DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. I regret not to be able to accompany the Court's majority in the decision which the Court has just adopted today, 3 February 2012, in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*. My dissenting position pertains to the decision as a whole, encompassing the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of substance, as well as the conclusions of the Judgment. This being so, I care to leave on the records the foundations of my dissenting position, given the considerable

importance that I attach to the issues raised by Germany and Italy, as well as by Greece, in the course of the proceedings in the *cas d'espèce*, and bearing in mind the settlement of the dispute at issue ineluctably linked to the imperative of the *realization of justice*, as I perceive it.

2. I thus present with the utmost care the foundations of my entirely dissenting position on the whole matter dealt with by the Court in the Judgment which it has just adopted, out of respect for, and zeal in, the exercise of the international judicial function, guided above all by the ultimate goal precisely of the *realization of justice*. To this effect, I shall dwell upon all the aspects concerning the dispute brought before the Court which forms the object of its present Judgment, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of cases of the kind on the basis of fundamental considerations of humanity, whenever grave breaches of human rights and of international humanitarian law lie at their factual origins, as in the *cas d'espèce*.

3. Preliminarily, I shall dwell upon the inter-temporal dimension in the consideration of State immunity, moving then onto my initial line of considerations, pertaining, first, to the ineluctable relationship (as I perceive it), in the present case, between State immunities and war reparation claims, and, secondly, to the recognition by Germany of State responsibility in the present case. I shall then seek to rescue some doctrinal developments, forgotten in our days, acknowledging fundamental human values, and to recall the pertinent collegial doctrinal work, on the subject-matter at issue, of learned institutions in international law. I shall, next, turn to the threshold of the gravity of the breaches of human rights and of international humanitarian law.

4. This will lead me into the consideration of the question of waiver of claims in respect of the right of access to justice in the pleadings before the Court, and into the position upholding the inadmissibility of inter-State waiver of the rights of the individuals, victims of grave violations of international law. I shall then review the arguments of the contending Parties as to the right of access to justice. Attention will then be drawn to the clarifications from the contending Parties, Germany and Italy, and from the intervening State, Greece, in response to a series of questions I put to them in the oral hearings before the Court, on 16 September 2011.

5. I shall next consider the prohibition of forced labour at the time of the Second World War, and the prohibitions of *jus cogens* and the removal of immunity. This will lead me to review the tension, in international case law, between State immunity and the right of access to justice, as well as to assess the contentions of the Parties in the present case as to acts *jure imperii* and acts *jure gestionis*. My next line of considerations will focus on the human person and State immunities, singling out the shortsightedness of the strict inter-State outlook, particularly when facing the imperative of justice, and stressing the need to overcome that distorted inter-State outlook. This will lead me to sustain the position that there are no State

immunities for *delicta imperii*, with the prevalence of the individual's right of access to justice, in the domain of *jus cogens*.

6. In sequence, I shall dwell upon the configuration of the individual victim's right to the law *(droit au Droit)*, bearing witness of the primacy of the never-vanishing *recta ratio*. My following line of reasoning will concentrate on the individuals' right to reparation as victims of grave violations of human rights and of international humanitarian law, and on the imperative of the State's duty to provide reparation to those victims. This will lead me to uphold the primacy of *jus cogens*, with a rebuttal of its deconstruction. The path will then be paved, last but not least, for the presentation of my concluding observations.

II. Preliminary Issue: The Inter-Temporal Dimension in the Consideration of State Immunity

7. The consideration of the issue of the application of State immunity calls for addressing an ineluctable preliminary question, namely, the inter-temporal dimension in that consideration. This raises the preliminary issue as to whether State immunity should be considered in the present case opposing Germany to Italy as it was understood at the time of the commission of acts for which immunity is claimed (in the 1940s), or as it stands when the Court was lately seized of the present dispute.

8. Germany claims, in this respect, that, at the time when German forces were present in Italy in 1943-1945, "the doctrine of absolute immunity was uncontested"[1], and that, even today, "[a]bsolute jurisdictional immunity in respect of sovereign acts of government is still the generally acknowledged customary rule"[2]. Germany further contends that a departure from this doctrine, or the creation of new exceptions to State immunity with retroactive effect, would be in contradiction with general principles of international law[3].

9. Italy, for its part, argues that the acts *sub judice* in the present case, the Italian judgments from 2004 onwards, that have asserted jurisdiction vis-à-vis Germany, have applied correctly the modern-day understanding of the principle of State immunity[4]. It further claims that immunity is a procedural rule, and as such it must be assessed on the basis of the law in force at the time that a Court is seized[5]; it adds that courts have generally applied the law in existence at the "moment of the judicial action and not of the original injurious facts"[6].

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[1] Memorial of Germany, para. 91; and Reply of Germany, para. 37.
[2] *Compte rendu* (CR) 2011/17, para. 29.
[3] Memorial of Germany, para. 91; and Reply of Germany, para. 37.
[4] Counter-Memorial of Italy, paras. 1.14-1.16; CR 2011/18, pp. 23-24.
[5] Rejoinder of Italy, para. 4.2.
[6] Counter-Memorial of Italy, para. 4.47.

10. Inter-temporal considerations for the application or otherwise of State immunity call into question two issues, namely: first, whether State immunity has changed, or evolved, in the past decades; and secondly, whether State immunity should be applied in the present case as it is understood today, the time when the Court is seized of the dispute. As to the first question, the law of State immunity has clearly developed and evolved; it has not remained static. Developments in the domains of international human rights law, of contemporary international criminal law, and of international humanitarian law, cannot be said to have had no influence on the evolving law of State immunity.

11. As to the second question, there is a case for focusing on State immunity as it stands when the Court is seized of the dispute. After all, it would not make sense to consider the matter at issue as it was understood at the time of the Second World War, in relation to Italian courts' judgments rendered from 2004 onwards, setting aside State immunity and awarding reparations to the individual victims. The formation and development of international law, as well as its interpretation and application, can hardly be dissociated from the inter-temporal dimension. The "inter-temporal law" issue came to the fore in the arbitral award of 4 April 1928, in the *Island of Palmas* case *(Netherlands* v. *United States)*, wherein arbitrator Max Huber pondered that:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, *demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law*."[7]

12. In modern times it has been clearly reckoned that there are no "immutable" rules of international law, as erroneously assumed in times long past. The Institut de droit international covered the topic of "inter-temporal law", in its Sessions of Rome (1973) and Wiesbaden (1975). There was general acknowledgement as to the basic proposition that any given situation is to be appreciated in the light of legal rules contemporary to it[8], and evolving in time; awareness of the underlying tension was reflected in the cautious resolution adopted by the Institut in Wiesbaden in 1975[9].

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[7] *Reports of International Arbitral Awards (RIAA)*, Vol. II: *Island of Palmas* case *(Netherlands* v. *United States)*, 4 April 1928, p. 845 (emphasis added), and cf. pp. 829-871.

[8] Cf. 55 *Annuaire de l'Institut de droit international (AIDI)* (1973), pp. 33, 27, 37, 48, 50 and 86; 56 *AIDI* (1975), p. 536 (para. 1 of the resolution of the Institut). And cf. M. Sorensen, "Le problème dit du droit intertemporel dans l'ordre international — Rapport provisoire", 55 *AIDI* (1973), pp. 35-36.

[9] Cf. 56 *AIDI* (1975), pp. 536-541 (cf., particularly, the second *considerandum* of the preambular part of the resolution).

13. The impact or influence of the passage of time in the formation and evolution of the rules of international law is not a phenomenon external to law[10]. The surpassed positivist-voluntarist conception of international law nourished the pretension of attempting (in vain) to establish the independence of law in relation to time, while concomitantly privileging the method of observation (e.g., of State practice) in its undue minimization of the principles of international law, which touch on the foundations of our discipline.

14. Within the conceptual universe of this latter, aspects of inter-temporal law came to be studied, e.g., keeping in mind the relationship between the contents and the effectiveness of the norms of international law and the social transformations which took place in the new times. A *locus classsicus* in this respect lies in the well-known *obiter dictum* of this Court, in its Advisory Opinion on Namibia (1971), wherein affirmed that the system of mandates (territories under mandate)[11] was "not static", but "by definition evolutionary"; and it added that its interpretation of the matter could not fail to take into account the transformation occurred over the following fifty years, and the considerable evolution of the *corpus juris gentium* in time. In the words of the Court, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[12].

15. In respect of the present case opposing Germany to Italy, the fact remains that, even after Court's Order of 6 July 2010[13], dismissing as "inadmissible" the Italian counter-claim, and thus, much to my regret,

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[10] In the aforementioned work of the Institut, attention was in fact turned to the impact of the passage of time on the development of international law; cf. 55 *AIDI* (1953), pp. 108 and 114-115 (interventions by M. Lachs, P. Reuter and S. Rosenne).

[11] And in particular the concepts incorporated in Article 22 of the Covenant of the League of Nations.

[12] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53.

[13] The effects of this Order of the Court were interpreted distinctly by the contending Parties. Germany claimed that the *cas d'espèce* does not concern the Second World War violations of international humanitarian law and the question of reparations, and that this ensues from the Court's Order of 6 July 2010 (CR 2011/17, p. 18, para. 11); in Germany's view, the Court does not have jurisdiction to adjudicate upon this issue (CR 2011/20, p. 11, para. 4). Italy, in turn, argued that the aforementioned Order of the Court does not bar it from raising the issue of reparations at this stage of the proceedings, in order to have Germany's immunity lifted (CR 2011/18, p. 13, para. 10). Turning to the inter-temporal dimension of the present dispute, Germany, however, went back to the times of the Second World War, to claim that the question whether it enjoys immunity before Italian courts should be examined according to the standards in force from 1943-1945, since immunity is the procedural counterpart of the substantive rule that provides for war reparations at inter-State level (CR 2011/17, pp. 35-36, para. 32). Italy, for its part, argued that the rules of State immunity, as procedural rules, must be applied by courts as they exist at the time of the filing of the complaint and not as they existed at the time the alleged violation of international law took place, and claims that such position is supported by Article 4 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (CR 2011/18, pp. 23-24, paras. 15-18).

trying to dissociate State immunities from war claims for reparations, the contending Parties themselves, Germany and Italy, continued to relate their (written and oral) submissions on the issue of State immunities to the factual background of war reparations claims. This appears ineluctable to me, as one cannot consider State immunities in the void, outside the factual context (including the factual origin) wherein they are invoked. The two go together, as the proceedings in the present case clearly demonstrated. I shall come back to this point throughout the present dissenting opinion.

16. It is not warranted, in my view, to invoke the factual origin of a dispute simply to try to argue that forced labour in the war industry was not prohibited in the past (the Second World War), or that *jus cogens* did not exist then, or that rights inherent to the human person were not yet recognized, and at the same time hide oneself behind the shield of State immunity. That makes no sense to me at all, and leads to impunity and manifest injustice. That goes against international law. That is inacceptable today, as was inacceptable in the past. It goes against the *recta ratio*, which lies in the foundations of the law of nations, today as in the past.

17. One cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same *continuing* situation. There may be greater awareness of the interrelatedness between State immunities and war reparations claims today, and this is reassuring. One cannot simply discard such interrelatedness without providing any foundation for such dogmatic position. One cannot hide behind static dogmas so as to escape the legal consequences of the perpetration of atrocities in the past. The evolution of law is to be taken into account, in the unending struggle to put an end to atrocities and to see to it that they do not happen again, anywhere in the world.

III. State Immunities and War Reparation Claims: An Ineluctable Relationship in the Present Case

18. It should not pass unnoticed that, *after* the Court's Order of 6 July 2010 summarily dismissing the Italian counter-claim, references to the facts underlying the dispute between the Parties, and conforming its historical background, continued to be made by the contending Parties (Germany and Italy). It is in fact striking to note that, even after the Court's Order of 6 July 2010, both Parties — and, more significantly, Germany — have kept on referring to the factual and historical background of the present case. More specifically as to the question of reparations, Germany has dedicated part of its written and oral pleadings to this topic.

19. In fact, *after* the Court's Order of 6 July 2010 concerning Italy's counter-claim, Germany submitted its Reply (of 5 October 2010) where it dedicates its Section III, paras. 12-34, to "Reparation Issues concerning Italy and Italian Citizens"[14]. As to Germany's arguments concerning the question of reparation and the factual context of the present case, in paragraph 13 of its Reply, for example, it claims that Italy was involved in the post-war reparations scheme and that it received appreciable amounts of compensation from Germany. In paragraph 34 of its Reply, Germany further contends that, through the various mechanisms of reparation, in particular through collective reparations, it has fulfilled its duty to provide reparation in a fully satisfactory manner.

20. The same is true concerning the arguments of the Parties during the oral hearings[15]. A statement by the counsel for Italy is illustrative of this:

> "Is it not surprising to hear the Agent of Germany assert again at this stage that the question of reparation 'do[es] not form part of the present proceedings', whereas most of the discussions and the remarks your Court has heard throughout this week of pleadings have been and continue to be focused on this topic, and each of the counsel for the opposing Party has in particular made every effort to demonstrate that no violation of the obligations in question was ever committed?"[16]

21. While Germany states that the case is not about "the [Second World War], violations of international humanitarian law committed during the war and the question of reparations"[17], during its second pleadings in the oral proceedings, the agent of Germany stated that she intended "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"[18]. She then went on to describe the mechanism of reparation that was put in place after the Second World War, stating that

> "— 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, Responsibil-

[14] Reply of Germany, paras. 12-34.
[15] Cf., e.g., CR 2011/20, p. 11; CR 2011/21, p. 14.
[16] CR 2011/21, p. 14 (official translation).
[17] CR 2011/17, p. 18.
[18] CR 2011/20, pp. 11-12.

ity, 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."[19]

22. The question is addressed again in the pleadings of counsel for Germany, wherein it is claimed that Italy's stance that Germany has failed to provide reparation collectively "requires an explanation of the entire system of reparations as it was conceived by the community of States"[20]. The argument goes on to explain the foundations of the system of reparations "conceived by the community of States having declared war on Germany . . . [which] were laid down at Potsdam, a few months after Germany's surrender"[21]. Thus, counsel for Germany presented "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"[22].

23. In conclusion on the point at issue, one cannot make abstraction of the factual context, of the historical background of the facts which gave origin to the present case. State immunities cannot be considered in the void, they constitute a matter which is ineluctably linked to the facts which give origin to a contentious case. This is precisely what I upheld in my dissenting opinion in the Court's Order of 6 July 2010, whereby the Court decided, however, to dismiss the Italian counter-claim, much to my regret. Shortly after that Order, the contending Parties themselves (Germany and Italy) kept on relating their (written and oral) submissions on the issue of State immunities to the factual background of war reparations claims. It could not have been otherwise, as one and the other are ineluctably interrelated.

IV. Germany's Recognition of State Responsibility in the *Cas d'Espèce*

24. Having established the ineluctable interrelatedness between the claims of State immunities and of war reparations in the *cas d'espèce (supra)*, I now move on to the next point, namely, Germany's recognition of State responsibility for the wrongful acts which lie in the factual origin of the present case. This comes to reveal the uniqueness of the present

[19] CR 2011/20, pp. 11-13.
[20] *Ibid.*, pp. 25-26.
[21] *Ibid.*, pp. 25-26.
[22] *Ibid.*, p. 27.

case concerning the *Jurisdictional Immunities of the State*, a very rare one in the inter-State *contentieux* before the Hague Court, and an unprecedented one in that the Complainant State recognizes its own responsibility for the harmful acts lying in the origins, and forming the factual background, of the present case.

25. Throughout the proceedings before this Court in the present case concerning the *Jurisdictional Immunities of the State*, in the written and oral phases, Germany took the commendable initiative of repeatedly recognizing State responsibility for the wrongful acts lying in the factual origins of the *cas d'espèce*, i.e., for the crimes committed by the Third Reich during the Second World War[23]. Thus, in the written proceedings, in its Memorial Germany stated that

> "the historical context of the dispute cannot be fully understood without at least a summary description of the unlawful conduct of the forces of the German Reich, on the one hand, and the steps undertaken by post-war Germany, at the inter-State level, to give effect to the international responsibility of Germany deriving from that conduct, on the other. (. . .)
>
> The democratic Germany, which emerged after the end of the Nazi dictatorship, has consistently expressed its deepest regrets over the egregious violations of international humanitarian law perpetrated by German forces during the period from 8/9 September 1943 until the liberation of Italy."[24]

26. Germany then referred to its own previous "symbolic gestures", on many occasions, to remember the Italian citizens who became "victims of barbarous strategies in an aggressive war". It added that it was "prepared to do so in the future" again. Germany recalled, in particular, the 2008 ceremony held in the memorial site "La Risiera di San Sabba" close to Trieste (which had been used as a concentration camp during the German occupation in the Second World War), where Germany fully acknowledged the untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees"[25].

27. One of the conclusions of the meeting of German and Italian authorities during the ceremony in the memorial site near Trieste (on 18 November 2008) was the decision to create a joint commission of German and Italian historians.

> "with the mandate to look into the common history of both countries during the period when they were both governed by totalitarian regimes, giving special attention to those who suffered from war

[23] Cf., e.g., Memorial of Germany, paras. 7, 15, 59, 94; Reply of Germany, para. 2; CR 2011/17, p. 15, para. 5; pp. 18-19, para. 12; p. 31, para. 20; p. 48, para. 41; CR 2011/20, para. 1.

[24] Memorial of Germany, paras. 7 and 15.

[25] *Ibid.*, para. 15.

> crimes, including those Italian soldiers whom the authorities of the Third Reich abusively used as forced labourers ('military internees'). In fact, the first conference of that joint commission, which comprises five eminent scholars from each side, was held on 28 March 2009 in Villa Vigoni, the prominent centre for cultural encounters in German-Italian relations."[26]

28. Germany added that it "does not challenge the assertion that indeed very serious violations, even crimes, were committed by its occupation forces in Italy"[27]. It added that "[t]he unlawful actions of the armed forces of the Third Reich took place between 1943 and 1945. Since that time, no injurious new element was added to the damage originally caused."[28] In its Reply, Germany again referred to "[t]he horrendous events of World War II, when German occupation forces perpetrated indeed serious violations of the laws of war"[29] (which it sought, however, to separate from the issue of State immunity submitted to the jurisdiction of the Court).

29. Likewise, in the course of the oral proceedings, in the public sitting of 12 September 2011 before the Court, counsel for Germany stated that

> "The democratic Germany which emerged after the end of the Nazi dictatorship has consistently expressed its deepest regret over the egregious violations of international humanitarian law perpetrated by German forces and fully acknowledges the suffering inflicted on the Italian people during the period from September 1943 until the liberation of Italy in May 1945. In this context, the German Government has, in co-operation with the Italian Government, made a number of gestures to reach out to the victims and their families. (. . .).
>
> [M]ost horrendous crimes were committed by Germans during World War II. Germany is fully aware of her responsibility in this regard. Those crimes were unique, as were the instruments and mechanisms for compensation and reparation — financially, politically and otherwise — set up and implemented by Germany since the end of the war. We cannot undo history. If victims or descendants of victims feel that these mechanisms were not sufficient, we do regret this."[30]

30. Shortly afterwards, in the public sitting of 15 November 2011 before the Court, counsel for Germany reiterated that

> "We are well aware that the complex legal nature of these proceedings on State immunity cannot do justice at all to the human dimen-

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[26] Memorial of Germany, para. 15.
[27] *Ibid.*, para. 59.
[28] *Ibid.*, para. 94.
[29] Reply of Germany, para. 2.
[30] CR 2011/17, pp. 15 and 18, paras. 5 and 12; and cf. p. 31, para. 20, for yet another reference to the "grave breaches of the law perpetrated by the authorities of the German Third Reich".

> sion 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."[31]

Germany further recognized its responsibility specifically for the massacre of Distomo in Greece, perpetrated on 10 June 1944 (cf. para. 188 *infra*).

31. The massacre of Distomo was by no means an isolated atrocity of the kind; there were other massacres in occupied Greece at that time, in a pattern of systematic oppression and extreme violence[32]. The above statements before this Court, of acknowledgment of State responsibility on the part of Germany, commendable as they are, show again the impossibility of making abstraction of the factual background of the present case, pertaining to the claim of State immunity as ineluctably related to war reparation claims.

V. Fundamental Human Values: Rescuing some Forgotten Doctrinal Developments

32. Since legal doctrine (i.e., "the teachings of the most highly qualified publicists of the various nations") is listed among the formal "sources" of international law, together with "judicial decisions", in Article 38 (1) *(d)* of the ICJ Statute, consideration of the basic issue raised in the present case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* cannot thus prescind from, and be exhausted in, a review only of case law (both international and domestic) on the procedural issue of State immunity strictly. Attention is to be turned also to the most lucid international legal thinking, drawing on the underlying human values. I thus turn my attention to some writings which I regard as particularly relevant to the consideration of the *cas d'espèce*.

33. I do not purport to be exhaustive, but rather selective, in singling out some ponderations which should not remain seemingly forgotten in our days, particularly by the active (if not hectic) legal profession, which appears today oblivious of the lessons of the past, in its persistent obsession of privileging strategies of litigation over consideration of fundamental human values. I draw attention to the apparently forgotten thoughts of three distinguished jurists, who belonged to the same generation which witnessed and survived two World Wars, who were devoted to interna-

[31] CR 2011/20, p. 10, para. 1.

[32] For one of the few general historical accounts available, cf. M. Mazower, *Inside Hitler's Greece: The Experience of Occupation, 1941-44*, New Haven/London, Yale Nota Bene/Yale University Press, 2001, pp. 155-261.

tional law in the epoch of the anguish of the inter-war period and of the horrors of the Second World War: Albert de La Pradelle (1871-1955), former member of the Advisory Committee of Jurists which in 1920 drafted the Statute of the old Permanent Court of International Justice (PCIJ), subsequently to become, with minor changes, the Statute of the ICJ; Max Huber (1874-1960), former judge of the PCIJ[33]; and Alejandro Alvarez (1868-1960), former judge of the ICJ.

34. At the same time as the rise of Nazism in Germany, humanism was being cultivated elsewhere, and not so far away, within the realm of international legal thinking. In an illuminating series of lectures, delivered in Paris, from November 1932 to May 1933, Albert de La Pradelle pondered that the *droit des gens* transcends inter-State relations, it regulates them so as to protect human beings: it is a true "law of the human community". The *droit des gens* seeks to ensure respect for the rights of the human person, to ensure compliance by States of their duties vis-à-vis the human beings under the respective jurisdictions. International law — he added — was constructed as from human beings, it exists *by* and *for* them[34].

35. Under the *droit des gens*, States ought to permit human beings who compose them to become masters of their own destiny. One is here before a true *"droit de l'humanité"*, in the framework of which general principles of law — which are those of international law, emanating from natural law[35] — play an important and guiding role. The purely inter-State conception is dangerous, he warned; in his own words,

> "It is extremely grave and perilous that international law is forming on the conception of reciprocal rights and duties of the different States. (. . .) [I]t is essential to move away from that process of definition. (. . .) [I]t poses an immediate danger, leading States to focus solely, in respect of the organization and development of international law, on their particular freedoms grouped together under a new expression, that of *sovereignty*."[36]

Attention is, in his view, to be turned to those general principles, emanating from the *juridical conscience*, and to the "evolution of humankind", respectful of the rights of the human person[37].

36. On his turn, Max Huber, in a book written in his years of maturity and published towards the end of his life, drew attention to the relevance of "superior values", above "State interests", in the whole realm of the *jus*

[33] And its former president in the period 1925-1927.

[34] A. de La Pradelle, *Droit international public* (cours sténographié), Paris, Institut des hautes études internationales/Centre européen de la dotation Carnegie, November 1932/May 1933, pp. 49, 80-81, 244, 251, 263, 265-266 and 356.

[35] *Ibid.*, pp. 230, 257, 264 and 413.

[36] *Ibid.*, pp. 33-34. *[Translation by the Registry.]*

[37] *Ibid.*, pp. 261 and 412.

gentium as a law of mankind *(droit de l'humanité)*[38]. Looking back in time (writing in 1954), he pondered that

> "If one compares the current era with that of 1914, it is clear to see that there has been a weakening of the sense of the law, a reduction in the instinctive respect for the limits it imposes; this is surely a consequence of the damage sustained within the legal structures of States (. . .) Devaluation of the human person and life and widespread deterioration of the legal consciousness. All that explains why a significant part of humanity accepted, without any apparent strong reaction, a serious debasement of the laws of war."[39]

37. The *jus gentium* beheld and advocated by Huber, in the light of natural law thinking, is meant to protect the human person. Contemporary international humanitarian law (as embodied, e.g., in the four Geneva Conventions) — he added — purported ultimately to the protection of the human person as such, irrespective of nationality; it was centred on human beings. He further recalled the ultimate ideal cultivated by some international legal philosophers of the *civitas maxima gentium*[40].

38. For his part, Alejandro Alvarez, in a book published (originally in Paris) one year before his death, titled *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples* (1959), also visualized the foundations of international law — subsequent to the "social cataclysm" of the Second World War — as from its general principles[41], emanated from the "international juridical conscience"[42], wherefrom derive also — he added — precepts such as those pertaining to the crime against humanity[43]. To him as well, those general principles of international law emanated from the juridical conscience, and should be re-stated in the new times[44].

39. They were endowed with much importance, as historically exemplified by the two Hague Peace Conferences (1899 and 1907)[45]. A. Alvarez further observed that, as a result of the "dynamism" of the evolving international law,

> "it is rather often difficult to make in this law the traditional distinction between '*lex lata*' and '*lex ferenda*'. Beside a formed international law, there is always an international law in the process of formation."[46]

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[38] M. Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, CICR, 1954, pp. 26, 247, 270 and 293.

[39] *Ibid.*, pp. 291-292. *[Translation by the Registry.]*

[40] *Ibid.*, pp. 247, 270, 286 and 304.

[41] A. Alvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos*, Santiago, Editorial Jurídica de Chile, 1962 [reed.], pp. 156, 163 and 292.

[42] *Ibid.*, pp. 49, 57, 77, 155-156 and 292.

[43] *Ibid.*, pp. 156 and 304.

[44] *Ibid.*, pp. 163 and 304.

[45] Cf. *ibid.*, pp. 156 and 357.

[46] "Es a menudo difícil hacer en este derecho la distinción tradicional entre la *'lex lata'* y la *'lex ferenda'*. Al lado de un derecho internacional formado, hay siempre un derecho internacional en formación." (*Ibid.*, p. 292.) *[My translation.]*

40. This brief survey of doctrinal developments, centred on fundamental human values, discloses that, some of the most distinguished jurists of a generation which witnessed the horrors of two World Wars in the twentieth century did not at all pursue a State-centric approach to our discipline. On the contrary, they advanced an entirely distinct approach, centred on the human person. They were, in my understanding, faithful to the historical origins of the *droit des gens*, as one ought to be nowadays as well. Even a domain so heavily marked by the State-centric approach — which did not help at all to avoid the horrors of the World Wars — such as that of State immunities has nowadays to be reassessed in the light of *fundamental human values*. State immunities are, after all, a prerogative or a privilege, and they cannot keep on making abstraction of the evolution of international law, taking place nowadays, at last, in the light of fundamental human values.

VI. The Collegial Doctrinal Work of Learned Institutions of International Law

41. The work of learned institutions in the domain of international law can be invoked in this connection. The subject of the jurisdictional immunities of the State, central in the *cas d'espèce*, has attracted the attention of succeeding generations of legal scholars, as well as of learned institutions, such as the Institut de droit international (IDI) and the International Law Association (ILA). The Institut de droit international, since its early days in the late nineteenth century up to the present time, has occupied itself of the theme. As early as in its Hamburg Session of 1891, its *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers* (Drafting Committee and L. von Bar, J. Westlake and A. Hartmann) stated, in Article 4 (6), that:

> "The only admissible actions against a foreign State are:
>
> . . . . . .
>
> — actions for damages for delicts or quasi-delicts committed on the territory." *[Translation by the Registry.]*

42. Over half-a-century later, its conclusions on *L'immunité de juridiction et d'exécution forcées des Etats étrangers* (Session of Aix-en-Provence, 1954 — rapporteur, E. Lémonon) held, in Article 3, that:

> "The courts of a State may entertain actions against a foreign State and the legal persons referred to in Article 1 whenever the dispute relates to an act which is not an act of public authority.
>
> Whether or not an act is an act of public authority is determined by the *lex fori*." *[Translation by the Registry.]*

43. In 1991, at its Basel Session, its conclusions on *Contemporary Problems concerning the Immunity of States in relation to Questions of Jurisdiction and Enforcement* (rapporteur, I. Brownlie) provided (as to the criteria indicating the competence of courts of the forum State in relation to jurisdictional immunity), in Article 2 (2) *(e)*, that:

> "In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:
>
> . . . . . .
>
> — The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State."

44. One decade later, in its Session of Vancouver of 2001, the resolution of the IDI on *Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international* (rapporteur, J. Verhoeven) stated, in Article 3, that

> "In civil and administrative matters, the Head of State does not enjoy any immunity from jurisdiction before the courts of a foreign State, unless that suit relates to acts performed in the exercise of his or her official functions. Even in such a case, the Head of State shall enjoy no immunity in respect of a counter-claim. Nonetheless, nothing shall be done by way of court proceedings with regard to the Head of State while he or she is in the territory of that State, in the exercise of official functions."

45. Four years later, in the Krakow Session of 2005, the Institut de droit international, in its conclusions on *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes* (rapporteur, C. Tomuschat), was of the view (Article 3 *(a)*) that

> "Unless otherwise lawfully agreed, the exercise of universal jurisdiction shall be subject to the following provisions:
>
> — Universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict."

46. Last but not least, in its resolution on *Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* (rapporteur, Lady Fox), adopted at it Naples Session of 2008, the Institut was of the view (Arts. II (2) and (3)) that

> — "Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.
> — States should consider waiving immunity where international crimes are allegedly committed by their agents."

47. Furthermore, the same Naples resolution of 2009 of the IDI significantly added (Article III (1) and (3) *(a)* and *(b)*) that

> — "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes. (. . .)
> — The above provisions are without prejudice to:
> — the responsibility under international law of a person referred to in the preceding paragraphs;
> — the attribution to a State of the act of any such person constituting an international crime."[47]

Article IV of the same resolution adds that the above provisions "are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State".

