Foreign Office it is a great honour to appear before you in these oral proceedings concerning the case on *Jurisdictional Immunities of the State*, submitted to you by my country.

We are here to obtain a ruling of this Court on legal issues of great significance, not only for the immediate parties to this dispute, but for the international legal order as a whole and its future development.

We request a ruling on the principle of State immunity, a pillar of present-day substantive international law.

This pillar derives from the principle of sovereign equality of States, as enshrined in Article 2, paragraph 1, of the Charter of the United Nations, a principle that has for centuries been deeply rooted in customary international law.

Central to the principle of State immunity is that of jurisdictional immunity which, of course, debars private parties from bringing suits before the courts of a forum State against another State for its acts *iure imperii*.

2. Germany's sovereign right of jurisdictional immunity has been infringed by a series of judgments by Italian courts.

These judgments were rendered in proceedings that had been instituted against Germany by individuals who had suffered injury as a consequence of World War II.

Contrary to international law, these claims were not dismissed by the Italian national courts on the ground of lack of jurisdiction in respect of *acta iure imperii* performed by the German armed forces and other Third Reich authorities.

The Italian Court of Cassation *(Corte di Cassazione)*, expressly acknowledging its wish to *develop the law* and to base its decision on a *rule* "in formation", failed to act in compliance with *existing* international law. It insisted that Germany had forfeited its immunity by applying its new doctrine to occurrences dating back more than 60 years.

The Italian Government attempted to persuade the *Corte di Cassazione* that it should abandon its erroneous course, but could not reverse that strain of jurisprudence.

3. Thus, both our Governments, Italian and German, are of the view that only an authoritative finding of this Court will lead out of the impasse and "will help to clarify this complex issue", as it was put by our two Foreign Ministers in their Joint Declaration of 18 November 2008.

As fellow founding members of the European Union, Germany and Italy co-operate closely on many European and international issues. Our bilateral relationship is excellent and well established. Germany and Italy are united in their commitment to the ideals of reconciliation, solidarity and integration.

4. It is in this spirit of co-operation that we have examined the horrific incidents that occurred during World War II. Our two Foreign Ministries, for example, have established an

Independent German-Italian Commission of Historians which is to deal openly and in detail with the German-Italian war past and the fate of Italian military internees, as "a contribution to creating a common culture of remembrance". This Commission began its work in March 2009.

Mr. President, allow me to repeat the words of our Foreign Ministers in their Joint Declaration, words which deserve to be underlined at the beginning of our present hearing:

> "[T]ogether with Italy, Germany fully acknowledges the untold suffering inflicted on Italian men and women in particular during massacres and on Italian military internees, and keeps alive the memory of these terrible events."

5. The democratic Germany which emerged after the end of the Nazi dictatorship has consistently expressed its deepest regret over the egregious violations of international humanitarian law perpetrated by German forces and fully acknowledges the suffering inflicted on the Italian people during the period from September 1943 until the liberation of Italy in May 1945.

In this context, the German Government has, in co-operation with the Italian Government, made a number of gestures to reach out to the victims and their families.

In particular, Germany concluded the two agreements of 2 June 1961 under which considerable payments were made to Italy, notwithstanding Italy's explicit waiver of all claims against Germany in the Peace Treaty with the victorious Allied Powers in 1947.

The political gestures include the joint visit of the Foreign Ministers Steinmeier and Frattini to the memorial site of the former concentration camp at "La Risiera di San Sabba" near Trieste in November 2008, where the German-Italian Commission of Historians was founded.

Recently, in October 2010, the members of the Historians Commission visited the forced labour camp at Niederschöneweide — close to Berlin — where a large number of Italian military internees were held.

This visit was co-ordinated by the German Federal Foreign Office and the Italian Embassy in Berlin.

A. The facts

6. Mr. President, distinguished Members of the Court, please allow me to recall the facts of the case before you in order to prepare the ground for the detailed legal argument.

The case started in 2004 with the famous *Ferrini* decision of the Italian Court of Cassation. Here, the *Corte di Cassazione* held that Italian courts had jurisdiction to hear a claim directed against Germany for *acta iure imperii*.

The plaintiff was an Italian citizen who had been deported to Germany during the Second World War to perform forced labour. Germany had invoked the principle of State immunity before the Italian courts, but the argument was not heeded.

At that time, in 2004, it was not yet clear if this would remain an isolated case or herald a new trend.

In the aftermath of the ruling, however, many other cases were filed by Italian citizens who suffered the same plight of forced labour in Germany.

7. Four years later, in 2008, several decisions by the Italian Court of Cassation *(Corte di Cassazione)* confirmed the approach taken in the *Ferrini* case, ruling that the Italian courts had jurisdiction to hear cases against Germany for her acts *jure imperii*. The facts of these cases were similar to those of *Ferrini*.

In short, in its Orders of 29 May 2008 in the *Maietta* and the *Mantelli* cases, the *Corte di Cassazione* held that immunity of foreign States for acts *jure imperii* could be deemed to have been abrogated with respect to acts which qualify as crimes against humanity.

8. Such cases brought by Italians who were deported to Germany and subsequently subjected to forced labour are only one subset of proceedings brought against Germany.

Another set of cases pertains to massacres committed by the German *Wehrmacht*, the armed forces, in Italy. One case in point is the *Milde* case, in which the *Corte di Cassazione* in a judgment of 21 October 2008 again decided that Germany was not entitled to invoke immunity.

9. A third subset of cases concerns attempts undertaken in Italy to enforce a decision by a Greek court.

In 1995, the relatives of the victims of a massacre perpetrated by the German armed forces in Distomo, Greece, filed a claim for compensation against Germany.

In 1997, a regional court in Livadia held Germany liable, despite the principle of State immunity, and, on 4 May 2000, the Greek *Areios Pagos* (Hellenic Supreme Court) confirmed this decision.

Upon the refusal of the Minister of Justice of Greece to authorize enforcement action in Greece against German property, the claimants sought other avenues to obtain satisfaction.

After *Ferrini*, in 2004, Italy seemed to be a promising option. Indeed, the Court of Appeal of Florence declared the *Distomo* decision enforceable in Italy on 2 May 2005.

This is where we stand today.

I should like to add that these proceedings and their outcome have not remained unnoticed. Far from it. Many more cases have been filed before Italian courts and are still pending. The total of cases currently reached is about 80 court cases pending, with almost 500 plaintiffs.

B. Consequences of the jurisprudence of the *Corte di Cassazione*

10. The jurisprudence of the Italian *Corte di Cassazione* and its retrospective denial of sovereign immunity — if allowed to stand — would have far-reaching consequences.

Once an exception to the principle of State immunity is allowed, it will not be possible to limit such exceptions to breaches of international humanitarian law. It will just be a matter of time until *other* areas of *jure imperii*-behaviour are judged by domestic courts.

But the basis for State immunity is not to be found in the character of the legal norm which was allegedly violated, but in the character of the act as a State act which can, by its very nature, not be subject to the jurisdiction of another State.

Therefore, once State immunity has been perforated there is no reason not to extend the exceptions to a range of other areas.

The consequences would be severe:

Firstly, the whole system set up after the Second World War to address injuries caused by the war, which was the basis for comprehensive payments and reparations, would be put in question and opened to challenge before the domestic courts.

This would of course not only affect acts of German officials, but also acts of all other participants of the war, Germany's allies — like Italy — and opponents alike.

Secondly, all inter-State peace settlements concluded after an armed conflict would be put into jeopardy by allowing the domestic courts to re-examine and to reopen them. This would apply

not only to peace settlements following past conflicts. Efforts to reach peace settlements in the future would also be affected as their validity and reliability would be more than questionable.

Thirdly, the international legal order would be seriously weakened.

If domestic courts were able to pronounce judgment on foreign States, this could result in divergent, if not contradictory decisions. Plaintiffs would shop around for the most favourable national courts.

As a matter of fact, the case before you illustrates how realistic the scenario of forum shopping already is. The jurisprudence of the Italian *Corte di Cassazione* has attracted Greek claimants who were unsuccessful in Greece because of State immunity — and the *Corte di Cassazione* ordered execution on German State property in their favour even though the case had no connection with Italy.

As a result of such undermining of the principle of State immunity, legal proceedings before the courts would *not settle disputes* but would instead *create new disputes* and legal disorder.

If the national courts of all States were free to sit in judgment on the acts of foreign States, international law would be atomized and, of course, politicized. It would lose its character as an impartial balancing of interests and, thus, its authority.

11. Mr. President, this is the crux of this case. What this case is *not* about, is the Second World War, violations of international humanitarian law committed during the war and the question of reparations. You have confirmed this with your Order of 6 July last year rejecting the Italian counter-claim as inadmissible.

12. Mr. President, most horrendous crimes were committed by Germans during World War II.

Germany is fully aware of her responsibility in this regard.

Those crimes were unique, as were the instruments and mechanisms for compensation and reparation — financially, politically and otherwise — set up and implemented by Germany since the end of the war.

We cannot undo history. If victims or descendants of victims feel that these mechanisms were not sufficient, we do regret this.

However, the mechanisms for compensation and reparation are not the subject of the present dispute.

C. The German team

13. Mr. President, distinguished Members of the Court, our legal arguments will be presented in detail by my academic colleagues.

With your permission, Mr. President, I would like to introduce them:

— Professor Christian Tomuschat, former member and Chairman of the International Law Commission, Professor emeritus of Humboldt University Berlin;

— Professor Andrea Gattini from the University of Padua; and, next,

— Professor Robert Kolb from the University of Geneva.

D. Line of argument

14. Let me now indicate how we will structure our presentation.

Firstly, Professor Tomuschat will analyse the shortcomings of the *Ferrini* decision of the *Corte di Cassazione* in 2004. He will underscore that the *Corte di Cassazione* overstepped its judicial role by trying to rewrite and to develop international law.

He will also prove that State immunity for acts *jure imperii* does not yield any exception.

15. Thereafter, Professor Gattini will dwell upon the *tort exception in the law of State immunity* as the Italian argument tries to rely on this exception to justify the Court's "innovative" approach.

Professor Gattini will demonstrate that this tort exception does not apply to the conduct of armed forces in the course of an armed conflict and, therefore, is of no avail here.

He will then turn to a second line of argument, brought forward by our distinguished Italian colleagues in their written submissions, which could be called the "necessity argument". Professor Gattini will show that this argument, according to which the Italian courts *had to* act in this way out of necessity, is erroneous.

16. Next, Professor Kolb will address two further aspects of our case:

He will first examine the character of *jus cogens*, a concept upon which Italy relies heavily and will demonstrate that the Italian use of *jus cogens* for its line of argument is misleading.

He will then set out the consequences of the judgment of the Italian *Corte di Cassazione*. As I mentioned earlier, your ruling in this case is liable to have repercussions far beyond Germany and Italy. Professor Kolb will highlight the impact it could have in various fields, ranging from the destabilization of peace agreements to giving incentives for forum shopping.

17. Finally, I will conclude Germany's pleadings with a very brief summary of the most important aspects of our argument.

Mr. President, I respectfully ask you to give the floor to my distinguished colleague, Professor Christian Tomuschat.

The PRESIDENT: I thank Ambassador Ms Susanne Wasum-Rainer for her statement. I now call to the floor Professor Dr. Christian Tomuschat.

Mr. TOMUSCHAT:

A. Introduction

1. Mr. President, distinguished Members of the Court, Germany appears today before you in a dispute that can only be resolved by a pronouncement of the world's highest judicial body. The background of this case is well known to you. Its main features were reiterated a few moments ago by Dr. Wasum-Rainer. Obviously, a negotiated settlement might have been preferable. But the Italian Government has been unable to issue a call for order to its courts, in particular the *Corte di Cassazione*. Under the rule of law, courts are independent and cannot be made to obey orders imparted to them by the executive branch of government. They are subject only to the law. In practice, this means that they follow the law as they perceive and interpret it. In Italy, the general rules of international law pertain also to the body of law which is domestically applicable. Article 10 (1) of the Constitution provides explicitly that "the Italian legal system conforms to the generally recognized principles of international law". Thus, in principle decisions of Italian courts should never have given rise to complaints that the sovereign rights of another State were encroached upon. Unfortunately, this has been and still is the case, however, to the detriment of Germany.

