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International Court of Justice

THE HAGUE

Cour internationale de Justice

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Public sitting

held on Thursday 15 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 jeudi 15 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
		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
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
M. Gaja, juge *ad hoc*

M. Couvreur, greffier

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comme conseil.

The PRESIDENT: Please be seated. The sitting is open. Judge Skotnikov, for reasons that have been explained to me, is going to be absent from the morning session today. Today we begin the second round of oral argument in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*. Germany will present its second round of oral argument and will also give its observations with respect to the subject-matter of Greece's intervention. I shall immediately give the floor to the Agent of Germany, Ambassador Madame Susanne Wasum-Rainer.

Ms WASUM-RAINER:

1. Mr. President, distinguished Members of the Court, we have listened carefully to the arguments submitted by our esteemed Italian and Greek colleagues. Their expressions of friendship, co-operation and goodwill between our countries are greatly appreciated. The German Government is grateful for the possibility to settle this dispute in the present proceedings before this Court. Mr. President, we are well aware that the complex legal nature of these proceedings on State immunity cannot do justice at all to the human dimension of the terrible wartime events for which Germany has accepted full responsibility. I would like to take this opportunity to emphasize our deepest respect for the victims, not only here in the courtroom.

I. SUBJECT-MATTER OF THE DISPUTE

2. Over the last two days we have heard manifold arguments concerning and references to international humanitarian law and human rights law. Needless to say, Germany fully shares the commitment of Italy and Greece to those norms. This also applies to individual compensation in the case of breaches of human rights norms and, of course, individual criminal responsibility for all perpetrators of international crimes as enshrined in the Rome Statute.

However, these issues have nothing to do with our present case. None of the arguments put forward showed convincingly that the principle of State immunity for acts *jure imperii*, which is the subject of our dispute, has been restricted. No compelling legal argument was advanced to prove that Germany has been rightly subjected to the jurisdiction of other States. Quite the contrary, neither has international law been changed as to allow the abrogation of State immunity

in certain exceptional circumstances, as it was put. Nor, even if the criteria proposed by our distinguished Italian colleagues in their attempt to defend the jurisprudence of the Italian courts really did exist, would they be met by the facts of the cases against Germany. The Greek presentation, although it dealt with so many different aspects, did not focus on "the interest of a legal nature" which might be affected by the present proceedings as requested by the Court in its Order on the Greek application to intervene.

Italy relied, when justifying the abrogation of State immunity by her courts, on a denial of justice in very exceptional circumstances. But there is and was no denial of justice. Reparations were made. The exceptional circumstances referred to simply did not exist.

3. Indeed no national or international jurisprudence that proves the existence of this alleged trend has been submitted. While the distinguished delegate of Greece questioned the general applicability of the judgment of the Greek Special Supreme Court in the *Margellos* case, it is telling that thereafter no single Greek court including the *Areios Pagos* ever again denied German State immunity.

Our counsel will elaborate further on this point.

4. Mr. President, Italy has tried again to make the question of alleged outstanding reparations the subject-matter of the present proceedings. However, facts occurring before the date of the entry into force of the European Convention for the Peaceful Settlement of Disputes as between Italy and Germany clearly lie outside the jurisdiction of the Court. As the Court itself expressly noted when dismissing Italy's counter-claim, reparation claims do not fall within the subject-matter of the present dispute and do not form part of the present proceedings.

II. SCHEME OF REPARATIONS AFTER WORLD WAR II

5. Mr. President, one important purpose of my introduction is to dispel any erroneous impression that might have been created by our Italian and Greek friends that victims of German war crimes were deliberately left without compensation. At the end of the Second World War, the victorious Allied Powers proceeded from the conviction that Germany had to face up to her responsibility by making reparations to all of the countries that had defeated the Axis States. The mechanism that was put in place was a classic inter-State mechanism. It was a comprehensive

scheme for all countries concerned and covering all war damages. No provision was made for parallel reparation to individual victims. Italy and Greece were part of this comprehensive classic inter-State scheme.

The victorious powers demanded that the German Reich's former allies waive all claims against Germany arising from the Second World War in their peace agreements with them. And precisely this was the background to the peace treaty concluded with Italy in 1947. For, prior to September 1943, Italy had been an ally of Nazi Germany. In contrast, Greece received her share of reparations through the Paris Inter-Allied Reparations Agency.

6. The framework for reparations was established by the Potsdam Accord of 2 August 1945, concluded between the victorious Allied Powers, and unilaterally imposed on Germany. Reparations took place in various forms, including removals, primarily of industrial capital equipment from the different zones of occupation, the confiscation of all German external assets, and the renunciation of an area of more than 114,000 sq km, about a quarter of Germany's pre-war territory.

7. In addition to this comprehensive reparations scheme, Germany, on the basis of policy determinations of her own, put in place a system of compensation for victims of specific Nazi racist and ideological measures of persecution. As of December 2010, some €70 billion had been paid to individuals and States in this context. These payments continue: €600 million are currently paid each year to victims of Nazi persecution.

8. With regard to Italy and Greece, Germany decided to provide compensation both to the governments and to individual victims.

With your kind permission, Mr. President, I will provide some detail here in order to refute the arguments based on necessity and on an alleged denial of justice, and to demonstrate that Germany has indeed shouldered her responsibility.

— At the beginning of the 1960s the Federal Republic of Germany paid DM115 million to Greece for victims of racial and religious persecution. Germany likewise concluded the two treaties with Italy referred to in our Memorials, under which a lump sum of DM80 million was paid to Italy.

— Roughly 3,400 Italian civilians were compensated for their forced labour by the Foundation "Remembrance, Responsibility, Future". The total amount of funds awarded to Italian individuals by this Foundation was close to €2 million.

— Furthermore, roughly 1,000 Italian military internees were awarded compensation for forced labour under the Foundation scheme.

— In addition, numerous Italian and Greek individuals received payments under the German post-war compensation legislation.

9. To sum up, there was a comprehensive reparations scheme that was fully implemented. It was based on the premise that lump-sum payments are made to governments to compensate for war damages and that citizens must turn to their own governments to receive their share. All victims of war crimes were thus covered by this scheme. Germany further made individual payments to foreigners on a voluntary basis. These were on the whole paid to victims of specific types of Nazi racial and ideological persecution, and not generally to those who suffered loss and injury due to war. These collective reparation mechanisms were as comprehensive as possible. To the extent that recompense can ever be made for such grievous crimes, and we know that it cannot, Germany has honestly tried to do so. The idea that this whole reparation scheme needed to be subverted in 2004 is unacceptable.

10. The implementation of this reparation scheme was the basis and prerequisite for democratic Germany's re-admission into the international community. It enabled Germany to become a major pillar of European integration, together with Italy and later Greece. This has been acknowledged by the Italian Government. For decades, the Italian Government considered the reparations chapter to be closed. It was only when the German Government unilaterally — together with German industry — decided to make *ex gratia* payments to former forced labourers in the year 2000 that Italy raised the issue of Italian military internees. It is true that prisoners of war were not included in this specific scheme. But those military internees who had also been subjected to racial and/or ideological persecution were entitled to payments.

III. DENIAL OF JUSTICE

11. The allegation that there was a denial of justice is mistaken. All plaintiffs had the option of pursuing their claims before the German courts and, eventually, before the European Court of Human Rights. In a number of cases the claimants did indeed go to Strasbourg. The Court in Strasbourg decided that Article 6 of the European Convention on Human Rights, in which the right to access to justice is enshrined, was not violated. We have quoted these judgments in our written submissions and in our oral pleadings.

Just how erroneous the allegation of a denial of justice is can be seen from the leading case in which the Italian *Corte di Cassazione* formulated its new doctrine: the *Ferrini* Judgment. Here the plaintiff, Mr. Ferrini, had decided *not* to lodge his application with the competent German institution, the Foundation "Remembrance, Responsibility, Future". Mr. Ferrini was not a prisoner of war but a civilian who was subjected to forced labour. In principle, he would have been eligible for funds from the Foundation. However, he did not apply for compensation from the Foundation, let alone take his case to German courts. Instead he filed a case in Italy. Therefore, the allegation of our Italian colleagues that Mr. Ferrini had no other option than to resort to the Italian courts is simply not true. Consequently, the *Corte di Cassazione* when delivering its judgment in the *Ferrini* case did *not* refer to denial of justice as submitted by our Italian colleagues.

12. Mr. President, yesterday our Greek colleagues presented in detail an account of the various proceedings in the *Distomo* case: before the Greek courts, before the German courts and eventually before the European Court of Human Rights. How can anyone assume that there was a denial of the right to access to justice which then forced Italian judges to take such action?

IV. OUTLINE OF THE GERMAN PRESENTATION

13. Mr. President, with your permission, I will now outline the structure of Germany's second intervention.

Professor Tomuschat will first explain why the denial of justice argument cannot justify the abrogation of Germany's State immunity by the Italian courts. He will also address the Italians' attempt to apply retroactively emerging concepts of international law, as well as their grant of an *exequatur* to the Greek judgment in the *Distomo* case that I just mentioned. Professor Gattini will thereafter refute the alleged applicability of the tort exception of State immunity, and will

demonstrate that the Italian waiver contained in the peace treaty concluded with the Allied Powers cannot be interpreted as narrowly as contended by Italy. He will further show that there is no way in which Germany can be said to have committed an abuse of rights. Professor Kolb will then comment on aspects of international humanitarian law, *jus cogens*, the argument of complicity, and the alleged special character of the Italian cases. Lastly, I will present Germany's formal submissions.

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

The PRESIDENT: I thank Ambassador Susanne Wasum-Rainer for her presentation and I now invite Professor Tomuschat to take the floor.

Mr. TOMUSCHAT:

1. Mr. President, distinguished Members of the Court, a moment ago, Ms Wasum-Rainer explained that the core argument of the Respondent, namely that Germany has refrained from providing any kind of reparation to the victims of breaches of international humanitarian law committed by the authorities of the Third Reich during the period when Italy was under occupation from September 1943 to May 1945, is simply not true. Germany has indeed paid compensation to many categories of Italian victims — yet not to everyone, which is openly admitted. Indeed, the German Government is of the view that with regard to specific war damages other modalities of settlement were resorted to, a fact which the Respondent has chosen to ignore although it has consistently reiterated that the issue of reparation must be seen within its surrounding context.