48. It is clear from the above that, from the start, the IDI approached State immunities as evolving in time, certainly not static nor immutable, and having limitations or exceptions (Sessions of Hamburg of 1891, of Aix-en-Provence of 1954, and of Basel of 1991). The same may be said of immunities of Heads of State (Session of Vancouver of 2001). More recently (Session of Krakow of 2005), the IDI upheld universal jurisdiction over international crimes (grave violations of human rights and of international humanitarian law). And, in its most recent work on the subject (Session of Naples of 2009), the IDI held precisely that no State immunity applies with regard to international crimes (Art. III (1)); the resolution was adopted by 43 votes to none, with 14 abstentions.

[47] And Article V further stated that "The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State."

49. In the debates of that *confrèrie* which preceded the adoption of the aforementioned resolution of Naples of 2009, the following views were, *inter alia*, expressed: *(a)* State-planned and State-perpetrated crimes, engaging State responsibility, removed any bar to jurisdiction, at national and international levels, so as to avoid impunity (interventions by A. A. Cançado Trindade); *(b)* State immunity from jurisdiction cannot be understood as immunity from criminalization (interventions by G. Abi-Saab); *(c)* emphasis is to be laid on the need to avoid leaving the victims without any remedy (intervention by G. Burdeau); *(d)* there is need to take such progressive approach (intervention by R. Lee)[48].

50. The other learned institution aforementioned, the International Law Association (ILA), dwelt upon the matter as well. In its final report on *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (Conference of London of 2000), the ILA Committee on International Law and Practice employed the term "gross human rights offences" as shorthand for "serious violations of international humanitarian law and international human rights law that qualify as crimes under international law and that are of such gravity as to set them out as deserving special attention, *inter alia*, through their being subjected to universal jurisdiction" (p. 3). One of the "conclusions and recommendations" (No. 4) reached by that ILA Committee was that:

> "No immunities in respect of gross human rights offences subject to universal jurisdiction shall apply on the grounds that crimes were perpetrated in an official capacity." (P. 21.)

51. One decade later, in its report on *Reparation for Victims of Armed Conflict* (ILA Conference of The Hague of 2010), the ILA Committee on Reparation for Victims of Armed Conflict (substantive issues) observed, in the commentary on Article 6 of its draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), that the duty to make reparation has "its roots in general principles of State responsibility" (as expressed by the PCIJ in the *Chorzów Factory* case, 1928), in Article 3 of the Hague Convention (IV) of 1907 and in Article 91 of the I Additional Protocol of 1977 to the four Geneva Conventions of 1949 (p. 311). And the ILA Committee added that:

> "Whilst claims of the individual were traditionally denied, the dominant view in the literature has increasingly come to recognize an individual right to reparation — not only under international human rights law, but also under international humanitarian law. The same shift is discernible in State practice."[49] (P. 312.)

[48] Cf. 73 *Annuaire de l'Institut de droit international* — Session de Naples (2009), pp. 144, 148, 158, 167, 175, 187, 198, 222 and 225.

[49] And cf. pp. 313-320, on the changes that have occurred in recent years, pointing towards the recognition of the individual's right to reparation (cf. *infra*, on this particular point).

52. In sum and conclusion, contemporary international legal doctrine, including the work of learned institutions in international law, gradually resolves the tension between State immunity and the right of access to justice rightly in favour of the latter, particularly in cases of international crimes. It expresses its concern with the need to abide by the imperatives of justice and to avoid impunity in cases of perpetration of international crimes, thus seeking to guarantee their non-repetition in the future. It is nowadays generally acknowledged that criminal State policies and the ensuing perpetration of State atrocities cannot at all be covered up by the shield of State immunity.

VII. The Threshold of the Gravity of the Breaches of Human Rights and of International Humanitarian Law

53. This brings me to the consideration of a related aspect, not sufficiently developed in expert writing to date, namely, the threshold of the *gravity* of the breaches of human rights and of international humanitarian law, removing any bar to jurisdiction, in the quest for reparation to the victimized individuals. In this respect, there have been endeavours, at theoretical level, to demonstrate the feasibility of the determination of the international criminal responsibility not only of individuals but also of States; it has been suggested that the acknowledgement of State responsibility for international crimes is emerging in general international law[50]. It goes without saying that criminal practices of States entail consequences for the determination of reparations to individual victims, each and all of them, — even more cogently from the contemporary outlook — which I advance — of an international law *for* the human person, *for* humankind[51].

54. In this line of reasoning, it is important to dwell upon the needed configuration of the threshold of the *gravity* of the breaches of human rights, with ineluctable legal consequences for the removal of any bar to jurisdiction and for the question of reparations to the victims. It is indeed important to consider nowadays all mass atrocities in the light of the threshold of *gravity*, irrespective of who committed them; this may sound evident, but there subsist in practice regrettable attempts to exempt States from any kind of responsibility. From time to time there have been attempts to construe the threshold of the gravity of breaches of human rights; this concern has been expressed at times, e.g., in the work of the

[50] N. H. B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford University Press 2003, pp. 206-207, 231, 279-280 and 283.

[51] Cf. A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part I", 316 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (2005), pp. 31-439; A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part II", 317 *RCADI* (2005), pp. 19-312.

UN International Law Commission (ILC), albeit without concrete results to date.

55. In 1976, in its consideration of the draft Articles on State Responsibility (rapporteur, Roberto Ago), the ILC admitted that there were some international wrongs that were "more serious than others", that amounted to "international crimes", as they were in breach of fundamental principles (such as those of the UN Charter) "deeply rooted in the conscience of mankind", as well as of the foundations of "the legal order of international society"[52]. In acknowledging the need of recognizing such "exceptionally serious wrongs", the ILC, invoking "the terrible memory of the unprecedented ravages of the [Second World War]", pondered, still in 1976:

> "The feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi régime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected; all this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, apartheid and other inhuman practices of that kind."[53]

56. One decade later, in the same line of concern, the ILC rapporteur on the draft Code of Offences against the Peace and Security of Mankind (Doudou Thiam), in his Fifth Report (of 1987) made the point that the offences at issue were "crimes which affect the very foundations of human society"[54]. Shortly later, in 1989, the same rapporteur drew attention to the concept of "grave breaches" as incorporated into the four Geneva Conventions on International Humanitarian Law (1949) and Additional Protocol I (1977) thereto[55]. One decade later, in its commentary on Article 7 of the aforementioned draft Code (1996 Report), the ILC pondered that

> "It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code, to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions, particularly since these heinous crimes shock the conscience of mankind, violate

[52] UN, *Yearbook of the International Law Commission* (1976), Vol. II, Part II, pp. 109 and 113-114, and cf. p. 119.
[53] *Ibid.*, p. 101.
[54] UN doc. A/CN.4/404/Corr.1, of 17 March 1987, p. 2, and cf. pp. 5-6.
[55] Cf. UN, *Yearbook of the International Law Commission* (1989), Vol. II, Part I, pp. 83-85.

> some of the most fundamental rules of international law and threaten international peace and security."[56]

57. Grave breaches of international law were to make their appearance again in the 2001 Articles on State Responsibility, then adopted by the ILC. Article 40 defines as "serious breach" of an obligation under "a peremptory norm of general international law" that which involves "a gross or systematic failure by the responsible State" to fulfil the obligation. Article 41 again refers to "serious breach". The commentary to those provisions underlines the "systematic, gross or egregious nature" of the breaches at issue[57]. Those breaches engage *State* responsibility, which is not effaced by the international *individual* criminal responsibility[58]. State responsibility, in case of grave breaches, subsists in general international law. State and individual responsibility complement each other, as developments in international human rights law and in international criminal law indicate nowadays.

58. Moreover, in cases of grave breaches of human rights, the States concerned incur into responsibility for grave harm done ultimately to individuals, to human beings, and not to other States. The ILC itself so admitted, in its 2001 final Report, containing the commentaries on the Articles it had just adopted. The ILC conceded that:

> "a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights"[59].

59. In sum, the *titulaires* of the right to reparation are the individuals concerned, the victimized human beings. In the perpetration of grave breaches of human rights and of international humanitarian law, the criminality of individual executioners acting in the name of States is ineluctably linked to the criminality of the responsible States themselves. After all, war crimes, crimes against peace, and crimes against humanity are committed in a planified and organized way, disclosing a collective

[56] ILC, *Report of the International Law Commission on the Work of Its 48th Session* (6 May-26 July 1996), p. 39, para. 1 (on Article 7).

[57] J. Crawford, *The International Law Commission's Articles on State Responsibility — Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 247.

[58] A. A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", *International Responsibility Today — Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, Nijhoff, 2005, pp. 253-269; P. S. Rao, "International Crimes and State Responsibility", *ibid.*, pp. 76-77.

[59] "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", UN doc. A/56/10, of 2001, Art. 33, para. 3, p. 95.

criminality[60]. They count on resources of the State, they are true crimes of State. There is thus need to take into account, jointly, the international responsibility of the *State* and the international criminal responsibility of the *individual*, complementary to each other as they are[61].

60. At *normative level*, the threshold of gravity of breaches of the fundamental rights of the human person comes to the fore time and time again, even though insufficiently developed to date. There are historical moments when it has attracted particular attention, e.g., shortly after the adoption of Additional Protocol I (of 1977, Art. 85) to the four Geneva Conventions on International Humanitarian Law (of 1949)[62]. The regime of grave breaches set forth in the four Geneva Conventions of 1949 (I Convention, Arts. 49-50; II Convention, Articles 50-51; III Convention, Arts. 129-130; IV Convention, Arts. 146-147) is nowadays regarded as forming part of customary international law[63].

61. At *jurisprudential level*, the threshold of gravity of human rights breaches is nowadays beginning to attract attention, and to be considered, within the framework of the emerging case law in the domain of international criminal law[64]. It has much developed, above all, in the jurisprudential construction in recent years in the domain of the international law of human rights[65]. An example is afforded by the handling of the case of *Democratic Republic of the Congo* v. *Burundi, Rwanda and Uganda* (2003) by the African Commission on Human and Peoples' Rights[66]. The most notorious advances in this respect have been achieved by the jurispruden-

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[60] R. Maison, *La responsabilité individuelle pour crime d'Etat en droit international public*, Brussels, Bruylant/Eds. de l'Université de Brussels, 2004, pp. 24, 85, 262-264 and 286-287.

[61] *Ibid.*, pp. 294, 298, 409-410, 412, 459 and 511.

[62] Cf. E. J. Roucounas, "Les infractions graves au droit humanitaire", 31 *Revue hellénique de droit international* (1978), pp. 60-139.

[63] Cf. J.-M. Henckaerts, "The Grave Breaches Regime as Customary International Law", 7 *Journal of International Criminal Justice* (2008), pp. 683-701.

[64] Cf., e.g., W. A. Schabas, "Gravity and the International Criminal Court", *Protecting Humanity — Essays in International Law and Policy in Honour of N. Pillay* (ed. C. Eboe-Osuji), Leiden, Nijhoff, 2010, pp. 689-706.

[65] The gravity of certain breaches of fundamental rights (e.g., forced disappearances of persons and summary or extra-legal executions) was, early in its history, acknowledged by the IACtHR; its pioneering case law in that regard was served of inspiration to, and was followed by, the corresponding case law of the ECHR, in particular in the *cycle of Turkish cases*, towards the end of the twentieth century. Cf., e.g., J. Benzimra-Hazan, "En marge de l'arrêt *Timurtas contre la Turquie*: vers l'homogénéisation des approches du phénomène des disparitions forcées de personnes", 48 *Revue trimestrielle des droits de l'homme* (2001), pp. 983-997; Leo Zwaak, "The European Court of Human Rights Has the Turkish Security Forces Held Responsible for Violations of Human Rights: The Case of *Akdivar and Others*", 10 *Leiden Journal of International Law* (1997), pp. 99-110.

[66] As I recently pointed out, in my separate opinion in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 803-804, para. 218, note 158.

tial construction, throughout the last decade, of the IACtHR, in the adjudication of the aforementioned cycle of cases of massacres[67].

62. Reference can here be made, in this connection, to the Judgments of the IACtHR in the cases, *inter alia*, of *the Massacre of Plan de Sánchez* v. *Guatemala* (of 29 April 2004), of the *Massacre of Mapiripán* v. *Colombia* (of 15 September 2005), of the *Massacres of Ituango* v. *Colombia* (of 1 July 2006), of *Goiburú et al.* v. *Paraguay* (of 22 September 2006 — cf. *infra*), of *Almonacid Arellano* v. *Chile* (of 26 September 2006), of the *Prison of Castro-Castro* v. *Peru* (of 25 November 2006), of *La Cantuta* v. *Peru* (of 29 November 2006). There is here space for fostering a jurisprudential convergence between the international law of human rights and contemporary international criminal law. Another area of convergence lies in the participation of the victims themselves — their *locus standi in judicio* — in the respective procedures between international human rights tribunals and international criminal tribunals.

VIII. The Question of Waiver of Claims in respect of the Right of Access to Justice in the Pleadings before the Court: Assessment

63. The question of the *waiver of claims* in respect of the *right of access to justice* (in order to seek reparation) was controverted in the arguments of the contending Parties (Germany and Italy) as well as of the intervening State (Greece) in the course of the oral pleadings before this Court. Germany contended, challenging the Italian argument of an individual right to reparation[68], that the respect for the immunity of a foreign State is a lawful limitation to the right to access to justice[69]. It further argued that there is no rule that prohibits the waiver of pecuniary claims, as the actual violation has already ceased[70]. If the argument of Italy were to be accepted — Germany went on — the whole structure of the scheme of reparations built after the Second World War would be destroyed, as massive claims could be raised both by and against Germany for violations of the laws of war by Germany and Allied Forces[71]. Germany at last claimed that the system of reparation created was comprehensive

[67] For a recent assessment, cf. [Various Authors], *Réparer les violations graves et massives des droits de l'homme: La Cour interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Société de législation comparée, 2010, pp. 17-334.

[68] CR 2011/17, pp. 41-42, paras. 14 and 16.

[69] *Ibid.*, pp. 43-44, paras. 23-24. In this respect, Germany added that even if a right to reparation and a cause of action exist under international law, it has abided by it, since it has given full and non-discriminatory access to its Courts to all plaintiffs (Italian and Greek); *ibid.*, p. 46, para. 30.

[70] CR 2011/20, pp. 15-16, paras. 2-3.

[71] *Ibid.*, pp. 17-18, paras. 4-6.

and tried to balance the interests of the victim States and those of Germany[72].

64. Italy retorted that the waiver clause of Article 77 (4) of the 1947 Peace Treaty does not cover violations of international humanitarian law. Taking issue with the German argument, it reiterated the position that claims of reparation for grave breaches of international humanitarian law have not been waived by Italy, as they were beyond the scope of the provision of Article 77 (4) of the 1947 Peace Treaty. Italy thus claimed that the only interpretation of that provision of the 1947 Treaty is that it does not waive reparations for violations of international humanitarian law[73]. And even if the intention were to waive all such claims against Germany — Italy added — that would be illegal, as it would absolve Germany from all war crimes committed, which was not allowed under the Geneva Conventions regime[74].

65. Addressing specifically the right to reparation of the Italian military internees, Italy referred, in this respect, to the paradoxical treatment dispensed to them, who were excluded from the reparations regime provided by the on "Remembrance, Responsibility and Future" Foundation, because they were prisoners of war, whereas Nazi Germany had deprived them of this status and had used them as forced labourers[75]. Italy added that the claims of the victims of massacres cannot be considered as waived, because at the time of the alleged waiver (either in the 1947 Peace Treaty or in the 1961 Agreements) the crimes had not yet been established; moreover, the recognition of such a waiver would lead to the absurd situation of the perpetrators of these crimes being criminally responsible but not civilly liable. Such a solution would also be contrary to all modern developments of international criminal law, which recognizes that criminal responsibility and civil liability are connected[76].

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[72] CR 2011/20, pp. 23-26, paras. 17-24. Moreover, it included a waiver by Italy of all claims against Germany, as a sanction for its participation in the Axis; *ibid.*, pp. 26-27, paras. 23-25. And the two bilateral 1961 Agreements were a gesture towards Italy in order to further improve their relations, while the waiver clause remained in full force; *ibid.*, pp. 29-30, para. 32.

[73] CR 2011/21, p. 24, para. 29, and cf. CR 2011/18, pp. 26-27, paras. 4-8.

[74] Cf. CR 2011/18, pp. 31-32, paras. 18-23; and cf., pp. 20-21, paras. 11-13, and pp. 22-23, para. 14. Italy claims that the cases of reparations that are at issue herein do not concern victims of Nazi persecution, to which reparations have been made; CR 2011/21, p. 25, para. 33. The present concern is with victims such as the military internees, who have not received any reparation.

[75] CR 2011/18, p. 33, para. 28.

[76] *Ibid.*, p. 34, paras. 29-30. Moreover, Italy notes that, as Germany conceded, even those *ex gratia* reparations were only partial; CR 2011/21, pp. 25-26, paras. 34-35. Italy claims that there are a significant number of Italian citizens who are entitled to reparation and who have not yet received any. Italy thus claimed that their only avenue for redress is through the Italian courts, which would not have lifted Germany's immunity had the German Government agreed to take measures in order to offer them the reparations they are entitled to; CR 2011/18, pp. 13-14, para. 11.

66. Greece, for its part, contended that Greek courts have accepted the existence of an individual right to reparation for grave violations of international humanitarian law, based on Article 3 of the 1907 Hague Convention (IV)[77], Article 91 of the 1977 Additional Protocol I[78], Rule 150 of the ICRC International Humanitarian Law Codification[79] (of customary international law, cf. *supra*), Article 33 (2) of the ILC Articles on State Responsibility[80], and international practice. This is a point which was particularly stressed by Greece (cf. para. 147, *infra*), and which is deserving of close attention.

67. In effect, at an earlier stage of the proceedings in this case, I deemed it fit to address this point, in my dissenting opinion in the Court's Order (which dismissed the Italian counter-claim) of 6 July 2010. Article 3 of the 1907 Hague Convention (IV) determines that a belligerent State party that violates the provisions of the Regulations annexed thereto is responsible for all acts committed by members of its armed forces, and "liable to pay compensation". The *travaux préparatoires* of this provision (originated in a proposal by the German delegate) supported the view that the indemnization was due to the individual persons who were victims of the aforementioned violations[81].

68. Seven decades later, this provision was updated by Article 91 of Protocol I Additional to the 1949 Geneva Conventions on International Humanitarian Law. There was no controversy nor dissent (neither in 1907 nor in 1977) as to the recognition of State responsibility for breaches of the 1907 Regulations and the ensuing duty of the State concerned to provide indemnization to the individual victims[82]. To this effect, in my aforementioned dissenting opinion in the Court's Order of 6 July 2010, I pondered that:

> "In the days of the historical Second Peace Conference, held here in The Hague, the participating States decided to set forth a general obligation, incumbent on *all* parties to an armed conflict, to make reparations (not only on the part of the defeated States in favour of the victorious powers, as was the case in previous State practice). This was done *on the basis of a German proposal*, which resulted in Article 3 of the Fourth Hague Convention[83], and is the first provision dealing

[77] CR 2011/19, p. 17, para. 28.
[78] *Ibid.*, p. 32, para. 77.
[79] *Ibid.*, p. 32, para. 78.
[80] *Ibid.*, p. 34, para. 85.
[81] F. Kalshoven, "Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land, Signed at The Hague, 18 October 1907", *War and the Rights of Individuals — Renaissance of Individual Compensation* (eds. H. Fujita, I. Suzuki and K. Nagano), Tokyo, Nippon Hyoron-sha Co. Publishing, 1999, pp. 34-36.
[82] This — it has been argued — reflected "established customary law"; *ibid.*, pp. 36-37.
[83] Article 3 states: "A belligerent party which violates the provisions of the said Regulations [Regulations respecting the laws and customs of war on land, annexed to

specifically with a *reparation* regime for violations of international humanitarian law[84]. Thanks to the reassuring German proposal, Article 3 of the Fourth Hague Convention of 1907 clarified that it was intended *to confer rights directly upon individuals*[85]*, human beings*, rather than States.

This legacy of the Second Hague Peace Conference of 1907 projects itself to our days[86]. The time projection of the suffering of those subjected to deportation and sent to forced labour in the Second World War (period 1943-1945) has been pointed out in expert writing, also in relation to the prolonged endeavours of the victims to obtain reparation. (. . .) Not only had those victims to endure inhuman and degrading treatment, but later crossed the final limit of their ungrateful lives living with impunity, without reparation and amidst manifest injustice. The time of human justice is definitively not the time of human beings." (*Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010 (I)*, pp. 374-375, paras. 116-118).

IX. The Inadmissibility of Inter-State Waiver of the Rights of the Individuals, Victims of Grave Violations of International Law

69. The relevance of the individual right of access to justice is thus beyond question. In case of those grave breaches, the individual victims can thus invoke the responsibility of the State concerned on their own

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the IV Hague Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[84] This Article of the Fourth Hague Convention of 1907 came to be regarded as being also customary international law, and it was reiterated in Article 91 of the I Additional Protocol (of 1977) to the 1949 Geneva Conventions on International Humanitarian Law. Article 91 (Responsibility) of the I Protocol states: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[85] Cf., to this effect, Eric David, "The Direct Effect of Article 3 of the Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of War on Land", *War and the Rights of Individuals — Renaissance of Individual Compensation*, *op. cit. supra* note 81, pp. 50-53; and cf. also, e.g., F. Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", 40 *International and Comparative Law Quarterly* (1991), pp. 831-833; D. Shelton, *Remedies in International Human Rights Law*, 2nd ed., Oxford University Press, 2006, p. 400.

[86] For a general reassessment of that 1907 Conference on the occasion of its centennial commemoration in 2007, cf. : [Various Authors], *Actualité de la conférence de La Haye de 1907, deuxième conférence de la paix /Topicality of the 1907 Hague Conference, the Second Peace Conference* (ed. Yves Daudet), Leiden, Nijhoff/The Hague Academy of International Law, 2008, pp. 3-302.

initiative, and without the intermediation of any State; they can do so as subjects of the law of nations, and in conformity with the rule of law — as nowadays reckoned by the United Nations — at national and international levels. The traditional theory of the "act of State" cannot at all be relied upon, in face of grave breaches of human rights and of international humanitarian law by the State concerned.

70. In such circumstances, it is the individual victim's right of access to justice, to seek reparation, that prevails. In sum, Article 3 of the Hague Convention (IV) of 1907 and Article 91 of Additional Protocol I of 1977 confer the right to reparation at international level to victims of those grave breaches. And the responsible States are bound to provide them such reparation. A vast practice to this effect has developed in recent years, in the domain of the *corpus juris* of the international law of human rights, marking — being one of the multiple aspects of — the emancipation of the individuals from their own State, in the vindication of the rights inherent to them[87].

71. Also in my dissenting opinion in the Court's Order of 6 July 2010 in the present case of the *Jurisdictional Immunities of the State*, I furthermore set forth the foundations of my position that a State can waive only claims on its own behalf, but not claims on behalf of human beings pertaining to their own rights, as victims of grave violations of international law. The rights of victims of grave violations of human rights and of international humanitarian law subsist, their vindication cannot be waived by their States, or by States *inter se*, on their behalf (paras. 114-115). Any purported waiver to that effect would be deprived of any juridical effects (paras. 151 and 153). And I added, in that same dissenting opinion, that:

> "In any case, any purported waiver by a State of the rights inherent to the human person would, in my understanding, be against the international *ordre public*, and would be deprived of any juridical effects. To hold that this was not yet recognized at the time of the Second World War and the 1947 Peace Treaty — a view remindful of the old positivist posture, with its ineluctable subservience to the established power — would be, in my view, without foundation. It would amount to conceding that States could perpetrate crimes against humanity with total impunity, that they could systematically perpetrate manslaughter, humiliate and enslave people, deport them and subject them to forced labour, and then hide themselves behind the shield of a waiver clause negotiated with other State(s), and try

[87] Cf. A. A. Cançado Trindade, "The Emancipation of the Individual from His Own State — The Historical Recovery of the Human Person as Subject of the Law of Nations", in *Human Rights, Democracy and the Rule of Law — Liber Amicorum L. Wildhaber* (eds. S. Breitenmoser *et alii*), Zurich/Baden-Baden, Dike/Nomos, 2007, pp. 151-171; R. P. Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview", 1 *Journal of International Criminal Justice* (2003), pp. 343 and 345-347; M. Frulli, "When Are States Liable towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case", *ibid.*, pp. 424 and 427.

to settle all claims by means of peace treaties with their counterpart State(s).

Already in the times of the Third Reich, and before them, this impossibility was deeply-engraved in human conscience, in the *universal juridical conscience*, which is, in my understanding, the ultimate *material* source of all law. To hold that enforced labour was not prohibited at the time of the German Third Reich would not stand (. . .), not even on the basis on the old positivist dogmas. It does not stand at all, neither in times of armed conflict, nor in times of peace. The gradual restrictions leading to its prohibition, so as to avoid and condemn abuses of the past against the human person, became manifest not only in the domain of international humanitarian law, but also in that of the regulation of labour relations (proper of the international Conventions of the International Labour Organization — ILO). In my own perception, even before all those instruments (. . .), enslavement and forced labour were proscribed by human conscience, as the gross abuses of the past weighed too heavily on this latter." (*I.C.J. Reports 2010 (I)*, pp. 377-378, paras. 124-125.)

72. Here, once again, one ought to go beyond the strict inter-State level. Still in my earlier dissenting opinion in the Court's Order of 6 July 2010 (counter-claim) in the present case, I further pointed out that my own conception of international law, quite distinct from that of the Court's majority,

"goes well beyond the strict inter-State outlook, so as to reach the ultimate bearers *(titulaires)* of rights, the human beings, confronted with waiver of their claims of reparation of serious breaches of their rights by States supposed to protect, rather than to oppress, them.

States may, if they so wish, waive claims as to *their own* rights. But they cannot waive claims for reparation of serious breaches of rights that *are not* theirs, rights that are inherent to the human person. Any purported waiver to this effect runs against the international *ordre public*, is in breach of *jus cogens*. This broader outlook, in a higher scale of *values*, is in line with the vision of the so-called 'founding fathers' of the law of nations (the *droit des gens*, the *jus gentium*), and with what I regard as the most lucid trend of contemporary international legal thinking.

One cannot build (and try to maintain) an international legal order over the suffering of human beings, over the silence of the innocent destined to oblivion. At the time of mass deportation of civilians, sent to forced labour during the *two* World Wars (in 1916-1918 and in 1943-1945) of the twentieth century (and not only the Second World War), everyone already knew that that was a *wrongful* act, an atrocity, a serious violation of human rights and of international humanitarian

law, which came to be reckoned as amounting also to a war crime and a crime against humanity. Above the will stands conscience, which is, after all, what moves the law ahead, as its ultimate *material* source, removing manifest injustice." (*I.C.J. Reports 2010 (I)*, pp. 396-397, paras. 177-179.)

X. Positions of the Contending Parties as to the Right of Access to Justice

73. Germany and Italy understand the right to access to justice in fundamentally different ways. Both agree that access to justice is a fundamental right with two (complementary) components, namely, the right to an effective remedy and the right to a fair trial[88], but they disagree as to its scope and the consequences of its exercise in the case at issue. Germany argues that the right of access to justice entails an obligation the extent of which is limited to the guarantee of unimpeded and non-discriminatory access to nationals and aliens alike to effective remedies and to a fair trial[89], whereas Italy understands the right as entailing an obligation of satisfaction of the complaining party; it expands the right of access to justice to the outcome of the case and it argues that an aggrieved party[90] that has no other avenue ought to be allowed to seek an effective remedy before its national courts, even against a foreign State, and that in such case immunity has to be lifted in order to avoid a denial of justice[91].

74. Germany construes the right of access to justice very narrowly and argues that it is limited to the access to the judicial system of the *forum* State without discrimination and with full procedural rights. In this sense, Italian citizens have had full access to judicial remedies under German law, up to the Federal Constitutional Court[92]; while Greek citizens had exactly the same opportunity[93]. Furthermore, Germany distinguishes the access to justice and the right to an effective remedy from the question whether a "plaintiff has a genuine legal claim which he/she can assert"[94].

75. According to Germany, there is no individual right to reparation arising out of war crimes and other violations of international humanitarian law and consequently no (corollary) right of action. Similarly, the Peace Treaty of 1947 and the Agreement of 1961 provide for an inter-State reparation regime for injuries to Italian nationals due to the war

[88] CR 2011/17, p. 43, para. 24; Counter-Memorial of Italy, para. 4.88.
[89] Reply of Germany, p. 19, para. 34; CR 2011/17, p. 45, paras. 28-29.
[90] CR 2011/18, p. 62, para. 27.
[91] Counter-Memorial of Italy, p. 80, para. 4.103.
[92] Reply of Germany, p. 19, para. 34.
[93] CR 2011/17, p. 45, para. 30.
[94] Reply of Germany, p. 20, para. 34.

and that cannot be changed retroactively[95]. In addition, Germany argues that the common interpretation of Article 3 of the 1907 Hague Convention and the 1949 Geneva Conventions is in the sense that they do not create an individual right to compensation[96]. It also notes that more recent developments, such as the UN General Assembly resolution 60/147 (2005) or the draft ILA Report (2010) on reparation of victims of armed conflict that refer to such an individual right are not based on an existing customary or conventional rule of international law but rather propose the introduction of new rules[97]. Thus, the decisions of German courts in these cases are not a denial of justice but a recognition that the Italian nationals do not have the substantive rights they claim.

76. Even if such a right of action and to reparation were to be recognized, Germany argues that it has not violated it. Full access to all levels of the German judicial system was granted to all claimants and there has been no accusation of a violation of the procedural rights of Italian or Greek citizens; nor was there any discrimination against them due to their nationality[98]. Germany at last argues that if the right of access to justice were to be interpreted as allowing an individual who has not been successful in his/her claims before the Courts of the State (that allegedly violated his/her rights) to sue such State before Courts of a foreign State (and maybe before Courts of more than one State successively or simultaneously), then a serious case of "forum shopping" could emerge[99].

77. For its part, and quite distinctly, Italy argues that an individual right to reparation and a parallel cause of action for war damages exist. In its view, the origin of this right lies in the post-Second World War arrangements of the Treaty of Versailles (Art. 304) and the creation of the Mixed Arbitral Tribunals; it recognizes, however, that this path was not followed after the Second World War[100]. Nevertheless, it argues that, with the exception of the existence of an alternative international procedure, access to domestic remedies cannot be barred[101]. In fact, Italian courts have allowed lawsuits against Italy, despite the Peace Treaty and the inter-State mechanism for compensation it provides for[102]. Italy goes further and presents the right to access to justice as understood by the different regional and global systems for the protection of human rights, and, based on a decision of the IACtHR (case *Goiburú et al.*, cf. Section XVII *infra*), it argues that the right to access to justice is a peremptory right if the substantive right violated is of the same status[103].