B. The defects of the *Ferrini* jurisprudence of the Italian *Corte di Cassazione*

I. Assumption of a political role as legislator

2. In the famous *Ferrini* case[1] referred to a moment ago, the *Corte di Cassazione* departed deliberately from well-established rules of customary international law by denying Germany jurisdictional immunity although acts *jure imperii* were in issue. Already in that first judgment, it acknowledged openly that it was intent on creating a new rule, feeling that the traditional rule was inopportune as being inconsistent with basic values of the international community[2]. In fact, the *Corte di Cassazione* was not able to indicate a single judicial decision supporting its stance, apart from the earlier judgment of the Greek *Areios Pagos* in the *Distomo* case[3], overruled two years later by Greece's Constitutional Court in the *Margellos* case[4], and a number of United States judgments based on the Antiterrorism and Effective Death Penalty Act of 1996, which is not of any relevance in the present context. In fact, in a series of later decisions the *Corte di Cassazione* manifested even more openly that it saw its judicial mandate as including the task of basically reforming the régime of jurisdictional immunity in light of requirements of justice and good order in international relations. It did not hide this intention but said with missionary zeal that it: "is aware that it is contributing to the emergence of a formative rule concerning the immunity of a foreign State"[5], which it saw already "implicit in the system of international law". In other words, the *Corte di Cassazione* wished to bring about change, unilaterally, without taking due note of the facts of international practice and jurisprudence where similar lines of reasoning had nowhere found acceptance.

3. First of all, it is a truism to state that domestic judges are not called upon to amend and change international law. Their true mandate is to apply the law conscientiously and objectively. Private, subjective preferences and wishes should not determine the substance of a decision which the judge is entrusted with giving. It is certainly true that international law is not a static body of law. Many times, domestic courts have paved the way for the development of rules of international

---

[1] Judgment of 11 March 2004, *ILR* 128, p. 658.

[2] *Ibid*., p. 665, para. 7.

[3] Judgment of 4 May 2000, *ILR* 129, p. 513.

[4] Judgment of 17 September 2002, *ILR* 129, p. 526.

[5] Order of 29 May 2008; Memorial of Germany, Ann. 13, p. 7.

law, in particular in the field of State immunity. But as a rule they have given expression to broad trends and tendencies and currents emerging from the relevant actors in international relations. Thus, in the United Kingdom the *Trendtex* judgment[6], where for the first time, under the authority of Lord Denning, a suit against a foreign governmental agency was declared admissible, came about at the end of a long chain of precedential developments characterized by broad political support. Judges cannot be front-runners, they have no mandate to act as legislative bodies with a view to promoting political goals. International law derives its authority from consensus in the international community. Rightly, Article 38 of the Statute of the Court provides that customary rules are based on "a general practice accepted as law". International law would fall into an anarchic state of disorder if any person handling issues of international law could lightly claim that a given rule should be discarded because it did not fit into a system whose paramount values are peace and justice. It is indeed practice which moves forward under the impact of these key concepts which provide guidelines for all actions and activities in international relations. However, some consolidation is necessary. By contrast, the *Corte di Cassazione* went ahead with a bolt of lightning, sending out a cry to all other nations that its views should be followed and supported. Nothing of that kind has happened. More than seven years after its revolutionary *Ferrini* judgment — we abstain from calling it "ground-breaking"— the *Corte di Cassazione* still stands in isolation — or, put more drastically, in splendid isolation.

4. It is the great advantage of case law that the judges concentrate on the individual case pending before them. They try their best to do justice to the litigant parties. The specificities of the case at hand are meticulously examined. As it appears, this was also the general approach of the judges of Italy's highest court in civil matters in *Ferrini* and later similar proceedings. They took note of the suffering of the claimant, which is uncontested, but not bothering to inquire into the reasons underlying the rule of State immunity which they considered to be a pure technicality, and disregarding the systemic consequences of their jurisprudence.

---

[6]Court of Appeal, *ILR* 64, p. 111; *ILM* 16, 1977, p. 471.

II. No automatic link between substantive and procedural law

5. First, not a single word was spent on whether it corresponds to consistent logic to infer from the gravity of a breach of international law, a breach of substantive law, that domestic judges should be entitled to adjudicate private claims for reparation. Primary rules of conduct and the relevant rules of secondary law governing the procedural consequences must be carefully distinguished. This Court has consistently held that arguments derived from an alleged breach of obligations *erga omnes* or rules of *jus cogens* do not alter the principle of consent which is fundamental for peaceful settlement of international disputes. Referring to its judgment in the *East Timor* case, it held again in its decision in *Armed Activities on the Territory of the Congo (New Application: 2002)* that "the fact that a dispute relates to compliance with a norm having such a character . . . cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute" (*Judgment, I.C.J. Reports 2006*, p. 32, para. 64; see also, p. 35, para. 78; p. 52, para. 125).

6. This is a fundamental proposition of the international law of the current epoch, which is generally heeded today. Thus, most recently, Georgia took care to base its application against the Russian Federation on the jurisdictional clause in Article 22 of CERD, reserving the right to invoke as an alternative Article IX of the Genocide Convention[7]. No attempt was made to rely directly on the alleged massive violations of human rights by Russian military forces. Even where serious charges are brought against another State, the ways and means of peaceful settlement are not predetermined. States decide freely on what modalities they consider appropriate and suitable. Both litigants, the applicant and the respondent party, must be in agreement. Even a State that has allegedly — or even admittedly — committed serious breaches of international human rights law and international humanitarian law is still a sovereign State that does not suffer any forfeiture of its prerogatives under international law. Article 2 (3) of the United Nations Charter does not impose any specific modality of addressing the consequences of an internationally wrongful act. Only the Security Council has the power to impose particular ways and means of providing reparation, which it did in a particularly conspicuous manner when, dealing with Iraq's responsibility for the invasion of Kuwait, it determined that the aggressor country was

[7]Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation),* Judgment of 1 April 2011, para. 1.

> "liable under international law for any direct loss, damage — including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait"[8].

7. The same reasons, i.e., no direct inference from a breach of substantive law to the available remedies, apply with even greater weight where an attempt is made to suggest that domestic judges should assume the responsibility for the settlement of an international dispute. Obviously, the ICJ enjoys the highest degree of confidence and trustworthiness in the international arena. Its impartiality and objectiveness are beyond any challenge. Unfortunately, the same cannot be said of domestic judges even when, according to their sincere beliefs and convictions, they attempt to act without the least prejudice or bias. Institutionally, they are by necessity a component element of the governmental structure of the country in whose name they deliver judgment. They have lived their professional lives in the environment of their specific legal culture. International law is not their main field of expertise. Additionally, they are invariably exposed to the climate and the pressures of their national constituencies. The public at large generally expects that a judge called upon to make determinations in a dispute confronting the claimant with a foreign State will resolutely defend the perceived national interest.

8. All this is not meant to convey the message that domestic judges will never be able to issue correct rulings in instances where a case has some confrontational aspects, opposing the home State of the judge to a foreign State. But it is abundantly clear that a domestic judge is not endowed, from an institutional viewpoint, with the same guarantees of neutrality and objectivity as an international judge, in particular the bench of the ICJ. Accordingly, since the institutional logic of international law denies even the jurisdiction of the ICJ where allegations of a breach of obligations *erga omnes* or rules of *jus cogens* are in issue, there is even less justification for affirming the jurisdiction of domestic courts in instances where such charges are to be addressed. Thus, to jump from the assertion that an international crime has been committed to the conclusion that, in derogation from the traditional principle of jurisdictional immunity in respect of acts *jure imperii*, national judges are entitled to assume jurisdiction, is an arbitrary leap, which has no legal

[8]Resolution 687 (1991), para. 16.

basis whatsoever. More arguments on this point will be presented somewhat later by my colleague Robert Kolb.

III. Disregard of the systemic context

9. One specific aspect, however, should be highlighted already at this early stage of Germany's pleadings. For a national judge adjudicating a dispute between two private parties it may be sufficient just to scrutinize the particular facts of the case and to engage in a balancing process which takes into account no more than, and solely, the interests of the litigant parties as they have emerged in the course of the proceedings. However, the *Corte di Cassazione* pleads for a systemic change in the way international law operates. It was just pointed out that the proposition on which the *Ferrini* judgment is based overthrows the principle of consent which lies at the heart of international dispute settlement. Unilateral self-help is not condoned by international law as it applies between sovereign States. In practice, the opinion of the *Corte di Cassazione* would mean that, after an armed conflict during which international crimes were perpetrated, each side involved could make authoritative determinations on the torts allegedly attributable to the adversary. This consequence conflicts with the key principles of *jus contra bellum* and *jus in bello*. The parties to the four Geneva Conventions of 1949 have carefully avoided providing for the jurisdiction of the ICJ in respect of such disputes. They agreed that authors of "grave breaches" should be punished, establishing for that purpose even the principle of universal jurisdiction. Otherwise, however, in procedural terms the main achievement was in 1977 the establishment of the International Fact-Finding Commission pursuant to Article 90 of Additional Protocol I. This Commission, although it became operative in 1991, has hitherto not been entrusted once with investigating charges that grave breaches were committed during a conflict. This observation shows unequivocally that the taking of appropriate procedural steps after an armed conflict is considered by States to be within the exclusive realm of their decision-making power. And indeed it is trivial to state that war damages can be repaired only on the basis of mutual understanding — or on the basis of a relevant resolution of the Security Council, acting under Chapter VII of the Charter. In sum: the *Corte di Cassazione* wishes to revolutionize the system of operation and enforcement of

international law, decreeing that, where there appears to be a lacuna in the available array of remedies, domestic judges should simply fill in that gap — and this is wrong.

IV. Erroneous equation of personal immunity with State immunity

10. Another one of the systemic flaws of the *Ferrini* jurisprudence is the argument, resorted to quite openly by the judges of the *Corte di Cassazione*, that personal immunity and State immunity should be treated in the same manner. It held that, where on account of the commission of an international crime a governmental agent is deprived of any immunity, "there is no valid reason, in the same circumstances, to uphold State immunity and consequently to deny that one State's responsibility for such crimes can be evaluated in the courts of another State"[9].

11. It is precisely this inference which shows that the judges were not aware of the systemic specificities of the applicable legal régime governing international crimes. Since the landmark decision of the Victorious Powers of World War II to establish international criminal courts for the prosecution of the major war criminals of the Axis Powers, direct criminal responsibility under international law has become a unanimously accepted legal proposition. Although for more than four decades it appeared doubtful whether the precedents of Nuremberg and Tokyo would definitively find consolidation through practice, the creation of the International Criminal Tribunal for the former Yugoslavia and for Rwanda by the Security Council in 1992 and 1993 has definitively removed those doubts. The Code of Crimes against the Peace and Security of Mankind, adopted by the ILC in 1996, laid out the rationale and justification of that subordination of the individual under the authority of customary international criminal law[10]. All this is in full harmony with the provisions on universal jurisdiction of the Geneva Conventions on international humanitarian law. The international community deems it necessary and useful to prosecute individuals charged with committing international crimes, irrespective of the official position of a suspect within the system of government of his or her home country. This is not the moment to look into details. It is well known that domestic tribunals are bound to respect the traditional

[9] See fn. 1 *supra*, p. 674, para. 11.

[10] *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, p. 17.

immunities of heads of States and high-ranking ministers[11]. In any event, however: persons charged with international crimes should in principle be prosecuted. They cannot rely on their functional immunity to bar the operation of competent judicial machinery.

12. The immunity of a State is a totally different legal issue, for many reasons. When talking about the responsibility of a State, one really talks about the responsibility of a people, many members of which may also have been the victims of the same régime that caused injury through breaches of international law. This does not seriously matter in instances where a single act of non-respect of international law is in issue. However, to make determinations on the responsibility of a State on account of an armed conflict requires the utmost care. The situation must be considered in its totality. Generally, the conventional instruments are all based on a clear and sharp distinction between civil responsibility of States and criminal responsibility of individuals. Since Nuremberg and Tokyo in 1945 and the four Geneva Conventions of 1949, the prosecution of perpetrators of grave international crimes has become the standard policy of the international community. On the other hand, precisely the Geneva Conventions of 1949 and the two Additional Protocols of 1977 contain no clauses establishing the jurisdiction of the ICJ for reparation claims. The relevant provisions, in particular Article 91 of Additional Protocol I, confine themselves to providing that any violation of the rules of humanitarian law entails a duty to make reparation. But no jurisdictional clause was added to that substantive rule. In sum, the distinction between personal immunity on account of criminal acts and State immunity is crucial. Whoever infers from the absence of personal immunity *ratione functionis* that in the same way State immunity must be disregarded, does not argue within the confines of the current system of international law, but wishes to change boundaries the raison d'être of which has by no means become extinct.

