INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

12 JUNE 2009

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

12 JUNE 2009

Subject of the dispute

On 23 December 2008, the Federal Republic of Germany (hereinafter: Germany) instituted proceedings against the Italian Republic (hereinafter: Italy) before the International Court of Justice (hereinafter: the Court). In this Memorial, Germany will set out the reasons which have prompted it to take this step which may look unusual in the relationship between two nations which are linked to one another by deep bonds of friendship and understanding. However, the following submissions will make clear that a situation has emerged that cannot be resolved by diplomatic negotiations. Germany is convinced that its sovereign right of jurisdictional immunity has been infringed by a series of judicial decisions. In quite a number of submissions to the competent Italian courts, in particular the Corte di Cassazione, the Italian Government engaged its best endeavours with a view to persuading those courts that Germany's jurisdictional immunity had to be respected. However, those efforts were of no avail. The Corte di Cassazione insisted that Germany has forfeited its immunity on account of the gravity of the facts in issue. Thus, the situation has become inextricable. The Italian Government cannot reverse that strain of jurisprudence. Only an authoritative finding of the Court may lead out of the impasse.

The critical stage of that development amounting to an infringement of the jurisdictional immunity of Germany as a sovereign State was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the *Ferrini* case,[1] where the Corte di Cassazione declared that Italy held jurisdiction with regard to a claim (proceedings initiated in 1998) brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by individuals who had also suffered injury as a consequence of the armed conflict. All of these claims should have been or should be dismissed since Italy lacks jurisdiction in respect of acts *jure imperii* performed by the authorities of the Third Reich for which present-day Germany has to assume

[1] Judgment No. 5044/2044, 11 March 2004, Rivista di diritto internazionale 87 (2004), 539; English translation: 128 ILR 659; ANNEX 1.

international responsibility. However, the Corte di Cassazione has recently confirmed its earlier findings in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008. Germany is concerned that hundreds of additional cases may be brought against it.

Repeated representations with the Italian Government have been unsuccessful. Recourse to the Court is accordingly the only remedy available to Germany in its quest to put a halt to the unlawful practice of the Italian courts, which violates Germany's sovereign rights. The Italian Government has publicly stated that it "respects" the German decision to submit the dispute for final determination to the World Court. Also on its part, it is of the view that a decision by the Court on State immunity will be helpful for clarifying this complex issue.[2]

[2] See Joint Declaration, adopted on the occasion of German-Italian Governmental Consultations, held on 18 November 2008 in Trieste, ANNEX 2. "L'Italia rispetta la decisione tedesca di rivolgersi alla Corte Internazionale di Giustizia per una pronuncia sul principio dell'immunità dello Stato. L'Italia, anche come parte contraente, come la Germania, della Convenzione Europea sulla composizione pacifica delle controversie del 1957, e come Paese che fa del rispetto del diritto internazionale un cardine della propria condotta, considera che la pronuncia della Corte Internazionale sull'immunità dello Stato sia utile al chiarimento di una complessa questione."

Outline of Argument

I. Jurisdiction

1. The application was brought under the terms of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereinafter: European Convention).[3] Italy ratified that Convention on 29 January 1960, Germany did so on 18 April 1961. None of the two parties has denounced it.

2. Article 1 of the European Convention provides:

"The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

a the interpretation of a treaty;

b any question of international law;

c the existence of any fact which, if established, would constitute a breach of an international obligation;

d the nature or extent of the reparation to be made for the breach of an international obligation."

In the instant case, the dispute concerns in particular the existence, under customary international law, of the rule that protects sovereign States from being sued before the civil courts of another State. Accordingly, the claim falls *ratione materiae* within the scope of application of the European Convention.

3. The applicability of the European Convention is not excluded by the provisions of Article 27, which enunciate certain time limits. In fact, as stipulated there:

"The provisions of this Convention shall not apply to:

a disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute;

b disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

As already indicated when specifying the subject of the dispute, all the claims which have been introduced against Germany before Italian courts relate to occurrences of World War II, when German troops committed

[3] Council of Europe Treaty Series (CETS) No. 23.

grave violations of international humanitarian law. However, the proceedings instituted against Italy do not deal with the substance of those claims. Germany's only objective is to obtain a finding from the Court to the effect that to declare claims based on those occurrences as falling within the domestic jurisdiction of Italian courts, constitutes a breach of international law. The time when that objectionable judicial practice began can be accurately specified. It is the judgment of the Corte di Cassazione in the *Ferrini* case of 11 March 2004 which opened the gates for claims seeking reparation for injury sustained as a consequence of events situated within the framework of World War II. The date of 11 March 2004 and the years subsequent thereto are clearly within the scope *ratione temporis* of the European Convention.

II. Issues of Admissibility

1) No need for exhaustion of local remedies

4. Germany does not act in the exercise of its right of diplomatic protection in favour of German nationals. It acts on its own behalf. Its sovereign rights have been – and continue to be – directly infringed by the jurisprudence of the highest Italian courts that denies Germany its right of sovereign immunity. The claims that have been adjudicated by Italian courts and are still pending before them are directed against the German State as a legal entity, not against German nationals. Accordingly, there is no legal requirement for Germany to exhaust local remedies. On the other hand, if such a requirement existed, it would have been fully complied with since it is the Corte di Cassazione, the highest court in civil matters, that has developed the contested doctrine of non-invokability of sovereign immunity in cases of grave violations of human rights and humanitarian law.

2) No need for prior exhaustion of diplomatic negotiations

5. Article 33 of the UN Charter does not require States to find solutions to an actual dispute by all the methods listed therein before turning

to the Court. In the *Oil Platforms* case, this proposition was recently confirmed.[4] Nor does the European Convention establish any requirement to that effect. In any event, however, since the delivery of the *Ferrini* judgment by the Corte di Cassazione, Germany has been in constant contact with the Italian authorities, urging them to see to it that the erroneous course followed by the Italian judiciary be halted. Germany is aware of the efforts undertaken by the Italian Government with a view to informing its judicial branch about Italy's obligations under the rules of general international law which, in principle, are of direct applicability within the Italian legal order according to Article 10 (1) of the Italian Constitution. Of course, as in all the countries parties to the European Convention on Human Rights, Italian judges are independent and are not subject to any instructions imparted to them by their Government. Nonetheless, Italy as a whole must shoulder responsibility for the acts of all its State organs, whatever their nature. Article 4 (1) of the Articles on Responsibility of States for Internationally Wrongful Acts, elaborated by the International Law Commission and taken note of by General Assembly Resolution 56/83 of 12 December 2001, states unequivocally that conduct capable of entailing responsibility may emanate from any organ that

"exercises legislative, executive, judicial or any other functions."

This proposition reflects a rule of customary law. No voices can be found that would argue that the judiciary does not belong to the institutional elements for whose actions a State can be made accountable. The commentary of the ILC on Article 4 (1)[5] refers to a rich array of relevant precedents. It is left to every State to organize its entire machinery in such a way that violations of international law to the detriment of other States do not occur.

---

[4] ICJ Reports 2003, p. 161, 210, para. 107. For further references see Christian Tomuschat, comments on Article 36, in: Zimmermann/Tomuschat/Oellers-Frahm, *The Statute of the International Court of Justice. A Commentary* (Oxford 2006), p. 649, margin note 115; Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties', 14 (2003) EJIL 1, at 14.

[5] See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge 2002), p. 95, para. 6.

3) No jurisdiction of the Court of Justice of the European Communities

6. The present dispute is not covered by any of the jurisdictional clauses of the Treaty of Nice (Treaty establishing the European Community, Article 227 EC). Although disturbances of the proper functioning of the internal market under the Treaty of Nice – and later of the Treaty of Lisbon – may result from the contested practice of the Italian courts, it has no direct link with the operation of the European market regime. The general relationship between the European nations continues to be governed by general international law. Every Member State of the European Community/European Union is obligated to respect the general rules of international law vis-à-vis the other members unless specific derogations from that regime have been stipulated. In respect of the dispute in the instant case, however, no such derogation has been agreed upon. Jurisdictional immunity belongs to the core elements of the relationship between sovereign States. Outside the specific framework established by the treaties on European integration, the 27 European nations concerned continue to live with one another under the regime of general international law. It should be added, in this connection, that the special framework of judicial cooperation that enables individuals to obtain the execution of judgments rendered in one member State of the European Union in other member States of the Union does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare (see below section 127).

III. The Facts

1) Settlement of War Damages

7. In the following, a few observations will be devoted to the historical background of the dispute. This does not mean that occurrences of the period preceding the entry into force of the European Convention for both parties will be included in the subject-matter of the dispute. Germany

stresses once again that it challenges solely the judicial practices originated by the *Ferrini* judgment of the Corte di Cassazione. However, 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.

8. It stands to reason that after World War II, measures had to be taken to address the issue of war damages caused during the armed conflict. The first of these measures was the Potsdam Accord of 2 August 1945, concluded between the victorious Allied Powers.[6] This Accord was unilaterally imposed on Germany, which never became a party to it. It contained a large chapter (IV.) on "Reparations from Germany". In the chapeau to this chapter, the earlier Crimea decision of the Allied Powers was recalled

> "that Germany be compelled to compensate to the greatest possible extent for the loss and suffering that she has caused to the United Nations and for which the German people cannot escape responsibility …".

Accordingly, it was stipulated that reparations should take the form of removals primarily from industrial capital equipment in the different zones of occupation. Additionally, a determination was made that all German external assets should be confiscated. In fact, those confiscations were carried out over many years. Moreover, for purposes of reparation, territorial dispositions were made over German territory. Lastly, based on policy determinations of its own, Germany put in place a system of compensation for victims of specific injustices committed through the racist measures of persecution of the Nazi regime. It is hence obvious that Germany, in order to compensate the victims of World War II, has made major sacrifices not only of a financial character.

---

[6] Reprinted in: Ingo von Münch (ed.), *Dokumente des Geteilten Deutschland* (Stuttgart 1968), p. 32. On its legal significance see Jochen Abr. Frowein, Potsdam Agreements on Germany (1945), in: *Encyclopedia of Public International Law*, Vol. 3 (Amsterdam *et al.* 1997), pp. 1087-1092.

9. In 1947, Italy, which had been an Ally of Nazi Germany from June 1940 until September 1943, concluded a Peace Agreement with the victorious Allied Powers.[7] Under Article 77 (4) of that Treaty, it had to renounce all claims against Germany and German nationals:

"Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war."[8]

10. After the Federal Republic of Germany had been established as the authentic creation of the new democratic Germany, differences arose between the German and the Italian Government about the scope of the waiver clause of the Peace Treaty. In the governmental memorandum submitted to the legislative bodies to explain the background of the 1961 Settlement Treaty (see in the following section 11), it was explained:

"Repeated attempts to reach an agreement failed. On the other hand, both States did not overlook the fact that a settlement of this complex situation, which affected the friendly relations between them, was in the interest of both sides. The only viable solution to overcome all differences seemed to make a single lump sum payment the amount of which could be determined without any detailed examination of the factual and legal foundations of each controversial claim by way of compromise. Balancing all the circumstances to be taken into account for such a compromise, the two

[7] 49 UNTS 3, No. 747; ANNEX 3.

[8] The French text, which is also authentic, reads:
"Sans préjudice de ces dispositions et de toutes autres qui seraient prises en faveur de l'Italie et des ressortissants italiens par les Puissances occupant l'Allemagne, l'Italie renonce, en son nom et au nom des ressortissants italiens, à toutes réclamations contre l'Allemagne et les ressortissants allemands, qui n'étaient pas réglées au 8 mai 1945, à l'exception de celles qui résultent de contrats et d'autres obligations qui étaient en vigueur ainsi que de droits qui étaient acquis avant le 1er septembre 1939. Cette renonciation sera considérée comme s'appliquant aux créances, à toutes les réclamations de caractère intergouvernemental relatives à des accords conclus au cours de la guerre et à toutes les réclamations portant sur des pertes ou des dommages survenus pendant la guerre. »

governments eventually agreed upon an amount of 40 Million German marks."[9]

11. This understanding led to the conclusion of two international agreements, both signed on 2 June 1961. In order to bring about a definitive reconciliation between the two nations, Germany agreed to make some payments to Italy, notwithstanding the waiver clause in article 77 (4) of the Peace Treaty. By virtue of the Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions,[10] Germany paid an amount of 40 Million German Marks to Italy for "the purposes of settling outstanding questions of an economic nature" (Article 1). On its part, the Italian Government declared in Article 2 (1) of that Agreement

"all outstanding claims on the part of the Italian Republic or Italian natural or juridical persons against the Federal Republic of Germany or German natural or juridical persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945."[11]

By virtue of the Treaty Concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution,[12] Germany agreed to pay another amount of 40 Million German Marks for the benefit of Italian nationals affected by national-socialist measures of persecution on grounds of race, faith or ideology and who, through such measures of persecution, had suffered deprivation of liberty or health damages. It was left to the

---

[9] German Bundestag, Printed Matter (Drucksache) IV/433, p. 12: „Wiederholte Versuche, zu einer Übereinstimmung zu kommen, scheiterten. Andererseits verkannten beide Staaten nicht, dass eine Lösung dieses die freundschaftlichen Beziehungen beeinträchtigenden Fragenkomplexes im beiderseitigen Interesse lag. Als einzig gangbarer Weg erschien es, alle Differenzen durch eine einmalige deutsche Pauschalzahlung zu beseitigen, deren Höhe ohne nähere Prüfung der tatsächlichen und rechtlichen Voraussetzungen jedes einzelnen strittigen Anspruchs im Wege des Kompromisses bestimmt werden konnte. Unter Abwägung aller für einen solchen Kompromiss in Betracht zu ziehenden Umstände einigten sich die beiden Regierungen auf den Betrag von 40 Millionen DM (Artikel 1)."