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[95] Memorial of Germany, p. 12, para. 12.
[96] Reply of Germany, p. 23, para. 39.
[97] *Ibid.*, pp. 24-25, paras. 40-42.
[98] CR 2011/17, pp. 45-46, paras. 29-30.
[99] *Ibid.*, pp. 46-48, paras. 33-39.
[100] Counter-Memorial of Italy, p. 74, paras. 4.90-4.91.
[101] *Ibid.*, p. 75, para. 4.92.
[102] *Ibid.*, pp. 74-75, para. 4.91.
[103] *Ibid.*, p. 76, paras. 4.93-4.94.

78. In addition, Italy argues that access to justice entails protection against denial of justice, which can be understood as "refusal to grant someone that which he is owed"[104]. Thus, when Italian citizens, such as Mr. Ferrini and others before and after him, were not successful before German courts and administrative authorities[105] they filed lawsuits against Germany before the Italian courts, as their only available legal avenue[106]. Furthermore, the lifting of the immunity of the German State before the Italian courts in such cases, where the victims are deprived of any other means of redress, is necessary for the effective exercise of their right of access to justice[107].

79. These are the basic and opposing positions, sustained by Germany and Italy, on the right of access to justice. Before embarking on an assessment of them by dwelling further upon the matter (cf. Section XII *infra*), I deem it appropriate, next, to review their further clarifications of their arguments, in response to questions which I deemed it fit to pose to both of them, as well as to Greece as intervenor, in the course of the oral hearings before the Court. Once such clarifications are reviewed, I shall then proceed to the examination of the remaining aspects of the present case, in logical sequence.

XI. Clarifications from the Contending Parties and from Greece in Response to Questions from the Bench

1. Questions Put to the Contending Parties and to Greece

80. At the end of the oral hearings before the Court, on 16 September 2011, I deemed it fit to put a series of questions to the contending Parties, Germany and Italy, as well as to the intervening State, Greece, in order to seek clarification on the respective submissions they had presented to the Court. The questions I asked, on that occasion, were the following:

> "In order to maintain the linguistic balance of the Court, I will put my questions in the other language of the Court. Three questions to Germany and Italy and one to Greece.
>
> My first question to Germany and Italy is the following: In relation to your arguments in these public sittings before the Court and bearing in mind the Settlement Agreements of 1961 between Germany and Italy, what is the precise scope of the waiver clauses contained therein, and of the waiver clause of Article 77 (4) of the Peace Treaty of 1947? Can the issue of reparation be considered as entirely closed today? Or has any of its aspects remained open to date?

[104] CR 2011/18, p. 62, para. 27.
[105] CR 2011/21, p. 48, para. 30; Counter-Memorial of Italy, pp. 19-25, paras. 2.20-2.34.
[106] Counter-Memorial of Italy, p. 29, para. 2.44.
[107] *Ibid.*, p. 80, para. 4.103.

My second question to both Germany and Italy is the following: Is the delicts *exceptio* (territorial torts) limited to acts *jure gestionis*? Can it be? Are acts *jure imperii* understood to contain also a delicts *exceptio*? How can war crimes be considered as acts *jure* — I repeat, *jure — imperii*?

My third question to both Germany and Italy is the following: Have the specific Italian victims to whom the Respondent refers effectively received reparation? If not, are they entitled to it and how can they effectively receive it, if not through national proceedings? Can the regime of reparations for grave breaches of human rights and of international humanitarian law still be regarded as exhausting itself at inter-State level? Is the right to reparation related to the right of access to justice *lato sensu*? And what is the relationship of such right of access to justice with *jus cogens*?

And, finally, my question to Greece is the following: Within the Greek legal system, what are the legal effects of the Greek Special Supreme Court decision in the *Margellos* case upon the Areios Pagos decision in the *Distomo Massacre* case? Is the Areios Pagos decision in the *Distomo Massacre* case still pending of execution within and beyond the Greek legal system?"[108]

2. First Round of Answers

81. For the sake of clarity, I proceed to revise and summarize the answers provided by Germany, Italy and Greece, to the questions I put to them at the close of the oral hearings before the Court, last 16 September 2011. I shall proceed first, to a review of the answers of Germany and Italy as contending Parties, and then of Greece as the intervening State.

(a) *Germany's and Italy's answers*

82. In the relation to the *first question* I put to the contending Parties[109], Germany submitted that the Court's Order of 6 July 2010 (in particular paras. 27-28) determines the relevance of the 1947 Peace Treaty and of the two 1961 Agreements for the current proceedings. Germany reiterated its position that the question whether reparations related to the Second World War are still due is not the subject of the present proceed-

[108] CR 2011/21, public sitting of 16 September 2011, pp. 53-54.
[109] Namely:

"In relation to your arguments in these public sittings before the Court and bearing in mind the Settlement Agreements of 1961 between Germany and Italy, what is the precise scope of the waiver clauses contained therein, and of the waiver clause of Article 77 (4) of the Peace Treaty of 1947? Can the issue of reparation be considered as entirely closed today? Or has any of its aspects remained open to date?"

ings. Italy retorted that the two 1961 Agreements were the result of a process which demonstrated that there were differences of opinion between the Parties as to the scope of the waiver clause of the 1947 Peace Treaty, and that Germany had to take some measures to address them. Italy thus argued that the Agreements were, on the one hand, a measure of reparation for some pending economic questions (the "Settlement Agreement") and, on the other, an indemnification for victims of persecution (the "Indemnity Agreement").

83. Italy contended that the Settlement Agreement represents conclusive evidence that Italy never accepted Germany's interpretation of the waiver clause and the Indemnity Agreement focused on a specific category of victims targeted on the basis of specific discriminatory grounds. In this regard, Italy submits that the 1961 Agreements only cover pending economic questions and reparations to victims of persecutions. While these Agreements contain waiver clauses — it added — these "merely referred to the subject-matter of the Agreement and were not (and could not have been) so expansive as to cover, in addition, war crimes reparation claims". As to the waiver clause of Article 77 (4) of the 1947 Peace Treaty, Italy reiterated its position that this clause does not cover claims of compensation arising out of grave breaches of international humanitarian law.

84. With regard to the *second question* I posed to the contending Parties[110], Germany submitted that the delicts *exceptio* does not apply to military activities and that the cases subject to the proceedings before the Court concern acts having occurred during an armed conflict. It further contended that the qualification of an act of a State is based on the nature of the act and is independent of the legality of such act. In this sense, Germany argued that sovereign acts may also involve serious breaches of international law and that international law counts on substantive rules on State responsibility and international criminal responsibility that do not repeal or derogate from State immunity.

85. For its part, Italy argued that the issue of reparations is not closed, as there are several categories of victims that have never been taken into account for the purpose of awarding reparations, including those categories referred to in the cases underlying the present dispute. Italy submitted that the delicts *exceptio* applies to both acts *jure gestionis* and *jure imperii*[111], and added that there is no *obligation* to accord immunity for acts

[110] Namely:

> "Is the delicts *exceptio* (territorial torts) limited to acts *jure gestionis*? Can it be? Are acts *jure imperii* understood to contain also a delicts *exceptio*? How can war crimes be considered as acts *jure* — I repeat, *jure — imperii*?"

[111] And argues that its view is confirmed by the practice of States, the ILC's commentary on the draft Articles on Jurisdictional Immunities of States and Their Property, Article 11 of the European Convention on Jurisdictional Immunity, and the relevant legal literature.

jure imperii in cases in which the delicts *exceptio* applies. Italy further submitted that

> "[t]here is nothing inherent in the notion of acts *jure imperii* which dictates the conclusion that the tort exception does not cover this category of acts. The justification of this exception to immunity is based on the assertion of local control or jurisdiction over torts committed within the territory of the forum State".

Italy thus contended that, on the basis of this justification, the exception applies to all acts of a foreign State that took place on the territory of the forum State, whether they were performed *jure imperii* or *jure gestionis*.

86. Italy added that, while it was aware of the view that crimes against humanity and war crimes cannot be considered sovereign acts for which a State is entitled to invoke the defence of sovereign immunity, it acknowledged that this area of the law of State immunity is undergoing a process of change. Thus, under the unique and specific circumstances of the cases submitted to Italian courts, Italy contended that its case before this Court is based on other arguments: the tort exception and the existence of an irreconcilable conflict between immunity and the effective enforcement of peremptory rules, which support its position that Italy had no obligation to accord immunity to Germany.

87. In respect of the *third question* I asked the contending Parties[112], Germany again referred to the Court's Order of 6 July 2010, arguing that the question whether reparations related to the Second World War are still due is not, in its view, the subject of the present proceedings; it considered the reparation scheme for the Second World War to be a classic inter-State and comprehensive scheme. It further argued that those victims who consider to have a claim against Germany can institute proceedings in German courts, which abide by Article 6 (1) of the European Convention on Human Rights that guarantees the right of access to justice.

88. Italy retorted that none of the categories of victims referred to in the cases underlying the present dispute has received reparation; it added that some categories of victims were never able to claim compensation because no mechanism was put in place while others have been trying to

[112] Namely:

> "Have the specific Italian victims to whom the Respondent refers effectively received reparation? If not, are they entitled to it and how can they effectively receive it, if not through national proceedings? Can the regime of reparations for grave breaches of human rights and of international humanitarian law still be regarded as exhausting itself at inter-State level? Is the right to reparation related to the right of access to justice *lato sensu*? And what is the relationship of such right of access to justice with *jus cogens*?"

obtain compensation for a decade without any success. Italy further argued that there does not seem to be any willingness on Germany's part to conclude an agreement aimed at making reparation to these categories of victims. It also submitted that, at the moment, there is no other alternative than national proceedings for these categories of victims to receive reparation. Italy argues that had domestic judges not removed immunity, no other avenue would have remained open for war crime victims to obtain reparation, considering, for example, the strong reluctance of German authorities to enter into an agreement providing for reparation for the "Italian military internees".

89. Italy claimed that the regime of reparations for grave breaches of human rights and international humanitarian law does not exhaust itself at the inter-State level and that individual victims can address their claims in domestic courts. It also submitted that the removal of immunity is justified when resort to domestic courts represents the only and last means available to obtain some form of redress. Italy further argues that "[u]nder certain circumstances, the denial of access to justice because of the immunity granted to a foreign State may imply a denial of effective reparation". It next submitted that the concept of *jus cogens* does not confine itself to the realm of primary rules, but also relates to the remedies available in cases of grave breaches of obligations prescribed by norms having such character. In Italy's submission, when there is a conflict between rules that prevent individuals from having access to justice and the effective enforcement of *jus cogens* rules, if there is no other avenue open to obtain effective enforcement of *jus cogens*, "priority must be given to *jus cogens* by removing immunity, thereby allowing access to justice to individual victims".

(b) *Greece's answer*

90. In answer to the question I put to the intervening State[113] — to the best of my knowledge, the first question ever put to a non-party intervenor in the history of the Hague Court —, Greece first recalled that the Special Supreme Court does not rank as a Supreme Court nor is it a constitutional court within the Greek legal system; rather, it has a *sui generis* legal status in Greece. It added that the Special Supreme Court is an independent and non-permanent organ which does not fit within the hierarchy of the Greek court system. Greece further argued that, as part of the Special Supreme Court's function, it identifies or defines a customary rule of international law "in the present development of international law". In

[113] Namely:

"Within the Greek legal system, what are the legal effects of the Greek Special Supreme Court decision in the *Margellos* case upon the *Areios Pagos* decision in the *Distomo Massacre* case*?* Is the *Areios Pagos* decision in the *Distomo Massacre* case still pending of execution within and beyond the Greek legal system?"

this area of its functions, the Special Supreme Court judgments — it continued — have limited effects, and, in practice, a judgment by the Special Supreme Court is binding only on the courts which have posed to it the specific question. Greece further submitted that judgments of the Special Supreme Court do not have the force of *res judicata erga omnes*; it is for the ordinary courts or the Special Supreme Court to determine subsequently whether there has been any change in the assertion that a customary norm exists.

91. Greece added that a judgment of the Special Supreme Court "always reflects the considerations of an *opinio juris* expressed 'at the same temporal stage of development of international law and its generally accepted rules'". It argued that the judgment in the *Margellos and Others* case "has no effect whatever" or legal implications on the judgment of the *Areios Pagos* in the *Distomo Massacre* case, which was rendered prior to the *Margellos* judgment and concerned a different case. In this sense, Greece claimed that the *Areios Pagos* judgment "is final and irrevocable. It is in force and produces legal effects within the Greek legal order, remaining pending of execution." Greece at last contended that the fact that the Minister of Justice has not authorized the enforcement of the *Areios Pagos* judgment yet does not signify that it is "emptied of meaning and unenforceable"; the *Distomo* judgment "remains open".

3. Second Round of Answers

92. The contending Parties saw it fit to comment on the answers they provided to the questions I put to them during the oral hearings before the Court *(supra)*. These additional comments form the second round of their answers, which I proceed likewise to revise and summarize, for the sake of clarity as to the distinct positions taken by the contending Parties in the present case on the *Jurisdictional Immunities of the State* before the Court.

(a) *Germany's comments*

93. Germany only made observations on Greece's response to my question addressed to it. Germany first referred to Article 100 (1) of the Greek Constitution, Article 54 (1) of Greek Law No. 345/1976 regarding the Greek Special Supreme Court, and to a ruling by the Special Supreme Court on this latter provision. On this basis, Germany argued that, since the judgment of 2002 in the *Margellos and Others* case, "no Greek Court has issued a judgment disregarding Germany's state immunity for acts *jure imperii* during World War II and no measures of execution in the *Distomo* case have been taken". Germany then referred to two judgments of the *Areios Pagos* (in 2007 and in 2009) that followed the jurisprudence of the Special Supreme Court, "according to which the rule of jurisdictional immunity stands unaffected even in cases the

subject-matter of which are allegations of serious violations of international humanitarian law".

(b) *Italy's comments*

94. In turn, Italy commented on some parts of Germany's responses to the questions I posed *(supra)*. In relation to my first question, contrary to what Germany contended, Italy argued that the conclusion by the Court in the paragraphs of the Order of 6 July 2010 cited by Germany was strictly limited to the issue of the admissibility of Italy's counter-claim and it did not affect the solution of the question raised by Germany's main claim. Italy contended that it remains for the Court to examine Italy's arguments on the merits of Germany's main claim, and in particular, the argument whereby the obligation to make reparation for war crimes has some specific implications for State immunity.

95. As to Germany's response to my third question, Italy took issue with Germany's statement that the reparation regime set up for the Second World War was "comprehensive". Italy argued that Germany itself, both in its written and oral submissions, admitted that reparations made in relation to Italian victims of war crimes were only "partial". Italy further contended that the 1961 Agreement provided only for reparations for victims of persecution. Thus, Italy added that the characterization of the reparation scheme as "comprehensive" cannot be accurate, in particular concerning Italian victims of war crimes. It further claimed that Germany's arguments make it clear that no reparation has been made to numerous Italian victims of war crimes[114].

96. Italy at last contended that Germany's argument that Italian victims of war crimes did not receive compensation because Italy had been an ally of Germany until 8 September 1943

> "is flawed because it confuses the regime of responsibility for violations of *jus ad bellum* with the consequences of violations of the provisions of *jus in bello*, and in particular it ignores the special regime of responsibility for serious breaches of international humanitarian law".

Also in relation to my third question, Italy claimed that "[t]he fact that Italian victims had access to German courts does not mean that they were given an effective legal avenue to obtain reparation". It argued that Ger-

[114] As Germany claims that it has been relieved of the obligation to make reparation on the basis of the waiver clause of Article 77 of the 1947 Peace Treaty, an argument which Italy challenges in the present proceedings.

man laws imposed a number of "unduly restrictive requirements" for Italian victims to receive reparation[115].

XII. The Prohibition of Forced Labour at the Time of the Second World War

1. Normative Prohibition

97. The legal regulation of forced labour at the time of Second World War was based on the 1930 ILO Convention (No. 29) on Forced Labour, which came into force on 1 May 1932. The Convention provided for a series of restrictions and prohibitions of forced labour, aiming ultimately to its total suppression. The 1930 ILO Convention (No. 29) made clear that prisoners of war may not be employed in any way that is connected with the operations of war (manufacture, transport of arms and munitions) or for unhealthy or dangerous work (Arts. 31-32). In case of violations they have the right to complaint (Art. 31); moreover, more arduous work cannot be used as a disciplinary measure (Art. 31).

98. Forced labour, in the sense of labour imposed under coercion or the threat of penalty (Art. 2 (1)), has been condemned and expressly prohibited ever since the 1930 ILO Convention (No. 29)[116], despite the distinct contexts wherein forced labour was imposed as time went on. The 1930 ILO Convention (No. 29) was followed by the 1957 Abolition of Forced Labour Convention, to meet practically universal acceptance. As I sustained in my earlier dissenting opinion (paras. 130-132) in the Court's Order of 6 July 2010 in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (Counter-Claim), their underlying principles, informing and conforming the abolition of forced labour in general international law, belong nowadays to the domain of *jus cogens*[117].

99. Furthermore, in the domain of international humanitarian law, the treatment of prisoners of war or civilian populations during armed con-

[115] Italy argued, in this respect, that the reference made by Germany to the jurisprudence of the European Court of Human Rights is "inapposite", as such jurisprudence relies on the assumption that "the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention". Italy added that the cases against Germany before the European Court were based on the right to property under Article 1 of Protocol No. 1 to the European Convention, and the Court considered those cases inadmissible as the facts at issue did not fall within the ambit of that norm.

[116] ILO/OIT, *Alto al Trabajo Forzoso — Informe Global con Arreglo al Seguimiento de la Declaración de la OIT Relativa a los Principios y Derechos Fundamentales en el Trabajo*, ILO, Geneva, 2001, pp. 9-10.

[117] Cf., to this effect, e.g., M. Kern and C. Sottas, "The Abolition of Forced or Compulsory Labour", in *Fundamental Rights at Work and International Labour Standards*, Geneva, ILO, 2003, p. 44, and cf. p. 33; and International Labour Office, *Eradication of Forced Labour*, Geneva, ILO, 2007, p. 111.

flict was governed, at the time of the Second World War, by the 1907 Hague Convention (IV) and by the 1929 Geneva Convention on Prisoners of War; the 1929 Geneva Convention added the prohibition of forced labour that was unhealthy or dangerous for the prisoners of war (Arts. 28-34). Still in connection with the prohibition of forced labour, at that same time, the 1926 Geneva Anti-Slavery Convention prohibited slavery and slave trade; it expressly set forth the obligation of States "to take all measures to prevent compulsory or forced labour from developing into conditions analogous to slavery" (Art. 5).

100. The Regulations concerning the Laws and Customs of War on Land, annexed to the aforementioned 1907 Hague Convention (IV), prohibited, with regard to forced labour of inhabitants of occupied territories, to involve those inhabitants in the work of "military operations against their own country" (Art. 52). Germany signed the 1907 Hague Convention (IV) on 18 October 1907 and ratified it on 27 November 1909. In addition, it should be noted that Germany ratified the 1930 ILO Convention (No. 29) on Forced Labour only on 13 June 1956. Be that as it may, even if this later ratification removed *jurisdiction* on the basis of this Convention before mid-1956, the *responsibility* of Nazi Germany subsisted. No one would dare to deny the wrongfulness of forced labour, already at the time of the Second World War.

101. The forced labour regime, as organized by Nazi Germany, could be equated to "enslavement", given the presence of the elements constitutive of this crime, namely, the subjection of a part of a population of an occupied territory, in order to sever forced or compulsory labour, meant to be permanent, and undertaken in conditions similar to slavery under the heel of private persons[118]. It was the policy of Nazi German authorities to let exhausted forced labourers die; sometimes they actively killed forced labourers when they could no longer work. Such circumstances could make their policy fall under the "enslavement" definition[119].

2. Judicial Recognition of the Prohibition

102. That State policy of Nazi Germany was to have repercussions in the work and findings of the International Military Tribunal of Nuremberg, shortly after the Second World War. The 1945 Charter of the Nuremberg Tribunal listed, among *war crimes*, the "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" (Art. 6 *(b)*); and, among *crimes against humanity*, the "enslavement, deportation, and other inhumane acts committed against any civil-

[118] L. Hannikainen, *Peremptory Norms* (Jus Cogens) in *International Law: Historical Development, Criteria, Present Status*, Helsinki, Lakimiesliiton Kustannus/Finnish Lawyers' Publ. Co., 1988, pp. 455-456.

[119] Cf. ICRC, *Customary International Humanitarian Law*, Rule 95: Forced Labour, Deportation to Slave Labour, No. 19.

ian population, before or during the war" (Art. 6 *(c)*). The prohibition of forced labour and enslavement was already established, as indicated above, in the *corpus juris gentium*, in international instruments of the ILO as well as of international humanitarian law.

103. It was then, with the work of the Nuremberg Tribunal, to gain judicial recognition as well. In fact, the question of forced labour during the Second World War was examined by the Nuremberg Tribunal, which, in the case of the *Major War Criminals* (judgment of 1 October 1946), recalled that Article 6 *(b)* its Charter[120] provides that the "ill-treatment, or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory shall be a war crime". The Tribunal further reminded that "[t]he laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Convention" of 1907[121].

104. In this regard, the Nuremberg Tribunal concluded that "[t]he policy of the German occupation authorities was in flagrant violation of the terms of [the Hague Convention of 1907]" and that an "idea of this policy may be gathered from the statement made by Hitler in a speech on 9 November 1941", asserting that "the German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture". It also noted that "[i]nhabitants of the occupied countries were conscripted and compelled to work in local occupations, to assist the German war economy" and that "[i]n many cases they were forced to work on German fortifications and military installations"[122].

105. From the above statement by Hitler, singled out by the Nuremberg Tribunal itself, there can be no doubt whatsoever that widespread forced labour of inhabitants of the occupied territories in the German war industry during the Second World War, was a State policy of Nazi Germany. Such State policy was in flagrant violation of international law, both conventional and customary.

106. In fact, the Nuremberg Tribunal further observed that a vigorous propaganda campaign was set up to induce workers to volunteer to work in Germany, and, in some instances, labourers and their families were threatened by the police in case they refused to go to Germany[123]. The evidence before the Tribunal showed that the workers were sent under

[120] Hereinafter referred to as the "Nuremberg Charter".

[121] International Military Tribunal, judgment of 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (22 August 1946-1 October 1946), p. 460.

[122] *Ibid.*, p. 460.

[123] *Ibid.*, p. 461.

guard to Germany and were often crammed in trains without adequate food, heat, clothing or sanitary facilities, and demonstrated that the treatment of workers in Germany was, in many cases, brutal and degrading; the Tribunal also found that, many prisoners of war were allocated to work directly in relation to military operations, in violation of Article 31 of the 1929 Geneva Convention [124].

107. As to the customary nature of the rules that it applied, the Nuremberg Tribunal further stated that

> "Article 6 of the Charter provides:
>
> *(b)* War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity;
>
> *(c)* Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (. . .)
>
> The Tribunal is of course bound by the [Nuremberg] Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, Section *(b)*, of the [Nuremberg] Charter were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument." [125]

108. The Nuremberg Tribunal further found that, by 1939, the rules laid down in the Hague Convention of 1907 were recognized by all "civilized nations", and were regarded as being declaratory of the laws and

[124] *Op. cit. supra* note 121, p. 462.

[125] *Ibid.*, p. 467. The Judgment also stated, in relation to the crimes committed in Czechoslovakia, that: "Although Czechoslovakia was not a party to the Hague Convention of 1907, *the rules of land warfare expressed in this Convention are declaratory of existing international law and hence are applicable*", p. 524 (emphasis added).

customs of war referred to in Article 6 *(b)* of the Nuremberg Charter. As to crimes against humanity, the Nuremberg Tribunal concluded that "[t]he policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic" and concerning "[t]he policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government" it found that such policy "was most ruthlessly carried out". The Tribunal thus concluded that "from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity" and held that "they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity"[126].

109. For its part, the International Military Tribunal for the Far East (the Tokyo Tribunal), in its judgment of 12 November 1948, also expressed concern with regards to the use of forced labour, the method of recruitment, the confination of labourers in camps; the Tokyo Tribunal was also concerned with the little or no distinction made "between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand", all being regarded as "slave labourers"[127].

110. In our days, in its recent adjudication of the case *Kononov* v. *Latvia* (2008-2010), lodged with the European Court of Human Rights (ECHR) by a survivor of the Second World War, the ECHR (former Section III, judgment of 24 July 2008) saw it fit to undertake an examination of the evolution of international humanitarian law, from the First and Second Hague Peace Conferences (1899 and 1907) to the aftermath of the Second World War (the Nuremberg and Tokyo Tribunals trials, and the 1949 Geneva Conventions), to determine that the subjuga-

[126] *Op. cit. supra* note 121, p. 468.

[127] In the words of the Tribunal:

> "Having decided upon a policy of employing prisoners of war and civilian internees in work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting labourers from the native population of the occupied territories. This recruiting of labourers was accomplished by false promises, and by force. After being recruited, the labourers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave labourers to be used to the limit of their endurance. For this reason, we have included these conscripted labourers in the term 'civilian internees' (. . .). The lot of these conscripted labourers was made worse by the fact that generally they were ignorant of the principles of hygience *[sic]* applicable to their unusual and crowded conditions and succumbed more readily to the diseases resulting from the insanitary conditions of confinement and work forced upon them by their Japanese captors." (International Military Tribunal for the Far East, judgment of 12 November 1948, in J. Pritchard and S. M. Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 22, pp. 693-694.)

tion and the ill-treatment of civilians was already prohibited well before the Second World War (paras. 55-70).

111. In the same line of reasoning, the ECHR, in its subsequent judgment (Grand Chamber, of 17 May 2010) in the *Kononov* v. *Latvia* case, deemed it fit to undertake to an ever greater depth such examination of the evolution of international humanitarian law, this time from the earlier codifications of the nineteenth century to the aftermath of the Second World War (paras. 206-217), to find that "the ill-treatment, wounding and killing" of villagers (in any case *hors de combat*) constituted, already by the time of the 1907 Hague Regulations, "a war crime" (para. 216). The Court pondered, *inter alia*, that:

> "While the notion of war crimes can be traced back centuries, the mid-nineteenth century saw a period of solid codification of the acts constituting a war crime and for which an individual could be held criminally liable. The Lieber Code [of] 1863 [the Oxford Manual of 1880 (. . .)], and in particular the [1874] draft Brussels Declaration, (. . .) inspired the Hague Convention and Regulations [of] 1907. These latter instruments were the most influential of the earlier codifications and were, in 1907, declaratory of the laws and customs of war: they defined, *inter alia*, relevant key notions (combatants, *levée en masse*, *hors de combat*), they listed detailed offences against the laws and customs of war and they provided a residual protection through the Martens clause, to inhabitants and belligerents for cases not covered by the specific provisions of the Hague Convention and Regulations [of] 1907. Responsibility therein was on States, which had to issue consistent instructions to their armed forces and pay compensation if their armed forces violated those rules." (Para. 207.)

112. After reviewing the "Hague" and the "Geneva" branches of humanitarian law, "the latter supplementing the former", in the course of the second half of the nineteenth century and the first half of the twentieth century, the European Court further recalled that the Charter of the Nuremberg Tribunal provided a "non-exhaustive definition of war crimes", and its judgment opined that the humanitarian rules enshrined into the 1907 Hague Convention and Regulations were generally recognized as being "'declaratory of the laws and customs of war' by 1939 and that violations of those provisions constituted crimes for which individuals were punishable" (para. 207).

113. The ECHR then added that "[i]nternational and national law (the latter including transposition of international norms) served as a basis for domestic prosecutions and liability" (para. 208)[128]. In sum, from the review above, it is clear that there has also been further judicial recognition of the fact that, well before the Second World War, ill-treatment of

[128] Cf. also para. 212.

civilians (such as forced labour) was illegal — it was a war crime — and engaged both State and individual responsibility.

3. The Prohibition in Works of Codification

114. The prohibition of forced labour as a form of slavery is not to be taken lightly, keeping in mind the long time it has taken to eradicate it, and the fact that it still survives in our days. Time and time again attention has been drawn into the everlasting struggle against forced labour as slave work. In this respect, in 1958, for instance, J. H. W. Verzijl pointed out that it was "shocking to have to acknowledge" that any attempt to deal with stigmatized abuses and disgraces of the past was "relatively recent". Thus:

> "It will suffice to remind ourselves of the humiliating historical evidence that the formal abolition of slavery was only reluctantly achieved, little by little, during the nineteenth century, that hidden or even overt forms of serfdom still flourish (. . .), that it was still necessary in 1956 to conclude a Convention for the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, (. . .) a still existing evil surviving from the past."[129]

115. When, early in its life and in the era of the United Nations itself, the International Law Commission (ILC) formulated the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950), it included, among *"war crimes"*, the "deportation to slave-labour or for any other purpose of civilian population of or in occupied territory" (Principle VI *(b)*); and it likewise included, among *"crimes against humanity"*, the "enslavement, deportation and other inhuman acts done against any civilian population" (Principle VI *(c)*)[130]. Codified in 1950, those principles were already deeply-engraved in the universal juridical conscience for a long time. Those crimes were already prohibited by international law likewise for a long time.

116. The fact remains that the prohibition of forced labour as a form of slavery soon marked its presence in endeavours of codification, not only of the ILC in the mid-twentieth century, but also of the International Committee of the Red Cross (ICRC) in the middle of last decade. In fact, in accordance with a study undertaken by the ICRC entitled *Customary International Humanitarian Law*, published in 2005, uncompen-

[129] J. H. W. Verzijl, *Human Rights in Historical Perspective*, Haarlem, Haarlem Press, 1958, pp. 5-6.

[130] UN, *The Work of the International Law Commission*, 7th ed., Vol. I, N.Y., 2007, p. 265.

sated and abusive forced labour is prohibited; the study asserts that such prohibition of forced labour attained the status of "a norm of customary international law applicable in both international and non-international armed conflicts"[131] (Rule 95).