13. Thus, we come back to the basic flaw of the *Ferrini* jurisprudence: the judges slipped into the role of legislators, wishing to remedy the structural weakness of international law, to wit, that it lacks a complete set of remedies. It may indeed be desirable to improve the effectiveness of international law by complementing the enforcement mechanisms. Yet, this is what international law is still about at the present stage of its development. Many steps forward have been made

---

[11] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 3.

during the last decades. In particular, the institutions of the organized international community have been endowed with new powers or have been enabled to exercise the powers held by them in an effective fashion. Since 1990, the Security Council has obtained the opportunity actually to act as the guardian of international peace and security on the basis of agreement among the five veto powers. Additionally, new avenues have been acknowledged for States to safeguard interests of the international community on the basis of the concepts of obligations *erga omnes* and *jus cogens* (see, in particular, Art. 48 of the ILC's Articles on Responsibility of States). But crude self-help is something else. It has no legitimacy, not even, and even less so, under the modern conception of international law under the auspices of the United Nations Charter.

V. Assumption of jurisdiction as countermeasure?

14. It is true that countermeasures are an acknowledged concept. Countermeasures have been included in the ILC's Articles on Responsibility of States. Yet they may not be taken at random. According to Article 49 of those Articles, they are permissible only with a view to inducing a State responsible for an internationally wrongful act "to comply with its obligations under Part Two". They would also presuppose meeting specific procedural requirements. Countermeasures based on the grave misdeeds perpetrated by the German occupation forces in Italy from September 1943 to May 1945 are to be categorically discarded. World War II is definitely over, since no less than 66 years, and Germany and Italy are strong partners within the European Union. Likewise, it would be outright absurd to argue that the jurisdiction of the Italian courts may be justified as a countermeasure responding to Germany's failure to fulfil its duty of reparation. There is no such failure, and for more than 40 years, from the conclusion of the two compensation treaties of 1961 until the culmination of the *Ferrini* case, Italy never made any representation to Germany in that sense. Lastly, Italy has never contended that the assumption of jurisdiction by the *Corte di Cassazione* was legally justified as a countermeasure.

VI. Practice confirms the traditional rule

15. The focus should now be again on the *Ferrini* judgment as the decision which sent the entire judicial system of Italy on a slippery slope, contrary to advice provided by the *Avvocatura*

dello Stato which, in its submission of 28 April 2008[12], demystified the reasoning of the *Corte di Cassazione* with accurate and persuasive legal logic, point by point. Germany could confine itself to referring to that submission which is abundantly persuasive. Yet, the main issues should be recalled again, albeit in a summary fashion since a more detailed presentation can be found in our Memorial.

16. Germany relies simply on the rule that States enjoy jurisdictional immunity in respect of civil suits brought against them before the courts of another country if the controversial conduct (allegedly) entailing international responsibility was performed in the exercise of powers *jure imperii*. It would be annoying and tedious to present here once again all the wealth of evidence that supports this legal conclusion. We confine ourselves to referring to the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted by the United Nations General Assembly by resolution 59/38 of 2 December 2004. Article 5 of that Convention provides: "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."

17. No exception to this rule applies with regard to sovereign acts, acts *jure imperii*. My colleague Andrea Gattini will later elaborate in greater detail on the territorial clause of Article 12 which has no relevance in the present proceeding as he will demonstrate. It is true that the Convention has not yet entered into force; currently, the number of ratifications stands at 11 (August 2011). Yet the Convention reflects *generally* — not everywhere — customary law. It is for that reason that States do not feel pressed for ratification. They see the Convention as an illustration of the customary rules that are applicable in any event.

18. The contention that the rule of jurisdictional immunity has shrunk *ratione materiae* with regard to serious violations of human rights and international humanitarian law has no valid basis. It presupposes that a practice to the contrary has evolved which denies immunity in such instances. Significantly enough, neither the *Ferrini* judgment nor the later orders of 29 May 2008 in the cases of *Maietta and Others* were able to identify such a practice. Vaguely enough, the *Corte di Cassazione* speaks of "trends", but the only true piece of evidence it could find was the *Distomo*

[12]MG, Ann. 12.

judgment of the Greek *Areios Pagos*, apart from the United States judgments that derived their lawfulness within the United States domestic legal order from the Effective Death Penalty Act of 1994 and which are conditioned by specific circumstances, namely a certification by the United States Secretary of State that the respondent State was a sponsor of terrorism. This is still the legal position today. Vainly did the *Corte di Cassazione* look for supporters outside the Italian borders. Nowhere else has the judiciary responded positively to that suggestion. Just the contrary can be observed. Again and again, the *Corte di Cassazione* referred to the judgment of the European Court of Human Rights in the *Al-Adsani* case but had to acknowledge that the views sharing its own stance were nothing else than the dissenting vote of a minority group of the Court. It is of no great help to underline that the decision in *Al-Adsani* was taken by only a slight majority — which often occurs in judicial proceedings. What is more important is the fact that to date the Strasbourg Court has not seen fit to reconsider its jurisprudence even after many years.

19. Great importance must also be attached to the undeniable fact that the ILC, when re-examining its 1996 draft in a working group specifically in respect of serious violations of human rights, was unable to reach consensus on creating a new exception from the principle of sovereign immunity[13]. The Respondent has attempted to exploit this fact in its favour. But just the contrary is true. All the discourse about trends and tendencies cannot hide the simple truth that the ILC did not find it suitable to create a new exception with unforeseeable consequences. Obviously, a State needs the immunity rule precisely in instances where a claimant alleges that it has committed an internationally wrongful act. Following the Respondent's conception, it would always be necessary, at the initial stage of a proceeding, to distinguish between a "normal" — what is a normal violation — and a particularly serious violation. Without having a complete overview of the available evidence, the judge would therefore invariably be required to proceed to a cursory advance assessment of the case, which would put him into an extremely uncomfortable, almost impossible, situation. Thus, the hesitations of the members of the working group are fully understandable and do not, by no means, support the interpretation that jurisdictional immunity is even further on the decline. Just the opposite is true; the issue was carefully considered. On that

[13]Report of the Working Group on Jurisdictional Immunities of States and Their Property, Annex to the Report of the ILC on the work of its Fifty-First Session, *Yearbook of the International Law Commission 1999*, Vol. II, Part Two, p. 149, App., p. 171; see also MG, para. 108.

basis, the ILC decided not to alter its draft. Hence, we are faced with a deliberate decision of the highest law-making body in the system of the world organization to the effect that the scope of jurisdictional immunity should not be reduced.

20. Article 38 (1) *(b)* of the Statute must be taken seriously. More important than trends and tendencies devoid of any hard substance are the tangible and concrete facts of international judicial practice. We shall confine ourselves to mentioning five decisions of domestic tribunals, three of which likewise had to address claims for reparation of grave breaches of the law perpetrated by the authorities of the German Third Reich. A fuller account is given in Germany's Memorial (paras. 115-130).

21. Although already referred to in that Memorial, the decision of the French *Cour de cassation* in *Bucheron* of 16 December 2003[14] should be recalled again because of the similarity of the underlying facts. Like Ferrini in Italy, Bucheron had been sent to Germany in June 1944 to perform forced labour. The *Cour de cassation* rightly found that no contract had been concluded between Bucheron and the German occupation forces. Accordingly, the work accomplished by Bucheron in Germany was founded on an act of *"puissance publique"*. Without further ado, very succinctly, the *Cour de cassation* concluded that consequently Germany enjoyed judicial immunity. It appears significant that the *Corte di Cassazione* did not mention the *Bucheron* precedent when three months later it handed down its judgment in *Ferrini*.

22. The judgment of the House of Lords in *Jones*[15] had to address an entirely different set of circumstances, where the alleged acts of torture had not been committed on the soil of the United Kingdom, but in Saudi Arabia. On the other hand, the main issue was identical. Can a private suit be brought against a foreign sovereign nation outside the purview of commercial transactions? The House of Lords did not only focus on the United Kingdom State Immunity Act 1978 but considered the legal position also from the viewpoint of general international law. It had no doubt that the applicable international rules on jurisdictional immunity of States had not changed under the impact of the Greek *Distomo* decision and the *Ferrini* decision of the *Corte di*

---

[14] *RGDIP* 108, 2004, p. 259.

[15] *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Sandiya (the Kingdom of Saudi-Arabia)*, 14 June 2006, *ILR*, Vol. 129, p. 713.

Cassazione. In this connection, Lord Bingham of Cornhill made the statement which sheds a determinative light on the issue since it captures the essence of the emergence of custom in international law:

> "The *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law."[16]

One might argue that the British judges did not fully grasp the modern tendencies of international law and that they should have decided otherwise. Academic criticism is free to make such suggestions. However, when it comes to finding out what the international practice is, one cannot ignore the dictum of the House of Lords. It must be characterized as a supplementary confirmation of the existing traditional rule. For the British judges, no valid reason justifying a departure from the long-standing rule could be perceived.

23. In Brazil, the Federal Court in Rio de Janeiro rejected, by a judgment of 9 July 2008, a reparation claim against Germany on account of the sinking of a fishing vessel by a German submarine in July 1943, in violation of international humanitarian law. On the basis of a few lines, the Brazilian Court rejected the action, invoking the principle of State immunity[17].

24. A third case is a fairly summary decision of the Israeli District Court in Tel Aviv-Jaffa of 31 December 2008[18]. It concerns again victims of Nazi barbarism who had filed a suit against Germany, requesting reparation for the injuries suffered by them during World War II. The Israeli court saw no necessity of proceeding to a deep-going analysis of the legal position. With a few sentences, it determined that the suit, as it was directed against a foreign State on account of the exercise of public power, did not come within Israeli jurisdiction; accordingly, it recommended to the plaintiffs to withdraw their action, which they did. It need not be explained that in Israel millions of people live who, either directly or indirectly, had become victims of Nazi measures of persecution during World War II. Nonetheless, the Court, without going into that sad background, flatly denied the jurisdiction of the Israeli courts in respect of the reparation claim.

---

[16] *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Sandiya (the Kingdom of Saudi-Arabia)*, 14 June 2006, *ILR*, Vol. 129, p. 726, para. 22.

[17] An English translation of the judgment will be submitted.

[18] Case of *Irit Tzemach and Others*.

25. The most meticulous examination of the legal position can be found in the judgment of the Polish Supreme Court of 29 October 2010 in the *Natoniewski* case. Mr. Natoniewski was a victim of an armed raid conducted by German troops against the village of Szczeczyn in today's south-eastern Poland in 1944. This raid was directed against the civilian population. The properties of the civilians were destroyed and their houses were burned down. Together with his grandfather, Mr. Natoniewski took cover in a potato pit but was not able to escape the fire and consequently suffered severe burns leading to permanent scars on his face and partial limb disabilities. A co-claimant, Mr. Skrzypek, claimed compensation for his physical disabilities and mental-health problems termed "syndrome of the second generation", both being a consequence of pseudo-medical experiments to which his father was subjected in the Nazi-German concentration camp of Dachau. Obviously, the Polish Supreme Court was fully aware of the gravity of the acts causing the injuries. However, it strictly applied the immunity rule. It held that that an armed conflict entailing victims, damages and suffering on a large scale cannot be reduced to a relationship between the State perpetrator and an individual victim. An armed conflict takes place first and foremost between States and it is for the States to decide on a comprehensive solution for mutual claims in a treaty after the termination of hostilities. The jurisdictional immunity is a warranty that the decision will be made in precisely this way and that a series of domestic court proceedings does not impair the re-established peaceful inter-State relations.

26. This is a line of argument which perfectly fits the specificities of the present dispute between Germany and Italy. A settlement on the issue of reparations was established decades ago. Judicial proceedings resulting from individual claims would disturb that balance. In any event, above all, the judgment of the Polish Supreme Court in *Natoniewski* shows that it amounts to a basic error to accept individual suits without taking account of the overall context of the legal issue, generally and also in respect of the specific case at hand.

27. In sum, it must be reiterated: consistent international practice denies any support to the thesis of the *Corte di Cassazione* that grave crimes under international law entail automatically domestic jurisdiction. Whoever takes the essential criteria of international custom seriously must accordingly draw the appropriate conclusions. Jurisdictional immunity of States in respect of acts

jure imperii continues to be a firm rule under international law. No rule to the contrary has evolved for serious violations of international human rights law and international humanitarian law.