[10] BGBl. 1963 II, 669; ANNEX 4. The German title is: Abkommen über die Regelung gewisser vermögensrechtlicher, wirtschaftlicher und finanzieller Fragen.

[11] „Die italienische Regierung erklärt, dass alle Ansprüche und Forderungen der Italienischen Republik oder von italienischen natürlichen oder juristischen Personen, die gegen die Bundesrepublik Deutschland oder gegen deutsche natürliche oder juristische Personen noch schweben, erledigt sind, sofern sie auf Rechte und Tatbestände zurückgehen, die in der Zeit vom 1. September 1939 bis 8. Mai 1945 entstanden sind."

[12] BGBl. 1963 II, 793, ANNEX 5. The German title is: Vertrag über Leistungen zugunsten italienischer Staatsangehöriger, die von nationalsozialistischen Verfolgungsmaßnahmen betroffen worden sind.

discretion of the Government of the Italian Republic to decide on the use of those monies.[13] This Agreement contained also a waiver clause. It was specified in Article 3:

"Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of German and the Italian Republic of all questions governed by the present Treaty.."[14] [15]

12. It emerges from the conventional instruments cited above that the entire reparation regime was founded on the premise that reparation should be sought and made exclusively in a global manner on an inter-State level. This premise underlay not only the Potsdam Agreement of 1945 and the Peace Treaty with Italy, but also the two 1961 Agreements between Germany and Italy. A reparation regime of that kind cannot be subverted retroactively.

2) Judicial Proceedings against Germany

13. As already hinted in the introduction, Germany is currently faced with a growing number of disputes before Italian courts where claimants who suffered injury during World War II, when Italy was under German occupation after it had terminated its alliance with Germany on 8/9 September 1943 and joined the Allied Powers, have instituted proceedings seeking financial compensation for that harm. *Three* main groups of claimants may be distinguished. *On the one hand*, there are claimants, mostly young men at the time, who were arrested on Italian soil and sent to Germany to perform forced labour. The *second* group is constituted by

[13] According to the Italian Presidential Decree No. 2043 of 6 October 1963, ANNEX 6, also Italian prisoners of war deported to Germany and used as forced labourers were to benefit from those monies. The monies were in fact distributed and gave rise to a number of legal disputes, see Corte di Cassazione, judgment of 30 October 1986/2 March 1987, ANNEX 7.

[14] „Mit der in Artikel 1 bezeichneten Zahlung sind zwischen der Bundesrepublik Deutschland und der Italienischen Republik, unbeschadet etwaiger Ansprüche italienischer Staatsangehöriger auf Grund der deutschen Wiedergutmachungsgesetze, alle Fragen, die Gegenstand dieses Vertrages sind, abschließend geregelt."

[15] The German „Wiedergutmachungsgesetze" are legal enactments adopted specifically with a view to making good injury caused not as a consequence of the armed conflict, but as a consequence of measures taken by the Nazi regime against racial and other ethnic minorities or political opponents.

members of the Italian armed forces who, after the events of September 1943, were taken prisoner by the German armed forces and were soon thereafter factually deprived by the Nazi authorities of their status as prisoners of war,[16] with a view to using them as forced labourers as well. The *third* group comprises victims of massacres perpetrated by German forces during the last months of World War II. Using barbarous strategies in order to deter resistance fighters, those units on some occasions assassinated hundreds of civilians, including women and children, after attacks had been launched by such fighters against members of the occupation forces. In many of those cases, there was additionally a gross quantitative disproportionality between the numbers of the German and the Italian victims.

14. Since the relevant events go back more than 60 years, in many instances the claimants are the heirs of the victims proper, either the children or the widows.

15. 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. On many occasions, Germany has already made additional symbolic gestures to commemorate those Italian citizens who became victims of barbarous strategies in an aggressive war, and is prepared to do so in the future. On behalf of the German Government, Foreign Minister Frank-Walter Steinmeier just recently confirmed that Germany fully acknowledges the untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees, when he visited, together with his Italian colleague Franco Frattini, the memorial site “La Risiera di San Sabba” close to Trieste, which during the German occupation had served as a concentration camp. One of the

[16] It stands to reason that in an armed conflict none of the two belligerent parties may deprive combatants made prisoners of war unilaterally of that status. The status of prisoner of war is regulated by rules of international law over which no party can dispose at its own free will.

conclusions of that meeting was that a joint commission of German and Italian historians should be established 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 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.

16. A *fourth* group of disputes must be mentioned separately, namely the disputes arising from the attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a similar massacre committed by German military units during their withdrawal in 1944 (*Distomo* case).[17]

17. In the following, Germany will confine itself to describing in more detail the leading *Ferrini* case and some other typical cases, in particular the *Distomo* case. Since the legal position is more or less the same in all of the proceedings, there does not seem to be a real need for setting out the facts of all cases with their specific features. However, Germany has attached to this Application a list of all currently pending cases.[18]

a) The Ferrini case[19]

18. By means of an application filed on 23 September 1998, Mr. Luigi Ferrini, born 12 May 1926, who had been captured by German forces in the province of Arezzo on 4 August 1944, and subsequently deported to Germany where he was compelled to perform work as forced labourer in the armaments industry, instituted proceedings before the Tribunale di Arezzo, claiming reparation, to an equitable extent, for the injury suffered during the

[17] For details see below sections 33-41.
[18] ANNEX 8.
[19] See above n. 1.

time until his liberation in May 1945 (return to Italy in August 1945). The Tribunale di Arezzo dismissed the claim (judgment of 3 November 2000), arguing that it lacked jurisdiction since Germany had acted in the exercise of its sovereign powers and was accordingly protected by the customary rule of State immunity.

19. The Corte di Appello di Firenze (Florence Court of Appeal) dismissed the appeal interjected by Ferrini (judgment of 16 November 2001/14 January 2002). It joined the line of arguments relied upon by the Tribunale di Arezzo, adding that the claim by the applicant lacked also any support in human rights law.

20. The Corte di Cassazione[20] departed from the grounds upon which the two lower courts had founded their decisions. There is no need to reflect in full the observations of the Corte di Cassazione. May it suffice to draw attention to the main points of that judgment. The Corte di Cassazione underlines first of all the gravity of the crime of deportation, prohibited under international humanitarian law. It then insists of the specificity of the *Ferrini* case in contradistinction to the *McElhinney* case adjudicated by the European Court of Human Rights[21] in that the acts alleged to be the root cause of the injury, namely the arrest of the applicant, took place on Italian soil. Furthermore, the Corte di Cassazione refers to developments in the United States where the US Foreign Sovereign Immunities Act was amended by the addition of the Anti-Terrorism and Effective Death Penalty Act of 1996,[22] which opened the door for claims against States "sponsors" of terrorism, if certified as such by the US Government. Lastly, the Corte di Cassazione argues that if leaders occupying high positions in a State government may be charged with committing grave crimes, there is no reason to debar the victims from bringing civil suits against the responsible State. However, as far as tangible precedents are concerned, the Corte di Cassazione can point to no more than the judgment of the Areios Pagos, the highest Greek tribunal in civil matters, which had as the first judicial body

[20] See above note 1.
[21] *McElhinney v. Ireland*, appplication No. 31253/96, 21 November 2001.
[22] 36 (1997) ILM 759.

ever affirmed that State immunity was forfeited by States committing serious human rights violations.[23] In sum, the Corte di Cassazione affirms that, given the different hierarchical position of the norms that protect human rights, on the one hand, and the rule of immunity, on the other hand, the former must prevail (para. 9.1).

21. Germany immediately expressed its strong concerns with the Italian Ministry of Foreign Affairs (5 May 2004).

22. The case was referred back to the Tribunale di Arezzo. Subsequently, some delays were caused before the trial court by the recusal of the competent judge by the lawyer of the claimant. By a judgment of 12 April 2007 the Tribunale di Arezzo found that the claim to reparation of the damage sustained was time-barred. Remedies were filed against this decision. The case is currently pending before the Corte di Appello di Firenze.

b) The subsequent cases

23. After the delivery of the *Ferrini* judgment, numerous victims of deportation to Germany, who had also been misused as forced labourers, instituted proceedings against Germany as well. Two cases should be specifically mentioned.

24. The first case is that of Giovanni *Mantelli and Others*, a mass claim involving twelve applicants. Concerning the relevant facts, the *Mantelli* case is also typical of all the others. Mantelli, born 3 October 1921 in Torino, was arrested by German forces in June 1944 and brought to Germany where he was assigned to work in the factory of Mercedes-Benz in Gaggenau (Baden). He was liberated after the surrender of the German Armed Forces in May 1945. Having learned about the outcome of the *Ferrini* proceedings, he and the other claimants filed a suit against Germany on 13 April 2004 before the Tribunale di Torino. In order to clarify the

[23] *Prefecture of Voiotia v. Federal Republic of Germany*, judgment of 4 May 2000, English translation: 129 ILR 514 (see also below sections 31, 59); ANNEX 9.

controversial issue of the jurisdiction of the Italian courts, a remedy was filed by Germany with the Corte di Cassazione before a decision on the merits of the claim had been issued ("regolamento preventivo di giurisdizione"). In order to enlighten the Corte di Cassazione about the applicable legal position, the Procura Generale della Repubblica presso la Corte di Cassazione made a submission on 22 November 2007.[24] In carefully worded terms, it stated (p. 17) that

"it is not at all easy to contend that in the international legal order conventional or customary rules have emerged pursuant to which the jurisdictional immunity yields if the civil responsibility of the State for the commission of international crimes is invoked".[25]

Accordingly, it concluded that the Corte di Cassazione should determine that the Italian courts lacked jurisdiction in the case under consideration.

25. Similar facts underlie the *Maietta* case. Liberato Maietta, born 12 September 1924, was arrested by German forces on 9 September 1943. Sent to Germany as a forced labourer, his first workplace was in Küstrin, while at a later stage he was compelled to work in Landsberg (no further details are given). He filed a suit against Germany on 28 April 2004 before the Tribunale di Sciacca. In his case, too, the Corte di Cassazione was seized by Germany with the request that it should make a determination on the jurisdiction of the Tribunale in the case at hand. The Procura Generale della Repubblica presso la Corte di Cassazione made again a submission which is substantially identical to the submission in the *Mantelli* case.

26. Given the delicate nature of the controversy, the Secretary-General of the Presidency of the Italian Council of Ministers, in a letter of 24 April 2008 to the Avvocatura Generale dello Stato,[26] stated that Germany's objections were justified. There was an absolute lack of

[24] ANNEX 10. The Procura Generale discharges the functions of a legal adviser with the Corte di Cassazione, comparable to the role of the Advocates General with the Court of Justice of the European Communities.
[25] „ … non è affatto agevole affermare che nell'ordinamento internazionale si siano formate regole convenzionali o consuetudinarie secondo le quali l'immunità dalla giurisdizione viene meno qualora si invochi la responsabilità civile dello Stato per la commissione di crimini internazionali.".
[26] ANNEX 11.

jurisdiction. In particular, the letter said, the international legal order recognizes, through customary and conventional rules that have been accepted almost unanimously by international and national courts, the "fundamental" requirement to comply with the exemption from the territorial jurisdiction of States, in order to defend the reciprocal sovereignties, to promote good relations and to avoid the growing of conflictive tensions. On this basis, the Avvocatura Generale dello Stato (Solicitor General of Italy) on 28 April 2008 made indeed an additional submission to the Corte di Cassazione.[27] In a central passage of this opinion (p. 3), it stated with regard to the *Ferrini* judgment:

" … this ruling, which moreover constitutes an *unicum* in the jurisprudential panorama, be it national or international, does not seem to be in line with the current position of international law although it emphasizes some relevant aspects …"[28]

27. The Corte di Cassazione, however, did not heed the advice given to it by the bodies whose task it is to state their views in order to assist it in reaching a correct assessment of the cases to be adjudicated by it. In a number of orders ("ordinanze") of 29 May 2008,[29] whereby, in addition to ruling on the *Mantelli* case and the *Maietta* case, it made determinations on 11 other cases, it held that the relevant Italian judges enjoyed jurisdiction with regard to the claims for financial compensation brought against Germany. In support of its determination, it observed, *inter alia*, that it was conscious of the fact

"that, *at this time*, there existed no *definite and explicit* international custom according to which the immunity of the foreign State from civil jurisdiction with regard to acts performed by it *iure imperii* (among which undoubtedly also those, in particular, are encompassed which relate to the conduct of armed activities …) could be deemed to have been derogated from in respect of acts of such gravity as to qualify as 'crimes against humanity'"[30]

[27] ANNEX 12.
[28] „…tale decisione, la quale peraltro costituisce un unicum nel panorama giurisprudenziale sia nazionale che internazionale, pur sottolineando aspetti di rilievo, tuttavia non appaia in linea con lo stato attuale del diritto internazionale …".
[29] ANNEX 13.
[30] „…che non esista, *allo stato*, una sicura ed esplicita consuetudine internazionale per cui il principio della immunità dello Stato straniero dalla giurisdizione civile per gli atti dal

and that it was also conscious of the fact that

…

"accordingly it contributed to the *emergence* of a rule shaping the immunity of the foreign State which is anyhow deemed to be *inherent* in the system of the international legal order."[31]

Lastly, the Court summarized its reasoning by stating that

"it could be presumed that a principle limiting the immunity of a State which has committed crimes against humanity was 'in the process of formation'".[32]

In other words, the Corte di Cassazione acknowledged quite openly that the rule which it applied in the cases before it did not yet exist. Apparently, however, it felt entitled to develop the law since the positive law in force did not correspond to requirements of justice as perceived by it.