4. International Crimes and the Prohibitions of Jus Cogens

117. The fact remains that, by the time of the Second World War, forced labour as a form of slave work was already prohibited by international law. Well before the Second World War, and indeed before the First World War, its wrongfulness was widely acknowledged. The fact that wrongful practices nevertheless persisted, in times of peace and or armed conflict — as they still persist today — does not mean that there was a legal void in that respect. The prohibitions of international law do not cease to exist because violations occur. Quite on the contrary, such violations entail legal consequences for those responsible for them.

118. Already at the beginning of the twentieth century, the Hague Convention (IV) of 1907 contained, in its preamble, the *célèbre Martens clause* (cf. *supra*), invoking, for cases not included in the adopted regulations annexed to it, "the principles of humanity" and "the dictates of the public conscience" (para. 8). Due attention had been taken not to leave anyone outside the protection granted by the *corpus juris gentium* — by conventional and customary international law — against forced and slave work in armaments industry. Such protection was extended by the *jus gentium* to human beings, well before the sinister nightmare and the horrors of the Third Reich.

119. In this line of thinking, in my previous dissenting opinion (paras. 144-146) in the Court's Order of 6 July 2010 in the present case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (counterclaim), I drew attention (in the light of the submissions of the contending Parties themselves in the present case, not necessarily diverging herein) to the incidence of *jus cogens*, in the absolute prohibition of forced and slave work in the war industry. In this respect, I pondered therein:

> "In fact, we can go back — even before the Second Hague Peace Conference (1907) — to the time of the First Hague Peace Conference (1899) (. . .). By the end of the nineteenth century, in the days of the First Hague Peace Conference, there was a sense that States could incur delictual responsibility for mistreatment of persons (e.g., for transfer of civilians for forced labour); this heralded the subse-

[131] ICRC, *Customary International Humanitarian Law* — Vol. I: *Rules* (eds. J.-M. Henckaerts and L. Doswald-Beck), Geneva/Cambridge, ICRC/Cambridge University Press, 2005, p. 330, and cf. pp. 331-334; and cf. also ICRC, *Customary International Humanitarian Law* — Vol. II: *Practice* — Part I (eds. J.-M. Henckaerts and L. Doswald-Beck), Geneva/Cambridge, ICRC/Cambridge University Press, 2005, pp. 2225-2262.

quent age of criminal responsibility of individual State officials, with the typification of war crimes and crimes against humanity.

The gradual awakening of human conscience led to the evolution from the conceptualization of the *delicta juris gentium* to that of the violations of international humanitarian law (in the form of war crimes and crimes against humanity) — the Nuremberg legacy — and from these latter to that of the *grave* violations of international humanitarian law (with the four Geneva Conventions on international humanitarian law of 1949, and their I Additional Protocol of 1977)[132]. With that gradual awakening of human conscience, likewise, human beings ceased to be *objects* of protection and became reckoned as *subjects* of rights, starting with the fundamental right to life, encompassing the *right of living* in dignified conditions.

Human beings were recognized as *subjects* of rights in all circumstances, in times of peace as well as of armed conflict. As to the former, may it here be briefly recalled that, well before the 1948 Universal Declaration of Human Rights, in the inter-war period, the pioneering experiments of the minorities system and the mandates system under the League of Nations granted direct access to the individuals concerned to international instances (the Minorities Committees and the Permanent Mandates Commission, respectively), in order to vindicate the rights emanated *directly* from the law of nations (the evolving *jus gentium*). As to the latter, likewise, as from the Second Hague Peace Conference of 1907 onwards, human beings were recognized as being entitled to war reparations claims." (*I.C.J. Reports 2010 (I)*, pp. 385-386, paras. 144-146.)

120. This being so, such right to war reparations claims, being recognized well before the end of the Second World War, could not be waived by States in their agreements with other States; it was related to other rights inherent to the human beings victimized by the cruelty and untold human suffering of arbitrary detention, deportation and forced labour in

[132] I Geneva Convention, Arts. 49-50; II Geneva Convention, Arts. 50-51; III Geneva Convention, Arts. 129-130; IV Geneva Convention, Arts. 146-147; I Additional Protocol, Arts. 85-88. The I Additional Protocol of 1977 (Art. 85) preferred to stick to the terminology of the four Geneva Conventions of 1949 in this particular respect, and maintained the expression of "grave breaches" on international humanitarian law, in view of the "purely humanitarian objectives" of those humanitarian treaties; yet, it saw it fit to state that "grave breaches" of those treaties (the four Geneva Conventions and the I Additional Protocol) "shall be regarded as war crimes" (Art. 85 (5)). Cf. Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, Geneva, ICRC/Nijhoff, 1987, pp. 990 and 1003.

war industry. I have already considered this point in the present dissenting opinion (cf. Section VII *supra*). In a logical sequence, I deem it now appropriate to turn attention to the oral pleadings of the contending Parties, and the intervening State, on *jus cogens* and removal of immunity, and next to the problem of the opposition of State immunity to the individuals' right of access to justice.

XIII. Oral Pleadings of the Parties, and the Intervening State, on *Jus Cogens* and Removal of Immunity: Assessment

121. As to *jus cogens* and *State immunity*, Germany contends that reference is here made to primary rules of international law and not secondary rules (such as the consequences of violations)[133]. Germany argues that there cannot be an issue of conflict between two rules of general international law, only a question of whether one of them has been modified by the operation of the other, and in the present case, in its view, State practice does not indicate that rules of State immunity have been modified in any way[134].

122. Italy, in turn, claims that *jus cogens* norms have effects on the realm of State responsibility, also for the prevention of breaches of international law[135]. Italy's position is that in some specific cases, there is a right to lift immunity in order to enforce *jus cogens* rules[136]. Hence the correctness of the decision of the Italian Court of Cassation to lift immunity in such cases of violation of *jus cogens* rules, putting an end to the continuation of the violation by Germany[137].

123. Greece, for its part, argued that, according to the Greek courts, if rules endowed with a peremptory character have been breached, State immunity cannot be invoked[138]; in its view, the attempt to draw a distinction between a substantive rule *(jus cogens)* and a procedural one (State immunity) does not have a legal value. A procedural rule cannot take precedence over the substantive *jus cogens* rule, since that would be inconsistent with the purpose and *ratio* of the substantive rule, and would result in impunity for the States that have committed such grave breaches of peremptory norms[139]. Moreover — it added — such a distinction

[133] CR 2011/17, pp. 49-50, para. 3; it further argues that *jus cogens* cannot be understood as expressing principles of law of higher value that override all other principles which express less high values.
[134] *Ibid.*, p. 53, para. 6.
[135] CR 2011/18, pp. 47-48, para. 25.
[136] *Ibid.*, p. 49, para. 28.
[137] *Ibid.*, pp. 56-58, paras. 16-18.
[138] CR 2011/19, p. 36, para. 98.
[139] *Ibid.*, p. 37, para. 102.

would hamper the right to an effective remedy, as provided for in international instruments[140]; thus, effective access to courts for the enforcement of such rules (with no bar to jurisdiction due to immunity) ought to be recognized[141].

124. Germany retorted that a decision to set aside immunity would destabilize peace settlements and the principle of *pacta sunt servanda* itself, as all peace treaties would be undermined by individual suits for compensation (and even Italy itself could face such suits)[142]. It also claimed that the common good ought not to be undermined for the individual good — and thus human rights cannot be recognized to be able to jeopardize the structure of the international society.

125. Italy replied that what is requested from the Court is to examine the legality of certain decisions of Italian courts based on a very specific factual background, which makes the present case unique. Thus, the decision of the Court cannot be considered to have the catastrophic consequences that Germany claims that it may have on the whole international legal system[143]. Italy added that its view brings one closer to the "principle of complementarity", as its argument is that an individual has the right to address his/her national courts only if he/she is unsuccessful before the courts of the State in breach[144].

126. As to the judgment of the *Areios Pagos* in the *Distomo Massacre* case, Greece recounts the proceedings before Greek courts and the decisions thereof, and argues that the Greek Special Supreme Court is not a "constitutional court"; it enjoys such a role only in limited situations regarding the constitutionality of laws and it does not correspond to the courts of other States, the decisions of which take precedence within their legal order[145]. Thus, the impact of the decision in the Greek legal order raises some questions, but cannot be considered as having reversed the decision of *Areios Pagos* in the *Distomo Massacre* case[146].

127. In this respect, Germany claims that, despite the arguments raised by Greece, it is a fact that following the Special Supreme Court's decision on the *Margellos* case, the Greek legal order does not recognize any limitation to sovereign immunity for acts *jure imperii*, as the decision of that

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[140] CR 2011/19, p. 38, para. 106.

[141] *Ibid.*

[142] CR 2011/17, pp. 55-56, para. 13. It further claimed that there is a risk of creating a culture of *"forum shopping"*, which would cause serious problems in international relations and would create an issue for the ownership of property abroad; *ibid.*, p. 59, para. 18.

[143] CR 2011/21, pp. 14-16, paras. 4-7. Italy further questioned whether the risk of *"forum shopping"*, as argued by Germany, is a real risk or not; Italy claimed that its argument and that of the Italian Court of Cassation have nothing to do with any sort of "universal civil jurisdiction"; *ibid.*, pp. 49-50, paras. 31-33.

[144] *Ibid.*, pp. 49-50, paras. 31-33.

[145] CR 2011/19, pp. 23-24.

[146] *Ibid.*, pp. 23-24, paras. 43 and 46.

court is a binding precedent for all Greek courts[147]. Germany also argues that the recognition and the enforcement of the Greek decision in the *Distomo* case by the Italian courts violated Germany's immunity[148]. In this regard, Germany also notes the acceptance of the Agent of Italy regarding the illegality of the judicial mortgage on the Villa Vigoni and the will of Italy to remedy the situation[149].

128. Italy argues that the enforcement of the *Distomo Massacre* judgment was not a consequence of the alleged *"forum shopping"* created by the *Ferrini* decision, and that there is no principle that renders any foreign State immune for recognitions proceedings. Furthermore, it argues that since the Greek courts had not recognized immunity to Germany based on the same justifications and on similar circumstances as those of the *Ferrini* case, Italy had no duty to accord immunity to Germany[150].

129. In my understanding, what jeopardizes or destabilizes the international legal order are the international crimes and not individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice. When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose. Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would block the access to justice, and impose impunity. It is, in fact, the opposite that should take place: breaches of *jus cogens* bring about the removal of claims of State immunity, so that justice can be done.

XIV. State Immunity *v.* the Right of Access to Justice

1. The Prevailing Tension in the Case Law of the European Court of Human Rights

(a) *The* Al-Adsani *case (2001)*

130. The tension between the right of access to justice and State immunity has been present in the recent case law of the European Court of Human Rights (ECHR). The leading case of *Al-Adsani* v. *United Kingdom* (2001) concerned the claim of a dual British/Kuwaiti national against the United Kingdom, wherein he argued that British courts had failed, in

[147] CR 2011/20, p. 19, para. 10.
[148] *Ibid.*, pp. 28-29, paras. 28-30.
[149] *Ibid.*, p. 29, para. 31.
[150] CR 2011/21, pp. 28-29, paras. 1-4.

breach of Articles 6 and 13 of the European Convention on Human Rights, to protect his right of access to a court by granting State immunity to Kuwait, against which he had brought a civil suit for torture suffered while he was detained by the authorities in Kuwait.

131. In its judgment of 21 November 2001, the ECHR (Grand Chamber), while accepting that the prohibition of torture has acquired the status of a norm of *jus cogens* in international law, nevertheless found itself unable to discern any firm basis for the conclusion that a State "no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged"[151]. This decision of the ECHR (Grand Chamber) was taken by nine votes to eight[152]. The shortcomings of the majority's reasoning are well formulated in the joint dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić; they rightly concluded that, when there is a conflict between a *jus cogens* norm and any other rule of international law, the former prevails, with the consequence that the conflicting rule does not have legal effects which contradict the content of the peremptory rule[153].

132. In my understanding, the dissenting judges touched upon the crux of the matter in the majority's reasoning. Unlike the majority, they duly drew the necessary consequence of the finding that the prohibition of torture has attained the status of *jus cogens*, namely: a State cannot hide itself behind the rules of State immunity in order to evade the consequences of its actions and to avoid civil proceedings for a claim of torture before a foreign jurisdiction[154]. The dissenting judges also reasoned that the distinction drawn by the majority between criminal and civil proceedings is not in line with the very essence of the operation of *jus cogens* rules: indeed, the criminal or civil nature of the proceedings at issue is not material, as what really matters is the fact that there was a violation of a *jus cogens* norm and thus any jurisdictional bar has to be lifted "by the very interaction of the international rules involved"[155].

133. Similarly, in his dissenting opinion, Judge Loucaides pondered that, once it is accepted that the prohibition of torture is indeed a *jus cogens* norm, the consequence is that no immunity can be invoked in respect of proceedings whose object is the attribution of responsibility for acts of torture[156]. It is indeed regrettable that the reasoning of the Court's majority failed to draw the relevant conclusions of the finding that the

[151] ECHR, *Al-Adsani* v. *United Kingdom*, application No. 35763/97, judgment of 21 November 2001, paras. 59-61.

[152] On the question of the alleged violation of Article 6 of the Convention.

[153] ECHR, *Al-Adsani* v. *United Kingdom*, application No. 35763/97, judgment of 21 November 2001, dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 1.

[154] *Ibid.*, para. 3.

[155] *Ibid.*, para. 4.

[156] *Ibid.*, dissenting opinion of Judge Loucaides, p. 1.

prohibition of torture is a *jus cogens* norm, which would entail, in the circumstances of the *Al-Adsani* case, an invalidating effect on the plea of State immunity[157]. Yet, the Court's majority at least accepted the customary law nature of rules on State immunity, with the recognition of their state of transition and of the possibility of imposing limitations upon them (even when States act *jure imperii*), which seems to leave the door open for future developments in the correct line[158].

134. In the present case of Germany *v*. Italy before this Court, Italian courts rightly drew the necessary legal conclusion on the effect of violations of norms that have the status of *jus cogens* upon the plea for State immunity in relation to civil claims. The facts underpinning the present case constitute violations of peremptory norms, and the responsibility of Germany for these violations is not contested. Thus, in the line of the right reasoning of the dissenting judges in the case of *Al-Adsani* before the ECHR, the consequence is that Germany cannot hide behind rules of State immunity to avoid proceedings relating to reparations for violations of *jus cogens* norms before a foreign jurisdiction (Italy). In this regard, it should not pass unnoticed that, unlike in the *Al-Adsani* case, where the complained conduct did not take place in the forum State (but rather in Kuwait), some of the claims lodged with Italian courts pertained to crimes committed in whole or in part on the territory of Italy itself[159].

(b) *The* McElhinney *case (2001)*

135. The *McElhinney* v. *Ireland* case (2001) concerned a claim for damages, pertaining to a legal action lodged in Ireland against both the British soldier who shot the claimant and the Secretary of State for Northern Ireland. The domestic courts rejected his claim on the basis of the plea of immunity submitted by the United Kingdom. The ECHR (Grand Chamber), in its judgment of 21 November 2001, held that, while there appeared to be "a trend in international and comparative law towards limiting State immunity" for personal injury caused by an act or omission committed in the territory of the forum State, the practice was "by no means universal" (para. 38). It then found, by twelve votes to five, that the decisions of the Irish courts had not exceeded "the margin of appreciation in limiting an individual's right to access to court" (para. 40).

136. Two of the five dissenting judges (Rozakis and Loucaides), in their respective individual dissenting opinions, held that the majority's decision did not take into account developments in international law, and

[157] Cf. Ch. L. Rozakis, "The Law of State Immunity Revisited: The Case Law of the European Court of Human Rights", 61 *Revue hellénique de droit international* (2008), pp. 579-680.

[158] Cf. *ibid.*, p. 593.

[159] CR 2011/18, pp. 41-46.

disproportionately restricted the right of access to courts, unduly affecting and impairing the essence of this right. Judge Loucaides added that

> "The international law immunities originated at a time when individual rights were practically non-existent and when States needed greater protection from possible harassment through abusive judicial proceedings. The doctrine of State immunity has in modern times been subjected to an increasing number of restrictions, the trend being to reduce its application in view of developments in the field of human rights which strengthen the position of the individual." (Para. 4.)

137. The other three dissenting judges (Caflisch, Cabral Barreto and Vajić), in their joint dissenting opinion, also supported compliance with the right of access to courts under Article 6 (1) of the European Convention (disproportionately restricted in the present case), as under Article 12 of the UN Convention on the Jurisdictional Immunity of States and their Property, there was at present "no international *duty*, on the part of States, to grant immunity to other States in matters of torts caused by the latter's agents". They further pondered that

> "The principle of State immunity has long ceased to be a blanket rule exempting States from the jurisdiction of courts of law. (. . .) [T]he edifice of absolute immunity of jurisdiction (and even of execution) began to crumble, in the first quarter of the twentieth century, with the advent of State trading (. . .).
>
> (. . .) [E]xceptions to absolute immunity have gradually come to be recognized by national legislators and courts, initially in continental Western Europe and, much later, in common law countries (. . .)
>
> The exceptions in question have also found their way into the international law on State immunity, especially the tort exception." (Paras. 2-4.)

138. In the present case of the *Jurisdictional Immunities of the State* before this Court, it is telling — as Italy argues — that the claimants pursued their suit before German courts, which did not find in their favour. Thus, the reasoning of the ECHR in the *McElhinney* case, that it was open to the applicant to bring a legal action in Northern Ireland (as he in fact did), is not readily applicable to the circumstances of the present case before this Court, as the original claimant did pursue other avenues before turning to Italian courts: in the present case there was no other reasonable alternative means to protect the rights at stake effectively[160].

[160] Cf. Counter-Memorial of Italy, para. 4.100. Cf. also Written Response of Italy to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 9, where Italy states that "had domestic judges not removed immunity, no other avenue would have remained open for war crime victims to obtain reparation".

(c) *The* Fogarty *case (2001)*

139. The case of *Fogarty* v. *United Kingdom* (judgment of 21 November 2001) concerned an employment-related dispute (an allegation of victimization and discrimination by a former employee of the US Embassy in London). The ECHR observed in this case that there was a trend in international and comparative law towards limiting State immunity with respect to employment-related disputes. It further noted that the ILC did not intend to exclude the application of State immunity when the subject of the proceedings was recruitment, including recruitment to a diplomatic mission.

140. The ECHR concluded that State practice concerning employment of individuals by an embassy of a foreign State is not uniform. The ECHR observed that the limitations applied to the right of access to court must "not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (para. 33), but decided as in the other aforementioned cases. In the circumstances of the present case of the *Jurisdictional Immunities of the State* before this Court, it seems, however, as Italy argued, that "no other avenue would have remained open for war crime victims to obtain reparation"[161].

(d) *The* Kalogeropoulou and Others *case (2002)*

141. Last but not least, the case of *Kalogeropoulou and Others* (2002) was brought by applicants who were relatives of the victims of the Distomo massacre. The applicants raised complaints under Article 6 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the European Convention on Human Rights. The ECHR's Chamber seized of the case declared it inadmissible (decision of 12 December 2002), even though, unlike the case of *Al-Adsani*, this case of *Kalogeropoulou and Others* pertained to crimes against humanity committed in the territory of the forum State (i.e., Greece). Notwithstanding, the Court's Chamber's decision rested on the premise that the right of access to court may be subject to limitations (proportionate to the aim pursued). Such limitations, however, in my understanding cannot impair the very essence of the right of access to court.

142. The conclusion reached by the Court's Chamber was that some restrictions on access to court ought to be regarded as inherent to fair trial, and it referred to State immunity; but it added that this "does not preclude a development in customary international law in the future" (p. 9). This statement seems to go slightly further than the finding in the *Al-Adsani* and the *McElhinney* precedents, which did not expressly articulate this "open door" for future developments. Even if such an "open door" for future developments may not appear an entirely sufficient finding of the ECHR's Chamber, it thus at least reckoned, one decade ago

[161] Written Response of Italy to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 9.

(in 2002), that the law on the matter at issue was undergoing a process of transition[162].

2. The Prevailing Tension in the Case Law of National Courts

143. The aforementioned tension, prevailing also in the case law of national courts, was the object of attention of the contending Parties in their oral pleadings before the Court, particularly in their respective views of the judgment of the Italian Court of Cassation in the *Ferrini* case (2004). Germany claimed that the *Corte di Cassazione* decided to substitute itself for the legislator and introduce a new rule, which has not yet gained international support in State practice and judicial decisions of other States[163]; it further contended that the practice of domestic courts shows recognition of the rule of State immunity even in cases of international crimes[164]. Germany concluded on this point that the *Ferrini* judgment of the *Corte di Cassazione* remained, in its view, an isolated decision in State practice, and that jurisdictional immunity in respect of acts *jure imperii* remains a firm rule in international law[165].

144. Italy, in turn, argued that the *Ferrini* decision did not harm the rule of immunity, which still remains fundamental, but rather redefined it in order to ensure compliance with the basic obligations of the international community[166]; sovereign immunity for acts *jure imperii* is not to be regarded as absolute, as it is subject to exceptions such as the tort exception. It is, in its view, for national courts to classify and define the acts of a foreign State in order to decide whether they are covered by immunity or not[167]. Italy further contended that, in the *Ferrini* case, the *Corte di Cassazione* also ensured the effective access to justice for victims of violations, which has two constitutive elements: the right to a fair trial and the right to reparation. Since, according to the German courts, Mr. Ferrini and the other vic-

[162] The Court's Chamber placed much emphasis on the fact that it was necessary, under Greek law, that the Minister of Justice authorized enforcements proceedings (Article 923 of the Greek Code of Civil Procedure), which was not obtained in the case at issue (cf. pp. 11-12). In this sense, the *Ferrini* case in Italy can be distinguished on this basis, since in Italy the consent of the Minister of Justice does not seem to be necessary for enforcement proceedings.

[163] CR 2011/17, pp. 21-22, and pp. 29-31, paras. 16-17, and pp. 27-28, paras. 13-14.

[164] *Ibid.*, p. 33, para. 27, and cf. para. 26. It further argued that the *Ferrini* judgment did not distinguish between substantive and procedural rules, besides disregarding the systemic context of war reparations, which allegedly falls under the exclusive competence of States and are based on mutual understandings (or the action of the Security Council); *ibid.*, p. 25, para. 9. Germany claimed, moreover, that the judgment in the *Ferrini* case confused the concepts of personal and State immunity; *ibid.*, pp. 26-27, paras. 10-12.

[165] *Ibid.*, pp. 61-62.

[166] CR 2011/18, p. 60, para. 24.

[167] *Ibid.*, p. 13, para. 9, and p. 16, para. 3.

tims were not entitled to reparations based on German legislation, they could only have recourse to the Italian courts, and the *Corte di Cassazione* had thus to adjust the principle of immunity so as to preserve the coherence of the international rules that apply in this case[168].

145. The decision of the *Corte di Cassazione* in the *Ferrini* case (2004) was just one of the relevant decisions of the national courts invoked by the contending Parties (Germany and Italy) and the intervening State (Greece) in the course of the proceedings of the present case on the *Jurisdictional Immunities of the State* before this Court. In the course of the proceedings, the contending Parties as well as the intervening State referred to other pertinent decisions of national courts, in order to substantiate their arguments on the matter at issue. Thus, in so far as the practice of national courts pertaining to State immunity is concerned, for example, Germany referred, in support of its claims, to a recent summary decision of the Israeli District Court of Tel Aviv-Yafo[169], to a decision of the Federal Court in Rio de Janeiro[170], and to another decision of the Polish Supreme Court[171].

146. Italy, for its part, countered the claimant's argument by contending that "when confronted with claims arising from breaches of *jus cogens* rules, domestic courts have taken different views as regards the question of the immunity enjoyed by the wrongdoing State"[172]. In support of this contention, Italy cites, in addition to the aforementioned judgments of the Greek *Areios Pagos* in the *Distomo Massacre* case and of the Italian *Corte di Cassazione* in the *Ferrini* case, two other recent judgments, respectively from the Superior Court of Quebec[173], and from the French *Cour de cassation*[174], which, in its view, go "in the direction of recognizing that the principle of immunity for *acta iure imperii* may be subject to restrictions in this kind of cases"[175].

147. Greece, for its part, points out that "the fundamental argument in the position of the Greek courts is based on the recognition that there is

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[168] CR 2011/18, pp. 61-62, para. 27.

[169] Case of *Orith Zemach et al.* v. *Federal Republic of Germany*, District Court Tel Aviv-Yafo, decision of 31 December 2009, Case 2143-07, referred to by Germany in its oral pleadings: CR 2011/17, p. 32, para. 24.

[170] Case of *Barreto* v. *Federal Republic of Germany,* Justiça Federal, Seção Judiciária do Rio de Janeiro, Ordinary Proceedings No. 2006.5101016944-1, 9 July 2008, referred to by Germany in its oral pleadings: CR 2011/17, p. 32, para. 23. This decision remains pending of appeal to date.

[171] Case of *Natoniewski* v. *Federal Republic of Germany*, Polish Supreme Court, decision of 29 October 2010, File ref. IV CSK 465/09, referred to by Germany in its oral pleadings: CR 2011/17, p. 33, para. 25.

[172] CR 2011/18, p. 40, para. 7.

[173] Case of *Kazemi (Estate of) and Hashemi* v. *Iran, Ayatollah Ali Khamenei and Others*, Superior Court of Quebec, 25 January 2011, 2011 QCCS 196, referred to by Italy in its oral pleadings: CR 2011/18, p. 40, para. 7.

[174] *Cour de cassation, première chambre civile*, France, 9 March 2011, No. 09-14743, referred to by Italy in its oral pleadings: CR 2011/18, p. 40, para. 7.

[175] CR 2011/18, p. 40, para. 7.

an individual right to reparation in the event of grave violations of humanitarian law"[176]. It argues that

> "the obligation on the State to compensate individuals for violations of the rules of humanitarian law seems to derive from Article 3 of the Hague Convention (IV) of 1907 (. . .). That is made clear by the fact that individuals are not excluded from the text of Article 3. This line of argument also emerges from the *travaux préparatoires* of the Second Hague Conference."[177]

Greece adds that the obligation to pay reparation, on the part of the State which committed a wrongful act, is, in its view, well-established in international law[178]. Human rights and international humanitarian law treaties contain some specific rules that lay down a State obligation of reparation to the benefit of individual victims of treaty breaches.

148. The over-all picture resulting from the pleadings before the Court discloses the tension which ensues from the relevant case law of national courts, as to claims of State immunity and the exercise of the right of access to justice. The Court could hardly thus base its reasoning on the practice of national courts only. It has to resort to other present-day manifestations of international law, such as those listed in Article 38 of its Statute (the formal "sources" of international law), and to go beyond that, as it has done at times in the past. Only in this way can it perform properly its function, in the settlement of a contentious case like the present one, as "the principal judicial organ of the United Nations" (Article 92 of the UN Charter).

3. The Aforementioned Tension in the Age of the Rule of Law at National and International Levels

149. This is even more compelling if one bears in mind the aforementioned tension in the current age of the rule of law at national and international levels. The origins of this concept (the rule of law essentially at domestic level), in both civil law and common law countries, can be traced back to the end of the eighteenth century, and it gradually takes shape throughout the nineteenth century. It comes to be seen, especially in the twentieth century, as being conformed by a set of fundamental principles and values, and the underlying idea of the needed *limitation* of power. One such principle is that of *equality* of all before the law.

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[176] CR 2011/19, p. 22 (translation).

[177] *Ibid.*, pp. 22-23 (translation).

[178] Cf. passages on page 4 of this memorandum. Greece refers to the Ethiopia-Eritrea Claims Commission in support of its claim that "individuals are perceived as the holders of secondary rights under international humanitarian law"; CR 2011/19, p. 26 (translation).

150. The concept of rule of law moves away from the shortsightedness of legal positivism (with its characteristic subservience to the established power), and comes closer to the idea of an "objective" justice, at national and international levels, in line with *jusnaturalist* legal thinking. Within the realm of this latter, it is attentive to the protection of human rights, anterior and superior to the State. Not surprisingly, the concept of rule of law has marked its presence also in the modern domain of the law of international organizations, within which it has gained currency in recent years.

151. We witness, nowadays, within the framework of the general phenomenon of our age, that of the *jurisdictionalization* of the international legal order itself, with the expansion of international jurisdiction (as evidenced by the creation and co-existence of multiple contemporary international tribunals)[179], the reassuring enlargement of the *access to justice* — at international level — to a growing number of *justiciables*[180]. Not surprisingly, the theme of the rule of law *(preéminence du droit)* at national and international levels, has lately become one of the items of the UN General Assembly itself (from 2006 onwards), wherein it has been attracting growing attention to date[181].

152. I have drawn attention to this development in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009* (p. 185, para. 55 and p.199, para. 101). An impulse to this development in the UN General Assembly was given by the 2005 progress review in the implementation of the 2000 Millenium Declaration and the Millenium Development Goals. Attention was drawn then to a core group of multilateral treaties[182], concerned, ultimately and to a large extent, with the rights of the human person.

153. The World Summit Outcome, adopted in September 2005, recognized the needed adherence to, and implementation of, the rule of law at

[179] Cf., e.g., Société Française pour le droit international (SFDI), *La juridictionnalisation du droit international* (Colloque de Lille de 2002), Paris, Pedone, 2003, pp. 3-545; A. A. Cançado Trindade, "Le développement du droit international des droits de l'homme à travers l'activité et la jurisprudente des Cours européenne et interaméricaine des droits de l'homme", 16 *Revue universelle des droits de l'homme* (2004), pp. 177-180.

[180] Cf., in this respect, A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, Santiago de Chile, CECOH/Librotecnia, 2008, pp. 61-407.

[181] Cf., on the item "The Rule of Law at the National and International Levels", the following resolutions of the UN General Assembly: resolutions A/RES/61/39, of 4 December 2006; A/RES/62/70, of 6 December 2007; A/RES/63/128, of 11 December 2008; A/RES/64/116, of 16 December 2009; A/RES/65/32, of 6 December 2010. For a recent examination of this issue, in the light of the aforementioned resolutions of the UN General Assembly, cf. A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 4th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2009, pp. 584-587 and 645-651.

[182] Cf. UN, *Multilateral Treaty Framework: An Invitation to Universal Participation — Focus 2005: Responding to Global Challenges*, New York, UN, 2005, pp. 1-154.

national and international levels. The main traits of that memorable exercise may thus be singled out: first, the aforementioned focus on multilateral treaties; secondly, the search for the primacy of the rule of law; thirdly, the assertion of that primacy at both national and international levels; and fourthly, the overcoming of the purely inter-State outlook of the matter.

