SEPARATE OPINION OF JUDGE BENNOUNA

Evolution of the customary rule of immunity — Change in the concept of sovereignty — Link between the law of international responsibility and jurisdictional immunity — Right to have access to justice — Exceptional circumstances allowing the lifting of immunity — Unity of international law — Mechanical conception of the judicial task.

1. Although I agree with the operative part of the Court's Judgment, which finds that, in the context of its dispute with Germany, Italy violated the latter's jurisdictional immunity (Judgment, para. 139 (1)), I cannot, however, endorse the approach adopted by the Court, or support the logic of its reasoning.

2. As we know, the scope of the principle of State jurisdictional immunity has divided, and continues to divide, opinions among States, despite an emerging trend towards rapprochement, in the context of globalization.

3. Thus, starting from an absolute concept of sovereignty, States had inferred an equally absolute concept of immunity, which allowed one State to claim immunity from the jurisdiction of another's courts under all circumstances.

4. However, a noticeable change in the concept of sovereignty, brought about by the diversification of international actors and by advances in international law, led a number of States to adapt and relativize their positions on jurisdictional immunity, essentially restricting it to acts of sovereignty *(jure imperii)*, as opposed to private and commercial acts *(jure gestionis)*. Nevertheless, the line between these two categories is not always easy to draw. Regarding the domestic laws, they are few in number and far from being consistent, as the Court points out (*ibid.*, para. 71); the same can be said of the case law of the various States, which means that the law of jurisdictional immunity still gives the impression of being a flag which covers all kinds of goods.

5. In practice, States have enacted legislation authorizing their courts to rule on certain activities by foreign States without necessarily basing themselves on international law governing immunity. Thus in 1996, the United States amended its legislation to enable its courts to entertain civil liability claims against foreign States designated by the United States Government as "sponsor[s] of terrorism" (United States of America, Foreign Sovereign Immunities Act 1976, 28 *USC*, Sec. 1605A). As a result, scholars have raised the question of the limits on the power of States to legislate in this area, in light of the customary rule of immunity.

6. The situation is further complicated by the introduction, first in the 1972 European Convention on State Immunity (Art. 11) and then in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (Art. 12), of the so-called "tort exception", which makes no distinction between acts *jure imperii* and acts *jure gestionis*. Thus, that exception is intended to cover injuries to persons and property in the territory of the forum State irrespective of the aim or purpose of the activity in question.

7. Furthermore, the responsibility of the State is now indissociable from the exercise of its sovereign power. The State is responsible, first, for its own population, which it has a duty to protect, but it is also responsible for acts attributable to it, committed outside its territory and injuring the population of another country.

8. The fact that responsibility is thus indissociable from the exercise of sovereignty means that, when assuming responsibility, a State can justify its claim to immunity before foreign courts on the basis of the principle of sovereign equality. In other words, the granting of immunity by those courts can in no sense mean that the State concerned is exonerated from responsibility; it merely defers consideration of that responsibility to other diplomatic or judicial bodies. Sovereign equality is only meaningful if it is accompanied by equality in terms of respect for international legality.

9. It should be emphasized that, when it arises in connection with international crimes, as in the present dispute, the question of jurisdictional immunity raises fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure.

10. Furthermore, as the Court notes, Germany acknowledges the "untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees", and that these were unlawful acts, engaging its responsibility (Judgment, para. 52). However, the Court is content to take the view that it is "a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize" (*ibid.*, para. 99).

11. In my view, the Court could not simply leave the matter there, whether in terms of principles or of the consequences to be drawn in this case. With respect to the principles, firstly, the Court had already clearly stated that "the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 244, para. 196). In this case, Germany invokes its immunity as a State on account of crim-

inal acts carried out by its organs and attributable to it; and it must assume responsibility for these acts.

12. The resolution of the Institute of International Law, adopted at the 2009 Naples Session, concerning "the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes" contains an Article (Art. II), entitled "Principles" that puts immunities in their context (first paragraph), which is not to evade the rules of international law, but to enable the courts to take account of the sovereign equality of States in the exercise of their respective jurisdictions:

> "1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States." (*Annuaire de l'Institut de droit international*, Vol. 73, Naples Session (Italy), 2009.)

13. In this case, therefore, the Court should have observed that Germany, which recognizes the unlawfulness of the acts committed against the group of victims in question, in particular the former Italian military internees, including Mr. Luigi Ferrini, is obliged in principle to assume its responsibility for those acts, and that it is subject to that condition that Germany should enjoy immunity before the courts of the forum State.