C. The inter-temporal dimension of the dispute

28. Lastly, a second issue should be addressed, namely the inter-temporal dimension. The Respondent maintains that the applicability of a "purely" procedural rule must be assessed with specific regard to the date of the relevant proceedings and not in conformity with the law as it stood when the relevant facts occurred. Thus, Italy maintains that the compatibility of its judicial practice should be assessed against the legal standards applicable as from 2004 and not against the standards in force from 1943 to 1945.

29. It has been shown in the preceding observations that the relevant rules on jurisdictional immunity have not changed during the last 70 years. Absolute jurisdictional immunity in respect of sovereign acts of government is still the generally acknowledged customary rule today like back in the past. Accordingly, there is no pressing need to discuss the issue. However, Germany wishes to make clear pre-emptively that the stance maintained by Italy cannot be justified.

30. In Germany's Memorial, lengthy considerations have been devoted to showing that jurisdictional immunity of States cannot be treated like any other procedural rule that is continuously in flux[19]. Through the commission of an internationally wrongful act, a legal relationship is brought into existence with specific features and particularities. On the one hand, the law in force determines the substantive consequences which are definitive and exhaustive. Later developments in international law do not alter that relationship. The scope and substance of the duty to make reparation do not underlie ups and downs in the same way as stock exchange prices. The principle of certainty of the law would be seriously disturbed by such volatility.

31. The same must be true of the rule of jurisdictional immunity. On the one hand, seen from the viewpoint of national procedural law, immunity is indeed no more than a procedural issue: in fact, its objective is to impede private claims, establishing therefore a procedural obstacle. Before the ICJ, too, jurisdiction must be assessed on the date of the filing of the act instituting

[19]Paras. 91-102.

proceedings[20]. On the other hand, jurisdictional immunity, barring private suits, is a ground rule for the relationships between sovereign States. It determines profoundly the relationship between an alleged wrong-doer and its victims by shaping expectations and prospects. It is on the basis of the knowledge that private suits cannot be filed that generally reparation schemes are conceived and implemented. In fact, after World War II, the Victorious Allied Powers, convening in Potsdam at the gates of Berlin, decided that war reparations should be made according to the classical inter-State scheme. Determinations were made in unambiguous terms. Chapter IV of the Potsdam Agreement specified that Germany — Germany as a State — would have to provide reparations to the USSR, to Poland, to the United States, the United Kingdom "and other countries entitled to reparations". This was a structural decision, in accordance with the rules of international law applicable at that time. No leeway was left for additional private claims of injured persons.

32. It stands to reason that there exists a close interconnection between the rule of immunity, on the one hand, and the substantive rule indicating to whom reparation is due. According to the classic concept, as laid down in Article 3 of the Hague Convention No. 4 of 1907, only States were regarded as being entitled to reparations resulting from a breach of the Hague rules. The immunity rule supports this substantive rule from the procedural side. By claiming that individual suits can be entertained by Italian courts, the *Corte di Cassazione* now seeks to topple the fundamental determinations made in Potsdam. Its intention is to open up a second level of reparation, reparation in each and every individual case, alongside the collective mode of settlement agreed upon by the Victorious Powers which, in 1945, acted as trustees of the entire group of States that had declared war on Germany, among them also Italy. The entire process of reparation was based on the understanding that restoration and compensation would be effected within the framework of the existing inter-State relationships. Additionally, Germany has voluntarily decided to provide compensation to specific groups of victims who were particularly hard hit, in particular persons that had sustained racial persecution. All these elements together form a coherent system. By contrast, the retrospective application of any narrowed-down new rule on jurisdictional immunity

---

[20] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 29, para. 54; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 437, para. 79.

would destroy the entire architecture of the peace settlement that received its first and fundamental features in Potsdam and was definitively approved, 45 years later, by Germany in the so-called Two-Plus-Four Treaty of 12 September 1990[21] on Germany's reunification. Therefore, under the specific circumstances of the present context, any denial of jurisdictional immunity to Germany amounts to the overthrow of a legally consolidated situation under international law.

Mr. President, these observations conclude the first part of Germany's pleadings. I do not know whether you wish to give the floor to my colleague or that you would rather opt for the coffee break now. Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Tomuschat, for your presentation. I believe that perhaps it is an appropriate moment for us to have a short coffee break of 10 minutes. Could we return in, shall we say, about 20 minutes?

The Court adjourned from 11.25 to 11.45 a.m.

The PRESIDENT: Please be seated. The Court now resumes its oral proceedings. I take it that the next speaker on my list is Professor Andrea Gattini, who is going to make his presentation. I invite him to the floor.

Mr. GATTINI: Thank you, Mr. President.

Mr. President, distinguished Members of the Court, it is a great honour and a great privilege to appear before you for the first time, and on behalf of the Federal Republic of Germany. I particularly feel the responsibility to act as counsel for the Federal Republic of Germany in a case which is so symbolically charged with her past, and of such importance for her present, for her future and for the future of international legal order. The fact that I am a citizen of the respondent State is another little testimony that the traditional close friendship and mutual understanding between our two States have not in the least been clouded by the unfortunate Italian judicial developments which have led to the present controversy.

[21] Treaty on the Final Settlement with Respect to Germany, *ILM* 29, 1990, p. 1186.

In the next 40 minutes I am going to refute two main arguments of the Respondent in order to justify the assumption of jurisdiction by Italian judges, the so-called tort exception and the so-called jurisdiction by necessity.

A. TORT EXCEPTION

1. After having reached the supreme heights of *jus cogens,* and proclaimed the universal civil jurisdiction as one of its inescapable corollaries, in the *Ferrini* decision the Italian Court of Cassation stepped down to a more down to earth approach. The Court found it convenient to stress, that, at any rate, a part of the criminal conduct attributable to Germany — that is, deportation for forced labour — had taken place in Italy. Therefore the Supreme Court suggested that it could assert — that the Italian judges could assert — jurisdiction as the *forum loci delicti commissi*.

2. In the present proceedings, too, the Respondent, besides its many arguments based on the pre-eminence of the concept of *jus cogens*, which my colleague Robert Kolb will later discuss, finds it convenient to stress the so-called tort exception, or territorial exception, as the Respondent prefers to call it, as a legitimate ground for denying State immunity to Germany. The exercise of jurisdiction would not need to be justified because of the commission of an international crime, but simply because, according to Article 12 of the 2004 United Nations State Immunity Convention, a State cannot enjoy immunity in the case of an action for personal injuries where the injury occurred in the territory of the forum State and the organ whose conduct is attributed to the foreign State was present in the territory of the forum State at the time of the occurrence.

3. By relying on the *forum delicti commissi*, the Court of Cassation first, and now the Respondent, make the *jus cogens* plinth of their arguments shaky, because they could have altogether narrowed the whole question from the beginning to the issue as to whether the conduct of foreign armed forces is included in the tort exception. But, even so, the attempt to deny State immunity on this narrower basis is doomed to fail, for at least three reasons, as I will demonstrate. The first reason is that Article 12, as such, does not codify customary international law as it stands. The second is that, at any rate, Article 12 does not apply to activities of armed forces. The third is that, besides the wording of Article 12 of the United Nations Convention, State practice does not

support the view that armed forces' activities fall into the scope of any tort exception, however framed.

I. Questionable customary international status of Article 12 of the United Nations Convention

4. First, it is more than doubtful that Article 12 of the United Nations State Immunity Convention codifies international customary law. To be more precise, it is more than doubtful whether the exception, to the extent that it deserts the traditional distinction of activities *jure gestionis* and activities *iure imperii,* reflects the real practice and *opinio juris* of States.

5. The codification work of the International Law Commission on this point is quite clear. In his fifth report to the ILC in 1983 the Special Rapporteur Mr. Sucharitkul recognized that even in the so-called "restrictive" jurisdictions, i.e., courts of a State not granting absolute immunity to foreign States, "immunity has been upheld wherever the courts have found the activities giving rise to damage to property or personal injuries to have been conducted *jure imperii*" (*YILC 1983*, Vol. II, Part One, p. 41, para. 77). Nevertheless, the Special Rapporteur drafted the article on tort exception without making any formal distinction, but leaning on the sole authority of the well known *Letelier* case, in which some years earlier the District Court for the District of Columbia denied immunity to the Republic of Chile for an act of political assassination which had occurred in the United States. The Commission followed the Special Rapporteur, but some members, among them one who is now a Member of this Court, Judge Koroma, expressed some doubts on the advisability of inserting such an exception for matters which "were best dealt with extrajudicially" (*YILC 1984*, Vol. I, p. 325, para. 32).

6. On the second reading of what was then draft Article 13, the second Special Rapporteur Mr. Ogiso, drew the attention of the Commission to the opportunity to "reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences have thus far been very few in practice" (*YILC 1989*, Vol. II, Part One, p. 66, para. 22). The proposal to limit the scope of application of the article to the jurisprudentially anchored cases of civil suits arising from traffic accidents involving State-owned or State-operated means of transport occurring within the territory of the forum State was eventually abandoned. However, if we consider later judicial developments, apart from the United States jurisprudence on political assassination of residents on

the territory of the United States, there are no further cases, either in the United States nor elsewhere, in which the tort exception has been used by courts when the act of the foreign State was clearly *jure imperii*, of course with the only exceptions of the *Distomo* decision by the Greek Areopagos in 2000 and the *Ferrini* jurisprudence of the Italian Court of Cassation.

II. Armed forces activities outside the scope of Article 12 of the United Nations Convention

7. But the second and even more important reason why the reference to Article 12 must fail in the present context is that a correct interpretation of the norm leads to the conclusion that it does not and it cannot encompass activities of armed forces.

8. When presenting to the ILC, in 1983, the draft Article, Special Rapporteur Sucharitkul drew the attention of the ILC to the fact that

> "the question of State immunity should not be raised, or indeed need not to be raised, when the causes of action are outside the jurisdiction of the courts, or when the courts before which proceedings have been brought have no jurisdiction, because of the subject-matter" (*YILC 1983*, Vol. II, Part One, p. 40, para. 66).

The underlying rationale that the individual must at any rate have a cause of action found expression in the final text of the Article, according to which the forum State must be "otherwise competent" in the proceedings. Whereas one can assume that there is a cause of action for personal injuries or damage to property deriving from tortious liability of the foreign State involved in cases of road accidents, or assault and battery, the same cannot be said for damages suffered in the context of an armed conflict. To affirm so would mean to have preventively and positively answered the question whether individuals might have a right to reparation for war damages under international law. And, as I will later explain, this is not so.

9. It seems therefore safe to conclude that the exclusion of armed forces' activities from the scope of Article 12 was taken for granted by the ILC, as the short commentary of the Article in the second reading of 1991 makes clear: "the article does not apply to situations involving armed conflicts" (*YILC 1991*, Vol. II, Part Two, p. 46, para. 10). The same position was shared by the Ad Hoc Committee on Jurisdictional Immunities of States established in the General Assembly Sixth Committee with the goal of exploring the feasibility of the adoption of a convention; it was summarized in 2004 by the Chairman of the Committee with the remark that "the general understanding had always prevailed that armed forces activities are excluded from the scope of

Article 12" (United Nations doc. A/C.6/59/SR 13, para. 36). For its part, the General Assembly, when adopting in December 2004 the text of the Convention, in the last preambular paragraph of its resolution took into account this statement. In our Memorial we have maintained that the interplay of these different sources could be seen as an "instrument of interpretation" of a convention in the meaning of Article 31 (2) *(b)* of the Vienna Convention on the Law of the Treaties. But, even without going so far, there is evidence enough that as recently as December 2004 no State had ever raised the claim that the tort exception should include activities of armed forces.

10. The Respondent makes a big deal of the absence in the United Nations Convention of a rule similar to that expressed in Article 31 of the European Convention on State Immunity of 1972, which expressly excludes the activities of armed forces from its scope of application, and therefore from the scope of application of Article 11 on the tort exception. Of course, one could regret that the ILC first, and the General Assembly later, did not show the same prudence and accuracy as the Council of Europe, but the argument does not prove anything. States are obviously free to append a declaration — declaration *nota bene*, not a reservation, which would be superfluous — to that effect in their instrument of ratification, as was already done by Sweden and Norway, and, by the way, let me notice that it is not by chance that this move came from two States which are well known for their generous contribution to United Nations peacekeeping missions.