I. WAIVER CLAUSES IN RESPECT OF REPARATION CLAIMS ARISING FROM BREACHES OF *JUS COGENS* RULES UNLAWFUL? A GROSS ERROR AND DANGEROUS THESIS

2. Mr. President, taking the observations presented by the Respondent, in particular Professor Zappalà[1], at their face value the whole of Europe would end up anew, 66 years after the end of World War II, in a state of tensions, enmity and distrust. Why am I saying this? Well, pursuant to the Respondent's argument all the peace settlements reached between the ex-enemies

[1]CR 2011/18, pp. 28-30, paras. 13-16 (Zappalà).

would to a large extent be null and void. Not a single one of all these complex settlements, some of which set out in explicit terms, others in somewhat subtler form, waivers of reparation claims would survive the surgical stroke of an analysis which handles *jus cogens* as its multiple-purpose sword. The contention is: reparation claims resulting from breaches of *jus cogens* cannot be renounced. When entering into negotiations for a peace agreement, governments must insist from the very outset on absolute and unrestricted fulfilment of any entitlements that may have accrued to them under the law of State responsibility, if and to the extent that such entitlements result from infringements of hierarchically superior norms.

3. This contention appears strange, very strange indeed. It introduces a novelty into international law: claims that may never be forgone, which cannot be waived. Yes, it is true that a State can never enter into an agreement with another State that would provide for the violation of basic rights of the individual. No State can allow another State to torture its citizens, to kill them at random, to hold them in slavery, to engage in genocidal practices. Such activities running counter to *jus cogens* norms or to obligations *erga omnes* cannot be condoned or permitted, under no circumstances. And perpetrators of such crimes must indeed be prosecuted. But it is quite another matter to dispose of financial reparation claims resulting from such and similar offences. The tort has been committed. The life and limb of the individual concerned are no more in danger. At that stage, when the unlawful act was already consummated, questions of enforcement and implementation arise. The realization of responsibility can take the most diverse forms. There is simply no *jus cogens* rule which provides how breaches of *jus cogens* must be repaired. Let me emphasize this sentence again: in matters of financial compensation, no *jus cogens* exists. The cautious drafting of Article 41 of the ILC Articles on State Responsibility clearly shows that as a general rule the ordinary ways and means of reparation are available to the States concerned. Clearly, any State can choose to renounce an entitlement which it has on grounds which it deems appropriate. Such grounds may be of the most diverse nature. One of the reasons which may impel a government to waive certain claims is to establish a firm and durable peace after a period of armed hostilities that has brought about death and destruction to its people. In any event, it would appear to be crystal clear that no rule of *jus cogens* enjoins States to proceed to a settlement where each and every violation of a rule of humanitarian law must be taken up and sanctioned by

specific reparation measures, pursuant to a bureaucratic list of the relevant violations one by one, in accordance with complex rules of taking evidence.

4. The model advocated by the Respondent is so far removed from reality that one may even ask whether it is meant seriously. Let me start by giving just one example. The Two-plus-Four Treaty of 1990 bringing to a formal end World War II by removing the overall responsibilities still held by the Victorious Powers of World War II. In the relationship between the former adversaries of the German Reich and the two German States this was the final close of the war, *el punto final*. However, what does the Respondent tell us? This settlement, hailed by the entire world as the achievement of a long process of mutual accommodation is to a large extent null and void since it does not do justice to the alleged entitlements of millions of persons who suffered injuries during the war. This is indeed the gist of their submissions. States had no right to dispose of the compensation claims of their nationals.

5. What are the consequences of this outrageous construction? Well, it stands to reason that they would subvert the entire post-war architecture of peaceful relations between States. Germany would have to pay compensation to millions of people although, at the inter-State level, it made reparation on a large and unprecedented scale. Germany knows well that World War II caused death and physical injury to huge, almost indescribable numbers of people. But international law is a law of reciprocity. Germany is not a pariah State, and the enemy State clauses of the Charter of the United Nations — Articles 53 and 107 — have become obsolete. In other words: German victims of war crimes would necessarily be in the same position. I do not have to go into details. What happened, in particular, when at the end of World War II Germans and ethnic Germans were expelled from the eastern parts of Germany and from other countries of Eastern Europe is well known. Air raids against Hamburg and Dresden would have to be examined as to their compatibility with international humanitarian law. I could also give an account of the losses suffered by my own family, but I abstain from so doing.

6. In other words, the legal stance advocated by Italy would lead Europe back into the unfortunate past of the years between 1939 and 1945. This time, no armed battles would take place. But legal battles would be fought, everywhere in Europe. Everyone believing that he or she suffered damage because of a violation of rules of international humanitarian law could today,

66 years after the formal end of World War II, file an action before the courts of his or her country against the alleged wrongdoing State, notwithstanding the existing settlements concluded between the States concerned. This is not just a political consideration, without any value on the legal plane. What I have hinted at shows persuasively that the traditional way of coming to terms through international agreements, where the State that receives compensation then proceeds to the distribution of the funds received to its nationals, has an inherent logic which is designed to render peace possible.

7. What counsel for the Respondent suggest as the appropriate and just solution would amount to a recipe for continued enmity, a state of tension which could never be ended by peaceful means. Indeed, the Respondent argues that just any individual might object to the definitive conclusion of a peace agreement. Complete satisfaction could never be reached. A veto right would be granted to everyone wishing to block the road to peace, to a fresh beginning.

II. JURISDICTIONAL IMMUNITY HAS NOT SHRUNK

8. After this introduction, which to some may seem exceedingly dramatic but which is perhaps not even pessimistic enough, let me come back to the core substance of the present dispute, which is nothing more and nothing less than jurisdictional immunity. The German team listened carefully to what was said on Tuesday by Italy about that principle. However, to be frank, not much was advanced that could lend support to the thesis that jurisdictional immunity has shrunk below the level to which it receded under the effect of the commercial-question doctrine. It is of course well accepted today that no State may claim immunity for business transactions. But to deduce from the transition to the restrictive theory of immunity in respect of acts *jure gestionis* that the process continues unabated, affecting even immunity in respect of acts *jure imperii*, is grossly erroneous. Germany must reiterate its clear stance: general international law consists of rules of positive law, rules that have come into existence by practice and an overarching legal opinion of the international community to the effect that the facts as empirically observable constitute binding precepts.

9. Rather vaguely, without proceeding to a clear analysis of the decision of the French *Cour de cassation* of 9 March 2011, counsel for the Respondent argued that that decision amounted to a departure from the former jurisprudence of the Court, reflected in *Bucheron*, according to which a State enjoys absolute immunity in respect of its acts *jure imperii*. A perusal of the relevant passages makes clear that the *Cour de cassation* considered in an *obiter dictum* that, perhaps, acts of terrorism might be outside the protective umbrella of immunity, without, however, coming to a definite conclusion in that regard. In sum, three points should be noted: First of all, the issue was terrorism and not armed warfare. Second, the case concerns occurrences of 1989 while here occurrences dating back almost 70 years need to be assessed. Third, the *Cour de cassation* ventilates an idea which it neither approves nor rejects, just stating that this is an issue which requires due attention. This is not the piece of concrete, palpable, tangible practice that could become the pillar of a new customary rule. By contrast, the recent decisions which Germany has put before you are all unequivocal: the rule of State immunity stands and must be respected.

10. Yesterday, the Agent for Greece was in some trouble when he had to explain the scope and meaning of the *Margellos* decision of the Special Court under Article 100 of the Greek Constitution. Visibly, he tried to belittle the legal connotation of that decision. Notwithstanding his expert knowledge, Germany feels entitled to note: the Special Court is a court specifically entrusted in Greece with ruling on the existence and scope of general rules of international law. It is not just one of many specialized courts with little authority. And the law of implementation, which was strangely enough not mentioned by Greece, specifies in Article 54 that decisions of the Special Court are binding on all Greek judicial authorities in respect of the issue that has been decided. In fact, after the *Margellos* case — as already pointed out by Ms Wasum-Rainer — not a single diverging judgment has been rendered in Greece. Even the *Areios Pagos* has heeded the authoritative determination by the Special Court. Accordingly, the *Margellos* decision is of the highest importance when we talk about the legal position with a view to ascertaining the existing legal practice in light of Article 38 (1) *(b)* of the Statute of the Court.

11. Mr. President, distinguished Members of this Court, we should not lose sight of the essential factual element of the case pending before you. You have to adjudicate a dispute that has arisen from the occurrences of World War II, a war that engulfed the whole of Europe in a state of

violence for almost six years. And the crucial question is: how can the consequences of armed conflict be settled, what are the modalities which international law puts at the disposal of the parties concerned to come to terms with a phenomenon which, by necessity, entails injuries and losses, including human lives? What the Respondent suggests is that every victim should be enabled to pursue an individual reparation claim for the damage he or she has suffered. In other words, any settlement would be privatized and individualized. States would be displaced from their traditional role as guarantors of the common weal at a stage when many considerations come into play. On the one hand, after armed conflict the necessity to make compensation for the losses sustained becomes an urgent concern. On the other hand, the bases must be laid for a fresh start in the relationship between the former enemies. Therefore, time becomes also an important factor. Treaties can normally be concluded fairly swiftly: not always, of course. If each and every individual case had to be examined separately, swift action would be rendered impossible. At the level of implementation, the difficulties would even grow into insurmountable obstacles. Why should any State recognize thousands of judgments rendered by judges from another nation convicting it, so to speak, of wrongdoing? An unfortunate cycle of charges and counter-charges would begin, each side beginning engaging in judicial practices denouncing the war crimes committed by the other side.

12. It is for these reasons that international law has evolved, over decades and even centuries, the rule of jurisdictional immunity, designed to permit a settlement at diplomatic level, very often by lump-sum agreements where the State entitled to reparation assumes the burden of distributing the sums received to its nationals. Thus, State immunity has an inherent logic, a raison d'être which has by no means become extinct. In particular, the classic modes of settlement ensure that the victims are compensated according to criteria of justice and equality. Otherwise, if we leave the settlement of war damages to private initiative, the most clever people, knowing how to initiate legal proceedings and being fortunate to hire well-versed lawyers, might get the lion's part, while the ordinary citizen would remain without any remedy. Thus, the traditional mode of settlement has also the advantage of a well-ordered default procedure, where strict rules, to be issued by the victim State, guarantee fairness and equity. This observation shows at the same time that the mechanical opposition resorted to by the Respondent and yesterday by the intervener,

claiming that on the one side there are individual human beings in need of protection while on the other side there are powerful cold and distasteful States is simply erroneous: well understood, jurisdictional immunity ensures good order in international relations, not least to the benefit of the individual victim citizen.