154. This, in my view, has an incidence in distinct areas of contemporary international law. In so far as State immunities are concerned, for example, the 1972 European Convention on State Immunity (Art. 11) and the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (Art. 12) provide for the personal injury (tort) exception. Both Conventions thus acknowledge that their subject-matter does not exhaust itself in purely inter-State relations.

155. It goes in fact beyond them, in encompassing the way States treat human beings under their respective jurisdictions. State immunities have not been devised to allow States that committed atrocities *(delicta imperii)* to shield themselves behind them. Before turning to this point, I shall address, in the following paragraphs, the old dichotomy between acts *jure imperii* and acts *jure gestionis* (as considered in the present case), and the treatment of the human person in face of State immunities, disclosing the shortsightedness and the overcoming of the strict inter-State outlook.

XV. The Contentions of the Parties as to Acts *Jure Imperii* and Acts *Jure Gestionis*

156. In the present case before the Court opposing Germany to Italy, the contending Parties put forward distinct lines of arguments concerning the distinction between *acta jure imperii* and *acta jure gestionis* for the purpose of the application of sovereign immunity, and, more broadly, on the question of the evolution from absolute to relative immunity. Germany essentially argued that at the time of German presence on Italian soil from 1943-1945 "the doctrine of absolute sovereign immunity was uncontested". It submitted that it was the United States Tate Letter, "based on a general consensus, [that] brought about a fundamental turnaround in 1952". It argued that since then "judicial practice has distinguished between two categories of State activities, *acta jure imperii* and *acta jure gestionis*"[183].

157. For its part, Italy argued that, at first, the exercise of jurisdiction was made exclusively based on the distinction between *acta jure imperii* and *acta jure gestionis* and that "more recently the law and practice of many States" have also supported "exceptions to State immunity for some activities in the domain of sovereign acts"[184]. Italy submitted that the evolution from absolute immunity to relative immunity has its origins

[183] Memorial of Germany, paras. 91-92.
[184] Counter-Memorial of Italy, p. 45, para. 4.13.

in the successive rulings of national courts. And Greece reiterated this view in its "written statement" of 4 August 2011 (paras. 43-49). In this regard, Italy referred to Belgian case law as pioneer in the evolution of the private-acts exception to immunity and argued that Italian case law, since the nineteenth century, "has been consistent in distinguishing the State as a political entity exercising sovereign powers and entitled to immunity and the State as a legal person not entitled to immunity"[185].

158. Italy added that "Belgian and Italian case law did not long remain isolated", and there were also repercussions in the same sense in legal doctrine as from the end of the nineteenth century[186]. Italy thus submitted that the turning point of the distinction between *acta jure imperii* and *acta jure gestionis*, was not, as Germany claimed, represented by the United States Tate Letter of 1952, as "well before the Second World War, the denial of State immunity before municipal courts was not considered prejudicial to the dignity or sovereignty of a foreign State" and "the evolution towards restrictive immunity has its *ratio* in the necessity of protecting private persons". It then added that "exceptions to immunity are not limited to *acta jure gestionis*"[187].

159. In the course of the oral pleadings before the Court, turning to the personal injury (tort) exception — as provided for in Article 12 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property —, Germany claimed that that provision does not codify customary law, and does not apply to the actions of armed forces, and that international State practice excludes armed forces from any exception to immunity[188]. Italy, for its part, argued that the tort exception provides for the lift of immunity if the tortuous act took place in whole or in part within the forum State, as it happened in the present case[189]. It further claimed that Article 12 of the 2004 UN Convention does not make any distinction between acts *jure imperii* and acts *jure gestionis*. And it added that the specific torts that German forces committed in Italy were not just torts, but grave violations of *jus cogens*; thus, the tendency to recognize the tort exception in order to provide relief and access to justice, coupled with the tendency to lift immunity in case of breaches of peremptory norms, means that there was no obligation of Italy to accord immunity to Germany for these acts[190].

160. This debate between the contending Parties was confined to the paradigm of inter-State relations. It did not free itself from the chains of

[185] Counter-Memorial of Italy, paras. 4.15-4.16.
[186] Cf. *ibid.*, para. 4.17.
[187] *Ibid.*, paras. 4.20-4.50.
[188] CR 2011/17, pp. 37-38, paras. 2-3.
[189] CR 2011/18, p. 41, paras. 9-11.
[190] CR 2011/21, pp. 35-36, paras. 16-17.

the lexicon of traditional international law, with the exception of the sole reference to *jus cogens*. The evolution of law to which the two contending Parties referred — with an entirely different reading and interpretation advanced by each of them — can be better appreciated within a larger framework, going well beyond the strict outlook of an inter-State legal order. I purport to draw attention, in the following paragraphs, to this point, so as to arrive at a better understanding of the matter at issue.

XVI. The Human Person and State Immunities: The Shortsightedness of the Strict Inter-State Outlook

161. To that end, an appropriate starting-point lies in the identification of the distortions of the State-centric outlook of the international legal order, leading to an awareness of myth surrounding the role of the State. Shaken by the horrors of the Second World War and the collapse of reason (rational thinking) in European relations, the learned thinker Ernst Cassirer (1874-1945), studied the role played by myth in that collapse. He concluded, shortly before dying, that civilization was — unlike what most people used to assume — not solid at all, but rather a fragile layer, below which lay extreme violence and recurring massacres and atrocities throughout history[191]. Cassirer, focusing on the twentieth century myth of the State, identified the deleterious influence of traces of Machiavellian thinking (dismissal of, or indifference to, ethical considerations), of Hobbesian thinking (indissoluble links between the rulers and those ruled, with the subjection of the latter to the former), and of Hegelian thinking (the State as the supreme historical reality that has to preserve itself, the interests of which stand above anything, irrespective of any ethical considerations)[192].

162. One has to be careful with myths — E. Cassirer further warned — including the "political myths", in particular those which have led, in the twentieth century, to so much extreme violence and to totalitarianism[193]. Another learned thinker, the historian Arnold Toynbee, also propounded the same view in this particular respect. In an insightful essay published in 1948, Toynbee questioned the very bases of what was understood by *civilization* (as "a movement and not a condition"), characterizing this latter as no more than quite modest advances at social and ethical levels. Under its thin layer — he added— barbarism unfortunately persisted[194], as demonstrated by the uncontrolled and extreme violence of his times.

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[191] E. Cassirer, *El Mito del Estado*, Bogotá/Mexico City, Fondo de Cultura Económica, 1996 [reed.], pp. 338-339, and cf. pp. 347 and 350. His book *The Myth of State* was published posthumously in distinct idioms (1946 onwards).

[192] *Ibid.*, pp. 168 (Machiavelli), 207 (Hobbes) and 311 and 313 (Hegel), and cf. p. 323.

[193] *Ibid.*, pp. 333-336, 341-342, 344-345 and 351.

[194] A. J. Toynbee, *Civilization on Trial*, Oxford/New York, Oxford University Press, 1948, pp. 54-55, 150-151, 159, 161, 213, 222 and 234.

163. State-centric thinking, to the exclusion of human beings, gradually made its incursions into international legal thinking — with disastrous consequences, as illustrated by the horrors of the Second World War, and the successive atrocities throughout the twentieth century and the beginning of the twenty-first century. The term "sovereignty", for example, has a long-standing and troubling history: from the times of Jean Bodin (1530-1596) and of Emerich de Vattel (1714-1767) up to the present, in the name of State sovereignty — unduly and inadvertently diverted from inter-State to intra-State relations — millions of human beings were sacrificed. The misuses of language, having repercussions in international legal thinking, sought to exert influence in the international scenario, for whatever purposes, devoid of ethical considerations.

164. Soon it was realized that there should be limits to what one could do, in the sphere of inter-State relations. International legal language became then engaged in the recognition and construction of the principle of the equality of States, but again in the framework of sovereignty (internal and external), pursuant to an essentially State-centric outlook and reasoning[195]. It was in the blurred inter-State outlook of sovereignties in potential or actual confrontation that some jargon, remindful of the Westphalian paradigm, was to flourish. Such was the case of State immunities.

165. In fact, the origins of the term "immunity" (from Latin *immunitas*, deriving from *immunis*) go back to the mid-eighteenth century; the word was used, from then onwards, to refer to the condition of someone exempted from taxes, or from any charges or duties. Towards the end of the nineteenth century, the term "immunity" was introduced into the lexicon of constitutional law and international law (in relation to parliamentarians and diplomats, respectively)[196]. In criminal law, it became associated with "cause of impunity"[197]. In international law, the term came to be used also in respect of "prerogatives" of the sovereign State[198].

166. In any case, as such, the term "immunity" has all the time meant to refer to something wholly exceptional, an exemption from jurisdiction or from execution[199]. It was never meant to be a "principle", nor a norm of general application. It has certainly never been intended, by its invoca-

[195] S. Beaulac, *The Power of Language in the Making of International Law*, Leiden, Nijhoff, 2004, pp. 154-155 and 188, and cf. pp. 29, 190-191 and 196.

[196] *Dictionnaire historique de la langue française* (eds. A. Rey), 3rd ed., Paris, Dictionnaires Le Robert, 2000, pp. 1070-1071; *The Oxford English Dictionary* (prep. J. A. Simpson and E. S. C., Weiner), 2nd ed., Vol. VII, Oxford, Clarendon Press, 1989, p. 691; *The Oxford Dictionary of English Etymology* (eds. C. T. Onions *et al.*), Oxford, Clarendon Press, 1966, p. 463; *Dictionnaire étymologique et historique du français*) (eds. J. Dubois, H. Mitterand and A. Dauzat), Paris, Larousse, 2007, p. 415.

[197] G. Cornu/Association Henri Capitant, *Vocabulaire juridique*, 8th rev. ed., Paris, PUF, 2007, p. 467.

[198] *Ibid.*, p. 468.

[199] *Dictionnaire de droit international public* (ed. J. Salmon), Brussels, Bruylant, 2001, pp. 559-560.

tion, to except jurisdiction on, and to cover-up, international crimes, let alone atrocities or grave violations of human rights or of international humanitarian law. It has certainly never been intended to exclude reparations to victims of such atrocities or grave violations. To argue otherwise would not only beg the question, but also incur a serious distortion of the term "immunity".

167. The theory of State immunity was erected at a time and in an atmosphere which displayed very little concern with the treatment dispensed by States to human beings under their respective jurisdictions. Gradually, pursuant to an inter-State outlook perceived with myopia, the gradual introduction was to take place, towards the end of the nineteenth century — due to a large extent to the work of Italian and Belgian courts, and of national courts of the leading trading nations — of the distinction between *acta jure imperii* and *acta jure gestionis*: State immunity was then limited only to the former, to the so-called *acta jure imperii*.

168. As this development took place, those responsible for it did not have in mind international crimes: concern was rather turned to commercial transactions mainly, so as to exclude the incidence of immunity when the State was acting as a private entity. Reliance upon this distinction in legislative endeavours, including the drafting of conventions on State immunities — such as the 1972 European Convention on State Immunity, adopted in Basel four decades ago and in force as from 1976 — served at least to put an end to the notion of absolute immunity[200]. Likewise, in the American continent, the Inter-American Juridical Committee of the Organization of American States (OAS) concluded, in 1983, the draft Inter-American Convention on Jurisdictional Immunities of States, which took into account the on-going evolution towards restricting State immunity.

169. Such evolution was prompted by the involvement of States in commercial relations, excluded from the domain of State immunity. The Inter-American Juridical Committee questioned the "rigidity" of the classic distinction between acts *jure imperii* and *jure gestionis*, and refused to make reference to such traditional categorization of acts[201]. In any case, it deliberately shifted away from absolute immunity. The fact remains

[200] Cf., in general, *inter alia*, H. Fox, *The Law of State Immunity*, 2nd ed., Oxford University Press, 2008, pp. 502-598; M. Cosnard, *La soumission des Etats aux tribunaux internes face à la théorie des immunités des Etats*, Paris, Pedone, 1996, pp. 203-403; T. R. Giuttari, *The American Law of Sovereign Immunity — An Analysis of Legal Interpretation*, London, Praeger Publs., 1970, pp. 63-142; I. Sinclair, "The Law of Sovereign Immunity — Recent Developments", 167 *RCADI* (1980), pp. 121-217 and 243-266; P. D. Trooboff, "Foreign State Immunity: Emerging Consensus on Principles", 200 *RCADI* (1986), pp. 252-274; W. W. Bishop Jr., "New United States Policy Limiting Sovereign Immunity", 47 *American Journal of International Law* (1953), pp. 93-106; J. Combacau, "L'immunité de l'Etat étranger aux Etats-Unis: la lettre Tate vingt ans après", 18 *Annuaire français de droit international* (1972), pp. 455-468.

[201] Cf. Comité Jurídico Interamericano, *Informes y Recomendaciones*, Vol. XV (1983), Washington D.C., OEA/Secretaría General, 1983, p. 48.

that restrictive immunity entered into the lexicon of modern international law; but again, the underlying major concern, and the main motivation, were with commerce, essentially with commercial relations and transactions, excluded therefrom.

170. In his sharp criticism of State immunities in 1951, Hersch Lauterpacht challenged the prerogatives of the sovereign State that denied legal remedies to individuals for the vindication of their rights; to him, absolute immunity led to injustice, and the move towards restrictive immunity, on the ground of the distinction between acts *jure imperii* and *jure gestionis*, was not a solution either, it failed to provide a guide or basis for the development of international law[202]. To Lauterpacht, the concept of State immunity was rather "absolutist", a manifestation of the Hobbesian conception of the State; rather than a principle, it was an "anomaly", to be reassessed in the gradual "general progression towards the rule of law within the State"[203]. After all, one could no longer "tolerate the injustice" arising whenever the State "screens itself behind the shield of immunity in order to defeat a legitimate claim"[204].

171. This becomes clearer if we move away from the rather circumscribed historical context which motivated the formulation of the distinction between acts *jure imperii* and *jure gestionis*, namely, trade relations and transactions. If we enter the larger domain to the treatment dispensed by the State to human beings under their respective jurisdictions, that traditional distinction will appear even more insufficient and inadequate. One ought to proceed to the definitive overcoming of the strict and dangerous exclusively inter-State outlook of the past.

XVII. The State-Centric Distorted Outlook in Face of the Imperative of Justice

172. The beginning of the personification of the State — in fact, of the modern theory of the State — in the domain of international law took place, in the mid-eighteenth century, with the work of Emer de Vattel (*Le droit des gens ou Principes de la loi naturelle appliquées à la conduite et aux affaires des nations et des souverains*, 1758), which was to have many repercussions in the international legal practice of his times. The emphasis on State personality and sovereignty led to the conception of an international law applicable strictly to the relations among States (the *jus inter gentes*, rather than the *jus gentium*), that is, an inter-State legal order; it

[202] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *British Yearbook of International Law* (1951), pp. 220 and 226-227.
[203] *Ibid.*, pp. 232-233 and 249-250.
[204] *Ibid.*, p. 235.

amounted to a reductionist outlook of the subjects of the law of nations, admitting only and exclusively the States as such[205].

173. The consequences of this State-centric distortion were to prove disastrous for human beings, as widely acknowledged in the mid-tenth century. In the heyday of the inter-State frenzy, individuals had been relegated to a secondary level. To G. W. F. Hegel (1770-1831), apologist of the Prussian State, for example, the individual was entirely subsumed under the State; society itself was likewise subordinated to the State[206]. The State was an end in itself *(Selbstzweck)*, and freedom could only be the one granted by the State itself[207]. Hegel endorsed and justified the authoritarian and absolutely sovereign State; to him, the State should be stronger than society, and individuals could only pursue their interests within the sovereign State[208].

174. From the late nineteenth century onwards, legal positivism wholly personified the State, endowing it with a "will of its own", and reducing the rights of human beings to those which the State "conceded" to them. The consent of the "will" of the States (according to the voluntarist positivism) was erected into the alleged predominant criterion in international law, denying *jus standi* to individuals, to human beings; this rendered difficult a proper understanding of the international community, and undermined international law itself, reducing its dimension to that of a strictly inter-State law, no more *above* but rather *among* sovereign States[209]. In fact, when the international legal order moved away from the universal vision of the so-called "founding fathers" of the law of nations *(droit des gens — supra)*, successive atrocities were committed against human beings, against humankind.

175. Such succession of atrocities — war crimes and crimes against humanity — occurred amidst the myth of the all-powerful State, and even the social milieu was mobilized to that end. The criminal policies of the State — gradually taking shape from the outbreak of the First World War onwards — counted on "technical rationality" and bureaucratic organization; in face of the aforementioned crimes, without accountability, individuals became increasingly vulnerable[210], if not defenceless. It soon became clear that there was a great need for justice, not only for the victims of their crimes and their relatives, but for the social milieu as a whole; otherwise life would become unbearable, given the denial of the

[205] Cf., e.g., E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, Paris, Pedone, 1998, pp. 255, 311, 318-319, 344 and 347.

[206] Eric Weil, *Hegel et l'Etat* [1950], 4th ed., Paris, Librairie Philosophique J. Vrin, 1974, pp. 11, 24 and 44.

[207] *Ibid.*, pp. 45 and 53.

[208] *Ibid.*, pp. 55-56, 59, 62, 100 and 103.

[209] P. P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 36-37.

[210] G. Bensoussan, *Auschwitz en héritage? D'un bon usage de la mémoire*, 9th rev. ed., Paris, Mille et Une Nuits, 2006, pp. 174, 183, 187, 197 and 246.

human person, her annihilation, perpetrated by those successive crimes of State[211].

176. It was at the time of the prevalence of the inter-State myopia that the practice on State immunity took shape and found its greatest development, discarding legal action on the part of individuals against what came to be regarded as sovereign "acts of State". Yet, the individual's submission to the "will" of the State was never convincing to all, and it soon became openly challenged by the more lucid doctrine. The idea of absolute State sovereignty — which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it (or in its name) against human beings — appeared with the passing of time entirely unfounded. The State — it is nowadays acknowledged — is responsible for all its acts — both *jure gestionis* and *jure imperii* — as well as for all its omissions[212]. In case of (grave) violations of human rights, the *direct access* of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate such rights, even against their own State[213].

XVIII. The Human Person and State Immunities: The Overcoming of the Strict Inter-State Outlook

177. In the present case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* before this Court, we are faced with a matter entirely different from those which prompted the traditional doctrines of the past. We are here before the invocation of State immunity in respect of the perpetration of international crimes (of grave violations of human rights and of international humanitarian law), and of the individual victims' right of access to justice, in order to vindicate their right to reparation under general international law. What is the relevance of that distinction between *acta jure imperii* and *acta jure gestionis* for the consideration of the present case before the Court? None.

178. War crimes and crimes against humanity are not to be considered *acta jure gestionis*, or else "private acts"; they are crimes. They are not to be considered *acta jure imperii* either; they are grave *delicta*, crimes. The distinction between acts *jure imperii* and acts *jure gestionis*, between sovereign or official acts of a State and acts of a private nature, is a remnant of traditional doctrines which are wholly inadequate to the examination

[211] *Op. cit. supra* note 210, p. 207.
[212] *Ibid.*, pp. 247-259.
[213] S. Glaser, "Les droits de l'homme à la lumière du droit international positif", in *Mélanges offerts à H. Rolin — Problèmes de droit des gens*, Paris, Pedone, 1964, pp. 117-118, and cf. pp. 105-106 and 114-116.

of the present case on the *Jurisdictional Immunities of the State* before the Court. Such traditional theories, in their myopia of State-centrism, forgot the lessons of the founding fathers of the law of nations, pointing to the acknowledgement that individuals are subjects of the law of nations *(droit des gens)*.

179. No State can, nor was ever allowed, to invoke sovereignty to enslave and/or to exterminate human beings, and then to avoid the legal consequences by standing behind the shield of State immunity. There is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity. To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice. The present case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* gives eloquent testimony of this.

180. Individuals are indeed subjects of international law (not merely "actors"), and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are *titulaires* of rights and bearers of duties which emanate *directly* from international law (the *jus gentium*). Converging developments, in recent decades, of the international law of human rights, of international humanitarian law, and of the international law of refugees, followed by those of international criminal law, give unequivocal testimony of this.

181. The doctrine of sovereign immunities, which blossomed with the myopia of a State-centric approach — which could only behold inter-State relations — unduly underestimated and irresponsibly neglected the position of the human person in international law, in the law of nations *(droit des gens)*. The distinction between acts *jure imperii* and acts *jure gestionis* is of no assistance to a case like the present one before the Court. International crimes are not acts of State, nor are they "private acts" either; a crime is a crime, irrespective of who committed it.

182. History shows that war crimes and crimes against humanity are generally committed by individuals with the support of the so-called State "intelligence" (with all its cruelty), misuse of language, material resources and the apparatus of the State, in pursuance of State policies. The individual and the State responsibilities for such crimes are thus complementary, one does not exclude the other; there is no room for the invocation of State immunities in face of those crimes.

183. Perpetrators of such crimes — individuals and States alike — cannot seek to avoid the legal consequences of those anti-juridical acts, of those breaches of *jus cogens*, by invoking immunities. International legal doctrine in our days appears to be at last prepared to acknowledge the

duties of States vis-à-vis individuals under their respective jurisdictions[214]. This should have been the primary concern in the adjudication of the present case before the Court.

XIX. No State Immunities for *Delicta Imperii*

184. This brings me to the next point to consider, namely, the absence or inadmissibility of State immunities in face of *delicta imperii*, of international crimes in breach of *jus cogens*. I shall refer to two illustrations of such *delicta imperii* often referred in the course of proceedings of the *cas d'espèce*, namely, the perpetration of massacres of civilians in situations of defencelessness (as illustrated, *inter alia*, by the massacre of Distomo in Greece, and the massacre of Civitella in Italy), and the practice of deportation and subjection to forced labour in war industry, that took place during the Second World War. Such *delicta imperii*, marking the factual origin of the claim of State immunity before the Court, were committed within a pattern of extreme violence which led to several other episodes of the kind, not only in Greece and Italy, but also in other occupied countries as well, during the Second World War.

1. Massacres of Civilians in Situations of Defencelessness

(a) *The massacre of Distomo*

185. In my separate opinion at a prior stage of the present case opposing Germany to Italy, with Greece intervening (Court's Order of 4 July 2011, on Greece's Request for Intervention), I have already referred to the massacre of Distomo (on 10 June 1944) — wherein 218 villagers (men, women and children) were murdered by the Nazi forces — a massacre which was brought to the attention of the Court in the course of the proceedings. In that separate opinion, I evoked one of the historical accounts of it (para. 29).

186. There are, furthermore, other historical accounts of that massacre, including one of the devastation of, and the desolation in, the Greek village of Distomo, shortly after its perpetration: this was recalled by Sture Linnér, the (then) Head of the Mission of the International Committee of the Red Cross (ICRC) in Greece, who arrived at the village shortly after the aforementioned massacre in order to provide assistance.

[214] Cf., e.g., J. Stigen, "Which Immunity for Human Rights Atrocities?", in *Protecting Humanity — Essays in International Law and Policy in Honour of N. Pillay* (ed. C. Eboe-Osuji), Leiden, Nijhoff, 2010, pp. 750-751, 756, 758, 775-779, 785 and 787; M. Panezi, "Sovereign Immunity and Violation of *Jus Cogens* Norms", 56 *Revue hellénique de droit international* (2003), pp. 208-210 and 213-214; P. Gaeta, "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?", *International Humanitarian Law and International Human Rights Law* (ed. O. Ben-Naftali), Oxford University Press, 2011, pp. 319-320 and 325.

The account that follows (excerpt), describes the brutalities of the Nazi forces, as verified in the bodies of the victims that he found at the village of Distomo and on the way thereto:

> "We needed too much time to cross the broken roads and the many blockades to reach, at dawn, the central road that led to Distomo. From the edges of the road, vultures got up from low height, slowly and unwillingly, when they heard us approach. From every tree, along the road and for hundreds of metres, human bodies were hanging, stabilised with bayonets, some of whom were still alive. They were villagers who were punished in this way: they were suspected for helping the partisans of the area, who attacked an SS detachment. The smell was unbearable.
>
> Inside the village, the fire was still burning in the ashes of the houses. Hundreds of people, of all ages, from elders to newborns, were lying on the ground. They [the Nazis] had torn the uterus and removed the breasts of many women; others were lying strangled with their intestines still tied around their necks. It seemed that no one had survived.
>
> But! An elder man at the end of the village! He had miraculously survived the massacre. He was shocked by the terror, his gaze was empty and his speech was incomprehensible. We got out of the car in the middle of the disaster and we shouted in Greek: 'The Red Cross, the Red Cross! We came to help'."[215]

187. In the adjudication of the case of the *Massacre of Distomo*, the legacy of the decisions of the Livadia Court of First Instance (case of *Prefecture of Voiotia* v. *Federal Republic of Germany*, 1997) and of the *Areios*

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[215] "Απαιτήθηκε ανυπόφορα μεγάλο χρονικό διάστημα έως ότου διασχίσουμε τους χαλασμένους δρόμους και τα πολλά μπλόκα για να φτάσουμε, χαράματα πια, στον κεντρικό δρόμο που οδηγούσε στο Δίστομο. Από τις άκρες του δρόμου ανασηκώνονταν γύπες από χαμηλό ύψος, αργά και απρόθυμα, όταν μας άκουγαν που πλησιάζαμε. Σε κάθε δέντρο, κατά μήκος του δρόμου για εκατοντάδες μέτρα, κρεμόντουσαν ανθρώπινα σώματα, σταθεροποιημένα με ξιφολόγχες, κάποια εκ των οποίων ήταν ακόμη ζωντανά. Ήταν οι κάτοικοι του χωριού που τιμωρήθηκαν με αυτόν τον τρόπο: θεωρήθηκαν ύποπτοι για παροχή βοήθειας στους αντάρτες της περιοχής, οι οποίοι επιτέθηκαν σε δύναμη των Ες Ες. Η μυρωδιά ήταν ανυπόφορη.

Μέσα στο χωριό σιγόκαιγε ακόμη φωτιά στα αποκαΐδια των σπιτιών. Στο χώμα κείτονταν διασκορπισμένοι εκατοντάδες άνθρωποι κάθε ηλικίας, από υπερήλικες έως νεογέννητα. Σε πολλές γυναίκες είχαν σχίσει τη μήτρα με την ξιφολόγχη και αφαιρέσει τα στήθη, άλλες κείτονταν στραγγαλισμένες, με τα εντόσθια τυλιγμένα γύρω από το λαιμό. Φαινόταν σαν να μην είχε επιζήσει κανείς.

Μα να! Ένας παππούς στην άκρη του χωριου! Από θαύμα είχε καταφέρει να γλυτώσει τη σφαγή. Ήταν σοκαρισμένος από τον τρόμο, με άδειο βλέμμα, τα λόγια του πλέον μη κατανοητά. Κατεβήκαμε στη μέση της συμφοράς και φωνάζαμε στα ελληνικά: «Ερυθρός Σταυρός! Ερυθρός Σταυρός! Ήρθαμε να βοηθήσουμε"' (Sture Linnér, *Min Odyssé* (1982), as reprinted in: Petros Antaios *et al.* (eds.), *Η Μαύρη Βίβλος της Κατοχής (The Black Book of Occupation)*, 2nd ed., Athens, National Council for the Claim of Reparations Owed by Germany to Greece, 2006, pp. 114-115.) *[Unofficial translation.]*

Pagos (2001, upon appeal from Germany) — whether one fully agrees with the whole of their reasoning or not — is that the Third Reich's acts (of their armed forces) carried out in the territory of the forum State (i.e. the massacre of Distomo, in Greece) were not acts *jure imperii*, but rather breaches of *jus cogens* (failing to comply with the obligations imposed upon it by the Regulations annexed to the IV Hague Convention (1907) respecting the Laws and Customs of War on Land), thereby discarding the possibility of any invocation of sovereign immunity[216].

188. Furthermore, it should not pass unnoticed that, in the course of the proceedings before this Court in the present case concerning the *Jurisdictional Immunities of the State*, counsel for Germany took the commendable initiative — in a sign of maturity — of recognizing the responsibility of the State for the massacre of Distomo. To this effect, in the public sitting before the Court, after recalling the origins of the claim against Germany "enshrined in the judgment of the Court of Livadia", pertaining to the *Massacre of Distomo* case, counsel for Germany — though contending that the issue of State immunity was a distinct one — stated:

> "(. . .) 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 (. . .)."[217]

(b) *The massacre of Civitella*

189. Another massacre, in the same pattern of extreme violence, was perpetrated, on 29 June 1944, by the Nazi forces in the town of Civitella (near the town of Arezzo), in Italy, during which 203 civilians were killed. The matter was again brought into the cognizance of the Italian Court of Cassation, half a decade after its decision of 2004 in the *Ferrini* case. Thus, on 29 May 2008, the *Corte di Cassazione* rendered 12 identical decisions endorsing its position in the *Ferrini* case[218], to the effect that State

[216] For the view that the focus on territoriality (of those two Greek courts' decisions as well as of the decision of the Italian *Corte di Cassazione* in the *Ferrini* case, 2004) could have yielded to greater stress on *universal values* shared by the international community, cf. Xiaodong Yang, "*Jus Cogens* and State Immunity", 3 *New Zealand Yearbook of International Law* (2006), pp. 163-164 and 167-169. And, on the divergences of State practice causing the erosion of State immunities, in face of the growing demand for protection of the rights of the human person, cf. R. Garnett, "Should Foreign State Immunity Be Abolished?", 20 *Australian Year Book of International Law* (1999), pp. 175-177 and 190.

[217] CR 2011/20, p. 28, para. 28.

[218] Cf. R. Pavoni and S. Beaulac, "L'immunité des Etats et le *jus cogens* en droit international — Etude croisée Italie/Canada", 43 *Revue juridique Thémis* (2009), Montréal, pp. 503-506 and 515-516; and A. Atteritano, "Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years", 19 *Italian Yearbook of International Law* (2009), p. 35.

immunity does not apply in cases of international crimes (grave breaches of human rights and of international humanitarian law) amounting to breaches of *jus cogens*.