III. Lack of any State practice

11. Apart from the correct reading of Article 12 of the United Nations 2004 Convention, it is foremost the practice of States as well as international and national jurisprudence which clearly show that armed forces activities are excluded from the scope of application of any tort exception, however framed. A case in point, which deserves particular attention, is the *McElhinney* case, decided by the European Court of Human Rights on 21 November 2001. In that case the Irish Supreme Court in 1995 had recognized sovereign immunity for the United Kingdom with regard to a tortious act committed on the territory of Ireland by a British soldier. What is significant in the case is that the Irish Supreme Court expressly referred to Articles 11 and 31 of the European Convention, although Ireland had not ratified it. What is even more significant is that the European

Court of Human Rights fully endorsed the findings and reasoning of the Irish Supreme Court, by a larger majority than that in the *Al-Adsani* case, previously referred to by Professor Tomuschat, which was decided on the same date.

12. Equally significant is that the same position is shared by the Criminal Chamber of the Italian Court of Cassation itself. Indeed, in July 2008, a couple of months after the *Majetta*, *Mantelli* and the other orders of the Civil United Chambers previously referred to, the First Criminal Chamber of the Court of Cassation in the *Lozano* case plainly affirmed that the conduct of armed forces is excluded from the scope of Article 12 of the United Nations 2004 Convention (*Lozano,* Court of Cassation, First Criminal Division, Judgment No. 31171 of 24 July 2008). It is telling, but nonetheless amazing, that in the subsequent *Josef Milde* judgment of October 2008, which was the case that actually precipitated Germany's decision to invest you with this dispute, the same First Criminal Chamber of the Italian Court of Cassation found it preferable to avoid altogether the whole issue of its jurisdictional basis.

13. Now I turn to the Italian second argument: jurisdiction by necessity.

B. JURISDICTION BY NECESSITY

14. Being aware that the argument based on a tort exception would not and indeed does not stand up to scrutiny, the Respondent tried to infuse in the *Ferrini* jurisprudence a different rationality, which the Court of Cassation apparently never intended. So the Respondent endeavoured to weave a complex argument, which, once stripped of its delicate rhetorical intricacies, boils down to affirming that Italian judges were compelled to exercise a sort of jurisdiction by necessity in order to offer a judicial remedy to Italian victims of a "blatant denial of justice", allegedly inflicted upon them by the German judicial system.

15. By this argument the Respondent shrewdly mixed the question of State immunity, which is the only issue you are required to judge in the present dispute, with the different issue of the alleged existence of a subjacent individual cause of action. Reserving our position on the pertinence of this last question in the present case to a possibly later pleading, some words are nevertheless necessary at this point as a matter of principle, in order to disentangle the Italian argument.

16. The Respondent's argument can be summarized as follows. International law provides for an individual right of reparation, which is directly actionable. Initially this right of action should be exercised before the courts of the responsible State. In the case that the courts of that State do not recognize the right of reparation, the individual may then bring the action before the courts of his or her own State. I think I do not need too many words in order to demonstrate how ungrounded, as well as dangerous, this theory is. I will do it, by illustrating and refuting the three steps of the Respondent's argument.

I. Lack of any individual right to reparation under general international law

17. One could of course stop the entire reasoning at the first step, by simply noting that general international law does not grant any individual right of reparation, and certainly not for war damages. Article 3 of the IV Hague Convention of 1907, as well as Article 91 of the First Additional Protocol to the Four Geneva Conventions of 1977, because of the very structure of the conventions, can only deal with inter-State responsibility and hence, cannot have any direct effect for individuals. The *travaux préparatoires* of both texts make this abundantly clear; and also the jurisprudence of domestic supreme courts is unanimous on this point.

18. Certainly, Article 33, paragraph 2, of the 2001 ILC Articles on State Responsibility, inserted in Part Two on the content of international responsibility, states that: "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State." Apart from the fact that this is simply a saving clause, inserted into the project at the very last minute and without any adequate discussion, it is telling that in the commentary to the article, besides a generic reference to human right treaties, there is no trace of any alleged individual right to reparation for war crimes, or even for crimes in general. The only example given by the ILC in the Commentary is that of Article 36 of the 1963 Vienna Convention on Consular Relations, i.e., a treaty right whose potentialities as well as limits we know thanks to your decisions in the *LaGrand* and the *Avena* cases, so that it is not necessary to dwell upon it in the present context.

II. Lack of any individual right of action under general international law

19. But let us, for the sake of argument, share the Italian assumption of an individual right to reparation and proceed to the second step of the Italian demonstration.

20. The Respondent argues that from the right of reparation there necessarily derives a right of action. Here again this assumption is devoid of any foundation. To come back to the ILC Articles on State Responsibility, it is once again telling that, when coming to Part Three dealing with the invocation of responsibility, the ILC did not mention, not even for the purpose of a saving clause, any role for individuals. The reason is quite simply that under general international law there is no such role.

21. In spite of great juridical refinement and inventiveness, our esteemed colleagues left, most probably on purpose, some fundamental aspects in a shadow. Is the right of action the object of a secondary rule or rather of a primary rule? Reading the Italian Counter-Memorial and the Rejoinder one is left with a confusing impression. I guess that the blurring is not accidental.

22. Of course, there is an established practice granting to individuals a claim for reparation before the domestic courts of the responsible State. The Italian counterpart quotes in this context the jurisprudence of the Italian Court of Cassation of 1974 asserting the competence of Italian courts to adjudicate lawsuits for compensation regarding war damages brought by citizens of the Allied Powers against the Italian State. There is nothing extraordinary or remarkable in all this. In that case the legal basis was found in Article 78, paragraph 4, of the Italian Peace Treaty of 1947. In other cases the right of action is that provided for under the domestic law of the responsible State. This is exactly what happened in Germany, where, as the evidence shows and of course the same Italian Government concedes, the domestic judicial venue was opened without any discrimination to all Italian claimants, who even went up to the Federal Constitutional Court.

23. Aware of the non-existence under general international law of any individual right of action as a consequence of an international wrongful act of a State, the Respondent found it expedient to clothe this alleged right of action in a different garb, invoking a right to access to justice as a primary rule. This move is of no avail either.

24. The right to access to justice, in its two meanings of the right to an effective remedy and the right to a fair trial, is a well-established human right, enshrined in main international

conventions. But the point is that in each one of those texts, and *a fortiori* in customary international law, if one were to concede its customary law nature, beside being an ancillary right, the right to access to justice is not an absolute one, being subjected to various limitations and conditions that a State can legitimately impose on its exercise. One of those limits is the rule of foreign State immunity. Far from there being an "irreducible contradiction" between the right of access to justice and the rule on State immunity, as the Italian Counter-Memorial maintains (CMI, para. 4.88), the two must live together in the sense that, on some occasions, such as those illustrated by the European Court of Human Rights in the *McElhinney* and the *Al-Adsani* case of 2001, the first must yield to the second.

25. The Respondent points at a decision by the Inter-American Court of Human Rights in September 2006 — *Goiburù and others* v. *Paraguay* — in which access to justice was described as a peremptory norm of international law in all those cases in which the substantive rights violated were granted by *jus cogens* norms. In this regard three observations are appropriate. First, the case mentioned by the Respondent, as well as some other later cases decided by the same Inter-American Court, did not concern war damages. Second, the case dealt with access to justice in the State which was responsible for the wrongful act, and therefore did not concern in any way the rule of foreign State immunity. Third, it will be recalled that an approach similar to that of the Inter-American Court on Human Rights was taken a year later by the United Nations Committee of Human Rights in its General Comment No. 32 on Article 14 of the ICCPR (CCPR/C/GC/32 (2007), para. 6). The Committee limited itself to saying that the guarantees of fair trial may not be "subject to measures of derogation", or in the very precise French text, *"objet de mesures qui détourneraient la protection"*, whenever one of the core rights enshrined in Article 4, paragraph 2, ICCPR, is at issue. However, in the absence of any discussion whatsoever on the point within the Committee, it would be a totally unjustified conclusion to include in the phrase "measures of derogation" the respect due to State immunity in accordance with applicable rules of customary international law.

26. In conclusion, it is hard to see how the unwarranted blend of two different concepts, one of which — the right to access to justice — is subjected to various limitations, and the other of which — the alleged right of action as a consequence of a war crime — simply does not exist *de lege lata*, can together create a super-rule of *jus cogens*.

III. Inexistence of any "jurisdiction by necessity"

27. But once again, and for the sake of argument, let us proceed from the Italian assumption of the existence of an individual right of action. So we reach the third step of the Italian construct. Assuming that there is an individual right of reparation and an individual right of action, in the case of non-recognition by the domestic judges of the responsible State, the judges of a national State may, and indeed should, come to the rescue of the individual victims, i.e., they should exercise jurisdiction getting rid of foreign State immunity. This third step is, if possible, even less justifiable than the previous two.

28. To begin with, it is totally unwarranted to assume that in a situation such as the present one, there has been a denial of justice, not to speak of a "blatant" one.

29. In order to speak of a denial of justice, the Italian citizens must have been debarred from any possibility whatsoever of bringing an action before German courts or must have wilfully and maliciously been deprived of their procedural rights, or must have been discriminated against on the basis of their nationality. Now, of course, nothing of the sort happened. On the contrary, the *Associazione Nazionale Reduci dalla Prigionia* and 942 Italian citizens, among them Mr. Ferrini himself, were able to lodge a joint constitutional complaint before the German Federal Constitutional Court, which, with a well-reasoned order, rejected the complaint on 28 June 2004. The correctness of the order was confirmed by an unanimous judgment of the Fifth Chamber of the European Court of Human Rights on 4 September 2007, which also reiterated the lack of any individual right to reparation, stating as follows:

> "Whatever suffering the applicants' forced labour brought about, none of the Conventions referred to by the applicants establishes any individual claims for compensation." (*ECHR*, 2007, 5556.)

30. By the way, the same applies to the Greek claimants in the *Distomo* case. Parallel to the civil action in Greece, the claimants had sued the German Government before German courts and

had access to all available judicial venues up to the German Federal Constitutional Court, which rendered its decision in June 2003. In this case as well, the Fifth Chamber of the European Court of Human Rights, in its recent judgment of 31 May 2011, *Sfountouris and Others* v. *Germany* (Application 24120/06) rejected the claim and confirmed the correctness of German judicial proceedings and findings with the following words [I quote in my own translation]:

> "The Court finds that it could not be maintained that the application and interpretation of international and domestic law made by the German judges were vitiated by unreasonable or arbitrary arguments."
>
> [*"La Cour estime que l'on ne saurait soutenir que l'application et l'interprétation du droit international et interne auxquelles ont procédé les juridictions allemandes aient été entachées de considérations déraisonnables ou arbitraires."* (P. 16 ; original French.)]

31. I would like to draw your attention to the date of a decision of the German Constitutional Court in the Italian citizens' claim, the 28 June 2004, because it alone demolishes the whole Italian thesis of a jurisdiction by necessity, which the Italian Court of Cassation would have reluctantly exercised only after the denial of justice suffered at the hand of German judges. The *Ferrini* decision of the Italian Court of Cassation actually dates back to December 2003, and was deposited on the 11 March 2004, three and a half months before the Order of the German Constitutional Court was delivered.

32. Furthermore, the legal basis of such a *"forum by replacement"*, so to say, is anything but clear. If one tries to extract the pith from the well-torn but ultimately frail Italian arguments, one is left with a heap of unusable notions, which do not become more usable for the fact of having been intermingled. We have identified at least three.

33. To start with, is the underlying concept that of countermeasures? If so, the immediate objection, as already formulated by Professor Tomuschat, would be that it is not the business of domestic courts to decide and enforce countermeasures against a foreign State.

34. Is the underlying concept that of necessity? The Italian Counter-Memorial (CMI) and Rejoinder are sprinkled with such phrases describing the exercise of domestic jurisdiction as "the only path to pursue in order to secure compliance" (CMI, para. 1.9), and the resort to the Italian courts as "the only means, the *ultima ratio*, for obtaining redress" (CMI, para. 4.42). If one is aware of the extreme delicacy of the notion of necessity and therefore takes seriously the restrictive

wording of Article 25 of the ILC Articles on State Responsibility, as you rightly did in the *Gabčíkovo-Nagymaros* case, then it is impossible to subsume under the notion of state of necessity the self-conferred power of a domestic judge to stand alone as the protector of the essential interests of the State, let alone the essential interests of the international community as such.