13. Mr. President, distinguished Members of the Court, Italy has put before us a few cases which allegedly show that the rule of jurisdictional immunity has become fragile and should not be observed in the present case. The truth is: none of the cases, not a single one, concerns situations of armed conflict! There is no new practice that might support the inference that domestic courts have transgressed the principle of jurisdictional immunity with regard to disputes arising from reparation claims based on violations of international humanitarian law. Reference has already been made by me to the recent decision of the French *Cour de cassation* of March of this year. This dispute concerned an act of terrorism, an isolated, though, of course, very serious act of terrorism. And the Canadian case, submitted at a very late stage, during the pleadings of Italy last Tuesday, concerns an act of torture to the detriment of one person. Yet, individual cases of wrongdoing cannot be compared to the violations that are committed during armed hostilities, where — unfortunately — a mass phenomenon has to be addressed — and resolved. One must see these recent cases in the same light as the US case of *Letelier*, where the American judges seised by the relatives of ex-minister Letelier of Chile ruled that Chile had to answer the claim and that they had jurisdiction to go into the merits of the case. This is one class of cases, attacks on the physical integrity of a person on the soil of the forum State. But: how can one possibly equate these cases with criminal occurrences during armed conflict? It is the fundamental intellectual duty of lawyers to distinguish. Already during the first days when we happily arrived at law school for the first time we were taught to distinguish. Have a careful look at the factual circumstances characterizing a case and which determine its essence! Do not fall prey to false analogies! Do not follow blindly the abstract terms of a legal provision! This is necessary in our case as well.

14. It is in this sense that the interpretation of Article 12 of the United Nations Convention must proceed. My colleague, Professor Gattini, will scrutinize in more detail the scope and meaning of Article 12. But let me say already at this stage: it is obvious that Article 12 does not talk about warfare! It clearly is meant to cover accidental events, not organized violence during

warfare. The terms are there, one just has to take note of them. And the drafting history does not contain a riddle, it is no enigma. The original intention was to cover road accidents and other insurable risks. This is the gist of Article 12. To apply it to armed warfare is to distort its essential meaning. There are limits to any interpretive endeavour. Let me just recall the preamble of the United Nations General Assembly resolution adopting the United Nations Convention and also the statement by Mr. Hafner, chairman of the Working Group that eventually succeeded in pushing the Convention over the hurdles where it had lain blocked for many years. All this has been amply explained in our written submissions and already clarified by Professor Gattini in his pleadings.

III. COMPLIANCE WITH JURISDICTIONAL IMMUNITY IN PRACTICE

15. Mr. President, before addressing the erroneous contention that Germany has not provided any reparation to Italy, let me just make one observation that may seem self-evident but is not self-evident at all — but maybe it is self-evident for a law-abiding country. And this observation is as follows: in Germany, no plaintiff has ever succeeded in bringing a claim against the States at the hands of which he — or she — suffered injustice, or to put it more mildly — believed to have suffered injustice — during World War II! Well, of course the courts in Germany are open. Whoever believes that he or she has a claim against a foreign country can introduce such an action. Nobody is prevented from so doing. But the relevant claims have never been successful, not in a single case. There were cases where persons forcefully expelled from a number of Eastern European States under the most degrading conditions and deprived of their properties without any kind of reparation filed actions against the relevant States: no way, the claims were deemed to be inadmissible by virtue of the principle of sovereign immunity.

16. Would it be the ideal solution, as advocated in principle by Italy and also by the intervener, that the more recent wars in Iraq and in Afghanistan be settled through individual actions by persons who might be able to argue that they have become the victims of war crimes? This is by no means to suggest that series of war crimes were committed on a daily basis by the foreign troops deployed there. On the other hand, it is an undeniable fact that war crimes were committed. Do we know anything about civil actions brought by the local population against the troop-contributing countries? Not the slightest hint of such legal responses has become known in

the international legal community. No doubt, the victims should be compensated. But the ways and means must be carefully devised by the governments concerned. Many channels are open for that purpose. It is certainly not by accident that no attempt has been made to proceed unilaterally, imposing domestic judicial decisions on the alleged wrong-doing State.

IV. GERMANY'S ALLEGED FAILURE TO PROVIDE REPARATION

17. Mr. President, allow me now to come to an issue which has taken a pivotal role in Italy's pleadings but which is, if considered more closely, a secondary question, namely the extent to which Germany has in fact provided redress to the victims. Of course, from the human viewpoint, reparation and compensation are crucial. Victims who can be identified should obtain reparation, no doubt about that. We, as Members of the German team, are shocked like you about the atrocities committed in the past by German armed forces in some places, in Italy as well as in Greece. Even though the rules on military reprisals were fairly rough during World War II, the armed forces of a civilized country should never have engaged in a war against civilians as retaliation against partisan attacks. Our sympathy is with the victims. But the heart of the matter here is whether Germany enjoys sovereign immunity for acts committed during World War II, 66 years ago. Like any other sovereign State, Germany enjoys sovereign immunity after having shown, for more than six decades after the collapse, in 1945, of the evil Nazi dictatorship, its willingness and ability to live as a peaceful partner within the international community of nations. The misdeeds and crimes of the past are fully acknowledged. However, the deplorable developments of World War II, which brought about a catastrophe not only for Germany's neighbours, but also for Germany itself, cannot and do not entail as a consequence that Germany can be deprived of its attributes as a State that is on a par with all other States.

18. This does not mean that Germany wishes to escape responsibility for the offences which the authorities of the German Reich perpetrated in Italy from September 1943 to May 1945. Germany notes that the ominous phrase "Immunity cannot mean impunity", used in the written submissions of the Respondent with a view to discrediting the German stance and attempting to taint the invocation of immunity as an ugly endeavour to shed responsibility in a light-handed manner, has not appeared again in Italy's pleadings of last Tuesday. Germany is grateful to Italy

for having corrected its language. It is clear now that the debate has not been shifted onto the level of criminal prosecution, suggesting that the German people should be collectively punished.

19. But coming now to the question of reparation, the legal position should be stated unambiguously so that no misconception may arise. Two strands of reparation may be taken into account, reparation to the victims individually, on the one hand, and collective reparation to Italy as a State. When reading Italy's pleadings, more often than not there is a definite lack of clarity as to what was really meant by the speaker. Reparation is mentioned as a catch-all concept. May I recall again my concern that lawyers must distinguish. That is their first quality. Reparation on an inter-State level is not the same thing as reparation to individual victims.

20. May I first address the issue of reparation to individuals. It was pointed out by Ms Wasum-Rainer that many groups of persons were granted reparation in an individualized manner, in particular those persons having suffered persecution on racial grounds. It was a point of honour for the new Germany to distance itself from the outrageous racial persecution policies of the Third Reich by providing compensation to the victims of such policies. The sums paid are considerable.

21. On the other hand, Germany has consistently taken the view that no individual entitlements arise from violations of international humanitarian law. Professor Perrakis, in yesterday's pleadings, has attempted to show that already in 1907 the governments convening at The Hague agreed in Article 3 of the Fourth Convention on granting reparation claims to individual victims in case of a violation of rules of international humanitarian law. This attempt has clearly failed. The relevant practice of the peace treaties for more than 100 years has not confirmed the thesis advocated by my learned colleague Frits Kalshoven. The issue has been extensively dealt with in our written submissions so that we see no need to again take up the relevant discussion. And Germany notes that Italy would seem to be in agreement with Germany in this respect. On Tuesday, Professor Zappalà said in paragraph 31 of his pleading: "[W]hat is at issue here is the question of State responsibility in its inter-State dimension. . . . The question of the right of victims to individually obtain reparation is not at issue."[2] Professor Zappalà distinguished, he did.

[2]CR 2011/18, p. 35, para. 31 (Zappalà).

Well, this closes the debate on whether Germany may have failed to provide redress to individual victims. No inference may be drawn to the effect that individuals, seeing their entitlements frustrated by Germany, had no other avenue than to turn to the courts of their own country. Germany does not contradict Mr. Zappalà's observations on this point. But it notes an inconsistency in Italy's line of reasoning. Professor Dupuy speaks of applicants who have vainly sought to obtain reparation for 50 years[3]. Well, Mr. Ferrini, in particular, as already pointed out, has never submitted any application to the German authorities.

22. Consequently, the question arises whether Germany has failed to honour its obligation to provide reparation collectively as it should have done, following Italy's submissions. Italy's stance requires an explanation of the entire system of reparations as it was conceived by the community of States having declared war on Germany under the leadership of the Three, and later Four, Allied Victorious Powers: the Soviet Union, the United Kingdom, the United States, later joined by France. The foundations of that system were laid down at Potsdam, a few months after Germany's surrender. The Potsdam Agreement has a chapter on reparations that did not become a dead letter, but was meticulously executed. It was meant to constitute a comprehensive peace settlement, subject to further approval by a peace conference that would be convened to define the new boundaries of Germany, after the massive amputations already decided in principle by the conference, in the absence of Germany as a defeated country. At that time, at Potsdam, determinations were made as to the quantity of reparations, as to their form and modalities and as to the countries that should become beneficiaries of the assets to be distributed. Italy was not taken into account as being entitled to reparations. Indeed, this determination of principle was implemented by the Paris Interallied Reparations Agency which operated as a centre of computing and distribution. Accordingly, no payments were made to Italy from those assets. The intention was to assist the countries that had become victims of the wars of aggression launched by the Axis Powers. Greece was among those States that were counted as beneficiaries. Of course, and logically, Germany was only considered as the aggressor that was obligated to make good the damage caused by it to the greatest extent possible. And Italy was not taken into account as a

[3]CR 2011/18, p. 53, para. 8 (Dupuy).

beneficiary either, very simply because before joining the victorious Allied Powers in 1943 it had engaged in a similar manner in aggressive policies. Italy could not shed its past. Wisely enough, it had abandoned its close connection with Nazi Germany at a point in time when the fall of the Third Reich became a realistic prospect. But for the purpose of the peace settlement it was still considered an aggressor State. Until September 1943, it had participated actively in the imperialist subjugation of European peoples. Understandably enough, it was felt that it should provide redress to its nationals, to its victims, from its own resources.

23. It is hence understandable that Italy had to renounce all claims against Germany by virtue of Article 77, paragraph 4, of its Peace Treaty. Both countries, the Third Reich and fascist Italy, had been accomplices in attempting to establish a hegemonic system in Europe, in violation of the right of self-determination of the peoples not allied with them. Why should one partner of that unholy alliance be gratified by reparation claims against the other? Article 77, paragraph 4, of the Peace Treaty is a deliberate sanction imposed on Italy which, under other provisions of the Peace Treaty, was enjoined to make reparation to the countries occupied by it.

24. Clearly, the Allied Powers, on the strength of the responsibilities which their victory had brought to them, exerted some kind of discrimination against Italy. However, as just explained, this deliberate discrimination had specific reasons. On the whole, the system of reparations conceived of by the Allied Powers was carefully equilibrated. No State against which the Axis Powers had conducted military operations obtained full compensation for the losses and injuries it had suffered. The available assets were scarce, and Germany had to be given the chance of rebuilding a future, in particular for its younger generations. Therefore, some countries particularly severely hit obtained larger portions of the assets ready for distribution, and some other countries — like Italy — were completely left out of consideration. This discrimination, this inequality does not mar the established architecture as a whole. It had its intrinsic, well-pondered reasons. Accordingly, the Respondent cannot claim that it was unfairly treated.