190. Shortly afterwards, on 13 January 2009, the Italian Court of Cassation again confirmed its position (judgment of 21 October 2008), in the case of the *Massacre of Civitella*. In effect, the case *Milde* v. *Civitella* concerned criminal proceedings against a Nazi officer, former member of the *Wehrmacht* (the armed forces), who took part in that massacre, conducted by the Hermann Göring tank division on 29 June 1944. The *Corte di Cassazione*, having found that the *Massacre of Civitella* was an international crime, denied immunity from civil jurisdiction, and upheld the right to reparation of the victims or their surviving relatives, from the Federal Republic of Germany and from Milde (as joint debtors).

191. The keypoint of the Italian Court of Cassation's decision, in the line of the interpretative guidelines of the *Ferrini* judgment[219], was its denial of State immunity in the occurrence of State pursuance of a criminal policy conducive to the perpetration of crimes against humanity. The decision of the *Corte di Cassazione*, in the case of the *Massacre of Civitella*, was clearly value-oriented, in the sense that a State cannot avail itself of immunity in case of grave violations of human rights; emphasis was led, in such circumstances, on the individual victim's right to reparation[220].

2. Deportation and Subjection to Forced Labour in War Industry

192. Attention has already been drawn to the long-standing prohibition, in the realm of international humanitarian law, of ill-treatment of civilians, deported and subjected to forced labour in war industry, in infrahuman conditions. This prohibition, as already pointed out, is set forth at normative level, and found in works of codification of international law. It amounts to cruel, inhuman and degrading treatment (in the domain of international human rights law), and belongs to the domain of *jus cogens*.

193. Such international crime soon met with judicial recognition, not only of international criminal tribunals, such as in the pioneering trials of the Nuremberg and the Tokyo Tribunals, but also of international human rights tribunals, as acknowledged by the recent adjudication by the ECHR of the case *Kononov* v. *Latvia* (2008-2010). Such crime is not an act *jure imperii* nor an act *jure gestionis*: it is an international crime, irrespective of whom committed it, engaging both State and individual responsibility.

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[219] Cf. A. Gianelli, "Crimini Internazionali ed Immunità degli Stati dalla Giurisdizione nella Sentenza *Ferrini*", 87 *Rivista di diritto internazionale* (2004), pp. 648-650, 655-657, 660-667, 671-680 and 683-684.

[220] A. Ciampi, "The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case relating to the Second World War — The *Civitella* Case", 7 *Journal of International Criminal Justice* (2009), pp. 605 and 607-608; and cf. pp. 599-601, on the uniqueness of the *Civitella* proceedings.

194. Parallel to the concentration camps (of extermination), in the course of the Second World War Nazi Germany established also a network of forced labour camps, less studied by historians to date. They were intended to exploit the forced labour of detainees from the occupied countries. There were numerous camps of this kind, erected also by private enterprises within their premises; in this "privatized" system, the forced labour of detainees was exploited[221], even without remuneration, and in *infra*-human conditions of living, or rather surviving.

195. Those subjected to this ordeal were detained civilians and prisoners of war from occupied countries, who were deported to work in private industry in Nazi Germany; there, they were subjected to forced labour in the production of weapons, in sub-human conditions of work[222]. They became part of a vast productive enterprise aimed at the planified destruction of the enemies and the perpetration of massacres, in a campaign of extermination in the so-called *total war*[223]. Civilians, and prisoners of war who became forced labourers[224], were all subsumed in this process of dehumanization of all those involved in this enterprise.

196. The regime of forced labour during the Second World War — insufficiently studied to date — was marked by manipulation, distortions and lies; according to the few historical accounts available, workers were constantly threatened, and forced labour was reduced into slave work in Nazi Germany's war industry[225]. From 1943 onwards, forced labour became vital to Nazi Germany's war efforts; slave workers hoped to survive by participating, under coercion and domination, in the war industry of their persecutors[226]. Forced labour in occupied countries was put in practice by the Third Reich with a long-term projection, in order to sustain the war economy[227].

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[221] C. R. Browning, *A l'intérieur d'un camp de travail nazi — Récits des survivants: mémoire et histoire*, Paris, Les Belles Lettres, 2010, p. 24.

[222] E. Traverso, *La Violencia Nazi — Una Genealogía Europea*, Buenos Aires/Mexico D.F., Fondo de Cultura Económica, 2002, pp. 42-43, and cf. p. 92.

[223] The sinister book by E. Ludendorff (*La guerre totale* [1935], Paris, Perrin, 2010 (reed.), pp. 49-286), a crude incitement to total war (of extermination) involving the whole population, launched in 1935, had by 1939 sold some 100,000 copies, in anticipation of Hitler's total war of 1939-1945, with its devastating consequences.

[224] E. Traverso, *op. cit. supra* note 222, pp. 96 and 100.

[225] C. R. Browning, *op. cit. supra* note 221, pp. 34 and 197.

[226] *Ibid.*, pp. 350-351.

[227] In this regard, Himmler is reported to have stressed, in a speech delivered to the senior leadership of the SS in June 1942, that "if we do not fill our camps with slaves (. . .), then even after years of war we will not have enough money to be able to equip the settlements in such a manner that real Germanic people can live there and take root in the first generation"; cited in M. Mazower, *Hitler's Empire — Nazi Rule in Occupied Europe*, London, Penguin Books, 2009, p. 309.

197. Members of the civilian populations of the occupied countries during the Second World War were deported and subjected to conditions of slave labour in the war industry in Germany. Likewise — as the present case discloses — besides civilians, members of the Italian armed forces were denied and deprived of the status of prisoners of war (and the protections ensuing from that status) and used as forced labourers in the German war industry. These crimes, perpetrated with great cruelty[228], generated, not surprisingly, much resentment in occupied countries, and incited the organized resistance movements therein to struggle against them[229].

198. It is estimated that, "[b]y the fall of 1944, 7.7 million foreign workers were in Germany"[230]. The conditions of "slave labour" and "forced labour" have thus been defined by German reparations law[231]:

> "*[Slave labour:]* Work performed by force in a concentration camp (as defined in the German Indemnification Law) or a ghetto or another place of confinement under comparable conditions of hardship, as determined by the German Foundation.
>
> *[Forced labour:]* Work performed by force (other than 'slave labour') in the territory of the German Reich or in a German-occupied area, and outside the territory of Austria, under conditions resembling imprisonment or extremely harsh living conditions; or work performed by force under a program of implementing the National Socialist policy of 'extermination through work' *(Vernichtung durch Arbeit)* outside the territory of Austria."[232]

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[228] In one of the testimonies on them, from Maideneck (*Communiqué* of the Commission extraordinaire polono-soviétique), it is reported that:

> "The Germans forced numerous groups (1,200 people) of professors, doctors, engineers and other specialists brought over from Greece to carry out work beyond their physical capabilities — the transport of heavy stones. The SS beat to death any who fell, exhausted by this back-breaking work. That entire group of Greek intellectuals was wiped out within five weeks by a system of starvation, gruelling work, beatings and murder." *[Translation by the Registry.]* In: *Paroles de déportés — Témoignages et rapports officiels*, Paris, Bartillat, 2009 (reed.), p. 113.

[229] J. Bourke, *La Segunda Guerra Mundial — Una Historia de las Víctimas*, Barcelona, Paidós, 2002, p. 43, and cf. pp. 144 and 175.

[230] J. Authers, "Making Good Again: German Compensation for Forced and Slave Labourers", in *The Handbook of Reparations* (ed. P. de Greiff), Oxford University Press, 2006, pp. 421-422.

[231] Law of 2000, Art. 11 (on "Eligible Persons").

[232] J. Authers, *op. cit. supra* note 230, p. 435.

XX. The Prevalence of the Individual's Right of Access to Justice: The Contending Parties' Invocation of the Case *Goiburú et al.* (IACtHR, 2006)

199. From all the aforementioned, it results, in my perception, that it is not at all State immunity that cannot be waived, as some *droit-d'étatistes* keep on insisting even in our days, seemingly incapable of learning the lessons of history (including international legal history). There is no immunity for crimes against humanity. In cases of international crimes, of *delicta imperii*, what cannot be waived, in my understanding, is the individual's right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels.

200. Some decades ago, on the basis of a Kantian aphorism ("Out of the crooked timber of humanity no straight thing was ever made"), Isaiah Berlin pondered that "[t]he first public obligation is to avoid extremes of suffering"[233]. To force people into "neat uniforms" demanded by dogmatisms — he added — is "almost always the road to inhumanity"; the unprecedented atrocities of the twentieth century show that it is possible to attain "a high degree of scientific knowledge and skill" and yet to subjugate, humiliate and "destroy others without pity"[234].

201. Tragedy — distinct from mere disaster — is due to "avoidable human mistakes", some with devastating consequences. At the end, concluded Berlin, we are left with a constant return to the idea of an "objective" justice, to universal principles — in the line of natural law thinking, forbidding the treatment of human beings "as means to ends"[235]. In this respect, another great thinker of the twentieth century, Simone Weil, pondered, in an illuminating essay (of 1934, ever since republished in distinct countries and idioms)[236], that, from the times of *The Iliad* of Homer until nowadays, the influence of war upon human beings has been constantly revealing an "essential evil" of humanity, namely, "the substitution of the ends by the means"; the search for power takes the place of the ends, and transforms human life into a means, which can be sacrificed[237].

202. From Homer's *Iliad* until today — she added — the unreasonable demands of the struggle for power leave no time to think of what is truly

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[233] I. Berlin, *The Crooked Timber of Humanity — Chapters in the History of Ideas* [1959], Princeton University Press, 1991, p. 17, and cf. pp. 18-19.

[234] *Ibid.*, pp. 19 and 180.

[235] *Ibid.*, pp. 185, 204-205 and 257.

[236] S. Weil, "Réflexions sur les causes de la liberté et de l'oppression sociale", *Œuvres*, Paris, Quarto Gallimard, 1999, pp. 273-347.

[237] S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82.

important; individuals are "completely abandoned to a blind collectivity", incapable of "subjecting their actions to their thoughts", incapable of thinking[238]. The terms, and distinction between "oppressors and oppressed", almost lose meaning, given the "impotence" of all individuals in face of the "social machine" of destruction of the spirit and fabrication of the inconscience; all start living — or rather surviving — in the painful domain of the inhuman, in a world wherein "nothing is the measure of man", wherein there is no attention at all to the needs of the spirit[239].

203. The prevalence of the individual's right of access to justice cannot be challenged even in the light of the stratified inter-State mechanism of litigation before the ICJ. In this respect, in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I deemed it fit to ponder that

> "Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values[240]. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Reversely, requesting States themselves have, in their arguments before this Court, gone beyond the strictly inter-State outlook of the past, in invoking principles and norms of the international law of human rights and of international humanitarian law, to safeguard the fundamental rights of the human person.
>
> In so far as material or substantive law is concerned, the inter-State structure of litigation before this Court has not been an unsurmountable obstacle to such vindication of observance of principles and norms of international human rights law and international humanitarian law (. . .)." (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 174-175, paras. 23-34.)

204. Moreover, in my separate opinion appended to this Court's Advisory Opinion of the day before yesterday, on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a*

[238] *Op. cit. supra* note 237, pp. 84 and 130.
[239] *Ibid.*, pp. 130-131.
[240] Cf., *inter alia*, G. Morin, *La révolte du droit contre le code — La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

Complaint Filed against the International Fund for Agricultural Development, I dwell further upon this particular point. It is not my intention to repeat herein the critical reflections I developed two days ago (keeping in mind the Court's mission as the principal judicial organ of the United Nations), in my separate opinion in that Advisory Opinion. I thus limit myself only to refer to those reflections herein, for the purposes of the present dissenting opinion.

205. In the course of the proceedings in the present case concerning *the Jurisdictional Immunities of the State*, both Germany and Italy expressly referred to the judgment of 22 September 2006 of the IACtHR in the case of *Goiburú et al.* v. *Paraguay*. Italy was the first to invoke this judgment of the IACtHR, in its Counter-Memorial, of 22 December 2009, in support of its argument that the right of access to justice "is conceived in all systems of human rights of protection as a necessary complement of the rights substantively granted" (para. 4.94). Italy added that,

> "Accordingly, it is not surprising that the Inter-American Court of Human Rights has described access to justice as a peremptory norm of international law in a case in which the substantive rights violated were also granted by *jus cogens*."[241] (Para. 4.94.)

206. For its part, Germany referred to the IACtHR's judgment in the case of *Goiburú et al.*, in the first round of its oral pleadings, so as to respond to the argument of Italy in this regard. Germany first submits that the *Goiburú et al.* case (in the line of other cases decided by the IACtHR), in its view "did not concern war damages" (para. 25). Germany added that that case concerned the right of access to justice in the State which was responsible for the wrongful act and thus did not concern the rule of foreign State immunity (para. 25)[242].

207. The case of *Goiburú et al.* pertained to the "Operation Condor", whereby the States of the Southern Cone of South America, during the period of the dictatorships in the 70s, mounted a network of collaboration of their so-called "intelligence services", to pursue, at inter-State level, their joint criminal policies of repression. These latter were co-ordinated State policies of extermination of targeted segments of their respective populations, consisting of "anti-insurrection" transfrontier operations, which comprised illegal or arbitrary detentions, kidnappings, torture, murders or extra-judicial executions, and forced disappearances of persons. Planified at the highest level of the State, the "Operation Condor" also secured the cover-up of the operations, and,

[241] Counter-Memorial of Italy, pp. 76-77.

[242] CR 2011/17, p. 44, para. 25; Germany also referred to "an approach similar to that of the Inter-American Court of Human Rights", taken one year later, by the UN Committee of Human Rights, in its "general comment" No. 32, on Article 14 of the UN Covenant on Civil and Political Rights.

with that, the irresponsibility and the absolute impunity of the official perpetrators[243].

208. In the *cas d'espèce* before the IACtHR, the respondent State itself recognized, in a commendable spirit of procedural co-operation, its own international responsibility for the existence, at the time the grave wrongs took place, of a *criminal State policy*. Those were *crimes of State*, of equivalent gravity to those perpetrated in Asia also in the 70s, in Europe three decades earlier, and again in Europe, and in Africa, two decades later. Time and time again succeeding generations witnessed, in distinct regions of the world, the perpetration of true *crimes of State* (whether segments of the international legal doctrine like this expression or not).

209. In its judgment of 22 September 2006 in the case of *Goiburú et al.*, concerning Paraguay, the IACtHR established the grave violations of human rights that had taken place, and, accordingly, it ordered the corresponding reparations. In an *obiter dictum*, the IACtHR observed that, while the State, through its institutions, mechanisms and powers, should function "in such a way as to ensure protection against criminal action", in the present case, however, the instrumentalization of the State power was a means to violate the rights that it should guarantee: worse still, such breaches counted on "inter-State collaboration", with the State constituting itself as "the main factor of the grave crimes committed, giving place to a clear situation of 'State terrorism'" (paras. 66-67).

210. In my separate opinion in the *Goiburú et al.* case, I sought *inter alia* to identify the elements of approximation and complementarity (insufficiently dealt with by international legal doctrine to date) between the international law of human rights and international criminal law, namely: *(a)* the (active and passive) international legal personality of the individual; *(b)* the complementarity of the international responsibility of the State and that of the individual; *(c)* the conceptualization of crimes against humanity; *(d)* the prevention and guarantee of non-repetition (of the grave violations of human rights); and *(e)* the reparatory justice in the confluence between the international law of human rights and international criminal law (para. 34)[244].

211. Although the "Operation Condor" belongs to the past, scars have not yet healed, and they probably never will. The countries where it was mounted still struggle with their past, each one in its own way. Yet, being a region with a strong tradition of international legal thinking, advances in international justice have occurred therein, as some cases, and other situations of the kind, have been brought to international justice (before the IACtHR), and no State of the region dares nowadays to invoke State immunity in respect of those crimes. May it here be recalled, in historical

[243] A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des individus à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 174-175.

[244] *Ibid.*, pp. 139 and 167.

perspective, that Article 8 of the 1948 Universal Declaration of Human Rights, on the right to an effective remedy before competent national courts to safeguard fundamental rights, has, as its *travaux préparatoires* reveal, a Latin American origin, being a Latin American contribution to the Universal Declaration.

212. In effect, to uphold State immunity in cases of the utmost gravity amounts to a travesty or a miscarriage of justice, from the perspective not only of the victims (and their relatives), but also of the social milieu concerned as a whole. The upholding of State immunity, making abstraction of the gravity of the wrongs at issue, amounts to a denial of justice to all the victims (including their relatives as indirect — or even direct — victims). Furthermore, it unduly impedes the legal order to react in due proportion to the harm done by the atrocities perpetrated, in pursuance of State policies.

213. The finding of the particularly grave violations of human rights and of international humanitarian law provides, in my understanding, a valuable test for the removal of any bar to jurisdiction, in pursuance of the necessary realization of justice. In sum and conclusion on this point: *(a)* there is no State immunity in such cases of extreme gravity, cases of *delicta imperii*; and *(b)* grave breaches of human rights and of international humanitarian law ineluctably entail the duty to provide reparation to the victims.

XXI. The Individual's Right of Access to Justice: The Evolving Case Law towards *Jus Cogens*

214. Unlike the IACtHR, the ECHR has approached a fundamental right, such as that of access to justice — and to a fair trial — (Articles 6 (1) and 13 of the European Convention on Human Rights), with attention drawn also to permissible or implicit limitations. Thus, in its *jurisprudence constante* (judgments in cases *Ashingdane* v. *United Kingdom*, of 28 May 1985; *Waite and Kennedy* v. *Germany*, of 18 February 1999; *T. P. and K. M.* v. *United Kingdom*, of 10 May 2001; *Z. and Others* v. *United Kingdom*, of 10 May 2001; *Cordova* v. *Italy*, of 30 January 2003; *Ernst* v. *Belgium*, of 15 July 2003; among others), the ECHR has laid down the test for permissible limitations, namely, pursuance of a legitimate aim, proportionality, and no impairment of the essence of the right.

215. This flexibility was useful to the ECHR's (Grand Chamber's) majority in the decisions on cases concerning immunities (cf. Section XII *supra*). But it should not pass unnoticed that the *Ashingdane* case, which marks the beginning of the adoption by the ECHR of this inadequate approach to a fundamental right such as that of access to justice, was not a case of grave violations of human rights concerning several victims; it

was rather a single individualized case, of alleged breaches of Articles 5 (1) and (4) and 6 (1) of the European Convention, wherein the ECHR found no violation of this latter. In sum, a fundamental right is, in my view, to be approached as such, and not as from permissible or "implicit" limitations.

216. For its part, on the other side of the Atlantic, the IACtHR has focused, to a far greater extent, on the essence of the fundamental right of access to justice itself, and not on its "limitations". These latter have not been used, or relied upon, to uphold State immunity — not until now. The ECHR has granted the "margin of appreciation" to Contracting States, the IACtHR has not done so (at least not in my times serving it). The result has been the approach, by the IACtHR, of the right of access to justice (Articles 8 and 25 of the American Convention on Human Rights) as a true *fundamental* right, with not much space left for consideration of "limitations". The major concern has been with its guarantee.

217. The adjudication, by the IACtHR, of cases of *gravity* of violations of human rights, has led to a jurisprudential development stressing the fundamental character of the right of access to justice. This right assumes an imperative character in face of a crime of State: it is a true *droit au Droit*, a right to a legal order which effectively protects the fundamental rights of the human person[245], which secures the intangibility of judicial guarantees (Articles 8 and 25 of the American Convention) in any circumstances. We are here, in sum, in the domain of *jus cogens*[246], as the IACtHR itself acknowledged in its judgments in the cases of *Goiburú et al.* v. *Paraguay* (of 22 September 2006) and of *La Cantuta* v. *Peru* (of 29 November 2006)[247].

218. The ECHR could have reached a similar conclusion, had its majority developed its reasoning on the corresponding provisions (Articles 6 (1) and 13 of the European Convention) with attention focused on the essence of the right of access to justice, rather than on its permissible or implicit "limitations". Had it done so — as it should — the Court's

[245] IACtHR, case of *Myrna Mack Chang* v. *Guatemala* (judgment of 25 November 2003), separate opinion of Judge Cançado Trindade, paras. 9-55.

[246] IACtHR, case of the *Massacre of Pueblo Bello*, concerning Colombia (judgment of 31 January 2006), separate opinion of Judge Cançado Trindade, paras. 60-62 and 64.

[247] Paras. 131 and 160, respectively. On this jurisprudential construction, cf. A. A. Cançado Trindade, "The Expansion of the Material Content of *Jus Cogens*: The Contribution of the Inter-American Court of Human Rights", *La Convention européenne des droits de l'homme, un instrument vivant — Mélanges en l'honneur de Ch. L. Rozakis* (eds. D. Spielmann *et al.*), Brussels, Bruylant, 2011, pp. 27-46; A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., Secretaría General de la OEA, 2009, pp. 3-29; A. A. Cançado Trindade, "La Ampliación del Contenido Material del *Jus Cogens*", *XXXIV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2007*, Washington D.C., Secretaría General de la OEA, 2008, pp. 1-15.

majority would not have upheld State immunity the way it did (cf. Section XII *supra*). In my perception, Articles 6 and 13 of the European Convention — like Articles 8 and 25 of the American Convention — point to an entirely different direction, and are not at all "limited" with regard to State immunity.

219. Otherwise States could perpetrate grave violations of human rights (such as massacres or subjection of persons to forced labour) and get away with that, by relying on State immunity, in a scenario of lawlessness. Quite on the contrary, States parties are bound, by Articles 6 and 13 of the European Convention, to provide effective (domestic) remedies in a fair trial, with all the guarantees of the due process of law, in *any* circumstances. This is proper of the rule of law, referred to in the preamble of the European Convention. There is no room for the privilege of State immunity here[248]; where there is no right of access to justice, there is no legal system at all. Observance of the right of access to justice is imperative, it is not "limited" by State immunity; we are here in the domain of *jus cogens*.

220. It is immaterial whether the harmful act in grave breach of human rights was a governmental one *(jure imperii)*, or a private one with the acquiescence of the State *(jure gestionis)*, or whether it was committed entirely in the forum State or not (deportation to forced labour is a trans-frontier crime). This traditional language — the conceptual poverty of which is conspicuous — is alien to what we are here concerned with, namely, the imperative of the realization of justice in cases of grave breaches of human rights and of international humanitarian law. State immunity does not stand in the domain of redress for grave violations of the fundamental rights of the human person.

XXII. Out of Lawlessness: The Individual Victim's Right to the Law *(Droit au Droit)*

221. This leads me to the right of access to justice, in its proper dimension: the right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *procès équitable*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due. The realization of justice is in itself a form of reparation, granting *satisfaction* to the victim. In this way those victim-

[248] Cf., to this effect, J. Bröhmer, *State Immunity and the Violation of Human Rights*, The Hague, Nijhoff, 1997, pp. 164, 181 and 186-188; W. P. Pahr, "Die Staatenimmunität und Artikel 6 Absatz 1 der Europäischen Menschenrechtkonvention", *Mélanges offerts à P. Modinos — Problèmes des droits de l'homme et de l'unification européenne*, Paris, Pedone, 1968, pp. 222-232.

ized by oppression have their right to the law *(droit au Droit)* duly vindicated.

222. It is not my intention to dwell much further on this point — which I have done elsewhere[249] — but just refer to it in the course of my reasoning in the present dissenting opinion. May I just recall that, in its *jurisprudence constante*, the IACtHR has rightly taken together the interrelated provisions of the right to an effective remedy and the guarantees of due process of law (Articles 8 and 25 of the American Convention on Human Rights), while the ECHR has begun only more recently — in the course of the last decade, from the case *Kudla* v. *Poland* (judgment of 18 October 2000) onwards — to follow the same approach, bringing together Articles 6 (1) and 13 of the European Convention on Human Rights. This is reassuring, as the two provisions reinforce each other, to the benefit of the protected persons. The jurisprudential construction of the two international human rights tribunals is today converging, in respect of the right of access to justice *lato sensu*.

223. The individual's right to reparation, as already pointed out, is one of its components. In the case *Hornsby* v. *Greece* (judgment of 19 March 1997), the ECHR, after recalling the right to institute proceedings before a court and the right to procedural guarantees, added that the right of access to justice would be "illusory" if the legal system did not allow a final and operative binding judicial decision; in the view of the ECHR, a judgment not duly executed would lead to situations incompatible with the rule of law which the States parties undertook to respect when they ratified the European Convention.

224. The jurisprudential construction bringing the right of access to justice into the domain of *jus cogens (supra)* is, in my understanding, of great relevance here, to secure the ongoing evolution of contemporary international law upon humanist foundations. From this perspective, it is most unfortunate that the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property olympically ignored the incidence of *jus cogens*. In its *travaux préparatoires* it had the occasion to take it in due account, but it preferred simply not to do so: its draftsmen dropped the matter in 1999, when the Working Group of the ILC was evasive about it, and the Working Group of the Sixth Committee of the UN General Assembly argued that the matter "was not yet ripe" for codification (as recalled with approval by the Court in the present Judgment, para. 89).

225. This is simply not true, as, by that time, the IACtHR and the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) were already engaged in their jurisprudential construction on the expanding material content *of jus cogens* (being the two contemporary interna-

[249] A. A. Cançado Trindade, *Evolution du droit international au droit des gens gens — L'accès des individus à la justice internationale* (. . .), *op. cit. supra* note 243, pp. 113-119.

tional tribunals which have most contributed to that development to date)[250]. There were, moreover, other manifestations of contemporary international law that could have been taken into account, but were not. The 2004 UN Convention, which has not yet entered into force, has been heavily criticized[251] for not having addressed the problem of the jurisdictional immunities of States in face of *grave violations of human rights and of international humanitarian law*.

226. Its draftsmen were aware of the problem, but the Working Groups of the ILC and of the VI Committee of the General Assembly, finding the matter "not ripe" to be taken into account, took the easier path to conclude the Convention and have it approved, leaving the problem unresolved, continuing to raise uncertainties, — as the present case before this Court concerning the *Jurisdictional Immunities of the State* bears witness of. Worse still, the majority of the ECHR (Grand Chamber) in the *Al-Adsani* case (cf. *supra*) availed itself of that omission of the draftsmen of the 2004 UN Convention to arrive at its much-criticized decision in 2001[252], and, over a decade later, the Court's majority in the present case does the same in the Judgment (paras. 89-90) adopted today. I cannot at all accept that contemporary international law can thereby be "frozen", and hence the care I have taken to elaborate and to present this dissenting opinion.

XXIII. Towards the Primacy of the Never Vanishing *Recta Ratio*

227. Grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility with aggravating circumstances, and the right to reparation to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of law (in distinct legal systems — *Recht/diritto/droit/direito/derecho/right*) as a whole. Before I move on to this next point, may I, at this stage of the present dissenting opinion, raise just a couple of questions, which I find indeed appropriate to ask: when will human beings learn the lessons of the past, when will

[250] Cf. note 247 *supra*.

[251] E.g., L. Caflisch, "Immunité des Etats et droits de l'homme: Evolution récente", in *Internationale Gemeinschaft und Menschenrecht — Festschrift für G. Ress*, Cologne/Berlin, C. Heymanns Verlag, 2005, pp. 937-938, 943 and 945; C. Keith Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol", 55 *International and Comparative Law Quarterly* (2006), pp. 412-413 and 426; L. McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty", 18 *European Journal of International Law* (2007), pp. 903-904, 914 and 918-919; L. McGregor, "State Immunity and *Jus Cogens*", 55 *International and Comparative Law Quarterly* (2006), pp. 437-439 and 445.

[252] The ECHR (Grand Chamber) referred in detail to that omission of the Working Group of the ILC in 1999, in paragraphs 23-24, 62-63 and 65-67 of its judgment of 21 November 2001 in the *Al-Adsani* case.

they learn from the terrible sufferings of previous generations, of the kind which lie in the factual origins of the present case? As they have not learned to date (as it seems), perhaps they never will.

228. When will they stop dehumanizing their fellow human beings? As they have not stopped to date, perhaps they never will. When will they reflect in their laws the superior values *(neminem laedere)* needed to live in peace and with justice? As they have not done it yet, perhaps they never will. In all probability, they will keep on living with evil, subjecting themselves thereunder. Yet, even in this grim horizon, endeavours towards the primacy of the *recta ratio* also seem never to vanish, as if suggesting that there is still always hope, in the perennial quest for justice, never reaching an end, like in the myth of Sisyphus.

229. It is thus not surprising to find that the (underlying) problem of evil has been and continues to be one raising major concern, throughout the history of human thinking. As lucidly warned, in the aftermath of the Second World War, by R. P. Sertillanges, for centuries philosophers, theologians and writers have drawn their attention to that problem, without however finding a definite or entirely satisfactory answer to it. In his own words, "All souls, all groups and all civilizations fear evil. (. . .) The problem of evil calls into question the destiny of all, the future of humankind."[253]

230. The effects of the planified criminal State policies of the Third Reich over the population have been addressed by various contemporaries of those years of darkness. The historical novels of the thirties, of a sensitive person like Klaus Mann, for example, while criticizing the intellectuals who let themselves be co-opted by Nazism (in *Mephisto*, published in 1936), or else describing the drama of those who emigrated into exile to escape persecution (in *Le volcan*, published in 1939), are permeated by premonitions of the social cataclysm that was soon to take place (like a volcano that was already erupting), and was to victimize millions of human beings[254] — amongst whom forced labourers from the occupied countries.

231. In fact, throughout the last century, there were States which indeed pursued criminal policies — through those who spoke and acted in their names (as institutions have no moral conscience) — and victimized millions of human beings, incurring in responsibility for grave violations of human rights and of international humanitarian law of various kinds. The facts are fully documented nowadays by historians. What remains to be further developed, by jurists, is the responsibility of States themselves

[253] A.-D. Sertillanges, *Le problème du mal — L'histoire*, Paris, Aubier, 1948, p. 5. *[Translation by the Registry.]*

[254] Cf. K. Mann, *Mefisto* [*Mephisto*, 1936], Barcelona, Debolsillo, 2006 (reed.), pp. 31-366; K. Mann, *Le volcan* [1939], Paris, Grasset, 1993, pp. 9-404.

(besides that of their officials) for the crimes perpetrated, which from time to time, over decades, became the object of some rather solitary and penetrating studies[255].

232. The human suffering which ensued from those atrocities (narrated in some historical accounts and testimonies of surviving victims) can hardly be measured, goes beyond imagination, and is simply devastating. Moreover, suffering *projects itself in time*, especially if victims of grave violations of their rights have not found justice. In my own experience of the international adjudication (in the IACtHR) of cases of massacres, there were episodes when, many years after their occurrence, the surviving victims (or their *ayants droit*) remained in search of judicial recognition of their suffering[256]. Unlike what one may easily assume, human suffering not always effaces with the passing of time: it may also increase, in face of manifest injustice — and particularly in cultures that wisely cultivate the links of the living with their dead. Human suffering, in cases of persisting injustice, may project itself on an inter-generational scale.