14. Moreover, with respect to the consequences deriving from the principle of responsibility, the Court considers that

> "the claims arising from the treatment of the Italian military internees . . ., together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue" (Judgment, para. 104).

In my view, rather than regarding this simply as a possible subject of negotiation, Germany should assume its international responsibility and, in consultation with Italy, supplement the measures it has taken since the Second World War, so as to cover the categories of victims excluded therefrom.

15. Thus, it is only in exceptional circumstances — when a State presumed to be the author of unlawful acts rejects any engagement of its responsibility, in whatever form — that a State could lose the benefit of its immunity before the courts of the forum State. The right of the individuals concerned to have access to justice in their own country would then take precedence, where the State in question had refused to submit to the fundamental principles of law — on which, moreover, it was itself relying.

16. In my view, such exceptional circumstances cannot be ignored, either by national or by international courts, and, were this to happen, it would open the door to abuses with the potential to undermine the very foundations of international legality.

17. Judges should always remain vigilant to ensure that ultimate precedence is given to law and justice, as Rosalyn Higgins has recalled:

> "An exception [sovereign immunity] to the normal rules of jurisdiction should only be granted when international law requires — that is to say, when it is consonant with justice and with the equitable protection of the parties. It is not to be granted 'as a right'." ("Certain Unresolved Aspects of the Law of State Immunity", *Netherlands International Law Review*, Vol. 29, 1982, p. 271.)

18. One would have expected the International Court of Justice to follow that approach, which in recent decades has enabled the legal régime governing jurisdictional immunity to evolve in a way which strikes an equal balance between State sovereignties and the considerations of justice and equity operating within such sovereignties. The Westphalian concept of sovereignty is thus gradually receding, as the individual takes centre stage in the international legal system.

19. That evolution is in part reflected in the International Law Commission's work to codify the subject, and in the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted by the United Nations General Assembly on 2 December 2004, resolution 59/38), but that is not to say that it is now frozen for evermore. That is why it falls to the Court, when considering the cases submitted to it, to revisit the concepts and norms debated before it and to indicate, if appropriate, any emerging new trends in their interpretation and in the determination of their scope.

20. While the Court does indeed recognize that the granting of jurisdictional immunity to a State does not affect its international responsibility (Judgment, para. 100), it fails to draw any concrete conclusions from that fact. Thus, it could have added that a State which flatly rejects any engagement of responsibility on its part loses, by that rejection, the right to claim immunity from jurisdiction.

21. Where immunity is claimed, it comes with an obligation: namely that the State must assume its international responsibilities by appropriate means. And I consider that, in respect of armed conflict, such means include inter-State negotiations, but on condition that such negotiations are conducted on terms capable of covering the entirety of the situation at issue.

22. This case is distinguished by certain specific features: Germany admits its responsibility for the unlawful acts at issue before the Italian courts; and those acts took place, partly or entirely, on Italian territory.

Germany, however, claims jurisdictional immunity and has instituted proceedings against Italy before this Court on account of the latter's violations of its obligations in that regard. Finally, the individuals concerned have filed various claims, which have failed.

23. However, it is not sufficient to find that those persons have not been able to obtain satisfaction before either the German courts or before the European Court of Human Rights, and then to conclude that Germany has no obligation of reparation towards them. Such an obligation is the consequence of the internationally wrongful acts admitted by Germany and must be capable of being settled in an inter-State context. It is thus an issue which remains outstanding between the two countries.

24. The requirement of exceptional circumstances in order for immunity to be lifted disposes of the argument that to allow any derogation of this kind is completely unrealistic, because it would open a Pandora's box of individual claims for reparation by all victims of armed conflicts.

25. To my mind, if Germany were to close all doors to such settlement — and there is nothing to suggest that it will — then the question of lifting its immunity before foreign courts in respect of those same wrongful acts could legitimately be raised again. Thus, in finding that Italy has violated its obligation to respect Germany's jurisdictional immunity, the Court did not intend in any way to obstruct the implementation of another fundamental norm of international law, namely the responsibility of States for internationally wrongful acts.

26. Thus, I voted in favour of the operative clause of the Judgment, on the basis of the nature of this case, which dates back to the Second World War, the efforts made by Germany since the end of that conflict, and its willingness to assume its responsibility in that regard, which mean that the exceptional circumstances to which I referred, and which allow for immunity to be lifted, would not appear to me to be present.