25. In sum, the Potsdam Agreement, which was eventually confirmed by the Two-plus-Four Treaty of 1990, established, together with the Paris peace treaties of 1947, a comprehensive system of reparation applicable to all countries that had been enemies of Germany — like Italy that declared war on Germany after having denounced its association with the Third Reich as a

consequence of the rupture of September 1943. Italy cannot possibly contend that the Potsdam Agreement and the Two-plus-Four Treaty of 1990 are not opposable to it. The Victorious Powers of World War II had established a directorate in Europe that was never objected to and had to be formally accepted by Italy through the Peace Treaty of 1947. My colleague Andrea Gattini will proceed to a further analysis of Article 77, paragraph 4, of that Treaty. It was my task to present the political, historical and legal context of the waiver clause which must not be seen as a kind of accident, a derailing provision which does not fit into the system of international responsibility. The contrary is true! The waiver clause was deliberately imposed on Italy as a sanction of the international community for its earlier wrongdoing as an accomplice of Germany during a war which destroyed the bases of civilization in Europe.

26. Thus, in light of what has just been observed, there can be no question of Germany being remiss in fulfilling its duty of reparation. Germany has paid dearly for the criminal adventures of the Third Reich. Eventually, in 1990, the last page was written: Germany recognized once and for all that the territories which at Potsdam had been provisionally placed under Polish and Soviet administration had become Polish or Russian territory. More than 100,000 sq km became thus the price the new Germany had to pay for the failings of a criminal government which had not only breached the peace in Europe, causing millions of losses of human lives in east and west, north and south, but had also brought about death and destruction to the German people. Millions lost their ancestral homes, their *Heimat*. But history cannot be rolled back, and not everything can be made good again after evil has struck. Let us be happy and rejoice about the state of peaceful relations currently existing in Europe.

27. Given that Germany cannot be faulted with not complying with its duty of reparation, we see no need to discuss the very strange new theory of countermeasures advocated by Professors Palchetti and Dupuy. Their contention is that, because Germany was in breach of its obligation to make reparation, the Italian courts are entitled to rule on the controversial issues, acquiring jurisdiction by a magic stroke, in total departure from the rules elaborated by the International Law Commission. They are visibly on an erroneous course.

V. BREACH OF GERMANY'S IMMUNITY BY DECLARING THE GREEK *DISTOMO* JUDGMENT ENFORCEABLE

28. Mr. President, let me now come to a next point I wish to address in more detail. The judgment of the Greek Regional Court of Livadia in the *Distomo* case, which proved to be inoperative in Greece because of the denial of the Minister of Justice to give the requisite authorization to its execution, was declared "enforceable in Italy" by virtue of two decisions of the Court of Appeal in Florence. This was not a routine matter. The judges must have been aware of the origins of the claim enshrined in the judgment of the Court of Livadia, a claim against Germany derived from the Distomo massacre. Let me emphasize again: this was an abominable crime. We as counsel for Germany, in the name of Germany, deplore deeply what happened at Distomo, being ourselves unable to understand how military forces may exceed any boundaries of law and humanity by killing women, children and elderly men. But the issue is a different one here: was Italy allowed to lend its hand to the execution of the controversial judgment? And in fact, measures of constraint were taken.

29. There can be no doubt that jurisdictional immunity has a wide scope. It protects a State not only against claims being entertained as to their merits if acts *jure imperii* are in issue, but also against the enforcement of judgments having as their subject-matter such acts. Part IV of the United Nations Convention on Jurisdictional Immunities of States and Their Property deals with measures of constraint, allowing them only under very narrow conditions. The main point in issue here is not mentioned explicitly in the Convention. It does not state that a judgment delivered in violation of the rule of immunity may not be executed. But this proposition results unmistakably from the general rule of State immunity as it is enshrined, *inter alia*, in Article 5 of the Convention which embodies general international law. By declaring the judgment of the Regional Court of Livadia enforceable in Italy, the Court of Appeal of Florence assumed jurisdiction over Germany in a matter where national jurisdiction is excluded. Clearly, the decisions of the Court of Appeal of Florence stand in the line of the *Ferrini* jurisprudence of the *Corte di Cassazione*. Therefore, the objections raised against the *Ferrini* jurisprudence apply also to the decisions that prepare the ground for enforcement or order or permit actual measures of enforcement.

30. It is significant, in this regard, that the lack of enforceability of the Greek Livadia judgment is also established under the relevant legislation of the European Union. The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, incorporated into European Community law, does not comprise claims from actions of armed forces in the territory of one of the States parties as confirmed by the Court of Justice of the European Communities in *Lechouritou and Others*, a judgment of 15 February 2007. It is for that reason that the Italian State Advocate in Florence recommended to the Court of Appeal to set aside the declaration of enforcement delivered at first instance[4]. However, under the impact of the *Ferrini* jurisprudence, the Court of Appeal did not heed this appeal. Thus, it emerges again that a determination must be made on the legal correctness of the *Ferrini* logic, which in the view of the Applicant subverts well-established mechanisms of international law for the compensation of war damages.

31. On the other hand, Germany has duly taken note of the declaration of the Agent for Italy who recognized on Tuesday that the inscription of a judicial mortgage in the land register for Villa Vigoni is not in conformity with international law and will accordingly be remedied[5].

VI. THE TWO 1961 AGREEMENTS

32. Germany does not deem it necessary, at this stage of the proceedings, to comment any further on the two treaties of 1961. They are not at the heart of the present dispute. However, one observation is called for. In its written submissions, Italy has argued that by concluding the two treaties Germany has renounced any benefits of the waiver clause of the Peace Treaty. This conclusion is untenable. Germany has consistently maintained that the waiver clause of the Peace Treaty is fully valid and operative. On the other hand, no State is obligated to give up to a limited extent advantages that have accrued to it. The conclusion of the two 1961 Agreements was meant as a gesture towards Italy, designed to further improve the relationships between the two countries in the spirit of friendship that had developed with the establishment of the European Economic Community in 1958, and to further normalize the economic and financial relations. It was felt that

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[4]MG, Ann. 22.

[5]CR 2011/18, p. 14, para. 12 (Aiello).

States which were partners in the Community should strive to settle any divergences still existing between them. Not the slightest clue can be gleaned from the two treaties in the sense that Germany wished to forego the benefits derived from the waiver clause of Article 77, paragraph 4, of the Peace Treaty, and indeed the argument was not reiterated during Tuesday's pleadings.

33. Mr. President, this concludes my part of the second round of Germany's pleadings. May I kindly request you now to give the floor to my colleague Professor Gattini.

The PRESIDENT: I thank Professor Christian Tomuschat for his presentation. I now invite Professor Andrea Gattini to take the floor.

Mr. GATTINI:

1. Mr. President, distinguished Members of the Court, in my first pleading on Monday I demonstrated how the two arguments advanced by the Respondent, in order to justify the denial of State immunity by the Italian Court of Cassation, that of the tort exception and that of the jurisdiction by necessity, are devoid of any foundation. Our Italian esteemed colleagues have tried to counter my arguments respectively on the first and on the second points. Both attempts were inevitably doomed to fail.

A. TORT EXCEPTION

2. I will start with the tort exception. Allow me to clarify from the outset a misunderstanding in which our counterpart has apparently incurred, but surely not you, distinguished Members of the Court. Professor Palchetti believes to have detected a contradiction between my statements, the statement of Professor Tomuschat and that of Ms Wasum-Rainer with regard to Article 12 of the United Nations Convention on State Immunity. There is no such contradiction. Professor Tomuschat said that the United Nations Convention "generally" reflects customary international law, Ms Wasum-Rainer spoke of "a correct interpretation of customary law as expressed in Article 12", but obviously in the understanding that, as I have demonstrated, the correct interpretation is that one which excludes the activities of foreign armed forces from the scope of application of the Article. Surely, what I have done, is to instil some doubts whether that Article 12 accurately reflected State practice as it stood at the time of its adoption and, one may

add, as it still stands, to the extent that the International Law Commission did not make clear that to overcome the distinction between activities *jure gestionis* and activities *jure imperii* in this matter entailed an element of progressive development of international law. The arguments presented to you by Professor Palchetti on the scope of the tort exception prompted me to now add a second doubt, which you might find relevant, and which relates to the fact that under Article 12 of the United Nations Convention the activity must have taken place "in whole or in part" on the territory of the forum State.

3. You will notice that Article 11 of the European Convention on State Immunity says that the facts which occasioned the injury or damage must have "occurred in the territory of the State of the forum". Also the pertinent rules in the national statutes which inspired the International Law Commission when drafting Article 12, be it Section 1605 (5) of the United States Foreign Sovereign Immunity Act of 1976, or Section 5 of the United Kingdom State Immunity Act of 1978, limit themselves in saying that the injurious conduct must have occurred in the territory of the State, without specifying whether in whole or in part. Both articles, however, have consistently been interpreted by the national courts as requiring that the whole injurious conduct took place in the territory of a forum State. If this is actually the true picture of customary international law with regard to the tort exception, then this would exclude most of the cases decided to date by the Italian Court of Cassation, not only all of the IMIs cases, but the *Ferrini* case as well.

4. Counsel for Italy generously concedes that the tort exception would not apply to the cases in which the entire activity took place outside the forum State, such as the Italian cases of Italian soldiers who were captured by the *Wehrmacht* abroad, say in Greece, and brought to Germany. But it is quite unfortunate that the Italian Court of Cassation was apparently of a different opinion, when in one of the 11 orders of 29 May 2008, it repeated the usual formula of civil universal jurisdiction on tort exception also with regard to a Mr. Sciacqua, who was indeed captured in Kefalonia, Greece, in 1943 and brought to Germany.

5. The fact is that it is only in the recent judgment of 20 May 2011 in the *Repubblica Federale di Germania* c. *Autogestione prefettizia di Voiotia* (*Corte di Cassazione, prima sezione civile*, No. 11163/11) that the First Chamber of the Court of Cassation, made aware of the dead end into which the United Sections had manoeuvred themselves, parted way with the concept of

universal civil jurisdiction and resolutely took the tort exception path. As I said in my first pleading, the enthusiastic adherence by the Court of Cassation to the concept of universal civil jurisdiction in the *Ferrini* decision was just a logical, one could even say the all-too-logical, consequence of the whole structure of the Court's arguments based on the pre-eminence of *jus cogens*, as the Court itself plainly affirmed. As you will recall, the main thrust of the Court of Cassation, indeed, its only demonstration of the alleged correctness *de lege lata* of its view, was to affirm a — in our view totally misplaced — parallel between the lack of immunity of the individual organ from criminal jurisdiction because of the commission of a crime against humanity and the lack of immunity of a State from civil jurisdiction; hence the equation of universal criminal with universal civil jurisdiction. One cannot just erase a part of a portrait, say the nose, even in a painting by Picasso in his cubist period, without disfiguring the whole.