28. Following the decisions of the Corte di Cassazione, the proceedings are now pending again before the courts of first instance where the stage of taking of evidence has begun. The *Maietta* case is being dealt with by the Tribunale di Sciacca, and the *Mantelli* case is under consideration by the Tribunale di Torino.

c) The *Milde (Racciarini)* case

29. The case of Max Josef *Milde* has totally different characteristics. Milde was charged by the prosecutorial authorities in Italy with participating in a massacre committed on 29 June 1944 in Civitella, Val di Chiana, Cornia and San Pancrazio. Members of the division "Hermann Göring" of the German armed forces killed 203 civilians taken as hostages

---

medesimo compiuti *iure imperii* (tra i quali innegabilmente rientrano anche quelli, in particolare, relativi alla conduzione delle attività belliche …) possa ritenersi derogato a fronte di atti di gravità tale da configurarsi come 'crimini contro l'umanità'".

[31] „ … di contribuire così alla *emersione* di una regola conformativa della immunità dello stato estero, che si ritiene comunque già *insita* nel sistema dell'ordinamento internazionale."

[32] „un principio limitativo dell'immunità dello Stato che si sia reso autore di crimini contro l'umanità può presumersi 'in via di formazione'".

after resistance fighters had killed four German soldiers a few days earlier.[33] The Military Court of La Spezia convicted and sentenced Milde *in absentia* to life imprisonment ("ergastolo").[34] Some of the relatives of the massacred persons appeared as civil parties in the proceeding, requesting reparation from the accused and from Germany for the physical and moral injury suffered (case of *Ricciarini* and others). Amounts varying between 200,000 Euros (two claimants), 100,000 Euros (four claimants) and 66,000 Euros, to be borne by the respondents, were accordingly allocated. Germany was also ordered to bear the costs of the proceedings.

30. Germany filed an appeal against that judgment, invoking its immunity and therefore arguing that the judgment of the court of first instance must be set aside. However, the Military Court of Appeals in Rome, by a judgment of 18 December 2007,[35] dismissed the appeal. On the basis of lengthy observations, it attempted to show that the legal position had been clarified through the *Ferrini* judgment and that, as a consequence, Germany could not invoke the jurisdictional immunity which is generally applicable to States that have been impleaded before the courts of another State if the relevant acts forming the subject-matter of the dispute have been performed in the exercise of specific sovereign powers. It may be the first time in the history of international law that a State was found liable before the military courts of another State to make reparation for war crimes committed by one of its military agents. The judgment of the Military Court of Appeals is not only unsatisfactory on account of the wrong result which it reached. It also reveals a basic misunderstanding of international law. Perusing its many pages, the reader becomes aware of the Court's erroneous belief that infringements of human rights guarantees under international law must be remedied through national proceedings. The Court, in any event, does not demonstrate any knowledge of the existence of international procedures of settlement. Essentially, it argues that such infringements would remain without any kind of redress if national courts were prevented from entertaining civil actions seeking reparation.

[33] Originally, two more members of his unit had been indicted.
[34] Judgment of 10 October 2006, ANNEX 14.
[35] ANNEX 15.

31. The remedy of cassation filed by Germany against the finding regarding its financial responsibility by the judgment of the Military Court of Appeals was not successful. The Corte di Cassazione dismissed the remedy by a judgment of 21 October 2008, the text of which became available in January 2009.[36] In this judgment, the Corte di Cassazione confirms the Ferrini precedent, admitting very openly (section 3) that it meant an "abrupt *virement*" ("una svolta netta") in the pattern of its own case law and that it amounted to the application of "innovative principles" ("innovativî principi"). In order to support the legal correctness of that shift, it first of all refers to its own subsequent decisions, including the decisions of 29 May 2008, mentioned in para. 27. Without bothering to examine the relevant international practice on the issue – in fact, not a single foreign judgment or legislative act is mentioned - the Corte di Cassazione states in a grand gesture (section 4):

"Moreover, it is particularly important to stress that the solution to the question here discussed cannot be resolved on a purely quantitative basis, in other words, it cannot depend on how many rulings supported this or that position. It should be pointed out in this connection that although it is true that an examination of the practice of the courts of the various States is a meaningful way of ascertaining the application of customary rules of international law, it is equally true that the task of interpretation cannot be reduced to a mere mathematical computation of the data inferred from judicial practice …"[37]

32. The judgment continues emphasizing the value which in our time the international community attaches to fundamental rights. However, this is not the question the Corte di Cassazione had to address. In the first place, it should have dismissed the action against Germany because of Germany's jurisdictional immunity. But even its observations on the merits

[36] ANNEX 16.

[37] „Peraltro, il punto che sopratutto preme di sottolineare è intimamente collegato alla convinzione che la soluzione della questione dibattuta non possa corrispondere ad un esito di tipo meramente quantitative e non possa dipendere, perciò, soltanto dal numero, maggiore o minore, delle decisioni che aderiscono all'una o all'altra posizione. In proposito deve osservarsi che se è vero che l'esame della prassi dei tribunali dei vari Stati costituisce uno strumento importante per l'accertamento del vigore delle norme consuetudinarie di diritto internazionale, è non di meno certo che il compito dell'interprete non può ridursi ad un computo aritmetico dei dati desunti dalla prassi …".

of the case miss another essential issue. The damage entailed by a breach of fundamental rules during armed conflict can be repaired in many different ways, in particular on an inter-State level. To stick to the well-proven practices of international law does not amount to an interference in the rights that have suffered injury: compliance with the law in force cannot amount to a violation of the law.

d) The *Distomo* case

33. The *Distomo* judgment of the Greek Areios Pagos of 4 May 2000[38] has also had significant repercussions in Italy. The facts underlying that case go once again back to the final months of the German occupation of large parts of Europe. After 18 German soldiers had been killed by Greek resistance fighters, a German unit launched a revenge operation against the nearby village of Distomo. In the course of that operation, more than 200 civilians, among them mostly women, children and elderly men, were mercilessly massacred. The village was burned to the ground. There can be no doubt that this was an abominable war crime. In 1995, proceedings against Germany were commenced by more than 250 relatives of the victims of the massacre who claimed compensation for loss of life and property. In a judgment of 25 September/30 October 1997 (137/1997),[39] the Regional Court of Livadia found that it had jurisdiction over the case. It held Germany liable and made a finding – without issuing an order to pay – to the effect that Germany as the respondent had to pay an amount of 27 Million Euros to the claimants (according to the available French translation: "Reconnaît que l'Etat défendeur doit verser …"). As far as the procedural costs are concerned, Germany was "ordered" to reimburse a part of the costs defrayed by the claimants ("Condamne l'Etat défendeur à une partie des frais et dépenses de la demanderesse …"). This judgment was challenged by Germany. In an appeal to the Areios Pagos it invoked its jurisdictional immunity, arguing that no judgment on the merits should have been rendered.

34. The Areios Pagos dismissed the appeal. It relied essentially on the territorial clauses in a number of legal instruments dealing with State immunity pursuant to which immunity is not operative in instances where the relevant tortious action was committed in the territory of the forum State by an agent of that State present in that territory. In addition, it emphasized the gravity of the crimes in issue. Accordingly, it confirmed the judgment of the court of first instance.

[38] ANNEX 9.
[39] ANNEX 17.

35. Subsequent to the delivery of the judgment of the Areios Pagos, the successful claimants, for whom the Prefecture of Voiotia acted, sought to enforce the judgment 137/1997 of the Regional Court of Livadia against German property in Greece. However, enforcement action against a foreign State requires, under Article 923 of the Greek Code of Civil Procedure, the authorization of the Minister of Justice. This authorization was not granted; the Minister gave no response to a request to that effect submitted to him. Nonetheless, the claimants commenced enforcement proceedings. Germany lodged an objection and requested the proceedings – which aimed to register a legal mortgage on the Goethe Cultural Institute in Athens - to be stayed. Eventually, the Athens Court of Appeal upheld the objection lodged by Germany. It observed that Article 923 pursued an aim in the public interest, namely to avoid disturbances in international relations, and was proportionate to that aim. Neither did Article 923 constitute a denial of the right to effective judicial protection (Article 6 of the European Convention on Human Rights and Article 2 (3) of the International Covenant on Civil and Political Rights) since it did not enunciate an absolute prohibition on enforcement but merely established a requirement for prior government approval. An appeal to the Areios Pagos was dismissed on 28 June 2002. Details of the somewhat complex proceedings are given in the factual part of the judgment of the European Court of Human Rights in *Kalogeropoulou* of 12 December 2002 (see following section 36).[40]

36. Thereupon, the claimants introduced an application against Greece and Germany before the European Court of Human Rights (ECtHR), relying on Article 6 of the European Convention on Human Rights (ECHR). They contended that their right to judicial protection, enshrined in that provision, had been encroached upon by both governments. The European Court dismissed the application. It recalled first the principle of State immunity, developed from the maxim *par in parem non habet imperium*, concluding that by granting immunity to a foreign State a legitimate aim was pursued. It then stressed that the provisions of the European Convention

[40] Application No. 59021/00.

on Human Rights did not operate in a vacuum, as indicated by Article 31 (3) (c) of the Vienna Convention on the Law of Treaties pursuant to which in the interpretation of a treaty account is to be taken of "any relevant rules of international law applicable in the relations between the parties". Thus, harmony must be established with other rules of general international law, including the rule of sovereign immunity. Lastly, the European Court stated that it did

> "not find it established … that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity".

37. The claimants then attempted to enforce the *Distomo* judgment in other European countries. They found out that in Italy their chances of being successful might be good, given the *Ferrini* judgment of the Corte di Cassazione. Upon their request, the Court of Appeal of Florence, by virtue of a decision ("decreto") of 2 May 2005,[41] declared "enforceable in Italy" ("dichiara esecutiva in Italia") the order contained in the Livadia judgment which imposed on Germany to re-imburse the costs for the judicial proceedings in Greece (2,934.70 Euros). By decision of 6 February 2007,[42] the same Court rejected Germany's opposition against that decision, as did the Corte di Cassazione on 29 May 2008[43]. The amount of 2,93470 Euros plus costs is now enforceable in Italy against Germany.

38. Following its earlier line of reasoning, the Court of Appeal of Florence then declared, by a decision ("decreto") of 13 June 2006,[44] the enforceability of the judicial order directing Germany to pay the amounts allocated to the claimants on account of the merits of the dispute. Germany lodged the remedy of opposition on 2 August 2007. The Avvocatura Distrettuale dello Stato di Firenze, in a submission of 11 September 2008,

[41] ANNEX 18.
[42] ANNEX 19.
[43] ANNEX 20.
[44] ANNEX 21.

observed that the decision of 13 June 2006 should be set aside.[45] However, in its judgment of 21 October/25 November 2008 the Court of Appeal of Florence rejected the opposition.[46] Germany has filed the remedy of cassation against that judgment in order to try, once again, to convince the Corte di Cassazione of its erroneous course. To date, the proceedings have not yet come to a close.

39. Subsequently, the claimants looked out for property of Germany that might be subject to measures of constraint. They identified the Villa Vigoni, located in the village of Loveno di Menaggio, province of Como, on the heights surrounding Lake Como, as a suitable object for such action. Villa Vigoni is a place of cultural encounter between Germany and Italy. It was bequeathed in 1983 by Ignazio Vigoni, a member of a family with rich traditions in Italo-German relationships, to the German State with the proviso that a cultural centre should be established in the Villa and the surrounding park. In 1986, an executive agreement[47] was concluded between the two governments, fixing the legal status of Villa Vigoni. While the ownership of the real estate remains with Germany, the management of the entity was entrusted to an Association which operates as an Italian association in Italy and as a German *Verein* in Germany. On an annual basis, Villa Vigoni shall be awarded and has been awarded public monies from the budget of the German Federal Ministry of Education and Research as well as from the Italian Ministry of Foreign Affairs. Section 3 of the Exchange of Notes provides: "The property shall be maintained intact".

40. Notwithstanding the fact that the decision of the Corte di Appello di Firenze of 13 June 2006 has not yet become *res judicata*, the claimants obtained, on 7 June 2007, the inscription of a judicial mortgage ("ipoteca giudiziale") in the land register covering Villa Vigoni. The sum of that mortgage amounts to 25,000 Euros.[48] Germany challenged that decision.

[45] ANNEX 22.
[46] ANNEX 23.
[47] Exchange of notes constituting an arrangement concerning the establishment of the "Villa Vigoni" Association as a German-Italian Centre, 21 April 1986, 1501 UNTS 57, No. 25828, ANNEX 24.
[48] ANNEX 25.

In a submission of 6 June 2008 to the Tribunale di Como the Avvocatura dello Stato opined that the judicial mortgage should be cancelled[49]. No definitive decision has been taken as yet.

41. Additionally, the claimants in the *Distomo* case have recently attempted to attach credits owed by the Italian Ferrovie dello Stato to Deutsche Bahn AG, the German railway company, a private corporate body the shares of which are currently held by the German State. The sum in question amounts to roughly 50 million Euros. Germany has challenged the application of the claimants for a decision of the Tribunale di Roma to obtain such a garnishment order. A first hearing, scheduled for 17 March 2009, could not take place because the interested parties had not been correctly summoned. A (second) hearing will take place on 2 October 2009.