35. Is it then in the end the concept of an individual right of reparation as such which forms the underlying rationale of the Respondent's position? But, if so, the Respondent's argument falls into the trap of circularity, inferring each legal consequence from the previous one on the mere strength of a mantra. What is more curious is that the Respondent's third step runs counter to the very concept of *jus cogens* on which the entire construction is based. And I will explain this.

36. If an individual were the bearer of a right of reparation and of a right of action under international law, as the Respondent maintains, it would still make some sense to require him first to exercise his right before the domestic courts of the responsible State. But, in a case of a dismissal, why should the individual be subsequently restrained in his right to bring the claim in front of his domestic judges instead of the judges of any other State of his choice? If one were to find any merit in the *Ferrini* decision, and I am one who scarcely found any, it would be the parallel between *jus cogens* and the concept of universal civil jurisdiction.

37. I do not need to spend many words to refute the conformity with international law of this kind of jurisdiction. Allow me just to recall what three former judges of your Court, each of them eminent advocates of human rights and particularly sensitive to the development of the instruments for their international protection, as all of us are, said in this regard. In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal took issue with universal civil jurisdiction as practised in the United States under the Alien Tort Claims Act: "this unilateral exercise of the function of guardian of international values . . . has not attracted the approbation of States generally" (*I.C.J. Reports 2002,* p. 77, para. 48).

38. To follow the Respondent's argument to its logical conclusions, why should the individual bearer of the right rest content with the outcome of the judicial process provided by the judges of a certain State instead of another State? Given the lack of co-ordination of domestic civil judicial systems, neither the *electa una via* nor the *res judicata* principles would constitute effective deterrents from a never-ending carousel of forum shopping.

39. Moreover, why should the individual rest content with the compact agreed upon by his or her own State and the responsible one? By just sketching this scenario, everyone who cares for the authority of international law as the ordering hand of international relations, as your Excellencies and your predecessors have always done, can easily and vividly sense how the "best of all possible worlds" prefigured by some authors, who, as new Candides, hail such developments in international law, would rapidly turn into a nightmare of abuses and prevarications.

40. But apart from such obvious observations on the unsuitability of the solution envisaged — even *de lege ferenda* — by the Italian counterpart, there is another major flaw in the Italian argument. This is, quite simply, the utter inconsistency of the Italian argument with the structure of positive international law. Under present general international law, if an individual suffers a denial of justice abroad, the consequence will be the faculty of his State of nationality to espouse his claim through the exercise of diplomatic protection, nothing more, but also nothing less.

41. And that is not a trivial thing, as the Respondent tends to suggest. The fact that no Italian Government from 1945 onwards and actually up to now had ever thought to exercise diplomatic protection in favour of its citizens who might have suffered patrimonial or personal injuries because of war crimes committed by German forces during World War II, is simply due to the firm Italian belief, which until the *Ferrini* decision was shared by the Italian Supreme Court itself, that Italian citizens, apart from those who had suffered injury because of National Socialist measures of persecution and for whom Italy reached a satisfactory compensation agreement with the Federal Republic of Germany in 1961, had no right whatsoever to assert.

42. Mr. President, this concludes my remarks, and may I respectfully ask you to give the floor to my colleague Professor Robert Kolb.

The PRESIDENT: I thank Professor Andrea Gattini for his presentation. Now I invite Professor Robert Kolb to take the floor.

M. KOLB : Monsieur le président, Mesdames et Messieurs de la Cour, c'est la première fois que j'ai le privilège de me présenter devant votre haute juridiction. Avant d'aborder mon exposé, je désire adresser à la Cour l'expression de mon profond dévouement et la prier de m'accorder

toute l'indulgence dont j'aurai besoin. Je désire aussi adresser mon salut cordial aux éminents confrères qui sont nos contradicteurs dans la présente affaire. Il n'y a pas si longtemps, j'étais encore l'étudiant de l'un d'entre eux.

1. Le point qui est soumis à votre jugement est, à mon avis, relativement simple. Aussi, je tâcherai de m'expliquer de manière brève, car je crois que la cause de l'Allemagne n'a rien à redouter de votre sagesse. J'aborderai deux points dans mon exposé d'aujourd'hui. D'abord une question technique et juridique. Ensuite une question générale, allant largement au-delà des plages du droit positif. C'est d'abord la question du *jus cogens*. C'est ensuite la mise en relief des conséquences prévisibles d'une négation de l'immunité juridictionnelle et d'exécution dans des situations telles que celles qui nous intéressent présentement.

A. La question du *jus cogens*

2. La question du *jus cogens* a tenu une place éminente dans cette affaire — une place trop éminente. En réalité, ce concept est ici de peu de secours, à condition qu'on veuille bien regarder les choses de près, sans passion et avec le regard affûté du juriste. La position de la Cour de cassation italienne, dans l'affaire *Ferrini*, suivie par d'autres instances devant la même Cour, a été la suivante. Des normes internationales possédant un statut supérieur au regard des valeurs qu'elles expriment doivent avoir le pas sur des normes de droit international dont le statut serait inférieur au regard du fait qu'elles n'expriment pas de telles valeurs ou qu'elles expriment des valeurs moins éminentes. Cette manière de voir a été exposée devant vous avec talent par nos honorables contradicteurs. Je me réfère au paragraphe 4.23 de leur réplique, et aussi aux paragraphes 4.68 et suivants de leur contre-mémoire. Le *jus cogens* est ainsi subrepticement transformé en un vecteur de hiérarchie plus ou moins générale au sein de l'ordre juridique international. Mais sont-ce bien là son sens et sa portée ? Nous ne le croyons pas. Plusieurs arguments décisifs militent contre cette manière de voir. Vous me permettrez d'en mentionner trois.

1. Le *jus cogens* n'affecte pas les règles secondaires

3. En premier lieu, le *jus cogens* concerne les règles primaires et non les règles secondaires. Je m'explique. Le régime impératif d'une norme porte sur sa qualité intrinsèque comme proposition indérogeable, c'est-à-dire sur sa qualité comme norme primaire. Il concerne le rapport

entre une norme plus générale et une norme plus spéciale, interdisant la dérogation de la première par la seconde. Tout ce mécanisme s'inscrit dans le plan du métabolisme des normes elles-mêmes. En revanche, le *jus cogens* ne porte pas sur les normes secondaires touchant aux conséquences de la violation de dispositions ayant un caractère impératif. Il n'existe pas de réglementation juridique générale relative aux conséquences de la violation de normes impératives. Une telle réglementation ne peut pas être inventée au cas par cas par chaque Etat selon ses orientations et idiosyncrasies. Elle ne peut découler que de réglementations agréées de nature conventionnelle ou coutumière. De telles règles font manifestement défaut pour la question de l'immunité qui nous intéresse ici. L'Italie n'a pu faire fond que sur un seul précédent pour étayer sa thèse, celui de sa propre Cour de cassation. Même les juridictions grecques, comme le montre l'affaire *Margellos*, se sont finalement départies d'une mise à l'écart de l'immunité, sentant tout ce qu'elle avait d'iconoclaste, de dangereux et d'infondé. N'est-il pas caractéristique que pour montrer ce qu'elle appelle «a far more complex picture» (réplique, par. 4.19), l'Italie soit forcée de faire appel à des opinions dissidentes (donc minoritaires !) et à des tendances législatives de nature la plus diverse, pour ainsi faire feu de tout bois ? Vous avez-vous-même fort justement refusé de vous laisser obnubiler par la magie incantatoire du *jus cogens* en rappelant que la «violation» d'une règle impérative est une chose et que votre compétence en est une autre. En effet, n'avait-on pas essayé de manière très similaire à ce que l'on tente présentement, de vous convaincre qu'à l'égard des valeurs essentielles qu'incorpore le *jus cogens*, un recours au juge s'imposait comme conséquence nécessaire afin de ne pas laisser sans sanction une situation de telle gravité ? Or, qu'avez-vous fait, par exemple dans l'affaire *République démocratique du Congo c. Rwanda* (2006) ? Vous avez appliqué le droit du Statut comme règle pertinente, que nous pouvons appeler «secondaire». Le *jus cogens* n'a pas prévalu sur elle, parce que justement ce concept ne signifie pas une hiérarchie normative généralisée, en fonction de laquelle l'on pourrait écarter tour à tour, selon les besoins du moment, telle ou telle règle bien assise du droit international.

4. On nous objecte volontiers l'article 41 des articles sur la responsabilité des Etats de 2001 (réplique, par. 4.11). Or, loin de contredire notre position, cette disposition apporte de l'eau au moulin de notre thèse. Elle pose deux conséquences de la «violation» d'une règle de *jus cogens* ayant la gravité requise : un devoir de coopération pour mettre fin à la situation créée (par. 1) et un

devoir de non-reconnaissance (par. 2). En réalité, il s'agit de normes primaires. La première est peu ou prou nouvelle. La seconde existe de longue date, indépendamment de la «responsabilité des Etats». Ces obligations ne concernent ni la mise à l'écart de l'immunité, ni d'ailleurs ne s'appliquent à toutes les normes impératives. Je me réfère à cet égard par exemple aux normes impératives donnant lieu à un devoir de non-reconnaissance, à savoir l'utilisation illicite de la force et la violation de l'autodétermination des peuples. Les autres normes impératives n'y sont pas incluses. Le paragraphe 3 de l'article 41 renvoie par ailleurs au droit international général. Comme nous l'avons montré, celui-ci ne contient pas à ce jour de norme permettant la mise à l'écart de l'immunité dans les situations qui nous intéressent. L'article 41 montre donc que la «violation» d'une norme de *jus cogens* ne permet pas à un Etat de réagir par n'importe quel moyen proportionné à la gravité de la violation, selon son appréciation propre : levée de l'immunité, utilisation de la force, suspension des droits de l'homme, etc. Au contraire, les conséquences de cette violation doivent être mesurées aux normes «secondaires» (ou primaires) existantes et se conformer à elles. Le *jus cogens* n'est pas une sorte d'entité surnaturelle, subvertissant tout le corps du droit international dans la splendeur d'un pouvoir *legibus solutus*. Ce serait une étrange manière de favoriser la cohérence de l'ordre juridique au regard de ses valeurs fondamentales, comme le veulent nos honorables contradicteurs, que d'utiliser ce concept pour littéralement assassiner l'agencement savamment dosé des règles secondaires. Vous devez porter un soin et une attention tout particuliers à celles-ci : car elles sont décisives pour combattre l'hydre toujours menaçante et grimaçante de l'unilatéralisme et de l'affranchissement du droit international. Aucun prétexte ne doit être bon à un tel dessein ou à un tel résultat.

2. Le *jus cogens* n'est pas une règle générale de hiérarchie des normes

5. Permettez-moi, en second lieu, de reprendre l'idée que je viens d'énoncer sur un plan plus général, à savoir sur le plan des règles primaires. Si le *jus cogens* concernait véritablement une hiérarchie juridique généralisée entre toutes les normes du droit international, celle incorporant la valeur la plus élevée l'emportant sur celle reflétant une valeur moins élevée, nous serions confrontés à un véritable effondrement du droit international. L'Italie a beau tenter de fiévreusement cacher ce fait, qu'elle perçoit très nettement, en dosant très savamment cette

hiérarchie, en nous parlant de cas unique, d'*ultima ratio* en cas de déni de justice, et d'autres choses similaires encore. Or le fait demeure, car il est têtu. Réfléchissez avec moi, avec vue claire et sans passions. La suggestion de la Cour de cassation italienne, partagée je suppose par de nombreux observateurs, est que la dignité humaine — concept qui nous vient d'ailleurs du droit constitutionnel allemand — représente la valeur suprême dans ce monde. Je trouve cette équation un peu courte et un peu self-serving, définie par nous les hommes comme juges et parties à la fois, assurément bonne pour ce qu'elle inclut mais mauvaise pour ce (et ceux) qu'elle exclut ; mais enfin, concédons-là. Si l'on applique désormais la logique de hiérarchie très simple, très linéaire et très primaire de la Cour de cassation, fût-elle ourlée par des fioritures plus ou moins alambiquées, plus ou moins baroques, qui tentent maladroitement de détourner le regard de l'essentiel, l'on aboutit à ceci d'effrayant : tout l'ordre juridique international développé par la sagesse de l'histoire et le poids bénéfique des réalités peut être balayé d'un trait de plume, peut être subverti sans limite apparente autre que celle du subjectivisme sans bornes. Les droits de l'homme, reflétant la dignité humaine, l'emportent, en cas de vrai besoin, sur toute autre norme du droit international : malheur au droit diplomatique ; malheur au droit des immunités ; malheur à la souveraineté et l'intégrité territoriale ; malheur au droit des traités et à *pacta sunt servanda* ; malheur peut-être au non-recours à la force ; et haro sur tout ce qui peut s'opposer au Droit de l'Homme. En tant que cour de justice, attachée au droit, vous ne pouvez pas cautionner une telle anarchie, cachée derrière une sage hiérarchie ! Car le pire vient encore, et je ne l'ai pas encore dit. En effet, qui apprécie si la nécessité de faire prévaloir la règle hiérarchiquement supérieure existe dans un cas donné ? A cela, la règle générale du droit international s'appliquerait : chaque Etat apprécie pour lui-même les situations juridiques dans lesquelles il est partie. Vous l'avez justement rappelé dans l'affaire du *Génocide* de 1951. Nous assisterions ainsi à une «softisation» de tout le droit international, dans le corps émacié duquel chaque Etat pourrait pratiquer son «pick and choose» abrité derrière le paravent lénitif du *jus cogens*. Nous serions témoin d'un subjectivisme sans limites par rapport à des mises en balance à chaque fois ouvertes, entreprises au cas par cas par les acteurs les plus divers, selon l'arbitraire de chacun. A vouloir faire avancer le droit international, avec une malencontreuse doctrine de la hiérarchie librement appréciée par chaque sujet, on risque de — que dis-je : on va — le faire mourir. Faust, son âme et le diable n'indiquent pas la voie du salut. On ne

saurait récurer un petit bout du droit international en ébranlant ses assises, en sapant les bases mêmes de son fonctionnement.