6. The late and clumsy rejection of this kind of jurisdiction in favour of a tort exception smacks of a rueful obedience to a co-ordinated and instigated change of strategy, in the desperate attempt to break the splendid isolation of the Court of Cassation, which with the passing of time is becoming more and more embarrassing. Mr. President, distinguished Members of the Court, you yourselves have been witnesses, surely not victims, of such a strategy on Tuesday, when hearing Professor Palchetti declaring that "we are at a point of convergence of two different tendencies", conveying the message that the tort exception would go hand in hand with the possibility of restrictions to immunity in cases of grave breaches of *jus cogens* (CR 2011/18, p. 45, para. 20). This is why, in its most recent decision of 20 May 2011, the first Chamber of the Court of Cassation lays its last hopes in the former House of Lords. In the *Jones* decision of 2006, Lord Bingham, while disposing of the *Ferrini* decision with the felicitous chilling remark that "one swallow does not make a rule of international law", as a gesture of politeness had added the *obiter dictum* that: "[I]t may be, despite the Court's closing statement to the contrary, that the decision was influenced by the occurrence of some of the unlawful conduct within the forum state". This seems sufficient in the eyes of the Italian Court of Cassation to now boldly announce that:

> "At this point we may already conclude that, when the limiting principle of *locus commissi delicti* is taken into account, the *Ferrini* judgment is by no means out of step with the international jurisprudence." (Para. 33 of the Judgment.)

7. Now, the Court of Cassation reads a whole dream world into this *obiter dictum*. The solution of the *Jones* case would have been *very* different, so the Court informs us, if the events had occurred in the United Kingdom, given the tort exception clause of Section 5 of the United Kingdom State Immunity Act. Now, Mr. President, distinguished Members of the Court, allow me to express what most of you are probably thinking at this moment: all this sounds like the noise made by a frightened walker, whistling to give himself courage in a deserted street in the dead of night, rather than a happy-go-lucky whistler on a sunny spring morning. In fact, what the Court of Cassation apparently ignores is that the United Kingdom, alas, has ratified the European State Immunity Convention of 1972, and Section 16, paragraph 2, of the United Kingdom State Immunity Act expressly says that: "[t]his Part of this Act does not apply to proceedings relating to anything done by or in relation to armed forces of a State while present in the United Kingdom", with the consequence that decisions like *Ferrini* and all subsequent rulings would be plainly inconceivable in the United Kingdom.

8. These last remarks lead me to that part of the Italian counsel's presentation devoted to the scope of the "without prejudice" clause of Article 31 of the European Convention on State Immunity. The only adjective which comes to my mind is, frankly, outrageous. My learned colleague wants to make you believe that: "The reason which led to the inclusion of this clause in the Convention has nothing to do with the need to shield military activities from judicial scrutiny." And he thinks to find support for this thesis in the Explanatory Report of the Convention of Article 31. Now, this statement, by our esteemed colleague, is both false and wrong. Why false? Because paragraph 116 of the Explanatory Report to the European Convention on State Immunity is formulated as follows — and permit me to quote it at length:

> "The Convention is *not* intended to govern situations which may arise in the event of armed conflict; *nor* can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces. These problems are dealt with by special agreements." (Emphasis added.)

Then, why wrong? Because, if we look at those special agreements regarding the stationing of forces abroad — the so-called SOFAs — the result exactly confirms our position on the lack of jurisdiction of a forum State for activities of foreign armed forces. The general rule, as expressed in the United Nations Model SOFA (Model status-of-forces agreement for peacekeeping

operations) adopted in October 1990 (doc. A/45/594) is that of exclusive jurisdiction by the sending State (Art. VI, paras. 46, 47 *(b)*, 48), or else, like in the London Agreement on the Status of NATO forces of 1951, the rule is that of concurring jurisdiction, with the primacy of that of the sending State.

9. Now, the Respondent would object that these special agreements are concluded between Allies, or that they concern peacekeeping missions, and therefore that the solution would be different with regard to situations arising in the event of an armed conflict. But this is exactly the point in which customary international law enters the scene. The Respondent tries to make a point by maintaining that the right way to put the question would be "whether international law imposes on States an obligation to accord immunity for *acta jure imperii* in cases where the tort exception applies", and he comes very quickly to the conclusion that it does not, because of the formulation of Article 12 (CR 2011/18, p. 42, para. 12 (Palchetti)). That is a very peculiar way not to put, but I would say rather to beg the question. The Respondent seems oblivious, totally oblivious, of the core rule of the entire United Nations Convention, Article 5, the very first article of Part II on general principles, which says:

> "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."

The Article could not be clearer: State immunity remains the rule; non-immunity is the exception, which must be duly proven. And, when coming to the hard facts of State practice, it is no surprise that the Respondent did not quote a single precedent, obviously with the by now eternal exceptions of the Greek *Distomo* case and the Italian *Ferrini* jurisprudence, in which the courts of the forum State had not duly recognized immunity to the foreign State for the activities of its armed forces, either for cases of isolated events, or *a fortiori* for cases of complex armed conflicts. The reason for this total lack of practice supporting the Italian thesis is simple and obvious, and some of you could probably even find me tedious, if I keep repeating it: post-conflict settlements are the domain of inter-State relations, not of individuals and their domestic judges.

10. Italian counsel cursorily mentioned two recent decisions, one dated 25 January 2011 by the Superior Court of the Province of Québec in the *Kazemi (Estate of)* v. *Islamic Republic of Iran* case (2011, *QCCS*, 196), the other dated 9 March 2011 of the First Civil Chamber of the French

Cour de Cassation in the case *GIE La Réunion Aérienne c. Jamahiriya Arabe Libyenne* (09-14743) (CR 2011/18, p. 40, para. 7 (Palchetti)). Indeed, the mere mention of the first of the two decisions is grossly misleading, and not just because it dealt with the individual case of charter. In the Canadian case the Plaintiff, Mr. Hashemi, brought a claim on behalf of the estate of his deceased mother and further lamented the psychological trauma which he had suffered in Canada after having been informed of the arrest, detention, torture and lastly death of his mother while in custody in Iran. The Superior Court did not intend at all to deflect from the *Bouzari* decision of the Ontario Court of Appeal of 2004, and even quoted the *Al-Adsani* and the *Jones* decisions as well. Therefore it rejected the claim on behalf of the estate. On the other side, it did not dismiss the claim of Mr. Hashemi for personal injury, applying the tort exception as it is formulated in Section 6 of the Canadian State Immunity Act of 1985. But what is remarkable in that Act, however, is that it deviates from other domestic statutes to the extent that it does not put as a pre-condition that the author of the tortious conduct was present in the Canadian territory at the time of the occurrence of the facts. Under these circumstances it is a curious endeavour indeed to mention that case as evidence of a new trend denying foreign State immunity, either under the heading of tort exception or, as Italian counsel does, under the heading of breach of *jus cogens* . As for the French case, which was actually dismissed, the subject-matter as we heard by Professor Tomuschat, dealt with the "moral" responsibility of a State for a possible support of terrorist activities. In conclusion, what remains, is that neither case had anything to do with crimes related to armed conflicts.

I see, Mr. President, it is already 11.20 a.m. and I terminate the first part of my presentation. I think it could be a good opportunity to have a break if you so wish.

The PRESIDENT: How much time do you need for continuing your speech?

Mr. GATTINI: About 20 minutes.

The PRESIDENT: Twenty minutes. Thank you, Professor Gattini. I think, in accordance with the suggestion by Professor Gattini, we will have a short break here. Fifteen minutes until 11.35 a.m.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. The Court now resumes its session. I do not have to remind you that the time given to Germany for the second round of the proceedings is two hours and a half. Professor Gattini, you may proceed.

Mr. GATTINI: Thank you, Mr. President.

B. JURISDICTION BY NECESSITY

11. Mr. President, distinguished Members of the Court, I now turn to the argument of jurisdiction by necessity, which the Respondent motivates by an alleged denial of justice suffered by Italian citizens in Germany. In my first pleading I demonstrated that the Respondent's thesis is based on an erroneous assumption — the existence of an individual right to reparation for war damages and a subsequent individual right of action — as well as on an erroneous understanding of the very concept of denial of justice. Professor Tomuschat has once again set matters right with regard to these fundamental points, so that I am not going to repeat our arguments for a third time. Yet, some of Professor Zappalà's arguments deserve an attentive regard and refutation.

1. The Italian waiver of reparation against Germany in Article 77, paragraph 4, of the Italian Peace Treaty

12. As we have heard, a large part of Professor Zappalà's pleading was indeed aimed at demonstrating that Italy did not waive any right on behalf of his citizens for personal injuries in Article 77, paragraph 4, of the Peace Treaty of 1947. Actually, by the very clear language of your Order of the 6 July 2010, rejecting the Italian counter-claim for lack of jurisdiction, one would assume that the whole issue of post-war settlement should not have encumbered us in the present case. Apparently the Respondent held a different view, and Professor Zappalà's pleadings on the subject now compel us, as you heard Professor Tomuschat before me and me now, to spend some time to set the record straight.

13. The text of Article 77, paragraph 4, of the Peace Treaty is so very clear, that one could even use the old adage: *"in claris non fit interpretatio"*. On the contrary, the Respondent has deployed all imaginable hermeneutic finesse in order to make the norm just say the opposite of what it plainly says. Let us read it again:

> "Without prejudice to these [i.e., the dispositions in the preceding three paragraphs] and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf *and on behalf of Italian nationals* all claims against Germany and German nationals outstanding on May the 8th, 1945." (Emphasis added.]

The norm further specifies that "this waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into the course of war, and *all claims for loss or damage arising during the war*" (emphasis added). "On behalf of Italian nationals", "all claims for loss or damage arising during the war": the language could not be clearer.

14. Nevertheless the Respondent tries to concoct an argument, by lumping together a miscellany of *a priori* notions and dubious interpretative tools.

15. The *a priori* notion is just a variation of the well-known Respondent's refrain of the existence of a peremptory international right of the individual to reparation. The Respondent claims that, as this was already so in 1947, it follows that a State could not have validly waived the rights of its nationals. I do not need to spend too much time on this argument. It suffices to say, that for all possible developments of international law in the last 65 years, matters were definitely not so in the aftermath of the Second World War. There is not a single piece of evidence, neither State practice, nor judicial decision nor doctrinal authority, pointing in the direction of a right of the individual to reparation at that time, let alone a peremptory one.