[49] ANNEX 26.

e) The latest cases - Examples

42. Numerous other claims are currently pending before Italian courts. Thus, just to give an additional example, seven proceedings were instituted before the Tribunale di Mantova on 8 September 2004 (*Terzo Bosoni; Alfeo Mutti; Norma Secchi; Lea Salardi; Evaristo Trida; Lido Cera; Francesco Mazza*). The claimants argue that Germany owes them financial compensation because they were deported to Germany to perform forced labour. In all of these cases, the Tribunale di Mantova concluded that there was a lack of jurisdiction. However, appeals are pending before the Corte di Appello di Brescia. It must be presumed that those appeals will be granted since the Corte di Cassazione clings to the jurisprudence it initiated with the *Ferrini* judgment.

43. One of the more recent proceedings is the case of *Gamba and Others*, instituted before the Tribunale di Mantova on 10 April 2007 by 44 claimants. Later (11 March 2008) this action was joined by 30 further claimants. On grounds of territorial jurisdiction, the case is now pending before the Tribunale di Brescia. Here again, the claimants base their requests on the fact that they were unlawfully deported to Germany and were subjected, as forced labourers, to harsh living conditions.

44. In 2009, the series of mass claims has continued. On 27 February, two applications were introduced before the Tribunale di Torino, the first one (*Azzan* and Others) comprising ten claimants, and the second one (*Baldi* and Others) comprising nine claimants. Their wish is to join the proceedings in the *Mantelli* case[50]. A further case was brought to the attention of the Tribunale di Mantova in February 2009 (*Currà* and 32 other claimants).

45. Germany does not deem it necessary to describe in detail all the cases that are currently pending before Italian judges. Since 2004, the numbers have continually increased. Currently, almost 500 claimants have

[50] Above para. 24.

introduced civil actions against Germany, which are pending before 24 regional courts ("Tribunali") and four courts of appeal. The essential data can be gleaned from the list annexed to this application.[51] It stands to reason that Germany is thus involved in a continual confrontation which requires a huge amount of financial and intellectual expenditure. A special task force of lawyers had to be set up to follow the developments with their manifold ramifications. Having to observe the judicial practice of the Italian judges in the relevant cases, and to respond to it in an appropriate manner, is extremely burdensome for Germany and has grown into a serious stumbling block adversely affecting the bilateral relationships between the two nations.

f) No consent to Italian jurisdiction

46. It should be made clear at the very outset that Germany has never consented to the exercise of jurisdiction by the Italian courts in the cases referred to above. Whenever Germany has made an appearance in a proceeding, it has consistently asserted that the actions must be dismissed for lack of jurisdiction. If in the relevant cases the Italian courts had acted correctly, they would have rejected those actions "on their own initiative", as specified by Article 6 (1) of the UN Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004, which reflects the position under customary international law. On a regular basis, however, Germany has responded to the actions with a view to drawing the attention of the judges concerned to the jurisdictional obstacle of sovereign immunity, and remedies were filed solely in order to alert the competent higher judicial bodies about the mistaken course followed by some of the lower judges. In a spirit of partnership, its intention was to help the Italian judiciary to correct itself. Accordingly, Germany has never entered into a discussion about the well-foundedness of the claims brought against it. In a deliberate manner, it has always defended the viewpoint that substantive claims derived from occurrences dating back to World War II cannot be pursued before Italian courts. Accordingly, the subject-matter of the dispute is clearly confined to

[51] ANNEX 8.

occurrences that took place after the entry into force of the European Convention for the litigant parties.

IV. The Merits

47. Through its judicial practice, as described above, Italy has infringed and continues to infringe its obligations towards Germany under international law. Primarily, 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. Italy cannot rely on any justification for disregarding the immunity which Germany enjoys under that principle.

1) Sovereign Immunity as a Fundamental Principle of International Law

48. Sovereign immunity is a fundamental principle of the present-day international legal order. It is so well recognized that its existence needs no lengthy demonstration. One of the early decisions usually referred to in this connection is the U.S. judgment in *The Schooner Exchange*, delivered by Chief Justice Marshall, where it was said that immunity was rooted in the "perfect equality and absolute independence of sovereigns".[52] Before World War I and even during the inter-war period, absolute immunity of States from judicial interference was the dominant theory regarding the reach *ratione materiae* of such immunity.[53]

49. After World War I, doubts arose as to the scope *ratione materiae* of jurisdictional immunity. Pursuant to the dominant view, States enjoyed absolute immunity with regard to all kinds of suits brought against them. However, since the Soviet Union, a newcomer on the international stage, had decided to carry out trade activities through State undertakings, it was increasingly felt unjust to grant a privileged status to commercial

[52] 11 U.S. (7 Cranch) 116, 137.
[53] See, for instance, Hazel Fox, *The Law of State Immunity* (2nd ed., Oxford 2008), pp. 204-211; ILC, Report on the work of its 32nd session, YbILC 1980, Vol. II, Part 2, pp. 142-157.

activities of foreign States. The great turnaround occurred in 1952 when the Legal Adviser of the US Department of State stated in a letter of 19 May 1952[54] that in the future, when considering requests of foreign governments for a grant of sovereign immunity, the Department would not support continued full acceptance of the absolute theory immunity but would follow the restrictive theory, which limited immunity to non-commercial activities of foreign States.

50. This line of reasoning, which corresponded to a tendency in the jurisprudence of the Italian courts followed already for many decades,[55] found also a positive echo in the case law of the German courts. The Bundesverfassungsgericht (Constitutional Court), which is tasked under the Basic Law (Article 100 (2)) with ruling on the controversial existence of a general rule of international law if so requested by any one German court, joined the international consensus reflected in the Tate letter in a decision of 30 April 1963[56] by specifying that a customary rule prohibiting civil actions to be brought before the courts of other States no longer existed with regard to commercial activities – *acta jure gestionis*. Sovereign immunity had to be deemed to be confined to proceedings in which *acta jure imperii* were in issue.

51. With the exception of socialist States, the restrictive theory of sovereign immunity was indeed followed in the subsequent years almost everywhere in the world when such issues arose before civil courts in cases brought against foreign States. In the United States, the judgment of *Alfred Dunhill of London v. Republic of Cuba*[57] embraced the new doctrine, and fuller grounds for the new course were given in 1983 in *Verlinden v. Central Bank of Nigeria*.[58] At the same time, the United States proceeded to a legal enactment, the Foreign Sovereign Immunities Act (FSIA),[59] which provided that foreign States shall not enjoy immunity in commercial matters.

[54] "Tate letter", 26 (1952) Department of State Bulletin 984.
[55] For references see ILC, Report on the work of its 43rd session, YbILC 1991, Vol. II, Part Two, p. 36 n. 11.
[56] 16 Entscheidungen des Bundesverfassungsgerichts 27; English translation: 45 ILR 57.
[57] 425 U.S. 682 (1976).
[58] 461 U.S. 480 (1983).
[59] 15 (1976) ILM 1388.

In the United Kingdom, efforts to depart from the absolute theory of immunity eventually prevailed in 1977 in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria.*[60] In 1978, this new tendency received legislative support through the enactment of the State Immunity Act 1978,[61] and in *I Congreso del Partido*[62] the restrictive theory of sovereign immunity was also established in common law. In the 1978 Act, the main exception from the principle of immunity as stated in section 1. relates to "commercial transactions" (section 3 (1)). In France, the same development took place, partly already many years before the common law countries abandoned their former position.[63] To date, however, France has not deemed it advisable to enact a specific domestic statute to regulate the matter. In Italy, a judgment of the Corte di Cassazione of 6 June 1974[64] confirmed that foreign State activity, even if carried out in Italian territory, was shielded from private claims before Italian courts "as long as the activity concerned aims at the fulfilment of … public functions. Immunity does not apply to a merely private activity".[65]

52. The distinction between *acta jure imperii* and *acta jure gestionis*, between commercial and non-commercial activities, remains the parameter which is still determinative today regarding the scope *ratione materiae* of jurisdictional immunity of States. A current reflection of that distinction can be found in Articles 5 and 10 of the UN Convention on Jurisdictional Immunities of States and their Property.[66] Pursuant to Article 5, which purports to codify a rule of customary international law,[67]

---

[60] Court of Appeal, 64 ILR 111; 16 (1977) ILM 471.
[61] 17 (1978) ILM 1123.
[62] [1983] 1 A.C. 244.
[63] See ILC, Report on the work of its forty-third session 1991, Vol. II, Part Two, p. 37 n. 117; see also Patrick Daillier and Alain Pellet, *Droit international public* (7th ed. Paris 2002) para. 290.
[64] ANNEX 27. English translation: 65 ILR 308.
[65] "purché si tratti di un'attività diretta alla realizzazione dei loro fini pubblici, mente l'immunità non spetta se vi sia stato esercizio di un'attività meramente privata."
[66] Adopted by UN General Assembly Resolution 59/38, 2 December 2004.
[67] See ILC, Report on the work of its 32nd session, YbILC 1980, Vol. II, Part Two, commentary on Article 6, p. 142, at 156 para. 55: "The preceding review of historical and legal developments of the rule of State immunity appears to furnish ample proof of the foundations of the rule as a general norm of contemporary international law."

"[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention".

The main exception is then to be found in Article 10 of the UN Convention with regard to commercial transactions:

"If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

53. Additionally, the UN Convention contains some other exceptions in Articles 11 to 17. None of these exceptions is relevant to the case at hand. Special attention will be given to Article 12: Personal injuries and damage to property, in a later section of this submission.

54. All of the domestic statutes that were enacted in a number of countries that followed the US and the UK example rely in the main on the distinction between *acta jure imperii* and *acta jure gestionis* as well. Like the UN Convention, they add to this main criterion a limited number of other factual configurations in which a respondent State in a proceeding before the courts of another State is prevented from invoking jurisdictional immunity. None of those exceptions, however, covers the instances that have recently been handled by the Italian courts with regard to claims in connection with Germany's occupation of Italy during World War II.

55. No general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of state immunity in respect of violations of humanitarian law committed by military forces during an armed conflict. It has already been mentioned that the Corte di Cassazione was not able to rely on a customary rule that corresponds to the definition in Article 38 (1) (b) of the Statute of the International Court of Justice. The practice regarding the settlement of war claims is very

consistent. Such claims are generally settled under international treaties in the relationship between the States concerned. Specifically with regard to all the claims resulting from World War II, this traditional course was followed. Accordingly, there can be no *opinio juris* to the contrary. All the arguments which have been adduced by the Corte di Cassazione to sustain its line of reasoning are devoid of firm foundations in positive international law. Rightly, Pierre d'Argent has written that the jurisdictional immunity of States is not so much designed to protect States alleged to have committed internationally wrongful acts to the detriment of private persons, but rather has a "fonction systémique au sein du droit des gens", namely to entrust other mechanisms than the judicial authorities of the forum State with the regulation of reparation claims.[68]

56. Germany's position is fully confirmed by the special practice as it has evolved regarding the settlement of war claims in the relationship between the two litigant countries. By virtue of Article 77 (4) of its Peace Treaty, Italy had to renounce all claims against Germany and German nationals resulting from the period of World War II. In 1961, pursuant to the two treaties concluded for the settlement of any and all outstanding claims, Italy declared once again for itself and for all of its nationals that indeed all such claims were settled. There can be no doubt that such renunciation clauses are valid. All the peace treaties concluded by the victorious Allied Powers with the former enemy nations are based on that premise, which has never been contested. The wish of the Allied Powers was to put a definitive end to any litigation about the financial consequences of World War II, and Germany and Italy followed that philosophy when concluding the two treaties of 1961.

2) The Defects and Inconsistencies in the Case Law of the Corte di Cassazione

57. Two years before the Corte di Cassazione delivered its judgment in the *Ferrini* case, it had to pronounce on the jurisdiction of the Italian civil

[68] *Les réparations de guerre en droit international public* (Brussels 2002), p. 842.

courts in respect of an action brought by the relatives of some of the victims of the NATO air strikes against the former Yugoslavia during the armed conflict unleashed by the occurrences in Kosovo. The issue of sovereign immunity did not arise since the claimants based their demands on Italy's involvement in those air operations. The victims had died when the building of the Yugoslav radio and television station in Belgrade collapsed under the impact of a bomb. Accordingly, the claimants sought financial compensation for the loss suffered (*Markovic* case). They argued that to attack a radio and television station amounted to a war crime since such a station did not constitute a military target. Rejecting these arguments, the Corte di Cassazione held:

"2. The claim seeks to impute liability to the Italian State on the basis of an act of war, in particular the conduct of hostilities through aerial warfare. The choice of the means that will be used to conduct hostilities is an act of government. These are acts through which political functions are performed and the Constitution provides for them to be assigned to a constitutional body. The nature of such functions precludes any claim to a protected interest in relation thereto … With respect to acts of this type, no court has the power to review the manner in which the function was performed."[69]

In other words, the Corte di Cassazione was of the view that judicial review of acts of war was precluded *a limine* before ordinary civil courts, thus applying an Act of State doctrine. It is highly inconsistent to change direction a fairly short time later, affirming the jurisdiction of Italian courts in a case brought against Germany. Obviously, the Corte di Cassazione applies a double standard. It protects its own armed forces against any reparation claim, but it dismisses any defence of lack of jurisdiction when a case is filed involving the military activities of a foreign nation.

58. In the *Ferrini* judgment (point 7.1), the Corte di Cassazione has attempted to justify the departure from its own jurisprudence. It argued that

"whilst it is accepted that the *modus operandi* of such activities is beyond censure when they are carried out under the supreme direction of the public

[69] Decision of 5 June 2002, No. 8157, English translation 128 ILR 652, ANNEX 28, also to be found in the judgment of the European Court of Human Rights in *Markovic*, 14 December 2006, Application 1398/03, § 18.