233. The lucid German thinker Max Scheler (1874-1928), in an essay published posthumously (*Le sens de la souffrance*, 1951), expressed his belief that all sufferings of human beings have a meaning, and, the more profound they are, the harder it is to struggle against their causes[257]. And in one of his thoughtful writings in the years following the Second World War (an essay originally published in 1953), the learned German philosopher Karl Jaspers (1883-1969) pondered that reason exists "only by decision", it "arises from freedom", it is inseparable from existence itself; although we know that we stand all at the mercy of events beyond our control, "[r]eason can stand firm only in the strength of Reason itself"[258].

234. Shortly afterwards, in his book *Origine et sens de l'histoire* (1954), Karl Jaspers clearly expressed his belief that

> "(. . .) It is on [natural law] that the law of nations is founded, on [natural law] that a court would be constituted, within the world order, to protect the individual against abuse by the State by allowing him recourse to effective justice, exercised in the name of human sovereignty.
>
> (. . .) [I]t can be shown that the totalitarian State and total war are contrary to natural law, not only because they treat as an end that

[255] Cf., *inter alia*, Vespasien V. Pella, *La criminalité collective des Etats et le droit pénal de l'avenir*, Bucharest, Imprimerie de l'Etat, 1925, pp. 1-340; Roberto Ago, "Le délit international", 68 *RCADI* (1939), pp. 419-545; Pieter N. Drost, *The Crime of State — Book I: Humanicide*, Leiden, Sijthoff, 1959, pp. 1-352; J. Verhaegen, *Le droit international pénal de Nuremberg — Acquis et regressions*, Brussels, Bruylant, 2003, pp. 3-222.

[256] Cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, pp. 159-165.

[257] M. Scheler, *Le sens de la souffrance*, Paris, Aubier, [1951], pp. 5 and 27.

[258] K. Jaspers, *Reason and Anti-Reason in Our Time* [1953], Hamden/Conn., Archon Books, 1971 (reed.), pp. 50, 59 and 84.

> which is the means and conditions of life, but also because they proclaim the absolute value of the means, thus destroying the sense of the collective, of human rights.
>
> Natural law is confined to organizing the conditions of life (. . .) representing all aspects of the human condition in this world"[259].

235. In an illuminating essay published in Germany promptly after the war, in 1946 (titled *Die Schuldfrage/La question de la culpabilité*) — derived from a course he delivered in the winter of 1945-1946 at the University of Heidelberg, which has been re-edited ever since and has survived the onslaught of the passing of time —, K. Jaspers distinguished between criminal guilt, political guilt, moral guilt and metaphysical guilt, seeking to establish degrees of personal responsibility proportional to one's participation in the occurrences at issue. In one passage of his long-lasting essay, in addressing the "differentiation of the German guilt", K. Jaspers, discarding excuses on the basis of State sovereignty, asserted, in respect of the Second World War, that

> "This time there can be no doubt that Germany planned and prepared this war and started it without provocation from any other side. It is altogether different from 1914. (. . .) Germany, (. . .) violating international law, has committed numerous acts resulting in the extermination of populations and in other inhumanities."[260]

236. And then he identified the question, which he phrased "How can we speak of crimes in the realm of political sovereignty?" — with what he identified as "a habit of thought derived from the tradition of political life in Europe". And he added that

> "heads of States (. . .) are men and answer for their deeds. (. . .) The acts of States are also the acts of persons. Men are individually responsible and liable for them. (. . .) In the sense of humanity, of human rights and natural law, (. . .) laws already exist by which crimes may be determined."[261]

In fact, throughout all the proceedings before this Court in the present case concerning the *Jurisdictional Immunities of the State*, Germany recognized its State responsibility (cf. paras. 24-31) for the historical facts lying in the origins of the *cas d'espèce*.

237. Moreover, in the course of the last decades it provided the corresponding compensation on distinct occasions and circumstances. In addition, on successive occasions, Germany — homeland of universal thinkers and writers like, e.g., I. Kant (1724-1804) and J. W. Goethe (1749-1832) —

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[259] K. Jaspers, *Origine et sens de l'histoire*, Paris, Libr. Plon, 1954, p. 245. *[Translation by the Registry.]*

[260] K. Jaspers, *The Question of German Guilt*, N.Y., Fordham University Press, 2001 (reed.), p. 47. And cf. K. Jaspers, *La culpabilité allemande*, Paris, Editions de Minuit, 2007 (reed.), pp. 64-65.

[261] K. Jaspers, *The Question of German Guilt*, *op. cit. supra* note 260, pp. 49-50. And cf. K. Jaspers, *La culpabilité allemande*, *op. cit. supra* note 260, p. 66.

expressed public apologies, such as the renowned silent apology of former Chancellor Willy Brandt in Warsaw, Poland, on 7 December 1970, among other and successive acts of contrition. This being so, I wonder why Germany has not yet provided reparation to the surviving IMIs who have not received it to date (cf. *infra*), instead of having brought the present case before this Court.

238. In my view, in the present Judgment the Court could and should have gone beyond expressing its "surprise" and "regret" (para. 99) at the persistence of the unresolved situation concerning the IMIs. In effect, to attempt to make abstraction of grave violations of human rights or of international humanitarian law, or to attempt to assimilate them to any kind of "tort", is like trying to withhold the sunlight with a blindfold. Even in the domain of State immunities, there has been acknowledgment of the changes undergone by it, in the sense of restricting or discarding such immunities in the occurrence of those grave breaches, due to the advent of the international law of human rights, with attention focused on the right of access to justice and international accountability[262].

239. There is nowadays a growing trend of opinion sustaining the removal of immunity in cases of international crimes, for which reparation is sought by the victims[263]. In effect, to admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time to insist on shielding States with immunity, in cases of international crimes — marked by grave violations of human rights and of international humanitarian law — in pursuance of State (criminal) policies, in my perception amounts to a juridical absurdity.

XXIV. The Individuals' Right to Reparation as Victims of Grave Violations of Human Rights and of International Humanitarian Law

1. The State's Duty to Provide Reparation to Individual Victims

240. As early as in 1927-1928, the PCIJ gave express judicial recognition to a precept of customary international law, reflecting a fundamental principle of international law, to the effect that

[262] Cf. [Various Authors], *Le droit international des immunités: contestation ou consolidation?* (Colloque de Paris de 2003, ed. J. Verhoeven), Paris/Brussels, LGDJ/Larcier, 2004, pp. 6-7, 52-53 and 55.

[263] Cf. *ibid.*, p. 121, and cf. pp. 128-129, 138 and 274. And cf. also: M. Frulli, *Immunità e Crimini Internazionali — L'Esercizio della Giurisdizione Penale e Civile nei Confronti degli Organi Statali Sospettati di Gravi Crimini Internazionali*, Torino, G. Giappichelli Edit., 2007, pp. 135, 140 and 307-309; [Various Authors], *Droit des immunités et exigences du procès équitable* (Colloque de Paris de 2004, ed. I. Pingel), Paris, Pedone, 2004, pp. 20, 31, 150 and 152.

> "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.)

The PCIJ added that such reparation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 29 and 47-48).

241. In the present case concerning the *Jurisdictional Immunities of the State*, as already indicated, Germany itself recognized its State responsibility for the grave breaches of human rights and of international humanitarian law which rest in the factual origins of the *cas d'espèce* (cf. Section III *supra*). The *State*'s obligation of reparation ineluctably ensues therefrom, as the "indispensable complement" of those grave breaches. As the *jurisprudence constante* of the old PCIJ further indicated, already in the inter-war period, that obligation is governed by international law in all its aspects (e.g., scope, forms, beneficiaries); compliance with it shall not be subject to modification or suspension by the respondent State, through the invocation of provisions, interpretations or alleged difficulties of its own domestic law (*Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26-27; *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, pp. 32 and 35; *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24).

242. The individuals' right to reparation as victims of grave violations of human rights and of international humanitarian law was much discussed before this Court in the present case. In this regard, Germany contended that, under general international law, individuals are not granted the right of reparation, "and certainly not for war damages"[264]. In its view, "Article 3 of the IV Hague Convention of 1907, as well as Article 91 of the First Additional Protocol (of 1977) to the Four Geneva Conventions on International Humanitarian Law of 1949, given the very structure of the Conventions, can only deal with State responsibility at inter-State level, and, hence, cannot have any direct effect for individuals"[265]. As to, more specifically, whether individual victims are conferred rights which can be invoked before courts of law, Germany argued that

> "it is hard to see how the unwarranted blend of two different concepts, one of which — the right of access to justice — is subjected to various limitations, and the other of which — the alleged right of action as a

[264] CR 2011/17, p. 42.
[265] *Ibid.*

> consequence of a war crime — simply does not exist *de lege lata*, can together create a super-rule of *jus cogens*" [266].

243. In turn, Italy contended that the goal of "preserving individual rights from an unjust privilege and granting the individual access to justice and to tort reparation also characterized further developments of the immunity rule and its exceptions" [267]. It further claimed that

> "[t]he restriction of immunity in cases of individuals bringing lawsuits to obtain redress for a grave breach of the most fundamental principles of human dignity granted by *jus cogens* rules seems to be a reasonably balanced solution". [268]

Moreover, it also argued that "[w]hen the victims of violations of fundamental rules of the international legal order, deprived of any other means of redress, resort to national courts, the procedural bars of State immunity cannot bring the effect of depriving such victims of the only available remedy" [269].

244. For its part, Greece also held, in this respect, that "the fundamental argument in the position of the Greek courts is based on the recognition that there is an individual right to reparation in the event of grave violations of humanitarian law" [270]. Greece claimed that

> "the obligation on the State to compensate individuals for violations of the rules of humanitarian law seems to derive from Article 3 of the IV Hague Convention of 1907, even though it is not expressly stated in that Article and even though individuals needed State mediation through inter-State treaties. (. . .) That is made clear by the fact that individuals are not excluded from the text of Article 3. This line of argument also emerges from the *travaux préparatoires* of the Second Hague [Peace] Conference." [271]

245. The individual right to reparation is well-established in international human rights law, which counts on a considerable case law of international human rights tribunals (such as the European and Inter-American Courts) on the matter [272]. Beyond that, public interna-

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[266] CR 2011/17, p. 45.
[267] Counter-Memorial of Italy, para. 4.22.
[268] *Ibid.*, para. 4.101.
[269] *Ibid.*, para. 4.103.
[270] CR 2011/19, p. 22 (translation).
[271] *Ibid.*, pp. 22-23 (translation).
[272] The case law on the matter of the IACtHR has been particularly singled out, for the *diversity of forms* of the reparations it has granted to the victims; cf., e.g. [Various Authors], *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?, op. cit. supra* note 67, pp. 17-334; [Various Authors], *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pedone, 2009, pp. 7-413; [Various Authors], *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity — Systems in Place and Systems in the Making* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 217-282.

tional law itself has been undergoing a continuous development in relation to reparation for war-related individual claims, traditionally regarded as being subsumed by inter-State peace arrangements. From the nineties onwards, there have been attempts to re-structure such classical approach into the new line of the adjudication of individual claims by "regular courts of law"[273]. After all, the ultimate victims of violations of international humanitarian law are individuals, not States.

246. Individuals subjected to forced labour in the German war industry (1943-1945), or the close relatives of those murdered in Distomo, Greece, or in Civitella, Italy, in 1944, during the Second World War, or victimized by other State atrocities, are the *titulaires* (with their *ayants-droits*) of the corresponding right to reparation. Victims are the true bearers of rights, including the right to reparation, as generally recognized nowadays. Illustrations exist nowadays also in the domain of international humanitarian law. A study of the International Committee of the Red Cross (ICRC) on customary international humanitarian law rules[274] can be recalled in this connection. Rule 150 reads as follows: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."[275] As to, specifically, the question of "reparation sought directly by individuals", Rule 150 refers to "an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State"[276].

247. Furthermore, the 2004 Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, after asserting that grave violations of human rights and of international humanitarian law "can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or State-like entity) on whose behalf the perpetrator was acting", added that such international responsibility requires that that "the State (or the State-like entity) must pay compensation to the victim" (para. 593).

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[273] R. Dolzer, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", 20 *Berkeley Journal of International Law* (2002), p. 296.

[274] ICRC, *Customary International Humanitarian Law* (eds. J.-M. Henckaerts and L. Doswald-Beck), Vol. I: Rules, Geneva/Cambridge, Cambridge University Press, 2005, esp. pp. 537-550.

[275] *Ibid.*, p. 537; according to the appended summary, State practice establishes this Rule as one of "customary international law applicable in both international and non-international armed conflicts".

[276] *Ibid.*, p. 541; in this regard, Rule 150 refers to Article 33 (2) of the ILC Articles on State Responsibility and the commentary thereof, and asserts that reparations have been granted directly to individual victims through different procedures, ranging from mechanisms set up by inter-State agreements to reparations sought by individuals directly before national courts.

248. After singling out the impact of international human rights law on the domain of State responsibility, the 2004 Report stated that there is nowadays "a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility" (p. 151, note 217). The aforementioned Report of the Commission on Darfur then concluded that, under the impact of the international law of human rights,

> "the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made" (para. 598).

249. Reference can also be made to the legal regime of the Ethiopia-Eritrea Claims Commission: according to Article 5 (1) of the Agreement of 12 December 2000 between the Governments of the State of Eritrea and of the Federal Democratic Republic of Ethiopia, the Commission was thereby set up in order

> "to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (. . .) of one party against the Government of the other party or entities owned or controlled by the other party".

Furthermore, the 2010 draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), of the ILA International Committee on Reparation for Victims of Armed Conflict, in addressing the right to reparation (under Article 6), acknowledges the enhanced position of individuals in international human rights law, and sees no reason why individuals were to have a weaker position under the rules of international law applicable in armed conflicts.

250. In the same vein, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[277], sets forth, in Article 15, the duty of States to provide for reparation to victims:

> "In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross

[277] Adopted and proclaimed by UN General Assembly resolution 60/147, of 16 December 2005.

violations of international human rights law or serious violations of international humanitarian law."

All these recent developments go beyond the strict and traditional inter-State dimension, in establishing the individuals' right to reparation as victims of grave violations of human rights and of international humanitarian law.

251. It would appear odd, if not surreal, if the domain of State immunity were to remain oblivious of such significant developments in recent years. The *titulaires* of the right to reparation for those grave violations are the individual victims who suffered them. As I sustained in my dissenting opinion (para. 178) in this Court's Order of 6 July 2010 (dismissing the Italian counter-claim) in the present case concerning the *Jurisdictional Immunities of the State*, States cannot at all waive rights that do not belong to them. One cannot at all turn one's back to significant developments in areas of international law, such as those of the international law of human rights and international humanitarian law, so as to deprive the human person of its right to redress. This would lead to manifest injustice.

252. It appears clearly to me without foundation to claim that the regime of reparations for grave breaches of human rights and of international humanitarian law would exhaust itself at inter-State level, to the detriment of the individuals who suffered the consequences of war crimes and crimes against humanity. After all, those individuals are the *titulaires* of the right to reparation, as a consequence of those grave violations of international law *inflicted upon them*. An interpretation of the regime of reparations as belonging purely to the inter-State level would furthermore equate to a complete misconception of the position of the individual in the international legal order. In my own conception, "the human person has emancipated herself from her own State, with the acknowledgement of her rights, which are prior and superior to this latter"[278]. Thus, the regime of reparations for grave breaches of human rights and of international humanitarian law cannot possibly exhaust itself at the inter-State level, wherein the individual is left at the end without any reparation at all.

253. It is also to be kept in mind that national courts are not the only avenue for victims to obtain redress for grave violations of human rights and of international humanitarian law. There have been, in fact, other avenues, in the international *fora*, for individuals to seek and obtain reparation. These include Mixed Claims Tribunals and Commissions, and quasi-judicial bodies set up either by the UN Security Council, or by peace treaties, or at the initiative of States or corporations, and "dormant

[278] A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 209; A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des individus à la justice internationale…*, *op. cit. supra* note 243, pp. 29 and 146.

claims" arbitrations[279]. Thus, national courts are one avenue for victims to obtain redress, depending on the circumstances of the case, but they are not the only one. In contemporary international law, national and international courts are in increasingly closer contact with each other, in distinct domains.

254. For example, in the protection of individual rights, where there is a convergence between public domestic law and international law, they are so, by means of the States' duty, to provide effective local remedies[280]. In the realm of the law of regional integration, the preliminary ruling procedure (e.g., as under Article 234 of the EC Treaty) affords another example to the same effect. In international criminal law, the principle of complementarity provides yet another illustration. And the examples multiply, disclosing ultimately the *unity of the law*. In fact, what ultimately matters is the *realization of justice* at national and international levels. After all, international crimes are not acts *jure imperii*, they remain *crimes* irrespective of who committed them; they are grave breaches of human rights and of international humanitarian law which require reparations to the victims; claims of State immunity cannot do away with the State's duty to provide reparation to the individual victims.

255. In effect, the acknowledgment of the *individual's* right to reparation (corresponding to that obligation of the State), as a component of the individual's right of access to justice *lato sensu* — with judicial recognition nowadays from both the IACtHR and the ECHR — becomes even more compelling in respect of *grave violations of human rights and of international humanitarian law*, like the ones which form the factual background of the present case relating to the *Jurisdictional Immunities of the State* before this Court. Immunities can hardly be considered in a legal *vacuum*. From the very start of the present case, in the written phase of the proceedings, up to the conclusion of the oral phase, the *punctum pruriens* of a major difference between the contending Parties was precisely the counterposition of State immunities to the State's duty to provide reparation to those victimized by grave violations of human rights and of international humanitarian law.

256. Germany's thesis, clearly expounded in its Memorial, is that "Italy is bound to abide by the principle of sovereign immunity which debars private parties from bringing suits against another State before the courts of the forum State" (para. 47). In its view, "Italy cannot rely on

[279] Cf., e.g., E.-C. Gillard, "Reparation for Violations of International Humanitarian Law", 85 *International Review of the Red Cross* (Sept. 2003), note 851, pp. 539-545; and cf., generally, [Various Authors], *Redressing Injustices through Mass Claims Processes — Innovative Responses to Unique Challenges*, Oxford University Press/PCA, 2006, pp. 3-425.

[280] A. A. Cançado Trindade, "Exhaustion of Remedies in International Law and the Role of National Courts", 17 *Archiv des Volkerrechts*, Tübingen (1977-1978), pp. 333-370.

any justification for disregarding the immunity which Germany enjoys under that principle" (para. 47). Contrariwise, Italy's thesis, as expounded in its Counter-Memorial, is that

> "the State which has committed grave violations of fundamental rules cannot be regarded as being entitled to invoke immunity for its wrongful acts, even if these acts are to be qualified as *acta jure imperii*. If granted, immunity would amount to an absolute denial of justice for the victims and to impunity for the State." (Para. 4.110.)

In its view,

> "[t]he international legal order cannot, on the one hand, establish that there are some fundamental substantive rules, which cannot be derogated from and whose violation cannot be condoned, and on the other hand grant immunity to the author of violations of these fundamental rules in situations in which it is clear that immunity substantially amounts to impunity" (para. 4.111).

257. Consideration of this matter — the State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law — cannot possibly be avoided. It is a State's duty under customary international law and pursuant to a fundamental general principle of law. This brings me now to the issue of compliance or otherwise, by the responsible State, with the duty to provide reparation to the victims — referred to by Italy — for those grave violations which took place in the Second World War. The following points will be addressed in sequence: first, the categories of victims in the *cas d'espèce*; secondly, the legal framework of the "Remembrance, Responsibility and Future" Foundation (2000); and thirdly, assessment of the submissions of the contending Parties.

2. *The Categories of Victims in the* Cas d'Espèce

258. According to Italy, there are three categories of victims of the aforementioned violations[281], entitled to receive reparation, namely:

> "*(i)* soldiers who were imprisoned, denied the status of prisoners of war, and sent to forced labour [the so-called 'Italian military internees']; *(ii)* civilians who were detained and transferred to detention camps where they were sent to forced labour; *(iii)* civilian populations who were massacred as part of a strategy of terror and reprisals against the actions of freedom fighters"[282].

[281] Germany also classifies the victims into the three categories described by Italy; cf. Memorial of Germany, para. 13.

[282] Counter-Memorial of Italy, para. 2.8.

259. Italy contends that "none, or very few, of them has obtained [reparation] so far"[283]. Italy further argues, with regard to Mr. Ferrini in particular, that he belongs to the category of *(ii)* civilians who were detained and transferred to detention camps to be used as forced labour[284]. While Mr. Ferrini had already initiated proceedings before the *Tribunale di Arezzo* in 1998, he also sought to obtain reparation from German authorities. Italy claims that Mr. Ferrini decided not to submit a request for compensation under the law of 2 August 2000 (establishing the "Remembrance, Responsibility and Future" Foundation) "since he had not been detained in 'another place of confinement' within the meaning of Section 11, paragraph 1 of the Foundation Act and was furthermore not in a position to demonstrate that he met the requirements as set up by the guidelines of the Foundation"[285].

260. Italy adds that "[i]n 2001 Mr. Ferrini, together with other complainants, also lodged a constitutional complaint against Sections 10, paragraph 1, 11, paragraph 3, and 16, paragraphs 1 and 2 of the Foundation Law with the Federal Constitutional Court" and that "[t]his complaint was later rejected by the Federal Constitutional Court"[286]. Keeping this background information in mind, attention may now be turned to the legal framework of the "Remembrance, Responsibility and Future" Foundation, established in 2000.

3. The Legal Framework of the "Remembrance, Responsibility and Future" Foundation (2000)

261. In the years 1999-2000, Germany conducted diplomatic negotiations with a number of States — which formerly were belligerent parties in the Second World War — concerning reparation for individuals who had, during the war, been subjected to forced labour in German companies and in the public sector[287]. According to Italy, those negotiations were triggered by lawsuits brought by former forced labourers against German companies in US courts, and, against that background, Ger-

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[283] Counter-Memorial of Italy, para. 2.8.

[284] In Italy's words:

> "War crimes were widely committed against the civilian population, and thousands of civilians of military age, among them Mr. Ferrini, Mr. Mantelli, and Mr. Maietta (whose cases are referred to by the Applicant in its Memorial), were also transferred to detention camps in Germany, or in territories controlled by Germany, where they were employed as forced labour as another form of retaliation against the Italian civilian population." (*Ibid.*, para. 2.7.)

[285] *Ibid.*, para. 2.43 (note 43). Cf. summary of facts reported in *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione (ANRP) and 275 Others* v. *Germany*, p. 5 (Annex 10 to Italy's Counter-Memorial).

[286] Counter-Memorial of Italy, para. 2.43 (note 43).

[287] *Ibid.*, para. 2.27. And cf., generally, J. Authers, *op. cit. supra* note 230, pp. 420-449.

many and the United States concluded an agreement that envisaged the establishment of a mechanism for addressing reparation claims of former forced labourers[288].

262. Upon the conclusion of such agreement, on 2 August 2000 a German federal law was adopted, setting up the "Remembrance, Responsibility and Future" Foundation[289]. The purpose of the Foundation was to make funds available to persons who had been victims of forced labour "and other injustices from the National Socialist period" (Article 2 (1) of the Foundation Law). The Foundation did not provide reparation directly to individuals defined by the Foundation Law, but rather to so-called "partner organizations", which received specified global amounts (Article 9 of the Foundation Law)[290].

263. The categories of persons entitled to receive reparation, according to the Article 11 of the Foundation Law, were thus defined: *(a)* individuals "detained in a concentration camp, or in another prison or camp, or in a ghetto under comparable conditions, and subjected to forced labour" (Art. 11 (1)); *(b)* individuals "deported from their home country to Germany in the borders of 1937, or a territory occupied by Germany, and subjected to forced labour in a private company or in the public sector, and (. . .) detained (. . .) or subjected to particularly bad conditions of life" (Art. 11 (2)); and *(c)* it was expressly stated — importantly for the proceedings of the present case — that the status of a prisoner of war does not give entitlement to payments or benefits under the Law (Art. 11 (3))[291].

264. Thus, although the Foundation Law was intended specifically to cover categories of victims who were left out of other German reparation arrangements, the Article 11 (3) of the Foundation Law expressly excluded prisoners of war, stating that "[e]ligibility cannot be based on prisoner-of-war status". As to the scope of this provision, it has been pointed out that, in the official commentary of the Foundation Law,

> "the Federal Government explained the exclusory clause as follows:
>
> 'Prisoners of war subjected to forced labour are in principle not entitled to payments because the rules of international law allowed a detaining power to enlist prisoners of war as workers. However,

[288] Counter-Memorial of Italy, para. 2.27.

[289] Hereinafter referred to as "the Foundation".

[290] Cf. B. Fassbender, "Compensation for Forced Labour in World War II: The German Compensation Law of 2 August 2000", 3 *Journal of International Criminal Justice* (2005), pp. 244-245; cf. also, Counter-Memorial of Italy, paras. 2.27-2.28.

[291] Cf. B. Fassbender, "Compensation for Forced Labour in World War II...", *op. cit. supra* note 290, p. 246.

> persons released as prisoners of war who were made 'civilian workers' *(Zivilarbeiter)* can be entitled under the [Foundation Law] if the other requirements are met.'
>
> However, in 'guidelines' adopted in August 2001 in agreement with the Federal Ministry of Finance, the Board of the Foundation further limited the exclusionary effect of the clause by determining that 'prisoners of war who have been taken to a concentration camp' are not excluded from benefits under the Statute 'because in this case special discrimination and mistreatment on account of the National Socialist ideology is relevant, and imprisonment in a concentration camp cannot be regarded as a general wartime fate (. . .)'."[292]

265. Against this background, an expert opinion (by C. Tomuschat) concerning the issue of the entitlement of "Italian military internees" to reparation under the Foundation Law[293] cannot pass unnoticed here. Such expert opinion advised the German Government that, although Germany treated persons that were to be given the status of prisoners of war (POWs) as forced labourers, their status was actually that of prisoners of war. In the words of the expert opinion, the "Italian military internees" "possessed, up until their final liberation after the end of the Second World War, POW status in accordance with the rules of international law, although the German Reich massively infringed this status. Accordingly, the exclusion clause [Article 11 (3) of the Foundation Law] can in principle be applied to them"[294].

266. Thus, the expert opinion prioritized the military internees' *de jure* status — a status (with all the rights attached to it) which was in fact denied to them — over their *de facto* treatment. On the basis of the advice provided by the aforementioned expert opinion, many victims fell under the exception of Section 11 (3) of the Foundation Law *(supra)* and were thus excluded from that reparation scheme. Against this background, Italy submits that, since the year 2000, "thousands of [Italian military internees] and Italian civilians subjected to forced labour had lodged requests for compensation" on the basis of the Foundation Law and those requests "were almost all rejected". It adds that

> "[i]n 2003, German administrative courts had dismissed the lawsuits filed by a certain number of [Italian military internees]. With the sole exception of the *Ferrini* case, all the claims submitted before Italian

[292] *Op. cit. supra* note 290, p. 246.
[293] Counter-Memorial of Italy, Annex 8.
[294] The expert opinion concluded, however, that a different assessment should be given concerning "Italian military internees", who, in addition to the violation of their prisoner of war status, suffered measures of racist persecution.

courts were filed starting from 2004. At that time it was already evident that Italian forced labourers had no possibility of obtaining redress from German authorities."[295]

267. In my understanding, it is regrettable that the "Italian military internees" were actually precluded from obtaining reparation on the basis of a status which they were *de facto* denied. This was precisely one of the many violations committed by Nazi Germany against those persons: the denial of their right, under international law, to be treated as prisoners of war. Relying on this violation to commit yet another violation — the denial of reparation — amounts to, as Italy puts it, "a Kafkaesque black hole of law"[296], and amounts to a double injustice[297].

4. Assessment of the Submissions of the Contending Parties

268. May I now turn to the arguments of the contending Parties concerning the issue of the reparations due to the victims referred to by Italy, put forward by them in the written and oral phases of the proceedings before the Court in the present case. The materials and submissions of Germany do not generally address which specific victims have in fact received reparation. While Germany does not provide a full account of the reparations it paid after 1945 by stating that "[t]his is not the place to provide a complete balance sheet of all the reparations which the Allied Powers received from Germany after 1945", it nevertheless argues that, under the two 1961 Agreements between Germany and Italy, "considerable payments were made to Italy"[298]; it adds that it made payments to Italy "on grounds of equity", despite the waiver clause of the Peace Treaty[299].

269. The more telling submission of Germany is when it clearly admits that the "Italian military internees" have not received reparation on the basis of an interpretation given of the Foundation Law:

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[295] Counter-Memorial of Italy, para. 2.43. The assertion that Italian military internees have not received reparation for their forced labour is also found in expert writing; cf. R. Buxbaum, "German Reparations after the Second World War", 6 *African-American Law and Policy Report* (2004), p. 39.

[296] CR 2011/18, p. 33, para. 28.

[297] It has been pointed out, in this connection, that "[t]he Italians were not prisoners of war who happened also to be subjected to forced labour. Instead, the exploitation of their labour force was the principal reason for their continued detention in Germany" (B. Fassbender, "Compensation for Forced Labour in World War II . . .", *op. cit. supra* note 290, p. 251). Furthermore, "the living conditions of the Italians were worse than those of the Western Allied soldiers captured by Germany. In particular, Italian detainees suffered from poor nourishment." In a third period, between August 1944 and the end of the war, the detained Italian soldiers were given the status of "civilian workers" *(Zivilarbeiter)* in order to "exploit their manpower in a more efficient way" (*ibid.*, p. 244, note 2).

[298] Reply of Germany, paras. 30-33.

[299] *Ibid.*, para. 33.