16. By the way, if the Italian argument had any foundation, a systematic interpretation, as purportedly used by the Respondent (RI, paras. 3.9-3.11), would inescapably lead us to question the legitimacy of the Italian waiver contained in Article 76 vis-à-vis the Allied Powers as well. That would be indeed a curious outcome of the present case.

17. But, even more worrying than the *a priori* notion, are the dubious interpretative tools displayed by the Respondent. Without noticing the inner contradiction of its argument, the Respondent drew your attention to the broad formulation of Article 76 of this Peace Treaty, with the intent of persuading you that the more succinct Article 77 must be interpreted more narrowly.

In particular, the Respondent points to the nouns "debts" and "all inter-governmental claims in respect of arrangements entered into the course of the war", in order to demonstrate that the parties had meant to refer "merely to economic relationships" (CMI, para. 5.49; RI, para. 3.9, CR 2011/18, p. 27, para. 8 (Zappalà)), leaving in abeyance the different question of individual claims for personal injuries.

18. It is not clear whether the Respondent is suggesting to you a peculiar "contextual" reading different from that of Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties, or an outright escape to the long discarded interpretative maxim of *in dubio mitius*, i.e., an *a priori* restrictive interpretation when dealing with States' obligations. This latter approach would perhaps have some chances under an inter-temporal interpretation of the Treaty. The question of inter-temporal interpretation, however, does not matter at all in our case, if one just sticks to the fundamental interpretative principle enshrined in Article 31 of the Vienna Convention on the Law of Treaties, that of good faith.

19. A glance at the documents of the Peace Conference clearly shows, that, when confronted with the draft of what was to become Article 77, the Italian Government, while trying to raise an argument for taking into consideration various kinds of claims, did not say anything with regard to possible claims arising from personal injuries to its nationals.

20. The Italian Government insisted only on three kinds of claims "so that a fairer solution may be reached".

21. On the one hand, the Allied and Associated Powers took into account the first claim made by Italy, which gave rise to Article 77, paragraph 2, by which identifiable property of Italy and Italian nationals removed by force and duress from Italian territory to Germany by German forces or authorities after 3 September 1943, were declared eligible for restitution. On the other hand, the Allied and Associated Powers rejected the two other claims.

22. This is the plain reason why Article 77, paragraph 4, specified that the waiver encompassed "debts" and "inter-governmental claims with respect of arrangements entered into the course of the war". Far from reducing the scope of the Italian waiver, the text clearly implies that these were the only two points of divergence which necessitated a clarification between the parties.

23. In conclusion, the *travaux préparatoires* of Article 77 show that Italy was given a fair chance to express its opinion on the draft article, and that some of its views were accepted. It would now be a blatant lack of good faith to infer from the text of the paragraph, an implicit exclusion of personal damages from the scope of the Italian waiver, when Italy had not advanced any claim for that purpose. The phrase "all claims for loss or damage arising from the war", which referred to Italian nationals, may be more succinct than those used in Article 76, but its comprehensiveness is beyond doubt.

24. Apart from the clear intention of the Italian Government of the time, it is the "object and purpose" standard of interpretation which entirely undermines the Respondent's argument. Articles 76 and 77 make up Section III (Renunciation of Claims by Italy) of Part VI of the Peace Treaty (Claims arising out of the war) and you have it in your folder. But part VI includes two other sections, Section I on reparations, and Section II on restitutions. These Articles must be read together, and together with those of Part VII on property, rights and interests, in order to gain a comprehensive view of the peace compact with regard to war reparations in a broader sense.

25. Those dispositions are the result of intensive negotiations between the Allied Powers, which led to a delicate but nonetheless overall acceptable equilibrium. The Soviet Union, and the other States, insisted on obtaining monetary reparations summing up to US$360 million, in addition to the seizure or liquidation of property, rights and interests belonging to Italy or Italian nationals and present in their respective jurisdictions. On the contrary, the main Allied and Associated Powers were content to satisfy their claims only by this last kind of measures. In return, Italy had to waive all its claims not only in their regard, but also with regard to her former ally, Germany, which at the time was administered by the Four Allied Powers.

26. What is even more significant is the subsequent Italian practice, which the Respondent conveniently omitted to mention at all. Whenever the Italian Supreme Court had been asked to interpret Article 77, paragraph 4, and until the reversal of jurisprudence of the First Criminal Chamber in October 2008 in the *Josef Milde* case, it consistently took the view that the Italian waiver had led to an absolute lack of jurisdiction of the Italian courts to deal with any individual claim against Germany for facts arising from the war. One could just recall the precedent of *Società Ilva c. Cavinato* (Italian Court of Cassation, Unit. Chambers, Judgment No. 285 of

22 February 1953), which the leading repertory of Italian practice of international law quotes as one of the typical examples of lack of jurisdiction.

27. Being aware of the impossibility of turning upside down the unequivocal comprehensiveness of the Italian waiver, the Respondent pulls out a last argument. It argues that the waiver cannot be seen as a stipulation in favour of Germany itself, but only in favour of the Allied Powers. For all practical meaning, this argument amounts to an attempt to deny Article 77, paragraph 4, the nature of a provision in favour of a third State.

28. Unfortunately, the Respondent seems to confuse the juridical effect of a norm and the motives behind its adoption. Whatever the intent of the Allied Powers was, the unmistakable legal beneficiary of the waiver was, and still is, Germany. To rebut the Italian thesis, it suffices to say that the ILC in its Commentary on Draft Article 32, now Article 36 of the Vienna Convention on the Law of Treaties, had no doubt in selecting exactly the waivers in the 1947 Peace Treaties as a typical example of dispositions providing for rights for a third party.

29. In your *Nuclear Tests (Australia* v. *France)* Judgment of 1974, with regard to unilateral declarations, you said that their binding character is based on the principle of good faith, and went on to say "[t]hus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected" *(I.C.J. Reports 1974,* p. 268, para. 46). This must *a fortiori* apply for third parties of treaty obligations, which rely in good faith on the benefits granted to them, as Germany does in the present case.

2. Abuse of right as a fourth possible basis for jurisdiction of necessity?

30. This last remark on *bona fides* brings me to a last point I would like to briefly address. Professor Condorelli in his introductory presentation has, with his usual clarity and concision, listed in four points the reasons why the Respondent is of the opinion that the assumption of jurisdiction by Italian judges can, indeed must, be exceptionally justified: atrocity of the crimes committed, recognition by the tortfeasor State of its responsibility, lack of any reparation to the victims, domestic jurisdiction as the only available means of redress. All other counsel, who took the floor on Tuesday, repeated the same refrain. We have heard much on the first, on the third and

on the fourth arguments. Curiously, we have heard nothing from the Respondent on the second point: the recognition of responsibility by Germany. Indeed, it is well known that the Federal Republic of Germany has never denied its responsibility for the activities of the Third Reich, and has never tried to escape from the heavy burden of its liability. However, as we have heard, Italy now maintains that Germany did not live up to its obligations towards Italian citizens, and still does not, cloaking itself in the "unjust privilege" of State immunity, as the Respondent chose to qualify it in its Counter-Memorial.

31. Mr. President, distinguished Members of the Court, in my first pleading three days ago, as I tried to detect the rationale behind the so-called jurisprudence by replacement advanced by the Italian counterpart, I pointed at three possible notions, that of countermeasure, that of necessity, that of an individual right to reparation as such, and discarded each of them. Some discreet but nonetheless disquieting hints in the Italian Counter-Memorial and Rejoinder (CMI, paras. 4.69; 4.109-4.110) had made me think of a possible fourth one, the notion of abuse of rights, but that appeared to me to be so far fetched that I preferred to leave it aside. The Respondent accused Germany of "using" its immunity "in order to avoid its responsibility" (CMI, para. 4.67), "as a tool for exonerating itself from bearing the consequences of its faults" (CMI, para. 4.113), or of hiding itself behind an "unjust privilege" (CMI, para. 4.22). I hope that our learned colleagues will not be so inconsiderate as to venture to advance the notion of abuse of rights in the present dispute. I am confident that, should that be the case, you will firmly oppose any attempt to distort reality so grotesquely. For all its dexterity, I know that the Respondent will not succeed in making you believe that post-war Germany did not live up to its liability and responsibility.

32. Nevertheless, I wish to make our position on the point crystal clear. The doctrine of abuse of rights has a noble pedigree, as an expression of general principles of law, among other that one according to which nobody can take advantage from his own misdeeds. At first sight, the doctrine could even seem alluring in cases such as the one at hand, in which the State stripped of its immunity does not deny the wrongfulness of the acts attributed to it. But, like all others already advanced by the Respondent, also this concept would miserably fail.

33. One cannot but subscribe to what Sir Hersch Lauterpacht wrote in the late 1950s: "the concept of abuse of rights places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal"[6]. Therefore, so concluded Sir Hersch, "the doctrine of abuse of rights is an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint".

34. You must be aware that the doctrine, which was developed in the 1920s and 1930s of the last century, and found some support in the jurisprudence of your predecessor, was tailored only to the so-called exclusive rights of domestic jurisdiction. There is a profound logic in this limitation. At a time, like the first half of the last century when the *domaine réservé* of States was quite broad and in relation to which States were thought to be free from any international law constraints, the doctrine of abuse of rights was conceived as an *Ersatz* for a still lacking legal obligation. It was the same Permanent Court, and later especially your Court, which progressively succeeded in reducing the scope of *domaine réservé* and accordingly the need for the notion of abuse of rights. Mr. President, distinguished Members of the Court, you will at once have perceived that to speak of an abuse of rights in our case would literally be out of place in this Great Hall of Justice. The matter under your scrutiny, State immunity, is obviously not a matter belonging to the *domaine réservé* of any State, but is part and parcel of the very core of international customary norms regulating and assuring the peaceful intercourse of States.

35. In order to prove such an abuse of rights, the Respondent would have to prove that, first, Germany has an obligation of reparation towards Italian citizens, and, second, that it is not acting in good faith. On Monday and again today we demonstrated that the first prong of the argument does not hold, both as a matter of principle and as a matter of fact. The position of the German Federal Constitutional Tribunal on the lack of any individual right of reparation for damages is shared by the jurisprudence of most courts all over the world, and the German Executive is firmly convinced that, at any rate, Italy renounced all claims towards Germany, for itself and on behalf of its citizens, in the Peace Treaty of 1947. Italy might contest the correctness of this view, but all that you could

[6]Lauterpacht, *The Development of International law by the International Court*, London, 1958, p. 164.

say in this regard is that the German view could eventually be mistaken, but surely not that it is an arbitrary one, for all the reasons exposed this morning.