> authorities, this does not prevent investigations from being launched into possible crimes committed during the course of the activities and into those responsible for such crimes … Further, in accordance with the principle of adaptation enshrined in Article 10(1) of the Italian Constitution, those 'generally recognized' norms of international law which safeguard, as fundamental rights, the liberty and dignity of the human person, and which characterize as 'international crimes' activities that pose a serious threat to the integrity of those rights, automatically become an integral part of Italian law. As such they clearly constitute a legitimate judicial parameter in respect of harm caused by a criminally motivated or culpable act."[70]

These "explanations" do not explain anything. First of all, they mix up the issue of individual criminal responsibility with the issue of sovereign State immunity. Furthermore, they do not provide any justification for the contention that in case of the alleged commission of an international crime the immunity of the impleaded State may be automatically disregarded. Third, the judgment ignores that in the *Markovic* case the claimants had specifically argued that to target a radio and television station amounted to a war crime. The inconsistency of the Corte di Cassazione is therefore manifest.

59. Further in the *Ferrini* judgment, the Corte di Cassazione essentially relies on the gravity of the violations of international humanitarian law by German forces in Italy and on the fact that in criminal matters the perpetrators do not enjoy personal immunity. Additionally, it bases its findings mainly on the judgment of the Areios Pagos in the *Distomo* case. Germany does not challenge the assertion that indeed very serious violations, even crimes, were committed by its occupation forces in Italy. Yet it is a fundamental mistake to treat the personal immunity of perpetrators of an international crime and the sovereign immunity of a State in the same manner. Every person is accountable for war crimes, and there cannot even be any kind of personal immunity before criminal courts established by the international community. No valid reasons militate for sparing authors of grave crimes the just retribution which they deserve. Civil responsibility of a State for war damages belongs to a different conceptual framework, however. The liability of a national community for

[70] 128 ILR 665.

the tortious actions orchestrated by its leaders cannot be unlimited. For that reason, the traditional method of settling war claims, as already said above, consists of concluding comprehensive agreements at inter-State level. This preferred method is perfectly compatible, on the other hand, with systems where, on the basis of specific conventional understandings, the injured individual may also play a certain role in asserting his/her rights. However, in respect of war damages, no such agreements exist in the relationship between Germany and Italy. Given the waiver clause in the 1947 Peace Treaty, there was also no need for such special regimes. Other points raised in the *Ferrini* judgment will be dealt with separately in the following sections of this submission.

60. In the legal literature, the *Ferrini* judgment has been submitted to harsh criticism. In particular, it was noted that the Corte di Cassazione fails to draw a clear distinction between the value-loaden primary rules of international human rights law and humanitarian law and the secondary rules that come into play once a breach of such primary rules has occurred. Italian author Andrea Gattini charges the Corte with "deplorable superficiality" and observes that "judicial activism alone is not sufficient".[71] Thomas Giegerich concludes that the Corte "forgot to mention that the immunity rules are emanations of the sovereign equality of States which also is a fundamental principle of international law".[72] In an extensive article on the issue, Christian Tomuschat denounces the logical confusion which permeates the *Ferrini* decision.[73]

61. The most tangible expression of the inconsistencies in the case law of the Corte di Cassazione can be found in the orders of 29 May 2008.[74] The key passages from those orders were already cited. The reader can have no doubts as to the good intentions of the Corte di Cassazione. The judges

[71] War Crimes and State Immunity in the *Ferrini* Decision, 3 (2005) Journal of International Criminal Justice 224, at 231, 241.
[72] Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?, in: Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*. Jus Cogens and Obligations Erga Omnes (Leiden/Boston 2006), p. 203, at 222.
[73] L'immunité des Etats en cas de violations graves des droits de l'homme, 109 (2005) RGDIP 51 *et seq.*
[74] Above para. 27.

acknowledge with great openness that the "law" they wish to apply has no basis in actual rules of international law. They believe, however, that, given the value-oriented texture of the present-day international legal order, it is legitimate to develop the regime of sovereign immunity by giving precedence to those values which, they feel, are not yet fully reflected in positive law. In their view, the paramount importance of human rights and human dignity overrides the traditional rules determining the scope of State immunity *ratione materiae*.

62. It is certainly true that international law is not made up of a well-circumscribed set of norms that remain stable forever. Of course, the main instrument of change is international treaties. Customary law, too, moves ahead, yet at a slower pace, as shown precisely in the field of sovereign immunity by the passage from the absolute theory to the restrictive theory, which extended over decades. Broad political support is needed in any event. Processes of legal change must be in consonance with the general movement of the system of international law in its entirety. It cannot be denied that in the field of sovereign immunity, in particular, domestic courts have played a considerable role, given the nature of the subject-matter. But judges are not legitimated to place themselves at the forefront of processes of change. In this regard, Lord Hoffmann in the *Jones* case,[75] adjudicated by the UK House of Lords, observed cogently in joining Ronald Dworkin's views that:

> "the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."[76]

63. Italian authors have sharply criticized the way of reasoning the Corte di Cassazione embarked upon in the orders of 29 May 2008.

[75] House of Lords, 14 June 2006, 129 ILR 713.
[76] *Ibid*. 738.

Francesca De Vittor[77] takes as her point of departure the recognition by the Court of its intention

"not to apply an existing norm of general international law, but rather to contribute to its formation in a situation of legal uncertainty".[78]

Carlo Focarelli subjects the orders of 29 May 2008 to a stringent analysis and demonstrates also their logical inconsistency.[79] He calls them "profondément contradictores".[80] In fact, for a court of law it is rather strange to openly acknowledge that it refrains from applying the law as it stands, seeking instead new avenues that would better accommodate certain ideals of justice as perceived by the judges.

64. In sum, one may say that the Corte di Cassazione hastily jumped to conclusions which, with regard to its own country, it was not prepared to accept. Many intellectual steps are required in an attempt to particularize broad principles, translating them to the field of procedural law. Thus, for instance, the commission of an international crime does not automatically establish the jurisdiction of the International Court of Justice. This basic proposition was recently re-confirmed by the Court in *Democratic Republic of the Congo v. Rwanda*[81] (paras. 64, 125)[82]. Lastly, the Corte di Cassazione did not at all pay heed to the fact that at the time of its decision in the *Ferrini* case a whole system of settlement of war claims was in place between Italy and Germany. In very short words, delivering his judgment in

[77] 'Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli', Diritti umani e diritto internazionale 2 (2008), issue 3; ANNEX 29).
[78] The Supreme Court states explicitly "di non applicare una norma di diritto internazionale generale esistente, ma di contribuire piuttosto alla sua formazione in uno stato di incertezza del diritto."
[79] 'La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des États étrangers', 112 (2008) Revue générale de droit international public 761 *et seq*.
[80] Ibid., 768.
[81] Case concerning *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda*), 3 February 2006.
[82] "Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties".

the *Jones* case, Lord Bingham of Cornhill stated that the *Ferrini* decision could not

"be treated as an accurate statement of international law as generally understood".[83]

Referring to that judgment, he also added that "one swallow does not make a rule of international law", thereby emphasizing that *Ferrini* stood lost and lonely in the wide arena of international law in which 192 States interact with one another.

3) The *Distomo* Precedent Overruled by the Judgment in the *Margellos* Case

65. Seen from a chronological viewpoint, it was the *Distomo* case, culminating in the decision of the Greek Areios Pagos,[84] that set in motion the series of proceedings which have been commenced against Germany before Italian courts. Indeed, the *Distomo* decision was the first pronouncement of the highest court of any country to affirm that by committing grave violations of human rights a State forfeited its jurisdictional immunity if those crimes were committed in the territory of the forum State. The somewhat summary reasoning of the Areios Pagos was hardly persuasive, and indeed in *Margellos*[85] the Special Supreme Court of Greece, which discharges the functions of a constitutional court and is therefore hierarchically superior to the Areios Pagos, ruled in a similar case a short time later that the rule of international law according to which proceedings cannot be brought against a foreign State before the courts of a given State on account of a tort action committed by the military forces of the respondent State continues to exist. To support this finding, it held:

"Since there is no specific text or act formulating a rule providing for an exception to immunity in the case of a claim to establish State liability in tort arising from armed conflict, this court cannot itself formulate such a rule or confirm its existence in the absence of clear evidence from

[83] 129 ILR 726, para. 22.
[84] 129 ILR 513, 4 May 2000.
[85] Judgment of 17 September 2002, 129 ILR 526.

international practice. Nor can the Court extrapolate such a rule from the principle that States are liable to pay compensation for violations of the laws of war on land."[86]

Thus, the *Distomo* decision lost its underpinnings. Accordingly, one has to conclude that Italy remains indeed the only country where sovereign immunity in consonance with general international law is not respected.

4) The U.S. Practice

66. When the United States enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), it intended to reflect, to the greatest extent possible, the general rules of international law in force at that time.[87] However, such adjustment to international law was not considered a necessity. In the United States, domestic statutes push aside international treaties;[88] likewise, they replace general principles of international law.[89] The proposition that international law is part of the law of the land[90] remains subject to domestic determinations to the contrary.[91] In any event, the FSIA did not contain any opening for instances where the claimant alleged that the respondent State had engaged in serious human rights violations or violations of international humanitarian law. Obviously, the legislative bodies did not opine that in such instances sovereign immunity could be or should be made to yield.

---

[86] Ibid., 532.
[87] See Fox, above n. 53, p. 317 *et seq*. The Report of the House Committee on the Judiciary, September 1976, 15 (1976) ILM 1398, at 1402, states that "the bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."
[88] *Reid v. Covert*, 354 U.S. 1, at 18 (1957).
[89] See American Law Institute (ed.), *Restatement of the Law Third. The Foreign Relations Law of the United States*, vol. 1 (St. Paul, Minn., 1987), p. 63, § 115 (1).
[90] *Sabbatino*, 376 U.S. 398, at 423 (1964); *The Paquete Habana*, 175 U.S. 677, at 700 (1900).
[91] The U.S. Department of Justice has even ventured to state "that customary international law cannot bind the Executive Branch under the Constitution, because it is not federal law. In particular, the Department of Justice has opined that 'under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law.'", see Frederic L. Kirgis, 'Distinctions Between International and U.S. Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists', www.asil.org/insight 138.cfm.

67. The fact that in its original version the FSIA barred actions against foreign States even when serious allegations of wrong-doing could be brought against them, was felt to be a shortcoming of the Act after a few years. Eventually, in 1996, this perceived shortcoming was remedied by the adoption of the Antiterrorism and Effective Death Penalty Act of 1996[92] which deprives States alleged to have committed an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, of the defence of immunity if money damages are sought for personal injury or death, provided that the State concerned was officially designated as a sponsor of terrorism. Thus, Congress deliberately excluded any kind of automaticity.

68. In the first place, it should be recalled that a unilateral act of U.S. legislation is not capable of changing international law. Custom requires "a general practice accepted as law" (Article 38 (1) b. of the Statute of the ICJ). It is certainly true that big powers frequently take the lead in shaping new rules. However, such efforts, which may be taken as an element susceptible of contributing to a – protracted - process of change in international law, depend for their success on sufficiently broad support from other nations. This is not the case with regard to the extension of the scope of the FSIA through the 1996 Act. That Act is generally seen more as an emanation of the factual strength of the United States than as the manifestation of a rule that has by now crystallized as a rule of customary law.

69. It should also be noted that the 1996 Act is couched in fairly cautious terms. It is an absolute requirement that the respondent State be certified by the US Government as a sponsor of terrorism. The courts of the United States have no power to determine in an autonomous fashion whether a State has engaged in one of the activities enunciated in the list of relevant crimes. Lastly, only individual acts of a specific kind are covered. Occurrences related to an armed conflict have not been included in the list of crimes on account of which claims can be brought before US courts. In this connection, it is not without interest that the Legal Adviser of the

[92] Of 24 April 1996, 36 (1997) ILM 759.

Department of State, William H. Taft, IV, in a submission as Amicus Curiae to the US Court of Appeals for the District of Columbia Circuit in the case of *Hwang Geum Joo v. Japan*, a "comfort women" case, stated that "all World War II-related claims should be resolved exclusively through intergovernmental agreements".[93] His submission was embraced by the judges of the Court of Appeals who found that the case involved a nonjusticiable political question.[94] The determination that the settlement of war damages should be sought by diplomatic negotiation and intergovernmental agreements also underlies the 1996 Act.

70. Far from serving as a confirmation of a "trend" or a "tendency" to further restrict the reach of sovereign immunity, the US Antiterrorism and Effective Death Penalty Act of 1996 therefore rather buttresses the position of the Applicant that no relevant international practice can be identified that would deprive Germany of its right under general international law to raise preliminary objections – lack of jurisdiction - against any attempt to be sued before Italian courts on account of World War II occurrences.

5) The Narrow Scope of the Territorial Clause

71. One of the pivotal elements of the *Ferrini* judgment of the Corte di Cassazione is its reliance on the territorial clauses in international instruments and domestic statutes to the effect that States are debarred from opposing their sovereign immunity to a claim deriving from a harmful sovereign activity if the harm was caused in the territory of the forum State itself by one of its agents present in that territory. This argument fails, however. The territorial clauses which will be summarily set out in the following have never been intended to cover unlawful acts committed during armed conflict. It should be added, too, that in some cases the acts complained of did not take place in Italy, thus, for instance, when Italian prisoners of war were directly transported from Albania or Greece to the German territory.

[93] Submission of November 2004, ANNEX 30.
[94] Judgment of 28 June 2005, ANNEX 31.