> "It is only after the adoption of the 2000 German law on the 'Remembrance, Responsibility and Future' Foundation that Italy made representations to Germany on account of *the exclusion of the Italian military internees ('IMIs') from the scope* ratione personae *of that law. As prisoners of war, this group of persons was not taken into account for the purposes of that belated reparation scheme.*"[300]

270. For its part, in its written submissions, Italy notes that "[a] very large number of victims remained uncovered" by the two 1961 Agreements between Germany and Italy and "has never received appropriate reparation"[301]. While Italy recognizes that Germany has adopted and implemented, over the past decades, a number of measures in order to address the reparation claims from victims of war atrocities, and notes that two important pieces of legislation (the Federal Compensation Law of 1953 and the Foundation Law of 2 August 2000) were adopted, it adds that, nevertheless, neither provided an effective legal avenue for Italian victims to obtain reparation[302]. In this regard, Italy argues that under the 1953 federal compensation law, foreign nationals were generally excluded from compensation, and that, with regard to the Foundation Law:

> "while more than 130,000 Italian forced labourers lodged requests for compensation under the law of 2 August 2000, the great majority of such requests (more than 127,000) were rejected because of the unduly strict requirements for compensation set under that law"[303].

271. Italy also claims that

> "the measures adopted so far by Germany (both under the relevant agreements as well as in unilateral acts) have proved insufficient, in particular because such measures did not cover several categories of victims such as the Italian military internees and the victims of massacres perpetrated by German forces during the last months of the Second World War."[304]

For its part, Germany does not make reference to specific victims, and, instead, only argues generally that "reparations were made" through "a comprehensive scheme for all countries concerned and covering all war damages"[305].

272. Germany also recalls the lump-sum payments made to Italy and Greece, and claims that "[r]oughly 3,400 Italian civilians were com-

[300] Reply of Germany, para. 13 (emphasis added).
[301] Counter-Memorial of Italy, para. 2.18.
[302] *Ibid.*, paras. 2.20-2.21.
[303] *Ibid.*, para. 2.21.
[304] *Ibid.*, para. 7.9.
[305] CR 2011/20, pp. 11-12.

pensated for their forced labour by the "Remembrance, Responsibility and Future" Foundation, and that "roughly 1,000 Italian military internees were awarded compensation for forced labour under the Foundation scheme"[306]. As to this latter group of victims, Germany argues that it "decided to make *ex gratia* payments to former forced labourers in the year 2000", but then admits that "prisoners of war were not included in this specific scheme"; only "those military internees who had also been subjected to racial and/or ideological persecution were entitled to payments"[307].

273. It ensues, from the aforementioned submissions, that not all "Italian military internees" were provided reparations, but only those who had also been victims of "racial and/or ideological persecution"[308]. Italy retorts to this argument of Germany by arguing that the issue underlying the present dispute does not concern those latter victims, but rather hinges upon the "obligation to make reparation for war crimes committed against several thousands of Italian victims that *have not received any reparation, as indirectly admitted by Germany*"[309]. Italy thus concludes that "there is plain and unrestricted recognition of the fact that the rest of the victims — in other words, those who were not victims of persecution, and these represent the vast majority — remained totally unsatisfied"[310].

274. As already pointed out, at the end of the oral hearings before the Court of 16 September 2011, one of the questions I put to the contending Parties aimed at clarifying this particular factual issue: I then asked whether "the specific Italian victims to whom the Respondent refers effectively received reparation", and, if they have not received reparation, whether "they are entitled to it and how can they effectively receive it, if not through national proceedings"[311]. The responses of the contending Parties to this question served to clarify their respective positions on the matter at issue.

275. Germany, for its part, seemed to evade the question by referring to the Court's Order of 6 July 2010 (counter-claim) and by arguing that "the question of whether reparations related to World War II are still due or not is not the subject-matter of the proceedings before the Court"[312]. It also affirmed that the reparation scheme for the Sec-

[306] CR 2011/20, pp. 12-13.
[307] *Ibid.*, p. 13, para. 10.
[308] To whom Italy has already recognized that reparations were made, cf. CR 2011/21, p. 25, para. 33.
[309] *Ibid.*
[310] *Ibid.*, p. 26, para. 35.
[311] *Ibid.*, p. 54.
[312] Written Response of Germany to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 3.

ond World War was a classic inter-State and comprehensive[313] regime, and further argued that those victims who consider to have a claim against Germany can institute proceedings in German courts[314]. Germany thus shed no light into the factual question of whether or not those specific victims have received reparations; it appeared to evade this question by relying, somewhat equivocally, on the Court's Order of 6 July 2010 (counter-claim).

276. Italy, for its part, provided a clear answer to this specific question, in affirming unambiguously that "[n]one of the categories of victims referred to in the cases underlying the present dispute has received reparation"[315]. It added that some categories of victims were never able to claim compensation because no mechanism was put in place while others have been trying to obtain compensation for a decade without any success. Italy further argues that there is strong reluctance on Germany's part to conclude an agreement aimed at making reparation to these categories of victims. It also claimed that the question of reparation for the Italian military internees was addressed by the Italian Ambassador in Berlin during discussions on the possibility of compensation by the Foundation[316].

277. Italy also submitted that, at the moment, there is no other alternative than national proceedings for these categories of victims to receive reparation. Italy argued that had domestic judges not removed immunity, no other avenue would have remained open for war crime victims to obtain reparation[317]. In its comments on Germany's written reply to my question, Italy further claimed that Germany's arguments make it clear that no reparation has been made to numerous Italian victims of war crimes, as its refusal to make reparation was grounded on the argument that it had been relieved of the obligation to make reparation on the basis of the waiver clause of Article 77 of the 1947 Peace Treaty[318]. Germany

[313] Italy takes issue with Germany's statement that the reparation regime set up for the Second World War was "comprehensive". Italy argues that Germany itself, both in its written and oral submissions, admitted that reparations made in relation to Italian victims of war crimes were only "partial". Italy further contends that the 1961 Agreement only provided for reparations for victims of persecution. Thus, Italy submits that the characterization of the reparation scheme as "comprehensive" cannot be accurate, in particular concerning Italian victims of war crimes. Comments of Italy on Germany's Written Reply to the Questions Put by (. . .) Judge Cançado Trindade and on Greece's Written Reply to the Question Put by Judge Cançado Trindade at the Public Sitting Held on 16 September 2011, pp. 1-2.

[314] Written Response of Germany to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 3.

[315] Written Response of Italy to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 9.

[316] *Op. cit. supa* note 315, pp. 9-10.

[317] *Ibid.*

[318] Comments of Italy on Germany's Written Reply to the Question Put by (. . .) Judge Cançado Trindade and on Greece's Written Reply to the Question Put by Judge Cançado Trindade at the Public Sitting Held on 16 September 2011, p. 2.

did not contest Italy's clear assertion that "[n]one of the categories of victims referred to in the cases underlying the present dispute has received reparation"[319]; in its comments to Italy's response to my question, Germany had an opportunity to rebut this statement and set the record straight. Yet, it remained silent to this strong statement[320], and this should not pass unnoticed.

278. As already indicated, the question of whether reparations have or have not been paid has to be assessed in light of the records before the Court; both Parties have been given ample opportunity to clarify this issue in their written and oral proceedings. They have further been requested by me to provide a clear answer to a simple factual question. Italy did so; Germany evaded this question, arguing that the issue of reparations is excluded from the present dispute by virtue of the Court's Order of 6 July 2010 (counter-claim). This is far from convincing; had it provided a clear answer to my question, it would have assisted the Court to clarify further this factual question. On the basis of the foregoing, it appears, from the materials submitted by the contending Parties, together with their submissions, that the specific victims referred to in Italy's recent case law have not in fact received reparation.

279. In conclusion on the matter at issue, the records before the Court show that Italy has repeatedly claimed in the present proceedings that none of the victims referred to in Italy's recent case law received reparation. This is its basic argument, on which its case rests. Germany had ample opportunity, in its written and oral submissions, as well as in its responses and further comments to the questions I put to both contending Parties *(supra)*, to rebut this argument. It did not provide evidence of reparation made to these specific victims, and, instead, limited its arguments to general references of payments, while admitting that "Italian military internees" were left outside the scope of the scheme of the "Remembrance, Responsibility and Future" Foundation.

280. In sum, and as already indicated, on the basis of an expert opinion (by C. Tomuschat), Germany did not make reparation to Italian prisoners of war used as forced labourers ("Italian military internees") through the Foundation. It resorted to an appraisal which led to a treatment of those victims that incurs, in my understanding, into a double injustice to them: first, when they could have benefited from the rights attached to the status of prisoners of war, such status was denied to them; and secondly, now that they seek reparation for violations of international humanitarian law of which they were victims (including the viola-

[319] Written Response of Italy to the Questions Put by (. . .) Judge Cançado Trindade (. . .) at the End of the Public Sitting Held on 16 September 2011, p. 9.

[320] Comments of Germany on Italy's Written Reply to the Question Put by (. . .) Judge Cançado Trindade and on Greece's Written Reply to the Question Put by Judge Cançado Trindade at the Public Sitting Held on 16 September 2011, pp. 1-2.

tion of denying them the status of prisoners of war), they are seen to be treated as prisoners of war.

281. It is regrettably too late to consider them prisoners of war (and, worse still, to deny them reparation): they should be so considered during the Second World War and in its immediate aftermath (for the purpose of protection), but they were not. These are the uncontested and the distressing facts. On the basis of the foregoing, it can thus at last be concluded, on the basis of the records before the Court, that many victims of Nazi Germany's grave violations of human rights and of international humanitarian law have in fact been left without reparation.

XXV. The Imperative of Providing Reparation to Individual Victims of Grave Violations of Human Rights and of International Humanitarian Law

1. The Realization of Justice as a Form of Reparation

282. In my understanding, it is imperative that reparation is provided to the individual victims of the grave violations of human rights and of international humanitarian law at issue in the *cas d'espèce*. The individual victim's right to reparation is ineluctably linked to the grave violations of human rights and of international humanitarian law that they suffered. In the present case concerning the *Jurisdictional Immunities of the State*, the contending claims of war reparations and State immunities could not at all have been dissociated, and certainly not at all in the way they were by the Court's Order of 6 July 2010, summarily dismissing the Italian counter-claim. That decision was taken by the Court (with my firm dissent), without a public hearing, and on the basis of two succinct paragraphs (28 and 29) containing, each of them, a *petitio principii*, simply begging the question[321].

283. Notwithstanding, as I have pointed out in the present dissenting opinion (paras. 18-23 *supra*), the contending Parties, Germany and Italy, kept on referring to the factual and historical background of the *cas d'espèce*, in advancing their opposite views on State immunities. This was not surprising, as claims of State immunities and war reparations, in the circumstances of the present case, go inevitably together, as the two faces of the same coin. This is one of the many lessons to be extracted from the present case. Its factual background confirms that, whenever a State sought to stand above the law, abuses were committed against human

[321] Cf. *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, I.C.J. Reports 2012 (I)*, separate opinion of Judge Cançado Trindade, p. 91, para. 111.

beings[322], including grave violations of human rights and of international humanitarian law.

284. The *rule of law (état de droit)* implies restrictions imposed upon the power of the State by the law, as no State stands above this latter; the rule of law seeks to preserve and guarantee certain fundamental values, in the line of natural law thinking. Whenever those values are forgotten, in the mounting of a State apparatus of oppression leading to systematic and grave violations of human rights and of international humanitarian law, law reacts. And the *realization of justice*, which takes place also to put an end to impunity, in my view constitutes by itself a relevant form of reparation (satisfaction) to the victims.

2. Reparation as the Reaction of Law to Grave Violations

285. It indeed resembles a reaction of the law to the extreme violence victimizing human beings. We enter here into the domain of *jus cogens* (cf. *infra*); law reacts to assert its primacy over brute force, to seek to regulate human relations according to the precepts of the *recta ratio* (of natural law), and to mitigate human suffering. Hence the imperative of having justice done, and of providing reparation to the victims. In his work *L'Ordinamento Giuridico* (originally published in 1918), the Italian jusphilosopher Santi Romano sustained that sanction is not circumscribed to specific legal norms, but is rather immanent to the juridical order as a whole, operating as an "effective guarantee" of all the subjective rights set forth therein[323]. In face of the acts of extreme violence victimizing human beings, violating fundamental rights inherent to them, the legal order (national and international) reacts, so as to secure the primacy of justice and to render viable the reparation (satisfaction) to the victims.

286. I had the occasion, one decade ago, to dwell upon this particular point, in the adjudication of a case in another international jurisdiction (the IACtHR). I then pointed out that the law, emanating ultimately from human conscience and moved on by this latter, comes to provide the *reparatio* (from the Latin term *reparare*, "to dispose again"); and law intervenes, moreover, to guarantee the non-repetition of the harmful acts[324]. The *reparatio* does not put an end to the human rights violations already perpetrated[325], but it at least avoids the aggravation of the harm already done (by the indifference of the social milieu, by impunity or by oblivion).

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[322] E. Cassirer, *El Mito del Estado*, *op. cit. supra* note 191, pp. 311-319; A. Ross, *Sobre el Derecho y la Justicia*, 2nd ed., Buenos Aires, Eudeba, 1997, pp. 314-315.

[323] Santi Romano, *L'ordre juridique* (transl., 2nd ed.), Paris, Dalloz, 2002 (reed.), p. 16.

[324] IACtHR, case *Bulacio* v. *Argentina* (judgment of 18 September 2003), separate opinion of Judge Cançado Trindade, para. 35.

[325] Human capacity of both promoting the common good and to commit evil has not ceased to attract the attention of human thinking throughout the centuries; cf., e.g., F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, *op. cit. supra* note 253, pp. 5-412.

287. Under this outlook, the *reparatio* is endowed, in my understanding, with a double meaning, as I stated on that occasion, namely:

> "it provides satisfaction (as a form of reparation) to the victims, or their relatives, whose rights have been violated, at the same time that it re-establishes the legal order broken by such violations — a legal order erected on the full respect for the rights inherent to the human person. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts (. . .).
>
> The *reparatio* disposes again, reorganizes the life of the victimized survivors, but it does not manage to eliminate the pain which is already ineluctably incorporated to their day-to-day existence. The loss is, from this angle, rigorously irreparable. Yet, the *reparatio* is an inescapable duty of those who have the responsibility to impart justice. In a stage of greater development of human conscience, and thus of law itself, it is beyond doubt that the realization of justice overcomes every and any obstacle, including those ensuing from the abusive exercise of rules or institutes of positive law, thus rendering *imprescriptible* the grave breaches of human rights (. . .). The *reparatio* is a reaction, at the level of the law, to human cruelty, manifested in the most diverse forms: the violence in the treatment of fellow human beings *semejantes*, the impunity of those responsible on the part of the public power, the indifference and oblivion of the social milieu.
>
> This reaction of the broken legal order (the *substratum* of which is precisely the observance of human rights) is moved, ultimately, by the spirit of human solidarity (. . .). The reparation, thus understood, encompassing, in the framework of the realization of justice, the satisfaction to the victims (or their relatives) and the guarantee of non-repetition of the harmful acts, (. . .) is endowed with undeniable importance. The rejection of the indifference and oblivion, and the guarantee of non-repetition of the violations, are manifestations of the links of solidarity between those victimized and those who can be so, in the violent world, devoid of values, wherein we live. This is, ultimately, an eloquent expression of the links of solidarity that unite the living to their dead[326]. (. . .)"[327]

XXVI. The Primacy of *Jus Cogens*: A Rebuttal of Its Deconstruction

288. This leads me to my last line of considerations. In the present dissenting opinion, I have already expressed my firm opposition to the pos-

[326] On these links of solidarity, cf. my separate opinions in the case *Bámaca Velásquez* v. *Guatemala* (judgments of the IACtHR on the merits, of 25 November 2000, and on reparations, of 22 February 2002).

[327] IACtHR, case *Bulacio* v. *Argentina* (judgment of 18 September 2003), separate opinion of Judge Cançado Trindade, paras. 36 and 38-40.

ture of stagnation in respect of *jus cogens* whenever claims of State immunity are at stake (paras. 224-227 *supra*). In fact, in this and other respects (methodology, approach adopted and pursued, reasoning, conclusions), there seems to be an abyss separating my own position from that of the Court's majority in the present case concerning the *Jurisdictional Immunities of the State*. In laying the foundations of my own personal position on the issues dealt with in the present Judgment, may I now concentrate my dissenting opinion, at last, on one point which is particularly dear to me: the consolidation and primacy of *jus cogens* in international law. In effect, without the primacy of *jus cogens*, international law would have a grim future. I could not accept that, as all hope for a better future would then vanish.

289. I am a surviving Judge from the painful international adjudication of a cycle of cases of massacres that recently reached a contemporary international tribunal, the IACtHR, during which I was in contact with the most somber side of human nature. Now that those cases have been decided, and belong to the history of contemporary international law (and in particular the international law of human rights), I have organized my memories of that experience[328], so that present and future generations of scholars of the law of nations *(droit des gens)* may perhaps benefit from the lessons I have extracted therefrom. It is not my intention to recollect those lessons in the present dissenting opinion, but only and briefly to refer to them and to point out that, in my view, one cannot approach cases of the kind involving grave breaches of human rights and of international humanitarian law — without close attention to *fundamental human values*. Unlike what legal positivism assumes, law and ethics go ineluctably together, and this should be kept in mind for the faithful realization of justice, at national and international levels.

290. The invocation of "elementary considerations of humanity"[329] cannot be rhetorical, failing to guard coherence in not anticipating nor addressing the consequences of the application of those considerations in practice. Moreover, one should not pursue a very restrictive view of *opinio juris*[330], reducing it to the subjective component of custom and distancing it from the general principles of law, up to a point of not taking account of it at all[331]. In the present case, the "acts committed on the

[328] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, *op. cit. supra* note 256, pp. 1-340; and cf. also A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10 November 2011), Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A. A. Cançado Trindade, "Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte", 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), pp. 629-699, esp. pp. 695-699.

[329] Cf. Judgment, para. 52.

[330] Cf. *ibid.*, para. 55.

[331] Cf. *ibid.*, para. 78.

territory of the forum State by the armed forces of a foreign State"[332] (as the Court depicts them), are "acts" the illegality of which has been recognized by the responsible State itself, Germany, "at all stages of the proceedings"[333] of the present case. They are not *acta jure imperii*[334], as the Court repeatedly characterizes them; they are unlawful acts, *delicta imperii*, atrocities, international crimes of the utmost gravity, engaging the responsibility of the State and of the individuals that perpetrated them. The traditional distinction between acts *jure imperii* and *jure gestionis*, as I have already indicated, is immaterial here, in a case of the gravity of the present one.

291. The principle of the sovereign equality of States is indeed a fundamental principle applicable at the level of *inter*-State relations[335]: had it been duly observed, those atrocities or international crimes would not have occurred in the way and at the time they did (in 1943-1945). In any case, that principle is not the *punctum pruriens* here, as we are concerned in the *cas d'espèce* with atrocities or international crimes committed at *intra*-State level. The central principles at issue here are, in my perception, the principle of humanity and the principle of human dignity. State immunity cannot, in my view, be unduly placed[336] above State responsibility for international crimes and its ineluctable complement, the responsible State's duty of reparation to the victims.

292. As already indicated, the *jurisprudence constante* of the Hague Court (PCIJ and ICJ) upholds the understanding that, as a matter of principle, a violation of international law and the corresponding duty of providing reparation form an *indissoluble whole*, so as to make the consequences thereof cease. State immunities cannot be made to operate, as in the present Judgment, like thunder coming out of a dark storm (the social cataclysm of the Second World War) and falling upon that indissoluble whole, dismantling it altogether. As I have further also indicated, State immunity is not a right but rather a prerogative or privilege; it cannot be upheld in a way that leads to manifest injustice.

293. In order to try to justify the upholding of State immunity even in the circumstances of the *cas d'espèce*, the Court's majority pursues an empirical factual exercise of identifying the incongruous case law of national courts and the inconsistent practice of national legislations on the subject-matter at issue. This exercise is characteristic of the methodology of legal positivism, over-attentive to facts and oblivious of values. Be that as it may, even in its own outlook, the examination of national courts decisions, in my view, is not at all conclusive for upholding State immunity in cases of international crimes.

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[332] Cf. Judgment, para. 65.
[333] Cf. *ibid.*, para. 60.
[334] Cf. *ibid.*, para. 60 and cf. also paras. 61-65, 72 and 77.
[335] Cf. *ibid.*, para. 57.
[336] Cf. *ibid.*, paras 90 and 106.

294. As to national legislations, pieces of sparse legislation in a handful of States[337], in my view, cannot withhold the lifting of State immunity in cases of grave violations of human rights and of international humanitarian law. Such positivist exercises are leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind so widespread in the legal profession, such as, *inter alia*, the counterpositions of "primary" to "secondary" rules, or of "procedural" to "substantive" rules[338], or of obligations of "conduct" to those of "result". Words, words, words . . . Where are the values?

295. At times, resorting to conceptualizations of the kind may lead to manifest injustice, as in the present case concerning the *Jurisdictional Immunities of the State*. Once again the Court resorts to the counterposition between procedural law (where it situates immunity, as it did in its earlier judgment of 2002 in the *Arrest Warrant of 11 April 2000* case, opposing the Democratic Republic of the Congo to Belgium) and substantive law[339]. To me, the separation between procedural and substantive law is not ontologically nor deontologically viable*: la forme conforme le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice. And the application of substantive law is *finaliste*, it purports to have justice done.

296. In the present Judgment, the Court's majority starts from the wrong assumption that no conflict exists, or can exist, between the substantive "rules of *jus cogens*" (imposing the prohibitions of "the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour") and the procedural "rules of State immunity"[340]. This tautological assumption leads the Court to its upholding of State immunity even in the grave circumstances of the present case. There is thus a material conflict, even though a formalist one may not be discernible. The fact remains that a conflict does exist, and the Court's reasoning leads to what I perceive as a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences.

297. This is not the first time that this happens; it has happened before, e.g., in the last decade, in the Court's Judgments in the cases of the *Arrest Warrant* (2002) and of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)* (2006), recalled by the Court with approval in the present Judgment[341]. It is high time to give *jus cogens* the attention it requires and deserves. Its deconstruction, as in the present case, is to the detriment not only of the individual victims of

[337] Cf. Judgment, para. 88.
[338] Cf. *ibid.*, paras. 58 and 100.
[339] *I.C.J. Reports 2002*, p. 3. And cf. Judgment, para. 58.
[340] Cf. Judgment, para. 93 and cf. also para. 95.
[341] Cf. *ibid.*, para. 95.

grave violations of human rights and of international humanitarian law, but also of contemporary international law itself. In sum, in my understanding, there can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities.

298. State immunities cannot keep on being approached in the light of an atomized or self-sufficient outlook (contemplating State immunities in a void), but rather pursuant to a comprehensive view of contemporary international law as a whole, and its role in the international community. International law cannot be frozen by continued and prolonged reliance on omissions of the past, either at normative level (e.g., in the drafting of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), or at judicial level (e.g., the majority decision of the ECHR [Grand Chamber] in the *Al-Adsani* case, 2001, and of this Court in the present case), already pointed out. The assertion by the Court, in the present Judgment, that, analogically, there is nothing "inherent in the concept of *jus cogens*" which would require the modification, or displace the application, of rules determining the scope and extent of jurisdiction[342], simply begs the question: it requires persuasive demonstration, not provided to date.

299. The Court cannot, by its decisions, remain indifferent to, or oblivious of, the enormous suffering of victims of grave violations of human rights and of international humanitarian law; it cannot remain over-attentive to the apparent sensitivities of States, to the point of conniving at denial of justice, by unduly ascribing to State immunities an absolute value. Quite on the contrary, the individual victims of State atrocities cannot be left without any form of redress. State immunity is not supposed to operate as a bar to jurisdiction in circumstances such as those prevailing in the present case concerning the *Jurisdictional Immunities of the State*. It is not to stand in the way of the *realization of justice*. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, *inter alia*, enabling them to seek and obtain redress for the crimes they suffered. *Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity.

XXVII. A Recapitulation: Concluding Observations

300. From all the preceding considerations, it is crystal clear that my own position, in respect of all the points which form the object of the pres-

[342] Cf. Judgment, para. 95.

ent Judgment on the case concerning the *Jurisdictional Immunities of the State*, stands in clear opposition to the view espoused by the Court's majority. My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending Parties (Germany and Italy) and the intervening State (Greece), but above all on issues of principle and on fundamental values, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my dissenting position in the *cas d'espèce* in the present dissenting opinion. I deem it fit, at this stage, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

301. *Primus*: One cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same *continuing* situation. One cannot hide behind static dogmas so as to escape the legal consequences of the perpetration of atrocities in the past; the evolution of law is to be taken into account. *Secundus*: Likewise, one cannot make abstraction of the factual context of the present case; State immunities cannot be considered in the void, they constitute a matter which is ineluctably linked to the facts which give origin to a contentious case. Recognition of this interrelatedness is even more forceful, in a unique and unprecedented case like the present one, in which the Complainant State, throughout the proceedings before the Court (written and oral phases), recognized its own responsibility for the harmful acts lying in the origins, and forming the factual background, of the present case.

302. *Tertius*: There have been doctrinal developments, from a generation of jurists which witnessed the horrors of two World Wars in the twentieth century, which did not at all pursue a State-centric approach, and were centred on fundamental human values, and on the human person, guarding faithfulness to the historical origins of the *droit des gens*, as one ought to do nowadays as well. State immunities are, after all, a prerogative or a privilege, and they cannot keep on making abstraction of the evolution of international law, taking place nowadays in the light of fundamental human values.

303. *Quartus*: The more lucid contemporary international legal doctrine, including the work of learned institutions in international law, gradually resolves the tension between State immunity and the right of access to justice rightly in favour of the latter, particularly in cases of international crimes. It expresses its concern with the need to abide by the imperatives of justice and to avoid impunity in cases of perpetration of international crimes, thus seeking to guarantee their non-repetition in the future. *Quintus*: The threshold of the *gravity* of the breaches of human rights and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals. It is indeed important that all mass atrocities are nowadays considered in the light of

the threshold of *gravity*, irrespective of who committed them. Criminal State policies and the ensuing perpetration of State atrocities are not to be covered up by the shield of State immunity.

304. *Sextus*: Purported inter-State waivers of rights inherent to the human person are inadmissible; they stand against the international *ordre public*, and are to be deprived of any juridical effects. This is deeply-engraved in human conscience, in the *universal juridical conscience*, the ultimate material source of all law. *Septimus*: By the time of the Second World War, deportation to forced labour (as a form of slave work) was already prohibited by international law. Well before the Second World War its wrongfulness was widely acknowledged, at normative level (in the IV Hague Convention of 1907 and in the 1930 ILO Convention on Forced Labour); there was recognition of that prohibition in works of codification. That prohibition has, furthermore, met with judicial recognition. *Octavus*: The right to war reparation claims was likewise recognized well before the end of the Second World War (in the IV Hague Convention of 1907).

305. *Nonus*: What jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice. What troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice? When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose.

306. *Decimus*: Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity. *Undecimus*: International crimes perpetrated by States are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity. That traditional and eroded distinction is immaterial here.

307. *Duodecimus*: In case of grave violations of human rights and of international humanitarian law, the *direct access* of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate those rights, even against their own State. *Tertius decimus*: Individuals are indeed subjects of international law (not merely "actors"), and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are *titulaires* of rights and bearers of duties which emanate *directly* from international law (the *jus gentium*). Converging developments, in recent decades, of the international law of human rights, of international humanitarian law, and of the international law of refugees, followed by those of international criminal law, give unequivocal testimony of this.

308. *Quartus decimus*: It is not at all State immunity that cannot be waived. There is no immunity for crimes against humanity. In cases of international crimes, of *delicta imperii*, what cannot be waived is the individual's right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels.

309. *Quintus decimus*: The finding of particularly grave violations of human rights and of international humanitarian law provides a valuable test for the removal of any bar to jurisdiction, in pursuance of the necessary realization of justice. *Sextus decimus*: It is immaterial whether the harmful act in grave breach of human rights was a governmental one, or a private one with the acquiescence of the State, or whether it was committed entirely in the forum State or not (deportation to forced labour is a trans-frontier crime). State immunity does not stand in the domain of redress for grave violations of the fundamental rights of the human person.

310. *Septimus decimus*: The right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *proces équitable*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due. The realization of justice is in itself a form of reparation, granting *satisfaction* to the victim. In this way those victimized by oppression have their right to the law *(droit au Droit)* duly vindicated.

311. *Duodevicesimus*: Even in the domain of State immunities proper, there has been acknowledgment of the changes undergone by it, in the sense of restricting or discarding such immunities in the occurrence of those grave breaches, due to the advent of the international law of human rights, with attention focused on the right of access to justice and international accountability. *Undevicesimus*: The State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law is a duty under customary international law and pursuant to a fundamental general principle of law.

312. *Vicesimus*: There is nowadays a growing trend of opinion sustaining the removal of immunity in cases of international crimes, for which reparation is sought by the victims. In effect, to admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time to insist on shielding States with immunity, in cases of international crimes — marked by grave violations of human rights and of international humanitarian law — in pursuance of State (criminal) policies, amounts to a juridical absurdity.

313. *Vicesimus primus*: The right of access to justice *lato sensu* is to be approached with attention focused on its essence as a fundamental right, and not on permissible or implicit "limitations" to it. *Vicesimus secundus*:

Grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility and the right to reparation to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of law (in distinct legal systems — *Recht*/*diritto*/*droit*/*direito*/*derecho*/*right*) as a whole.

314. *Vicesimus tertius*: It is groundless to claim that the regime of reparations for grave breaches of human rights and of international humanitarian law would exhaust itself at inter-State level, to the detriment of the individuals who suffered the consequences of war crimes and crimes against humanity. It is clear from the records of the present case that there are IMIs, victims of Nazi Germany's grave violations of human rights and of international humanitarian law, who have in fact been left without reparation to date. *Vicesimus quartus*: These individual victims of State atrocities cannot be left without any form of redress. State immunity is not supposed to operate as a bar to jurisdiction in circumstances such as those prevailing in the present case concerning the *Jurisdictional Immunities of the State*. It is not to stand in the way of the *realization of justice*. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, *inter alia*, enabling them to seek and obtain redress for the crimes they suffered.

315. *Vicesimus quintus*: One cannot embark on a wrongfully assumed and formalist lack of conflict between "procedural" and "substantive" rules, depriving *jus cogens* of its effects and legal consequences. The fact remains that a conflict does exist, and the primacy is of *jus cogens*, which resists to, and survives, such groundless attempt at its deconstruction. There can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities.

316. *Vicesimus sextus*: *Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity. On the basis of all the aforesaid, my firm position is that there is no State immunity for international crimes, for grave violations of human rights and of international humanitarian law. In my understanding, this is what the International Court *of Justice* should have decided in the present Judgment.

(Signed) Antônio Augusto CANÇADO TRINDADE.