36. Mr. President, that concludes my remarks. May I respectfully ask you to give the floor to Professor Robert Kolb.

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

M. KOLB :

1. Monsieur le président, Mesdames et Messieurs de la Cour, je souhaite aborder devant vous aujourd'hui les aspects suivants. D'abord, les dispositions du droit international humanitaire et leur incidence sur le prétendu droit de réparation individuel. Ensuite, l'éternelle question du *jus cogens*, qui décidément ne cessera de me hanter, si ce n'est de me poursuivre. J'y ajouterai quelques brèves considérations sur la notion de complicité à la perpétuation d'un fait illicite international, que nos honorables contradicteurs ont agitée après l'avoir extraite de nulle part. Enfin, j'aimerais clore ma marche de ce jour avec un point spécial, que je vous révélerai tout à l'heure. Et voici les jalons de notre cheminement posés.

2. Avant de plonger *in medias res*, permettez-moi de rappeler que l'immunité de juridiction dont jouit l'Allemagne, d'un côté, et le droit intertemporel interdisant la rétroactivité, de l'autre, suffisent à jeter le sort de cette affaire. Les conseils de l'Italie l'ont si bien senti qu'ils ont tenté de détourner l'attention de ces aspects cruciaux. Nous voulons bien répondre à leurs arguments. Mais nous n'aimerions pas que nos débats sur ces aspects secondaires obstruent ou adultèrent votre vue, qui doit rester rivée sur le cœur de notre différend.

A. LES DISPOSITIONS DU DROIT INTERNATIONAL HUMANITAIRE

3. Que l'on considère cette question sous l'angle du droit en vigueur ou qu'on la considère sous l'angle des tendances nouvelles, la conclusion qui s'impose est la même : à savoir qu'il n'y a pas de règle imposant le devoir de réparation individuelle (l'emportant de surcroît sur l'immunité) et qu'on continue à hésiter fortement à admettre une telle règle pour l'avenir. Ni l'une ni l'autre de ces propositions ne sont sans signification.

I. Le droit en vigueur

1. L'article 3 de la convention de La Haye de 1907

4. Dans son contre-mémoire (par. 5.7 et suiv.), l'Italie a développé le principe de la réparation effective de violations graves du droit international humanitaire. Elle y a ajouté le caractère non dérogeable de ces dispositions. L'aperçu qu'elle donne du régime traditionnel, tel que retenu dans l'article 3 de la quatrième convention de La Haye de 1907, est quelque peu étonnant, considérant que l'Italie compte dans ses rangs des éminents spécialistes de la matière. Je disais étonnant. Etonnant parce que l'exposé est si palpablement anachronique. Nos contradicteurs ne peuvent ignorer que l'article 3 mentionné a constitué une innovation hardie à l'époque où il a été inséré dans la convention IV. En tout cas, il se cantonnait uniquement aux rapports interétatiques. En effet, il n'a pu être adopté qu'au regard du fait qu'il ne disait rien qui puisse déranger les affaires intérieures des Etats, par exemple, que la compensation «must reach the individual victims and be satisfactory» (contre-mémoire de l'Italie, par. 5.10). A qui l'indemnité devait revenir n'était à l'époque pas une affaire de la convention ; elle était une affaire intérieure. Tout cela est trop connu pour qu'il me soit nécessaire d'alourdir mon exposé de citations et d'*authorities*, comme diraient nos confrères anglo-saxons. Je ne puis que m'étonner aussi de l'argument selon lequel l'article 3 mentionné «amounts to an application to IHL of the broader principle of State responsibility under general international law». Nos contradicteurs n'ignorent pas que le droit de la responsabilité internationale des Etats n'était en 1899 et en 1907 que dans les limbes de sa gestation. Dionisio Anzilotti venait d'écrire un ouvrage fondamental et pionnier sur la question, en 1902, publié à Florence. Vous trouvez quatre ou cinq pages déjà chez August Heffter, au XIX^{e} siècle, qui traite de la question encore en analogie à certains principes de la *lex Aquilia* du droit romain ! Comment l'article 3 mentionné pouvait-il renvoyer à un corps de règles sur la responsabilité des Etats encore largement inexistant ? En réalité, le rapprochement de l'article 3 ici en cause avec la responsabilité en faveur des individus vient du commentaire à l'article 91 du protocole additionnel I de 1977. Mais 1977 n'est pas 1907 ; un sept sépare les deux ; mais il est décisif. Regrettablement, le même traitement désinvolte caractérise l'analyse du droit dans l'ensemble de cette section du contre-mémoire.

2. Les articles 51, 52, 131 et 148 des conventions de Genève de 1949

5. On nous cite les articles 51, 52, 131 et 148 des conventions de Genève I à IV de 1949, dont le texte est reproduit dans les pièces soumises par l'Italie. Pour mémoire, ces dispositions traitent de la responsabilité de l'Etat. Ces dispositions communes se réfèrent à l'article précédent : «en raison des infractions prévues à l'article précédent». Or, quelles sont ces infractions ? Il s'agit des «infractions graves» aux conventions de Genève. Je rappelle au passage que les «infractions graves» n'existaient pas avant 1949. Il s'agit d'une nouvelle catégorie de crimes de guerre, pour ainsi dire conventionnels. Or, les actes ici en cause précèdent l'année 1949. Faut-il appliquer rétroactivement les dispositions mentionnées ? L'article 28 de la convention de Vienne sur le droit des traités de 1969 dissipe tout doute éventuel à cet égard. Qui plus est, les «infractions graves» ne codifiaient pas davantage le droit coutumier. Le commentaire du CICR sur les conventions de Genève précise clairement que les quatre dispositions mentionnées sont nouvelles : «Il s'agit là d'un article entièrement nouveau...», y est-il écrit (commentaire à la convention I, Genève, 1952, p. 419, et analogiquement dans les autres commentaires). Peut-on être plus clair : un article *entièrement* nouveau. Qui plus est, l'Allemagne n'a pas été exonérée de toute responsabilité. Au contraire, elle a fourni les réparations les plus diverses.

3. Les articles 6, 6, 6 et 7 des conventions de Genève de 1949

6. On nous rappelle ensuite le caractère non dérogeable des dispositions du droit international humanitaire, tel que prévu dans les articles 6, 6, 6 et 7 des conventions de Genève I à IV. Je n'insisterai pas sur l'argument de la rétroactivité, car je ne souhaite même pas le soutenir, en l'occurrence. Le problème est ailleurs, et il est encore plus radical. Les conventions ne prévoient pas un droit à la compensation individuelle. Elles ne prévoient qu'une relation d'Etat à Etat : L'Etat demande la réparation des dommages subis, exactement parce que les individus ne peuvent pas le faire directement. Le commentaire du CICR précité est très explicite à cet égard. Dès lors, il n'y a pas d'objet sur lequel le devoir de non-dérogation pourrait se greffer. En réalité, l'article commun 6, 6, 6 et 7 porte sur les protections reconnues dans la convention, notamment sur les protections humanitaires, qui ne sauraient être restreintes par accords spéciaux, ni d'ailleurs, comme le montre la disposition immédiatement suivante dans les conventions, par l'aliénation volontaire de la part des personnes protégées. L'article commun précité ne porte pas sur les

réparations *post bellum*, matière à propos de laquelle les Etats ont toujours gardé la haute main et un pouvoir certain d'appréciation. Les conventions ont pour préoccupation et pour champ d'application le *jus in bello* ; elles ne visent pas le droit de la paix, ni le *jus post bellum*, qui est aussi un *jus pacis*. Elles en font une exception pour les situations où le conflit armé se prolonge, en quelque sorte, à cause de prisonniers toujours détenus ou de territoires toujours occupés.

7. Enfin, je rappelle à la Cour que tout ce que nous venons de dire ici a beau être vrai. Mais la question de l'immunité juridictionnelle demeure dans tous les cas. Le droit international humanitaire ne «déroge» pas à l'immunité des Etats devant les tribunaux de l'un de leurs pairs. Au fond, toute cette question de la dérogeabilité des «droits subjectifs humanitaires» n'a pas de vrai objet ni de réelle pertinence. Peut-être aurions-nous donc dû le passer sous silence. Il nous a toutefois semblé utile d'en éclairer la Cour.

II. Les tendances nouvelles

8. Nous objectera-t-on des évolutions récentes, enfin enclines à rendre plus de justice aux individus à l'encontre de l'Etat jadis excessivement idolâtré, encensé et protégé ? Regardons de plus près ce volet des choses. De ces tendances récentes, les travaux de l'International Law Association (ILA), qu'on ne saurait certainement qualifier d'exagérément conservatrice, sont sans doute emblématiques. Comme vous le savez, depuis quelques années, sous la direction des professeurs N. Ronzitti, R. Hofmann et S. Furuya, l'International Law Association a entrepris des travaux sur le sujet de la «Reparation for Victims of Armed Conflict». Je ne vais pas ennuyer votre haute juridiction en citant extensivement ces travaux, d'une excellente qualité au demeurant. Qu'est-ce qui en résulte en synthèse, à propos du point sur lequel porte notre intérêt ? On notera surtout une absence ; elle n'est nullement une lacune. En effet, l'International Law Association ne propose pas *de lege ferenda* un droit de plainte judiciaire individuel, ni à plus forte raison un droit de plainte judiciaire individuel enrichi d'une compétence civile universelle ; encore moins ne reconnaît-elle un tel droit *de lege lata*. Sa résolution n° 2/2010 portant «Déclaration de principes de droit international sur la réparation en faveur des victimes de conflit armé» ne prévoit essentiellement qu'une obligation des parties responsables de faire tout effort pour donner effet aux droits à la réparation des victimes (art. 11, par. 1) ; et il est immédiatement ajouté que des

programmes et institutions s'occuperont de faciliter l'accès à la réparation (art. 11, par. 2). «Programmes et institutions», le commentaire à cette disposition le montre, signifie dans l'esprit des rédacteurs l'adoption de procédures nouvelles et particulières, adaptées à la situation singulière d'après-guerre. Que les tribunaux ne soient pas les plus idoines à en traiter est ainsi implicitement reconnu. Car autrement, il aurait suffi de les mentionner, voire de les recommander. Ce n'est pas tout. Malgré le caractère peu révolutionnaire de la déclaration, l'article 15, paragraphe 1, de celle-ci ajoute, *ex abundante cautela*, que les «droits et obligations contenus dans la présente déclaration n'auront aucun effet rétroactif».

9. Notre argument est à cet égard essentiellement le suivant. Non seulement d'éventuelles nouvelles tendances allant dans le sens de reconnaître un droit de plainte judiciaire individuel ne seraient pas opposables à l'Allemagne pour des situations issues de la seconde guerre mondiale, car ce serait appliquer rétroactivement le droit. Encore, ces nouvelles tendances hésitent à consacrer des droits individuels, car ceux-ci peuvent facilement s'avérer excessifs et ingouvernables. Votre Cour voudra-t-elle se montrer moins studieusement prudente que des sociétés savantes telles que l'International Law Association ? Celles-ci ont pourtant une position nettement plus aisée que votre haute juridiction. Elles n'engagent qu'elles-mêmes, en restant toujours abritées derrière le filet de sécurité si bonnement lénitif des travaux scientifiques. Dès lors, si un acteur pouvait commodément se montrer plus hardi, c'est bien une telle société. Le fait qu'elle ne s'y aventure pas n'est-il pas fortement révélateur et plein de signification ? Toute cela n'indique-t-il pas à plus forte raison la voie que vous devriez, nous le croyons, suivre vous-mêmes ?