72. The European Convention on State Immunity of 16 May 1972[95] came first as an attempt to codify the law of State immunity. Article 11 of that Convention provides:

"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

It is clear from the Explanatory Report to the European Convention on State Immunity[96] that the article is designed to cover only incidental occurrences caused in the normal discharge of diplomatic or consular activities. The authors did not intend to lay down a rule that would deal with the consequences of armed conflict. Indeed, the Explanatory Report gives just one example that unequivocally indicates the limits of the article:

"for example, when a vehicle belonging to a State is involved in a traffic accident, then, provided the driver of the vehicle was present, the State as owner or possessor of the vehicle may be sued, even though the plaintiff does not seek to establish the personal liability of the driver".[97]

There is not a single example of a proceeding where Article 11 would have served, in one of the States parties, as a tool to overcome the hurdle of immunity in a dispute the subject-matter of which was a claim stemming from armed conflict or the involvement of military forces in a UN operation. In fact, Article 31 excludes the activities of armed forces from the scope of application of the 1972 Convention. This exclusionary clause corroborates the necessity of a narrow reading of Article 11. If military operations in the territory of another State are not to be taken into account, very little remains, only activities of a logistical nature the qualification of which as either being *jure imperii* or *jure gestionis* would be extremely difficult without any explicit determination. When participating through its agents in public traffic or transport in a foreign country, a State does not exercise its specific

[95] CETS No. 74. Germany is a party to that Convention since 1990, Italy has not ratified it as yet.
[96] Council of Europe, Strasbourg 1972.
[97] *Ibid*., 21.

sovereign powers. To specify, however, that such "neutral" activities are indeed removed from the privileged sphere of State power was a most useful clarification.

73. In the case of *McElhinney*, the Irish Supreme Court gave judgment on an incident at the border between Northern Ireland and the Republic of Ireland in which a British soldier, who partly acted on Irish soil, was involved.[98] Basing itself on the clause in Article 31 of the European Convention, the Supreme Court dismissed the action filed against the United Kingdom for lack of jurisdiction, arguing that in any event Article 31 prevailed over Article 11. For the Irish Supreme Court, this reading was just a matter of statutory interpretation. Its judgment was later confirmed by the European Court of Human Rights (ECtHR), before which the applicant had filed an application, arguing that his rights under Article 6 of the European Convention on Human Rights (ECHR) had been infringed.

74. In respect of the UN Convention on Jurisdictional Immunities of States and Their Property the legal position is even clearer. As generally known, it has emerged from the work of the ILC. The draft articles were adopted on second reading by the ILC in 1991.[99] For many long years, until 2004, the draft was thereafter pending before the Sixth Committee of the General Assembly. During that period, it was amended only on minor points. Article 12, the territorial clause, was not modified. It remained textually the same. Accordingly, the commentary adopted by the ILC in 1991 is highly relevant. It does not refer in the least to harm caused by armed conflict. The general philosophy pursued by Article 12 is unmistakably specified:

"The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail,

[98] Judgment of 15 December 1995, reproduced in the judgment of the European Court of Human Rights in *McElhinney v. Ireland and UK*, 22 November 2001, Application 31253/96, § 15.
[99] YbILC 1991, Vol. II, Part Two, p. 13.

road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals."[100]

75. The commentary adds just one further sentence to its exposition of the main purpose of the (then) draft article 12 where it is explained:

"In addition, the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination."[101]

Clearly, this is no more than a reference to individual cases of wrongdoing that have nothing in common with large-scale operations pursuing illegitimate aims, a frequent occurrence during armed conflict as the present dispute recalls with regard to the past of more than 60 years ago. It would amount to a total distortion of the object and purpose of Article 12 to apply it to the settlement of macro-injustices that were never envisioned by the authors of the 2004 Convention as coming within its purview. In particular, the *Letelier* case,[102] specifically mentioned in a footnote to the sentence cited above, may be classified as such an individual case. Secret agents of the Chilean Government assassinated a former ambassador and Minister of the Allende Government, Orlando Letelier, right in the heart of Washington on 21 September 1976 by detonating a bomb. To permit individual claims to be brought in such particular cases where the territorial integrity of the forum State was violated by unidentified agents of a criminal government differs fundamentally from authorizing individual claims the background of which is an armed conflict with thousands or perhaps even millions of victims with incalculable financial dimensions. Therefore, Article 12 of the 2004 UN Convention cannot even be characterized as indicative of a new tendency in international law. One may perhaps speak of a new tendency, perceived by some writers in recent years, with regard to egregious violations of human rights in individual cases. Concerning armed conflict, however, no clues whatsoever may be derived from Article 12.

---

[100] *Ibid.*, 45 para. 4.
[101] *Ibid.*
[102] *Letelier v. Republic of Chile*, 748 F 2d 798 (2d Cir. 1984), 79 ILR 561.

76. Following the example of the European Convention on State Immunity, most national statutes that were enacted above all in common law countries included also a territorial clause that denies immunity in instances where loss or injury were caused by an act or omission in the territory of the State concerned. The first one of those clauses was Section 1605 (a) (5) of the FSIA that refers to instances where

> "money damages are sought against a foreign state for personal injury or death … occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment".

However, not the slightest hint can be found that this provision was meant to cover claims related to any kind of armed conflict. It also stands to reason that the United States, when the FSIA was passed, never envisaged any probability of foreign armed forces acting in a hostile manner in its territory. In *Argentine Republic v. Amerada Hess*[103] the US Supreme Court explicitly confirmed that "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States".[104] This was said with regard to a dispute where the owners of a ship damaged and thereby rendered unusable by an Argentine air attack during the Falkland war sought financial compensation for the financial loss they had sustained. The claim brought against Argentina was held to be inadmissible, given that the FSIA did not provide an opening for violations of international law other than those specifically mentioned in its text (at that time: property taken in violation of international law). It would therefore be erroneous to contend that the FSIA was adopted with a view to departing from the narrow definition of the scope of the territorial clause by the European Convention on State Immunity.

77. The United States confirmed its narrow reading of the object and purpose of territorial clauses in legal instruments dealing with jurisdictional immunities when it took the floor in the General Assembly on the occasion

[103] 488 U.S. 428.
[104] *Ibid.*, 439.

of the concluding debate on the draft Convention on Jurisdictional Immunities of States and Their Property (25 October 2004):

" … article 12, on jurisdiction over non-commercial torts, must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*. It was entirely appropriate for States to be held accountable – not to be able to invoke immunity – with regard to their tortious acts or omissions in circumstances where private persons would be. Domestic law in the United States and in many other countries provided for that eventuality. However, extending that jurisdiction without regard to the accepted private/public distinction under international law would be contrary to the existing principles of international law and would generate more disagreements and conflicts in domestic courts which could be better resolved, as they currently were, through State-to-State mechanisms. In other words, article 12 must be read in the light of established State practice to concern tortious acts or omissions of a private nature which were attributable to the State, while preserving immunity for those acts of a strictly sovereign or governmental nature."[105]

This is a clear stance opposing any unwarranted extension of the usual territorial clauses as they have made their entry into some of the modern instruments, including the UN Convention.

78. The United Kingdom State Immunity Act 1978[106] has a similar territorial clause (Section 5). In very straightforward terms, it provides that a State is not immune with regard to proceedings in respect of death or personal injury or damage to or loss of tangible property, provided that the injury was "caused by an act or omission *in*[107] the United Kingdom". This formulation could have been interpreted as implying that military activities conducted in the territory of the United Kingdom are indeed encompassed by the clause. However, Section 16 (2) corrects this impression. The effects entailed by military activities do not come within the purview of the Act. It is specified:

"This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the visiting Forces Act 1952."

[105] UN doc. A/C.6/59/SR.13, 25 October 2004, para. 63.
[106] 17 (1978) ILM 1123.
[107] Emphasis added.

Obviously, in 1978 the only realistic prospect of foreign troops being present on British soil was their deployment within the framework of agreements among friendly nations, governed domestically in part by the Visiting Forces Act 1952. Nonetheless, the United Kingdom took care to exclude the entire complex of damage caused by foreign military activities from the scope of the 1978 Act.

79. The other Commonwealth countries that subsequently were to enact a domestic immunity act for the benefit of foreign nations mostly copied, with only some minor modifications, the UK State Immunity Act 1978. Mostly, the exact scope *ratione materiae* of the territorial clause was also clarified by a provision that subjects military activities of foreign States to a special regime. Thus, the Singapore State Immunity Act 1979[108] rejects the defence of sovereign immunity in Section 7 (damage caused by an act or omission in Singapore) but specifies in Section 19 (2) (a) that this provision does not apply "relating to anything done by or in relation to the armed forces of a State while present in Singapore". Pakistan opted for a slightly different regime in its State Immunity Ordinance, 1981.[109] It renounced a territorial clause; on the other hand, however, it took care to keep outside of the ordinance "anything done by or in relation to the armed forces of a State while present in Pakistan" (Section 17 (2) (a)). Lastly, the Canadian State Immunity Act 1982[110] joins also the precedents set by its predecessors. On the one hand, it establishes the jurisdiction of Canadian courts in respect of injury "that occurs in Canada" (Section 6). On the other hand, Canada confines the effect of that clause by giving primacy to its Visiting Forces Act (Section 15). Apparently, Canada did not wish to envisage the hypothesis of foreign troops acting on its soil other than on friendly terms according to an international agreement. In fact, in 1982 this was a perfectly reasonable determination.

---

[108] Reprinted in: United Nations (ed.), *Materials on Jurisdictional Immunities of States and Their Property* (New York 1982), p. 28.
[109] *Ibid*., p. 20.
[110] 21 (1982) ILM 798.
[112] Ibid., p. 34.

80. There are two domestic statutes which contain both a territorial clause but which do not explicitly state that in respect of the consequences of armed conflict they shall not apply. This is true of the South African Foreign Sovereign Immunity Act (1981)[112] (Section 6) and the Australian Foreign States Immunities Act 1985[113] (Section 13). The most probable explanation for that omission is that the legislative bodies did not seriously consider as an actual possibility the presence, on their soil, of foreign troops. In any event, however, the two statutes do not contain any hint to the effect that civil suits might be brought against foreign States in such instances. Moreover, there is absolutely no jurisprudence that would support a broad reading of the two territorial clauses.

81. Another interesting instrument in point is the new Israeli "Foreign States Immunity Law, 2008".[114] It contains the usual territorial clause (section 5), specifying, on the other hand that (section 22)

> "legal actions based on any act or omission committed by foreign military forces whose rights and status in Israel were determined by agreement between the State of Israel and the state to which the foreign military forces belong shall be governed by that agreement."

Accordingly, the text of the statute leaves it open whether immunity should obtain in instances where the foreign troops on Israeli soil were not invited on the basis of an agreement to that effect. One may take it, however, that the Knesset wished to follow the general line that has hitherto prevailed in the interpretation of the territorial clause.

82. Lastly, Germany wishes to recall that a few years ago the Corte di Cassazione recognized the jurisdictional immunity of the United States in respect of military training flights conducted over Italian territory, which had caused a number of fatal incidents.[115] The judgment deals at length with sovereign immunity. It rejects above all the argument that such immunity should be excluded if the activities concerned violate basic human rights,

---

[113] 25 (1986) ILM 715.
[114] ANNEX 32.
[115] *FILT-CGIL Trento and Others v. United States of America*, 3 August 2000; English translation: 128 ILR 644; ANNEX 33.

pointing out that the potentially injurious effects of military training flights on the right to life, personal safety and health of individuals cannot invalidate a principle that by virtue of Article 10 (2) of the Italian Constitution has been received by the Italian legal order. It was alone the nature of the activity that had paramount importance. By contrast, no mention whatsoever was made in the judgment of the fact that the incidents had all occurred in Italian territory.

6) Erroneous Reliance on *Jus Cogens* Arguments

83. The *Ferrini* judgment is replete with observations to the effect that Germany's sovereign immunity must yield vis-à-vis the superior legal force of the norms that were breached from 1943 to 1945 by the German military units responsible for the crimes from which the various plaintiffs derive their claims. In that judgment, the Corte di Cassazione does not explicitly speak of *jus cogens*, but the theory of *jus cogens* clearly underlies all of its considerations. Thus, in section 9 it says that international crimes, such as those perpetrated by German armed forces, take the form of serious violations of fundamental human rights, rights which

> "are protected by norms from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms, including those which relate to State immunity".[116]

Continuing this line of argument, it then holds that (section 9.1)

> "[t]here is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence to the norm with the highest status".[117]

Lastly (section 10.2), it underlines the priority status

> "which, in respect of particularly serious criminal activities, now attaches to the protection of fundamental human rights over and above the protection of

[116] 128 ILR 668.
[117] *Ibid*., 669.

State interests through the recognition of immunity from foreign jurisdiction".[118]

84. Similar, yet less extended legal grounds were set out in the orders of 29 May 2008 where the emphasis is placed on the particular gravity of the unlawful actions which led to the relevant proceedings. It should again be stressed that the Corte di Cassazione itself was not persuaded by its own reasoning since it had no more to say than that

"it could be presumed that a principle limiting the immunity of a State which has committed crimes against humanity was 'in the process of formation'".[119]

It is of course extremely difficult to posit the existence of a rule on such shaky foundations.