27. The Court cannot reject the so-called "last resort" argument, as it does in paragraph 103 of the Judgment, on the pretext of the absence of any supporting State practice or jurisprudence. In fact, the Court, whose function is "to decide in accordance with international law such disputes as are submitted to it" (Article 38 of the Statute), must apply and interpret the norm at issue within its legal context, that is to say, taking account of the other rules of law which bind the Parties. Consequently, it is difficult to see how the law of State immunity can be applied and interpreted without taking account of the impact of the law governing State responsibility. Especially if, before the domestic courts, it appeared, *in limine litis*, that the State responsible for the wrongful act has closed all doors to reparation.

28. It is by taking account of all those elements, and their mutually complementary nature, that the Court can help to ensure the unity of international law in the service of international justice. That primordial

function cannot be confined within a narrow, formalistic approach, which considers immunity alone, *stricto sensu*, without concern for the victims of international crimes seeking justice. It could be considered that an "interstitial norm", as expressed by Vaughan Lowe ("The Politics of Law-making: Are the Method and Character of Norm Creation Changing? ", in M. Byers, *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford University Press, 2000, pp. 212-221), would enable the establishment of a link between the law of immunities and the law of State responsibility. This could be done by invoking general principles of law, as the Court did in the *Corfu Channel* case, where it referred to "elementary considerations of humanity" as a link between human rights and international humanitarian law (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22).

29. The Court has relied on a "mechanical" conception of the judicial task, according to which the national court rules on immunity as a preliminary issue, without considering "the specific circumstances of each case" (Judgment, para. 106). However, that is an illusion, for, in practice, it often happens that, in order to rule on the issue of immunity, and on the arguments for lifting immunity put forward by the claimant, the court has to examine the merits of the case. Thus, for example, when this Court determines that an objection to jurisdiction does not possess "an exclusively preliminary character", it decides to rule on it only when it has examined the merits of the case of which it is seised.

30. We should, moreover, not lose sight of the fact that Italy may still espouse the cause of its nationals by exercising diplomatic protection on their behalf; this institution represents the last resort or *ultima ratio* for the protection of internationally guaranteed human rights, as the Court recognized in the case concerning *Ahmadou Sadio Diallo* (*(Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 599, para. 39).

31. Lastly, I regret that the Court's reasoning was not founded on the characteristics of contemporary international law, where immunity, as one element of a mechanism for the allocation of jurisdiction, could not be justified if it would ultimately pose an obstacle to the requirements of the justice owed to victims. Thus immunity is not a subjective right, in the strict sense, at the disposition of the State, but a possibility given to the latter not to be tried by foreign courts, according to whether the particular circumstances of the case so permit.

32. The power of national courts to interpret and apply the law relating to immunities remains complete, contrary to what is suggested by the Court in its Judgment (Judgment, para. 106). Where that power is exercised *in limine litis*, that does not preclude a national court from examining all the facts of the case before it, when that is necessary in order to

determine whether or not the circumstances of the case permit the State to be accorded immunity.

33. The question remains, of course, whether a systematic State policy founded on the commission of international crimes, such as genocide or crimes against humanity, could be covered by immunity under the banner of sovereign acts *(jure imperii)*. That question gives rise to another, namely, what authority would be in a position to distinguish between normal State functions and functions which should be categorized as international crimes, so as to exclude them from the privilege of immunity. On the other hand, if, as in this case, the criminal activity attributable to the State is well established and admitted, that State is required at some point to open appropriate channels to reparation, in order to avoid ultimately being tried by foreign courts.

34. This case plainly demonstrates the extent to which the immune system of a State is closely linked to the admission by the latter of its own breaches of international law. It was incumbent on the Court, in its analysis of international customary law, to note this trend, and to anticipate its impact on the formation of international law. The fact that few cases before national jurisdictions reflect this trend does not mean that it should be ignored by the Court.

35. The well-established pre-eminence of justice, whether criminal or civil, and the rule of law at the international level, also serves to discourage leaders, acting in the name of their countries, from engaging in violations of peremptory norms of law relating to the prevention and commission of international crimes. Care should be taken to ensure that such dissuasive function is not impaired by a backward-looking approach to the immunity of the State and its representatives.

(Signed) Mohamed BENNOUNA.