3. Le *jus cogens* n'est pas appelé à déroger au droit international général

6. En troisième lieu, je doute fort que le *jus cogens* puisse être utile comme norme hiérarchique quand il s'agit de la concurrence entre deux normes du droit international général, l'une impérative, l'autre non impérative. En l'espèce : réparation pour des crimes internationaux *(jus cogens)* contre immunité (concédons que non *jus cogens*). Le *jus cogens* touche au rapport entre une règle générale et une règle spéciale. Il touche à la dérogation d'une norme par une autre dans ce contexte précis. Là, il a toute sa place. Mais ici, de quoi s'agit-il ? De deux normes coutumières générales. Or, de deux choses l'une. Ou bien la norme impérative supérieure existe et alors il ne peut exister en même temps une norme non impérative contradictoire, car la pratique des Etats ne peut se contredire ; elle est de l'un côté ou elle est de l'autre. Ou bien la norme non impérative inférieure s'impose, et alors la norme supérieure impérative périclite en tout ou en partie, et ce nonobstant son caractère impératif. Il en est ainsi parce qu'une norme coutumière exige toujours une pratique diffuse et une opinion juridique. Si une nouvelle pratique effective et une nouvelle opinion juridique se font jour, c'est dire nécessairement que l'ancienne pratique et opinion juridique qui supportaient la norme impérative se sont quant à elles effacées. Dans ce cas, une norme coutumière — fût-elle impérative — ne peut se maintenir. Bien qu'impérative, en effet, cette norme n'en reste pas moins coutumière. Privée de sa pratique et de son opinion juridique, elle s'éteint comme le feu auquel on retire tout oxygène. Au fond, un conflit entre deux normes coutumières générales (y compris impératives) ne saurait exister. Au plan du droit coutumier, la question est plutôt celle de savoir si une norme s'est modifiée (par exemple partiellement éteinte) au regard d'une autre. Il en irait autrement si l'on envisageait du *jus cogens* fondé sur une source conventionnelle, mais cette question ne se pose pas dans le présent contexte. En l'espèce, la norme sur l'immunité ne s'est pas modifiée. La pratique étatique n'a pas jusqu'ici concédé d'exceptions pour le cas qui nous intéresse ici. Le *jus cogens* n'est donc d'aucun secours.

4. Questions de droit intertemporel

7. Enfin, un mot encore sur des questions de droit intertemporel. Nos honorables contradicteurs s'évertuent à vous faire croire que le *jus cogens* était bien établi déjà à l'époque de la seconde guerre mondiale et dans son immédiat sillage. Ils ont manifestement raison. Mais j'attire votre attention sur le fait que ce concept était à l'époque — et depuis les temps du droit de la nature et des gens — purement doctrinal. N'est-il pas caractéristique que nos contradicteurs soient obligés de citer Grotius, De Vitoria, Wolff (ils oublient De Vattel), le juge Walter Schücking ou Alfred Verdross (on aurait ici encore pu ajouter bien d'autres, comme le juriste-poète S. Séfériadès) ? La naissance du *jus cogens* au niveau du droit positif est incontestablement la convention de Vienne sur le droit des traités de 1969. On peut le regretter. Mais on ne saurait l'ignorer. Mes recherches assez extensives sur le *jus cogens*, que vous connaissez peut-être, me permettent de l'affirmer en connaissance de cause.

8. Voudra-t-on invoquer le *jus cogens superveniens* de l'article 64 de la convention de Vienne sur le droit des traités de 1969 ? Envisageons-le. Ce *jus cogens superveniens* suppose toutefois qu'une norme coutumière postérieure se soit établie. Je crois que l'Allemagne a pu démontrer que tel n'est pas le cas. Une hirondelle ne fait pas le printemps : le précédent de la Cour de cassation italienne, dans sa «splendid isolation», n'est pas le coucou d'une pratique, qui lui — le coucou — annonce sans faille le printemps, car il ne vient dans nos contrées que lorsqu'il peut se cacher derrière des feuilles (il est timide, le coucou).

5. Conclusions sur le *jus cogens*

9. Il faut prendre garde quand on manie le concept du *jus cogens*. Généreux, malléable, suggestif, il tend souvent à obstruer la vue et à faire reculer du champ visuel les vérités juridiques les plus élémentaires. J'en veux pour exemple une phrase citée dans les pièces des deux Parties à la présente instance. Les professeurs Belsky, Roth-Arriaza et Merva identifient le *jus cogens* à un système «of rules that States may not violate...» Peut-on s'exprimer moins pertinemment ? Je ne crois pas. Cette phrase suggère en effet très directement, presque irrésistiblement, que les Etats peuvent violer les règles ordinaires du droit international, à condition seulement de ne pas violer celles impératives. Votre Cour sait à quelle distance de la vérité se situe une telle allégation.

10. De quelle manière et sous quel angle que l'on considère la question, dans le droit positif actuel le *jus cogens* ne permet pas de justifier une mise à l'écart de l'immunité de l'Etat.

B. La question des conséquences d'une mise à l'écart de l'immunité

11. J'en viens maintenant à la question des conséquences d'une mise à l'écart de l'immunité. La question des conséquences d'un certain choix juridique ne fait pas partie du droit positif. Elle en est pourtant indissociable, car le droit est une œuvre finaliste. Il existe en vue de certains buts, de certaines finalités. Le droit n'est pas suspendu dans le vide. Il est fait pour s'appliquer à des réalités concrètes et à des conjonctures humaines. Quand il s'agit du droit international, qui est lié à la vie des Etats et des peuples, il est davantage encore nécessaire de ne pas perdre contact avec ces réalités et avec ces buts. Le juge ne saurait se dissocier de l'effort et de la responsabilité pour la réalisation du bien commun et pour celle de la justice. Dans les limites tracées par la norme positive, il doit évaluer les conséquences possibles de ses choix afin de les ajuster de manière à assurer, autant que faire se peut, la prospérité de la société dans son ensemble. En tout cas, il doit studieusement veiller à ne pas en déranger et encore moins à en détruire les délicats équilibres.

12. Or, quelles seraient les conséquences prévisibles d'une décision écartant l'immunité ? Il n'est pas nécessaire à cet égard de se lancer dans de fantasmagoriques spéculations ou dans d'outrecuidantes loufoqueries. La valeur du précédent et l'effet générateur qu'il déploie sont trop connus à une Cour de justice comme la vôtre pour que je doive insister. Voyons tour à tour quelles seraient les conséquences les plus humainement prévisibles d'un jugement de votre part mettant au ban l'immunité des Etats dans le contexte qui nous intéresse.

1. Déstabilisation des accords de paix

13. En premier lieu, vous déstabiliseriez de manière fatale les accords de paix, qui sont faits pour durer et qui permettent de sortir de la guerre et d'en refermer la parenthèse si douloureuse. Les inimitiés de la guerre seraient ainsi transférées indéfiniment vers la période de paix. L'on prolongerait dans l'état de paix l'enfer de l'état de guerre. En quelque sorte, la guerre ne serait jamais finie. Je n'ai pas besoin de rappeler à cette haute juridiction l'importance traditionnelle qu'ont eue, dans le règlement de conflits armés et dans l'instauration d'un ordre d'après-guerre, les accords de paix. Je n'ai pas besoin de rappeler l'importance qu'on a toujours attachée, à tort ou à

raison, à la finalité de ces accords. En mettant à l'écart l'immunité avec effet rétroactif, votre Cour permettrait de rouvrir tous ces règlements, notamment tous ceux conclus pour fermer la marche de la seconde guerre mondiale. Chacun pourra y puiser des griefs et des revendications encore insatisfaites, qu'ils soient anciens ou d'invention nouvelle. Si cela est vrai pour des plaintes individuelles suite à des violations du droit de la guerre, pourquoi n'en serait-il pas ainsi pour d'autres questions ? L'accord est un tout. D'ailleurs, même sur les plaintes ayant trait à la réparation pour des violations du droit de la guerre, comme celles qui nous occupent ce jour, l'effet dit «de domino» est aisément prévisible. Quel plus puissant stimulant que l'appât d'obtenir une «réparation», c'est-à-dire, plus prosaïquement, de l'argent ? Mais pourquoi s'arrêterait-on à l'Allemagne ? Une fois l'exemple donné, qui arrêterait l'avalanche de procès dans toutes les autres situations d'après-guerre ? Nos honorables contradicteurs n'ignorent pas que même avec leur règle conditionnée, portant sur la mise à l'écart de l'immunité, si savamment et si délicatement dosée, l'Italie elle-même pourrait se trouver confrontée aux plaintes les plus diverses venant d'horizons multiples, tantôt d'Ethiopie, tantôt de Libye, tantôt d'Albanie, de Grèce, de Yougoslavie, tantôt peut-être aussi d'Espagne. Et que dire des autres guerres qui ont émaillé le monde depuis 1945, voire même avant ? Aucun règlement de paix ne serait définitif. Aucun ne résisterait à l'ébranlement des plaintes individuelles. Le principe *pacta sunt servanda* lui-même, tenu pour si important, entre autres par votre juridiction, serait également subverti. Aucune sécurité juridique ne pourrait être créée par des accords de paix, liquidant les plaies de la guerre. Des individus auraient constamment en main la possibilité de les attaquer, de les torpiller et de les faire péricliter, en fait d'en obtenir la revision. Ils pourraient anéantir l'effort des collectivités publiques de chercher un équilibre durable et responsable dans le règlement global de l'après-guerre. Est-ce juste ? Et est-ce praticable ? Je vous le demande, en particulier à vous, parmi les juges, qui venez d'un pays qui a été ravagé par une guerre.

2. Course aux procès et «forum shopping» sans bornes

14. En second lieu, et concomitamment à ce que je viens d'exposer, on verrait rapidement s'instaurer une course malsaine aux procès plus ou moins non coordonnés, selon la règle du chacun pour soi et du chacun en vue de tenter d'obtenir un «maximum». Des myriades de procès

diapreraient le globe, dans une efflorescence printanière qu'on ne me voudra pas de rapprocher un tant soit peu d'une tuméfaction hors contrôle. Dans le «marché» de ces procès, la course au «forum shopping» le plus favorable serait de règle. La translation des plaintes grecques vers l'Italie en porte déjà un éloquent témoignage, qui n'attend que de faire des émules. Les juridictions internes entreraient ainsi en concurrence dans une éventuelle politique juridique du for le plus généreux. Il n'est guère besoin d'insister sur l'effet d'unilatéralisme effréné qu'une telle évolution ne manquerait pas de susciter. D'aucuns se réjouiront de l'effet boutoir de cette juridiction la plus généreuse. L'Allemagne, que j'ai l'honneur de représenter, y voit surtout un accroissement sans fin de l'anarchie internationale et une concurrence potentiellement malsaine, toute teintée de potentielles arrière-pensées, point trop rares dans le concert pas toujours très euphonique des relations internationales. Et, en effet, ne devons-nous pas nous interroger sur le point de savoir si ce moyen est bon ou est le meilleur, au regard de tels résultats prévisibles ? Je n'ai pas besoin ici de parler des coûts insignes que génèrent ces nuées de procédures, car il est convenu que devant une juridiction comme la vôtre on ne parle pas d'argent.