B. LA QUESTION DU *JUS COGENS*

10. L'objet de mes remarques suivantes est de répondre aux allégations de nos honorables contradicteurs relatives au droit international impératif. C'est la raison pour laquelle je pourrai être fort bref, étant donné que très peu d'éléments nouveaux, et encore moins d'éléments éclairants, ont émergé des débats de ces derniers jours devant votre prétoire.

1. Le conflit entre *jus cogens* et immunité

11. On vous a dit, en premier lieu, ceci. En cas d'irréductible conflit entre l'immunité juridictionnelle de l'Etat et la sanction effective d'une norme de *jus cogens*, comme celle qui prévoit le droit à une réparation pour crimes internationaux subis, la première doit, exceptionnellement, regrettablement, céder le pas à la deuxième. Parfois, la mise à l'écart de l'immunité serait la seule solution au problème du déni, non pas tant d'accès à la justice, mais de succès des plaintes individuelles en cause. L'argument est presque penaud ; mais en même temps il est très révolutionnaire. Pour agrémenter cette prise de position, nos éminents contradicteurs se sont lancés dans une belle envolée lyrique, qui sur le plan esthétique — mais sur celui-ci seulement — n'est pas pour me déplaire. On nous a dit, et j'en ajoute, qu'autrement le *jus cogens* ne serait qu'une pétition de principe, le panache flamboyant d'un vœu pieu proclamé à haute voix mais sans effectivité, un mirage sans vie réelle, en somme un ectoplasme diaphane et blafard. Je ne mets pas en doute que le procédé de mise à l'écart de l'immunité, si savamment développé, serait une solution *possible* au prétendu conflit. Mais il y en a d'autres. Il suffit pour s'en convaincre de se remémorer nos propres allégations à cet égard. Là où je veux en venir, c'est que les conseils prodigués par nos honorables contradicteurs supposent que nous, et surtout vous, et en tout cas la Cour de cassation, peuvent inventer de toutes pièces cette solution en la choisissant parmi une pluralité d'autres avenues possibles. Il ne s'agit pas de dresser l'inventaire du droit en vigueur. Il s'agit de le changer pour que la règle de demain soit quelque peu meilleure — à leurs yeux — que celle d'aujourd'hui. Mais pourquoi s'arrêter en si bon chemin à cette mise en balance là, et donc à cette solution particulière ? Si chaque tribunal interne peut inventer sa propre «résultante» selon les besoins de l'instant, selon les faits et circonstances particuliers des espèces les plus diverses que la vie charrie devant eux, nous aurons demain la bigarrure la plus prononcée de solutions, dont l'élément saillant sera le subjectivisme, voire l'opportunisme. Le droit international procède de consentements entre Etats. Ici, il procède plutôt de libres exercices législatifs concédés à chaque tribunal interne compétent. J'ai l'impression — mais je voudrais me tromper — que la doctrine de nos éminents collègues de l'autre côté de la barre est que la norme de droit international applicable d'aujourd'hui est celle selon laquelle cet ordre juridique délègue la compétence de délimiter la

sphère de l'immunité de juridiction et d'exécution des Etats étrangers aux tribunaux internes procédant au cas par cas et au plus près des faits éminemment variables des espèces. La norme de droit international sur l'immunité aurait ainsi disparu pour céder la place à cette norme-délégation de pouvoirs législatifs. Il est d'ailleurs superflu de dire que je ne trouve aucune trace d'une telle norme dans les sources du droit international, en l'occurrence la coutume. Nos honorables contradicteurs n'en ont pas davantage trouvé. Autrement, auraient-ils manqué de la mentionner ?

12. Il est de surcroît notable que la Partie adverse ait pu suggérer que vous devriez respecter le droit international de votre Statut (je suppose aussi le droit international restant) par le fait que vous êtes un organe de la société internationale dominée par des Etats souverains. Ainsi, vous seriez obligés de tenir scrupuleusement compte des limites consensuelles à votre compétence, en dépit du *jus cogens*. Au contraire, un tribunal interne serait un organe d'une collectivité publique intégrée. Sa compétence n'étant pas dépendante du consentement des justiciables, celle-ci pourrait procéder plus librement aux mises en balance nécessaires en cas de conflit entre normes, en choisissant de donner la priorité à la norme de droit international impératif. Tout cela m'a donné l'impression que le développement du droit international est en passe de devenir davantage une prérogative des tribunaux internes que de sujets internationaux ou même de la Cour internationale de Justice. Vous devez vous en tenir au droit international. Les juridictions internes, au contraire, mettent en balance ses règles pour dégager de nouvelles et parfois mirobolantes solutions. L'organe judiciaire principal des Nations Unies, et j'ai envie d'ajouter du droit international, n'a pas le pouvoir de légiférer pour améliorer ce droit ; les tribunaux internes, qui ne représentent qu'un ordre politique partiel de la collectivité humaine, posséderaient exactement ce droit, pour lequel ils sont si mal armés. Etrange construction. Pour ma part, je préférerais, en cas de choix, que vous légifériez dans l'ordre juridique que vous connaissez mieux que quiconque et dont vous êtes l'organe et le serviteur. Mais il est constant que ce pouvoir ne vous revient pas. Il n'est ni de votre apanage ni, à plus forte raison, de celui des tribunaux internes de tel ou tel Etat.

2. La distinction entre règles primaires et secondaires

13. On vous a fait part enfin de ce que la distinction entre règles primaires et secondaires, telle que j'ai eu l'occasion de la développer dans ma première plaidoirie, serait artificielle et largement dépourvue d'intérêt en l'espèce. Référence a été faite à cet égard aux articles de la Commission du droit international sur la responsabilité des Etats de 2001. Il n'est pas nécessaire que je reprenne ce que je vous ai dit lundi et que j'ai la faiblesse de continuer à croire juste. L'article 41 montre que seulement *certaines* conséquences juridiques de la violation de règles de *jus cogens* sont admises dans l'ordre juridique international d'aujourd'hui. Celles que nos collègues italiens tentent d'accréditer auprès de vous n'y figurent pas. Par ailleurs, les travaux et commentaires de la Commission du droit international montrent qu'elle s'est studieusement évertuée à ainsi limiter ces conséquences. Elle était consciente non seulement de se situer déjà sur un terrain confinant, et souvent outrepassant, la frontière entre la *lex lata* et la *lex ferenda*, mais encore de risquer autrement d'ouvrir une boîte que Pandore n'aurait guère dédaignée. Le paragraphe 3 de l'article 41 n'apporte dès lors aucun soutien à l'interprétation très intéressée qu'en donnent nos honorables contradicteurs. Elle se voulait simplement une clause de sauvegarde pour tenir compte de modifications du droit international. Puis-je ajouter : pour des modifications sûres, tangibles, canoniques ; non pas pour des modifications prétendues, extrapolées d'un seul précédent n'ayant eu l'heur et l'honneur de susciter des émules.

14. Laissez donc pour l'instant choir le *jus cogens*. Vous n'en avez pas besoin dans cette espèce. Or, tout ce qui est inutile est le plus souvent juridiquement nocif.

III. La complicité

15. Nos honorables contradicteurs ont suggéré que la Cour de cassation italienne se vit contrainte d'écarter l'immunité de juridiction allemande. En la maintenant et en la sanctionnant elle aurait participé selon eux en tant que complice à la prolongation dans le temps d'un fait internationalement illicite. Je dois avouer que l'argument m'a exalté, car il est de ceux que je n'aurais su trouver. Il fait référence à l'article 16 des articles sur la responsabilité des Etats de 2001. Voici donc un autre conflit épique entre normes internationales que nos pauvres juges italiens de la Cour de cassation se sont vus devoir trancher par un dédoublement fonctionnel.

16. Cette construction ne résiste pas à l'analyse pour deux raisons. Elles sont des plus simples. Premièrement : s'il n'existe pas (et s'il n'existait pas, en 1945) un devoir d'indemnisation individuelle pour les cas qui nous intéressent ici, ce devoir n'a pas non plus pu être violé. Deuxièmement : même si une telle complicité s'était manifestée, c'est-à-dire si un fait internationalement illicite avait été commis, les conséquences n'auraient pu être que celles prévues par les règles secondaires pertinentes, celles relatives à la responsabilité des Etats. Serait ainsi né par exemple un devoir de cessation et de réparation. En aucun cas en revanche il ne pouvait en découler une faculté de mise à l'écart de l'immunité, prévue nulle part par le droit international actuel. La commission de notre fait illicite putatif ne pouvait pas donner lieu à la commission d'un autre fait illicite, mais seulement à la liquidation des conséquences de la violation selon les règles du droit international en vigueur. Ce que le *jus cogens* ne daigne, à plus forte raison la prétendue complicité ne peut.

17. J'avais annoncé au début de ma plaidoirie de ce jour que je voulais parler d'un dernier sujet, dont je n'avais pas précisé la teneur. Je constate toutefois que si je veux laisser la parole pour les conclusions à notre agent, je ne puis plus exposer ce point maintenant ici et je vous demanderai donc, Monsieur le président, respectueusement, de passer la parole à Mme Wasum-Rainer pour la présentation de nos conclusions.

The PRESIDENT: I thank Professor Robert Kolb for his presentation. I now invite Ambassador Susanne Wasum-Rainer to make her presentation or her concluding remarks.

Ms WASUM-RAINER: Mr. President, distinguished Members of the Court, I should now like to present to you, in accordance with the Statute of this Court, our submissions. I will read them as they have been submitted to you.

SUBMISSIONS

Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

1. by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in

that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

2. by taking measures of constraint against "Villa Vigoni", German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;
3. by declaring Greek judgments based on occurrences similar to those defined in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

4. the Italian Republic's international responsibility is engaged;
5. the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable; and
6. the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1.

Mr. President, this brings me to the end of the second round of our pleadings. And I thank you very much.

The PRESIDENT: I thank Ambassador Susanne Wasum-Rainer for her concluding remarks. That brings today's sitting to an end. The Court takes note of the final submissions which you, Madam Ambassador, have now read on behalf of Germany. The Court will meet again tomorrow at 2.30 p.m. to hear the second round of oral argument of Italy as well as its observations with respect to the subject-matter of Greece's intervention. The sitting is closed.

The Court rose at 12.35 p.m.