85. In the first place, it must be observed that the theory of different hierarchical levels of the rules making up the international legal order received official consecration not earlier than in 1969 when the Vienna Convention on the Law of Treaties was adopted. For the first time on that occasion, it was recognized that a treaty can be void if it conflicts with a "peremptory norm of general international law" (Articles 53, 64). Before that time, it was unanimously held in practice that rights and obligations under international law are all located on the same hierarchical level. As a legal concept, *jus cogens* did not exist at the time when the violations occurred from which the plaintiffs attempt to derive their claims.[120] Thus, to apply the standard of *jus cogens* to the tragic events of World War II does not correspond to the general rules of temporal applicability of international law. Any conduct must be appraised by the standards in force at the time it

[118] *Ibid.*, 673.
[119] „un principio limitativo dell'immunità dello Stato che si sia reso autore di crimini contro l'umanità può presumersi 'in via di formazione'".
[120] See, for instance, Robert Kolb, *Théorie du ius cogens international. Essai de relecture du concept* (Paris 2001) p. 23; Erika de Wet, 'The Practice of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law', 15 (2004) EJIL 97, at 111.

was practiced. This will be pointed out in more detail in the following section 7) (paras. 91 *et seq.*) of this submission.

86. The main criticism to be directed against the Corte di Cassazione for (implicitly) resorting to the concept of *jus cogens* lies in its wide interpretation of such rules. Undoubtedly, for instance, *jus cogens* prohibits genocide. This ban has its legal foundations both in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and in (earlier) general rules of international law. Any treaty under which two States would agree to commit genocide would be null and void under Article 53 of the Vienna Convention on the Law of Treaties and general international law. In accordance with present-day interpretations, any unilateral legal act aiming at bringing about genocide would likewise be considered null and void. The *jus cogens* rule seeks primarily to prevent genocide. The international legal order does not recognize as valid any legal instrument that would promote, facilitate or condone the commission of genocide.

87. However, it is a totally different question that must be answered after an act of genocide has in fact been perpetrated. Responses to this question must be sought in the overall regime of international responsibility. The 1948 Convention on the Repression and Punishment of the Crime of Genocide regulates only one aspect of that wider issue by ordering that persons responsible for genocide "shall be punished" (Article IV). It refrains from regulating other details of the applicable regime of responsibility, thereby implicitly suggesting that the general rules apply – which, of course, may change over time. The substantive rule which encapsulates the values upheld in the international community is the ban on genocide. A breach of this pivotal rule entails consequences which are regulated by secondary rules. These secondary rules may of course be influenced by the paramount importance of the primary rule in issue. But a State that does not provide a remedy against an alleged author of genocidal acts or an alleged torturer

does not thereby become an accomplice of genocide or torture.[121] There exists no comprehensive special regime that applies to the breach of a *jus cogens* rule. In particular, such a special regime cannot be freely invented. Since international law is essentially based on the consent of States, it is in their general practice that answers must be sought to each one of the questions which emerge when it falls to be decided what consequences are entailed by a breach of a *jus cogens* rule. The Regional Court of The Hague (Rechtbank s'-Gravenhage) described the legal position as follows when it had to adjudicate a claim brought against the United Nations on account of the genocide committed in Srebrenica:

"Neither the text of the Genocide Convention or any other treaty, nor international customary law or the practice of states offer scope in this respect for the obligation of a Netherlands court to enforce the standards of the Genocide Convention by means of a civil action. The Contracting parties are obliged to punish all acts defined by this Convention as genocide within the boundaries set in article VI of the Convention. Also, as stated before, the states are bound to prevent genocide and therefore to refrain from committing it themselves. The states are also bound to clearly set out obligations on the extradition of suspects of genocide, but the Convention does not provide for (any obligation pertaining to) the enforcement of the standards of the prohibition on genocide via a civil law action."[122]

88. In order to buttress the preceding observations, just two examples should be given from the jurisprudence of the Court. Attention was already drawn to the fact that the breach of a *jus cogens* rules does not amount to a departure from the rules of the Statute pursuant to which the jurisdiction of the Court is based on consent. No State must answer an application brought against it if it has not given, or does not give, its consent to judicial settlement of the dispute in accordance with Article 36 of the Statute. The *Arrest Warrant* case[123] demonstrates that a high-ranking State official does not lose its functional immunity before domestic courts if it is

[121] See Lord Hoffmann in *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, 129 ILR 713, at 732, para. 44: " The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture."
[122] Judgment of 10 July 2008, ANNEX 34.
[123] ICJ Reports 2002, p. 3, at 24 s., paras. 58, 60.

alleged that he/she has committed a crime against humanity. Disregard for immunity protection can have extremely damaging consequences that would by far outweigh the moral victory gained by being allowed to institute judicial proceedings against a respondent/defendant, either before civil or criminal courts.

89. In other words, the substantive primary rules and the applicable secondary rules must be carefully distinguished. There is no mechanical link between the two. Persuasively, the United States Government argued in an amicus curiae brief in *Sampson v. Federal Republic of Germany* that the Amicus Curiae for the claimant conflated "the substantive norms of conduct and the methods by which violations of those norms should be redressed,"[124] and the Court of Appeals for the Seventh Circuit agreed, stating that while courts were directed to avoid conflicts with international law:

"international law itself does not mandate Article III [scil. of the US Constitution] jurisdiction over foreign sovereigns. In other words, although *jus cogens* norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity, e.g., the Nuremberg proceedings, *jus cogens* norms do not require Congress (or any government) to create jurisdiction."[125]

90. The nullity of treaties that infringe a *jus cogens* rule constitutes essentially a preventive measure, designed to combat a looming evil. After such a threat has – unfortunately - materialized, many options are open. It is highly significant that the ILC Articles on Responsibility of States for internationally wrongful acts provide for a duty of States to "cooperate" (Article 41 (1)) if a serious breach of obligations under peremptory norms of general international law has occurred. In other words, the Articles do not open the doors for unilateral measures of self-help. In cases of transitional justice, when a people has gone through a dark period in its history and is now attempting again to build democratic institutions under the rule of law, many avenues must be explored. Above all, consideration must be given to

[124] ANNEX 35.
[125] 250 F.3d 1145 (7th Cir. 2001).

what is realistically feasible. Where a State has waged an aggressive war, causing severe damage to other nations, the question arises inevitably to what extent it can be made financially responsible. The Potsdam Accord specified that the German people should bear liability "to the greatest possible extent" (Chapter IV., chapeau). History has indeed taught the lesson that to require complete reparation of war damages will inevitably destabilize the debtor country and may lead to catastrophic consequences. To individualize the settlement of war damages by granting every victim a separate claim is a particularly bad solution because domestic judges in the "victim countries" are generally overzealous in allocating to their nationals huge amounts of financial compensation which would easily exceed the financial capabilities of a debtor State.[126] Reason dictates that there must be some kind of insolvency procedure that can only be organized within an intergovernmental framework, i.e. following the classical methods for the settlement of mass damages, in particular as a consequence of armed conflict. Otherwise, no fair and equitable distribution of the available amounts of financial compensation could be ensured. Hence, the finding that an international crime has been committed does not automatically lead to the conclusion that an injured person must be granted an individual remedy.

7) Retroactive Application of the Doctrine Resorted to by the Corte di Cassazione

91. The Corte di Cassazione errs again in applying the extended doctrine of restrictive immunity, on which it creatively relies, to occurrences dating back more than 60 years. When German military forces were present on Italian soil as enemy forces from 1943 to 1945, the doctrine of absolute sovereign immunity was uncontested. At that time, only some Belgian and Italian judgments ventured to reject the defence of sovereign immunity in cases involving commercial activities. It was the Tate letter which, based on a general consensus, brought about a fundamental turnaround in 1952. Since

[126] The excessive amounts sometimes granted by US judges in proceedings where financial reparation is sought against foreign States under the Alien Tort Claims Act (more than 200 million $ in individual cases) are well known and require no elaboration.

that time, as shown above; the judicial practice has distinguished between two categories of State activities, *acta jure imperii* and *acta jure gestionis*. To depart from the principle of absolute sovereignty with retroactive effect infringes general principles of international law. It is even more objectionable to establish new classes of instances allegedly not covered by sovereign immunity, applying them retrospectively.

92. The rules governing sovereign immunity have the nature of substantive rules of international law. They derive from the principle of sovereign equality as laid down in Article 2 (1) of the United Nations Charter and also rooted in customary international law. No State is subject to the sovereign power of another State if no agreement to the contrary has been concluded between the parties concerned, according to the well-known Latin formulation of that proposition: *par in parem non habet jurisdictionem*. Although in a civil proceeding before a civil court there is invariably a private plaintiff, and although in such a proceeding the defence of sovereign immunity operates essentially as a procedural device, the relevant relationship between the two States concerned, the State of the forum and the respondent State, has little, if anything to do with procedure. At issue is the reach of the sovereign powers of one State vis-à-vis another State. The territorial jurisdiction of the forum State and the sovereign rights of the State forced into the role of a respondent must be balanced against one another. The defining fact is that, until 1952, that balancing process was regularly resolved in favour of the principle of jurisdictional immunity.

93. It is trivial to state that facts of international life must be assessed according to the law in force at the time when those facts occurred. The famous dictum of Max Huber in the 1928 *Palmas* case is generally recognized as correctly stating the legal position:

" … a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[127]

[127] II RIAA 829, at 845.

As far as international treaties are concerned, the Vienna Convention on the Law of Treaties provides explicitly (Article 24) that treaties do not have any retroactive effect. The same is true of general rules of customary law. The principle of non-use of force, for instance, formulated first by the Briand-Kellogg-Pact of 1928, reconfirmed and strengthened by the UN Charter (Article 2 (4)) and also having crystallized as customary law, cannot be applied to military operations that took place before 1928. Similarly, human rights existed before the advent of the United Nations as a moral and philosophical ideal, but not as a legal concept. In numerous judicial decisions, it has indeed been acknowledged that customary law does not, in principle, produce retroactive effects. A particularly instructive example is provided by the advisory opinion of the Court on *Western Sahara*. The General Assembly had requested the Court to pronounce on the question as to whether Western Sahara was a territory belonging to no one (*terra nullius*) at the time of the Spanish colonization from 1884 onwards. For the Court, there could be no doubt that the question

"had to be interpreted by reference to the law in force at that period".[128]

In the *Rights of Passage* case, the Court observed likewise that

"the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually."[129]

History cannot be rewritten, as far as its legal framework is concerned. Legal rules change as time goes by. But the law of the 21st century cannot be introduced back into the 20th century. In the instant case, an aggravating fact is that the new rules on which the Corte di Cassazione purported to base the decisions referred to above have not materialized as genuine positive international law, supported by a general practice, but remain constructs of judicial activism.

[128] ICJ Reports 1975, p. 12, at 38 para. 79.
[129] *Right of Passage over Indian Territory (Merits)*, ICJ Reports 1960, p. 6, at 37.

94. It is true that, on the other hand, Huber acknowledged that legal regimes can never be petrified, that they may be subject to change:

"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 manifestations, shall follow the conditions required by the evolution of the law."[130]

But this holding refers to the continuing effects of a situation brought into being either by treaty or by custom. It is not intended to convey the idea that legal effects that were produced in the past change continually over the course of time. In particular, internationally wrongful acts entail legal effects limited to the time of their commission if they do not have a continuing character (Article 14 of the ILC Articles on State Responsibility), which is not the case in the instant proceeding. French author Jean Combacau observes with specific regard to internationally wrongful acts:

"Alors que, dans le fait instantané, le délit s'épuise au moment même où il s'accomplit, la durée entre en jeu dans toutes les autres figures du délit … ».[131]

The 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. According to persuasive views in legal literature, the requirement that any legal obligation must be interpreted within its living context, cannot be extended to reshaping a legal relationship that received its contours pursuant to the proposition: *tempus regit actum*. Judge Rosalyn Higgins stated in an article specifically devoted to the issue of inter-temporal law:

" … an approach that merely requires human rights treaties, because of their nature, to be interpreted in accordance with contemporary international law or conditions in society, avoids any suggestion that the States upon whom

[130] II RIAA 845.
[131] L'écoulement du temps, in : Société française pour le droit international (ed.), *Le droit international et le temps* (Paris 2001), p. 77, at 88.

the obligations fall are required to reopen legal acts or pay compensation for 'incorrect applications' of the obligations in the past."[132]

In more general terms, Joe Verhoeven has written:

"L'acquis est fait pour l'essentiel de l'ensemble des situations créées ou des actes accomplis sous l'empire des règles ou des décisions qui étaient en vigueur à l'époque, peu importe d'ailleurs qu'elles aient par la suite cessé de l'être … Dans cette mesure, il se comprend que l'acquis représente pour l'essentiel un interdit, plaçant ce qui s'est passé à l'abri de mises en cause déchirantes. »[133]

95. Internationally wrongful acts belong to the past. They do not bring into being a dynamic regime that requires being adapted continually to changing circumstances, unlike an international treaty. The set of rights and obligations which they engendered is closed. Of course, for their assertion the procedural requirements before the Court or before any other international judicial body may change. But sovereign immunity cannot be downgraded to a simple procedural rule. It determines the substantive relationship between sovereign States, ensuring that good order will prevail in the international community. In particular, sovereign immunity prevents powerful States from establishing hegemonic mechanisms which invariably operate in their favour.

96. In the case of *Altmann v. Austria*,[134] adjudicated in 2004, the US Supreme Court held that the FSIA may be resorted to in cases preceding its enactment. In issue was a claim by the heir of an Austrian art collector of Jewish origin who in the years after Austrias's *Anschluss* had been deprived by the Nazi regime of a number of famous paintings of Gustav Klimt. In that case, the Supreme Court applied the expropriation exception enshrined in section 1605 (a) 3 of the FSIA, which expressly exempts from immunity certain cases involving rights in property taken in violation of international

[132] 'Some Observations on the Inter-Temporal Rule in International Law', in: *Theory in International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski* (The Hague *et al*. 1996), p. 173, at 176.
[133] Les conceptions et les implications du temps en droit international, in: *Le droit international et le temps* (above, n. 131), p. 9, at 22.
[134] 541 U.S. 677 (2004).

law. The judgment has been severely criticized by voices in legal doctrine from the United States itself.[135] In any event, it cannot have any bearing on the present dispute.