3. Danger de manipulations politiques

15. En troisième lieu, il faut craindre que la mise à l'écart de l'immunité ne soit, comme disent nos collèges des Etats-Unis d'Amérique, un «loaded gun», c'est-à-dire ne provoque des manipulations politiques de tout genre. Qui préviendra les règlements de compte ? Dans combien de pays la justice est-elle réellement indépendante ? Ne reçoit-elle pas aussi des instructions dans les Etats les plus démocratiques et les plus rompus à la prééminence du droit, tant les liens entre l'exécutif et la justice ne sauraient être entièrement inexistants ? Une fois l'immunité affaiblie, voire mortellement blessée, une fois l'immunité pulvérisée, la voie est libre pour indisposer des Etats étrangers par l'arme du juge. L'égalité souveraine des Etats serait ainsi mise en danger, car, pour ainsi dire, ce serait : *par in parem imperium habet.* Or, l'égalité souveraine est l'un des principes fondateurs de la Charte des Nations Unies, article 2, paragraphe 1, et du droit international général. Vous me direz : on est loin de cette situation dans le cas d'espèce, où il s'agit de crimes abominables de l'Allemagne de jadis. Je vous réponds : les précédents juridiques ont

vocation à se dépouiller de la personnalité des acteurs à l'occasion du procès desquels ils ont été formulés. Aujourd'hui vous avez un tel cas. Demain vous en aurez d'autres.

4. Renforcement significatif de l'unilatéralisme dans les relations internationales

16. En quatrième lieu, ouvrir les vannes de procès au sein de chaque Etat en faisant choir l'obstacle de l'immunité c'est donner libre carrière à l'unilatéralisme. Chaque Etat, dont la justice est un organe, article 4 des articles sur la responsabilité internationale des Etats (2001), agirait en fonction de ses propres agendas. Or, je vous le demande : quel est le sens le plus profond du droit international ? Quelle est la raison la plus incompressible de son existence ? On dit parfois que la fonction du droit international est de protéger le faible contre le fort. Je réponds : plus fondamentalement encore, c'est de barrer le chemin à l'unilatéralisme, c'est-à-dire à l'auto-appréciation et à l'auto-action sans limites. Ils sont la négation d'une situation ou d'une société régies par le droit. Cette haute juridiction voudra-t-elle donner sa caution à une solution qui signifierait accorder la victoire à un unilatéralisme triomphant ?

5. Multiplication des relations conflictuelles entre les Etats

17. En cinquième lieu, en écartant l'immunité, on risque de multiplier sans limite prévisible les relations conflictuelles entre Etats et entre gouvernements. Les procès de plus en plus nombreux et de moins en moins prévisibles irriteraient un nombre croissant de gouvernements, qui verraient leurs relations être grevées de nuages d'orage. La présente espèce en est un exemple encore très bénin. Unis par des liens d'amitié solides et durables, que l'histoire a scellés bien forts et bien trempés, l'Allemagne et l'Italie n'ont pas plongé dans une crise ou dans une exacerbation de leurs rapports. Dans les cas futurs auxquels le bannissement de l'immunité ne manquerait pas de donner lieu, il n'en sera plus ainsi. Des individus auraient dans leurs mains la possibilité d'embarrasser plus ou moins gravement les relations entre gouvernements. Le droit international moderne est basé sur la coopération et l'accroissement de la confiance entre Etats. Sans eux, rien de durable ne peut être construit. Le règlement global, entre gouvernements, des plaintes issues d'une guerre évite l'écueil mentionné. Il fait en sorte de ne pas rehausser ces questions en autant de motifs de discorde, mais de les embrigader dans une négociation d'ensemble. N'y gagne-t-on pas au change ?

6. Difficulté accrue pour les Etats de posséder des biens à l'étranger

18. En sixième lieu, en écartant l'immunité, les Etats seraient bien conseillés à n'avoir aucun titre de propriété hors de leurs frontières. Quel anachronisme dans notre monde du début du XXI^{e} siècle, fait d'interdépendance et même de globalisation ! Plus même : quelle impossibilité ! La présente affaire le met bien en exergue, mais en quelque sorte encore en sourdine. Un centre culturel italo-allemand risque d'être saisi, vendu, liquidé. Au détriment des relations entre les deux Etats, entre les deux peuples, au préjudice des bénéficiaires nombreux des activités de ce centre. Or, une fois l'immunité d'exécution volatilisée, comme celle juridictionnelle, sous le poids écrasant d'un prétendu *jus cogens*, quelle autre pièce de propriété résisterait à la saisie et à la vente ? Comptes en banque, participations industrielles, mais aussi centres d'échange culturels, fondations étatiques, biens de chefs d'Etat, navires de guerre, peut-être même locaux d'ambassade. Si la dignité humaine est au sommet de la normativité internationale, tous les biens que je viens de citer lui sont inférieurs. Une saisie et vente serait-elle dès lors à leur égard exclue ? Non, c'est le contraire. Un Etat serait ainsi bien conseillé de ne pas être titulaire de propriétés à l'étranger. Sans doute trouvera-t-il des moyens de se départir du titre formel de propriétaire par des montages juridiques. Peut-être faudra-t-il alors déplacer la joute juridique vers l'exercice d'une «levée des voiles». Je vous le demande : devrions-nous en arriver là ? La coopération entre les Etats n'est-elle pas elle-même un objet digne de protection ? Et la mise à l'écart de l'immunité ne la met-elle pas très directement et sans ambages en danger ?

7. La justice

19. On m'objectera la justice, à laquelle nous sommes d'ailleurs tous attachés. Mais est-il juste de produire des résultats tels que ceux que je viens de dépeindre ? Est-il juste de prendre en «otage» un peuple *saecula saeculorum*, en le tenant ployé indéfiniment sous le joug d'une responsabilité collective pour les méfaits d'un régime d'antan ? Qu'il paye des réparations, oui ; mais qu'un trait final puisse être tiré à cet égard, également oui. M'en voudra-t-on de paraître insensible aux terribles souffrances des victimes, auxquelles je suis en réalité tout sauf insensible, si j'ose poser la question de savoir jusqu'à quelle génération de descendants la «course» à une potentielle prestation pécuniaire pour torts subis jadis devrait s'étendre ? Si l'on accepte de le faire pour la seconde guerre mondiale, pourquoi pas pour les guerres plus anciennes ? Des ayants droit,

par succession, n'existent-ils pas ? En somme, la justice ne peut être perçue que d'un seul côté. Elle se trouve des deux, car des deux côtés il y a des hommes et des femmes d'aujourd'hui, pas des hommes et des femmes d'hier. J'aimerais que vous réfléchissiez méticuleusement à ce point. Il m'a quant à moi beaucoup interloqué.

20. Force est d'admettre qu'il n'est souvent pas possible de réaliser une justice parfaite, parce que l'on est obligé de répartir des biens. Une solution peut alors paraître juste si l'injustice est plus ou moins également répartie elle aussi. Votre haute juridiction savait bien pourquoi, avant de préciser les quatre exceptions existant dans le droit positif actuel, elle a réaffirmé l'immunité personnelle du ministre des affaires étrangères en fonction. Elle a affirmé cette orientation face à l'accusation de crimes internationaux formulée dans des procédures pénales devant les tribunaux d'un autre Etat (affaire du *Mandat d'arrêt du 11 avril 2000, arrêt, C.I.J. Recueil 2002*, par. 56 et suiv.). La *ratio* était à l'époque la même qu'elle l'est en la présente espèce : préserver l'égalité des Etats, permettre aux relations internationales de se poursuivre sans heurts majeurs, combattre l'unilatéralisme. Des jugements par des tribunaux internationaux pénaux, oui ; la libre carrière pour des jugements par des tribunaux pénaux internes, non. L'Allemagne estime que la Cour devrait suivre cette même ligne de raisonnement dans la présente espèce. Elle devrait se borner à appliquer le droit en vigueur. Au vu de ce qui précède, il est manifeste qu'il ne serait pas bienvenu de tenter de créer à propos de la question qui nous intéresse un droit nouveau. Ce ne serait de toute manière pas à cette Cour, ni à aucune cour de justice, qu'incomberait cette tâche. Elle est du ressort du législateur, des Etats.

21. Permettez-moi de conclure mon exposé d'aujourd'hui avec un petit conte. Il était une fois une maison où vivait une famille nombreuse. Quand l'un des fils s'en fut du havre familial et construisit sa propre maison, il demanda à son père s'il pouvait prendre une grosse pierre carrée, extraite du mur de la maison de famille. Elle lui servait pour étayer son propre mur, dans une place névralgique de celui-ci. Le père, très aimant, accepta. Plus tard, les autres fils et filles s'en furent tour à tour, et chacun voulut construire sa propre maison. L'un demanda à avoir aussi une pierre carrée, et un autre demanda à en prendre deux. Le père ne se sentit pas de leur refuser ce vœu, qu'il avait concédé au plus âgé. Un jour, la maison familiale chancela, puis elle s'effondra. Vous aurez compris le sens évident de cette petite histoire toute simple. Je voudrais le reformuler

comme suit : le bien individuel, si éminent soit-il, ne peut pas toujours prévaloir sur le bien commun. Les droits de l'homme ont leur place dans l'édifice d'ensemble ; ils ne sauraient sans autre l'ignorer, l'attaquer ou le mettre en danger.

Monsieur le président, Mesdames et Messieurs de la Cour, j'en arrive ainsi à la fin de ma plaidoirie. Je vous remercie de m'avoir prêté attention, qui plus est à une heure aussi tardive du matin.

Je vous serais reconnaissant, Monsieur le président, de redonner la parole à Mme Wasum-Rainer pour résumer les points saillants de notre argumentation. Merci.

The PRESIDENT: I thank Professor Robert Kolb for his presentation. Now I invite Her Excellency Ambassador Madam Susanne Wasum-Rainer to make her concluding remarks on behalf of the Federal Republic of Germany.

Ms WASUM-RAINER: Mr. President, distinguished Members of the Court, allow me to summarize in just two minutes the most important aspects of our argument.

1. This morning, we have shown that the Court of Cassation, by denying the application of the principle of State immunity to Germany for acts performed *iure imperii*, has failed to act in compliance with existing international law.
2. The *Corte* justifies its jurisprudence with its intention of creating a new rule of international law, but has failed to give a valid reason for such an approach outside *lex lata* and disregarded the inter-temporal dimension of international law.
3. It is erroneous to infer from the gravity of a breach of international law, a breach of substantive law a base for jurisdiction overriding the principle of State immunity.
4. The *Corte di Cassazione* is also wrong in equating personal immunity and personal responsibility with State immunity and State responsibility.
5. We have shown that, seven years after its *Ferrini* decision, State practice proves that the *Corte di Cassazione* still remains as isolated as ever in its erroneous belief that State immunity for sovereign acts knows any exception. This is not the case. Jurisdictional immunity in respect of acts *iure imperii* continues to be a firm rule in international law.

6. Italy, to no avail, tries to rely on a tort exception to State immunity. A correct interpretation of customary law as expressed in Article 12 of the United Nations State Immunity Convention must, however, lead to the compelling conclusion that this exclusion does not apply to the conduct of armed forces in an armed conflict.
7. Furthermore, Italy cannot rely on the argument that it discarded State immunity out of necessity. This argument fails to convince because neither in the 1940s nor today has international humanitarian law provided for an individual right to reparation.
8. Lastly, Italy also errs, for a number of reasons, in invoking the concept of *jus cogens* in its defence.

In accordance with the Statute of this Court, Germany will present its formal submissions at the end of the second round of our pleadings.

Mr. President, distinguished Members of the Court, I thank you, in the name of my whole team.

The PRESIDENT: I thank Ambassador Susanne Wasum-Rainer for her concluding remarks for the first round of the pleadings. This marks the end of today's sitting. Oral argument in the case will resume tomorrow at 10 a.m. in order for Italy to present its first round of oral argument. The sitting is closed.

The Court rose at 1.05 p.m.