97. First of all, it should be noted that the US Supreme Court did not at all render its judgment within the conceptual framework of international law. The Court focused exclusively on the FSIA, attempting to find out what intentions were pursued by the drafters in enacting that statute. A lengthy discussion centred on the earlier case of *Landgraf*,[136] which had stated general principles for the retrospective application of domestic law. Nowhere in the judgment does one find the slightest hint revealing that the Supreme Court was aware of the wide dimension of the case under international law. The only concern of the majority of the Court was to look for evidence showing that Congress intended the FSIA to apply to "preenactment conduct" Thus, the Supreme Court may be said to have missed the centre of gravity of the case.

98. In fact, the methodology applied by the US Supreme Court rests on the premise that the rules governing sovereign immunity do not form part and parcel of international law, but are left to individual determination by each nation. Pursuant to this view, States are free to define the scope of sovereign immunity as they see fit. In *Altmann*, Justice Stevens recalled approvingly the statement by Chief Justice Marshall in the *Schooner Exchange* case that "foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement". This statement unequivocally reflects the view that sovereign immunity can be handled free from any constraints deriving from international law. In *Altmann*, this perception is upheld in essence, albeit with different formulations:

---

[135] Marla Goodman, 'The Destruction of International Notions of Power and Sovereignty : the Supreme Court's Misguided Application of Retroactivity Doctrine to the Foreign Sovereign Immunities Act in *Republic of Austria v. Altmann*', 93 (2005) The Georgetown Law Journal 1117 *et seq.*; Carlos M. Vázquez, '*Altmann v. Austria* and the Retroactivity of the Foreign Sovereign Immunities Act', 3 (2005) Journal of International Criminal Justice 207 *et seq.*

[136] *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

"But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present 'protection from the inconvenience of suit as a gesture of comity'".[137]

Of course, one has to respect the holding of the US Supreme Court. Nevertheless, the legal position it embraces is far from the realities of international law. Outside the United States, sovereign immunity has always been regarded as a principle of international law. There is no need to explain this at length. The recent UN Convention on Jurisdictional Immunities of States, for instance, provides tangible proof of the prevailing opinion that indeed sovereign immunity constitutes a pivotal element in the mutual relationships between States. The rich materials that can be found in the materials assembled first by the two Special Rapporteurs of the ILC and thereafter included in the official commentary of the ILC itself, drawn from the judicial practice of numerous countries of the world, speak for themselves.[138] In a nutshell, Lord Millett, giving his judgment in *Holland v. Lampen-Wolfe*, has summarized the significance of sovereign immunity:

"State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself."[139]

99. Since the judgment in *Altmann* is based on the erroneous belief that States may deal with suits brought before their courts against foreign States at their pleasure, solely within the limits of "comity", *Altmann* cannot serve as a useful precedent in the instant case. The decision rendered by the Supreme Court cannot be relied upon to show that the Corte di Cassazione was right in applying the doctrine of forfeiture of sovereign immunity in cases of grave human rights violations, its own creation, to occurrences of

[137] *Ibid.*, Section IV.
[138] See ILC, Report on the work of its 32nd session, YbILC 1980, Vol. II, Part Two, pp. 142-157.
[139] [2000] 1 WLR 1573, at 1588.

World War II. Quite visibly, the Supreme Court has deviated from the mainstream in international law.

100. Moreover, even if one took *Altmann* as having the legal value of a precedent, its limitations *ratione materiae* would have to be respected. The Supreme Court did not give a comprehensive ruling on the applicability of the FSIA *ratione temporis*. In the dispute between Altmann and Austria, no more was in issue than the unlawful taking of works of art, assessed as involving an infringement of rules of human rights and/or international humanitarian law. It cannot be deduced from *Altmann* that any of the clauses of the FSIA would be suitable for retrospective application in the same manner. Each one of the exception clauses of the FSIA must be appraised on its own merits. In particular, retroactive recourse to a territorial clause might entail serious disturbances between the States concerned.

101. Lastly, there remains the fact that the FSIA does not deny immunity with regard to claims based on injury suffered during armed conflict. The FSIA does not touch upon the issue of armed conflict. It has been enacted as a statute that should govern relations among States in time of peace. In none of its provisions does it go beyond that subject-matter. Armed conflict is totally outside its scope *ratione materiae*. Therefore, the courts of the United States would never entertain a suit through which a claimant would seek reparation for injury suffered during armed conflict. It has been shown above that as from 1945 it was the policy of the United States to settle the responsibility of Germany for the damages caused by the aggressive policies of the Third Reich at the intergovernmental level. The Potsdam Accord between the four victorious Allied Powers constitutes the most significant reflection of that principled approach to the issue of war damages. It has also been shown that with regard to Japan the United States followed the same line. It stands to reason that this fundamental policy determination was supported by all nations that approved the Potsdam Accord as the primary instrument for the settlement of Germany’s war debts and can therefore be held against them.

102. Concluding its submissions on the retroactive character of the jurisprudence ushered in by the Corte di Cassazione, the Applicant stresses once again that the retrospective denial of sovereign immunity to the detriment of the Applicant amounts to a grave violation of the sovereignty of Germany for which the Italian Republic must assume full responsibility.

8) Protection Against Measures of Constraint

103. In the preceding pages, the Applicant has focused on sovereign immunity as a shield protecting a State against being pushed, against its will, into judicial proceedings before the courts of a foreign State. Immunity from measures of constraint is a complementary chapter of jurisdictional immunity, even more important than immunity in judicial proceedings. In principle, the property of a State, although located in the territory of another State, may not be seized or attached. The Respondent has also breached this rule to the detriment of the Applicant by inscribing in the land register covering Villa Vigoni a "judicial mortgage" in the amount of 25,000 Euros for the satisfaction of the *Distomo* judgment of the Greek Regional Tribunal of Livadia, confirmed by the Areios Pagos.[140]

104. The UN Convention on Jurisdictional Immunities of States and Their Property has recently codified the rules existing under general international law. Article 19 of that Convention provides that

"[n]o post-judgment measures of constraint … against property of another State may be taken in connection with a proceeding before a court of another State …".

Several exceptions modify the main rule. None of the exceptions, however, has any relevance for the instant case. Germany has not consented to the inscription of the judicial mortgage in the land register (Article 19 (a)). On the contrary, Germany has filed legal remedies which are still pending, awaiting final settlement. Second, it is obvious that Germany has not allocated or earmarked Villa Vigoni for the satisfaction of the Greek

[140] See above sections 39-40.

Distomo claim (Article 19 (b)). Lastly, Villa Vigoni is not in use for "other than government non-commercial purposes" (Article 19 (c)). This should be explained in more detail in a separate section.

105. As pointed out above (para. 39), Villa Vigoni is a centre for cultural encounters between Germany and Italy; it is not used for any commercial purposes. The executive agreement concluded between the two governments in 1986 provides explicitly that Villa Vigoni should serve as a place for dialogue and cultural exchange.[141] Dozens of colloquia and symposia take place there every year in a surrounding which permits ideas to be discussed in leisurely serenity. Thus, Villa Vigoni is considered by Germany as an important instrument of its cultural foreign policy, as corroborated by the financial allocations which it receives on a regular basis from the budget of the German Federal Ministry of Education and Research. Therefore, even if one should take the view that the 2004 UN Convention, by introducing the concept of "other than government non-commercial purposes"[142] is too restrictive in admitting measures of constraint, one would have to conclude that in any event the specific function to be discharged by Villa Vigoni is a genuine governmental function which is being fulfilled on Italian soil with the unreserved consent of the Italian government.

106. Indeed, for Italy Villa Vigoni has attained a similar status of centrality in respect of cultural exchange with Germany. Quite logically, therefore, the Italian Government itself has opposed the inscription of the judicial mortgage in the relevant land register. It remains, however, that the competent authorities being in charge of administering the land register have not respected Germany's sovereign immunity. One may hope that in the course of the proceedings before the ICJ this particular encroachment of German sovereignty will be removed by a decision of the relevant Italian courts granting the remedy filed by Germany.

---

[141] Article 2 (1) of the Exchange of notes (ANNEX 24) provides: "The Association shall promote German-Italian relations in the fields of science, education and culture, including their linkages with the economy, society and politics, through study visits, symposiums, round tables, summer schools and art exhibitions in the Villa Vigoni."

[142] For the commentary of the ILC see *Yearbook of the ILC* 1991, Vol. II, Part Two, p. 57.

107. The attempts of the judgment creditors of the *Distomo* case to obtain a garnishment order that would obligate the garnishee, the Ferrovie dello Stato, to pay to them what it owes Deutsche Bahn AG, have to date not been successful. However, the initiation of enforcement proceedings where a separate corporate body, Deutsche Bahn AG, would become the target of measures of constraint, shows to what degree of disturbance the relationship between Germany and Italy can be exposed by the practice of non-respect of sovereign immunity.

9) The UN Convention on Jurisdictional Immunities of States and Their Property

108. Lastly, it cannot go unnoticed that the 2004 UN Convention on Jurisdictional Immunities of States and Their Property has refrained from supplementing its list of exceptions from immunity by a clause that would allow claims to be brought against foreign States if the plaintiff alleges that he/she is the victim of grave violations of human rights. This is not an oversight. The issue was discussed by the ILC. In 1999 it even established a working group mandated with examining whether it might be advisable to lay down such an additional departure from the principle of immunity. The working group noted that some lower judicial instances had shown some sympathy for claims that could be founded on *jus cogens* rules. Eventually, however, its deliberations were inconclusive. No decision was taken to amend the existing draft articles.[143] The summary of the deliberations was even relegated to an "Appendix" to the report. This reluctance was nothing else than a rejection of the new proposals. It is hard to understand how against the opinion of the world's most qualified legal consultative body the view can be maintained that sovereign immunity has shrunk in relation to such cases.

[143] Report of the Working Group on Jurisdictional Immunities of States and Their Property, Annex to the Report of the ILC on the work of its 51st session, YbILC 1999, Vol. II, Part Two, p. 149, Appendix, p. 171.

109. There is, however, another issue which deserves close attention. The text of the Convention itself does not touch upon the actions of the armed forces of States, unlike the European Convention which pursuant to Article 31 categorically maintains sovereign immunity in such instances. Within the Sixth Committee of the General Assembly a Working Group (Ad Hoc Committee) had been established, tasked with examining the Convention with a view to its final adoption. In fact, the draft had been pending before the General Assembly since 1991, when it was approved by the ILC on second reading. One of the issues focused upon by the Working Group was the judicial accountability of States for operations of their armed forces abroad in the territory of other States. In order to dispel any misunderstanding that might arise regarding the territorial clause (Article 12), suggestions were made to clarify the meaning of that clause. No agreement could be reached on a formal amendment of the text. However, the Chairman of the Working Group, Gerhard Hafner of Austria, was authorized to make a statement when introducing the report of the Ad Hoc Committee in the General Assembly on 25 October 2004.[144] In that statement, Gerhard Hafner explained unequivocally that military operations on foreign soil did not come within the scope *ratione materiae* of Article 12:

"One of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not."

110. It is true that the interpretation of an international treaty starts out with elucidating the meaning of the text. The declaration just referred to was not embodied in the text of the 2004 Convention. However, it was explicitly referred to in the last preambular paragraph of GA resolution 59/38, which adopted the Convention:

"*Taking into account* the statement of the Chairman of the Ad Hoc Committee introducing the report of the Ad Hoc Committee."

[144] See UN Doc. A/C.6/59/SR.13, para. 36.

It therefore constitutes an important instrument in the sense contemplated by Article 31 (2) (b) of the Vienna Convention on the Law of Treaties and must be taken into account in that quality. Doubts may arise and have arisen regarding the precise contours of the territorial clause. Hafner's statement is suited to dismiss any extensive reading of Article 12.

111. In fact, when Norway ratified the Convention on 27 March 2006, it entered the following interpretative declaration – not a reservation! - in consonance with the understanding publicly expressed by Mr. Hafner:

"Recalling *inter alia* resolution 59/38 adopted by the General Assembly of the United Nations on 2 December 2004, in which the General Assembly took into account, when adopting the Convention, the statement of 25 October 2004 of the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property introducing the Committee's report, Norway hereby states its understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties. Such activities remain subject to other rules of international law."

This declaration evidences both international practice and *opinio juris* to the effect that, on account of military activities, States continue to enjoy unfettered immunity.

10) General Implications of the Self-Constructed Doctrine of the Corte di Cassazione

112. The doctrine embraced and promoted by the Corte di Cassazione would have far-reaching repercussions in vast areas of international law. In particular, the entire history of the settlement of the tortious damages caused by World War II would have to be rewritten. Not a single stone of the relevant instruments could be left unturned. According to the Corte di Cassazione, all the waiver clauses, designed to put an end to legal quarrelling after satisfactory global compromise solutions had been found at intergovernmental level, would be meaningless. No individual having sustained harm – or, as the experience with the pending proceedings in Italy shows, their heirs - could be prevented from instituting legal proceedings on his/her own behalf. Thus, a second front of reparation for war injuries would be opened, the debtor countries – not only Germany, but also Italy, for instance – being made accountable for their misdeeds a second time.

113. Since, according to the Corte di Cassazione, the claims in issue have as their foundation *jus cogens*, not even the Allied Powers could feel safe from litigation. Germany does not wish to reopen a debate that has lasted for decades. It is of the firm view that World War II, which will remain engraved in everyone's memory and will forever serve as reminder of the political threats that should be combated with determination from the very outset, must by now be considered an event of the past, as far as its juridical dimension is concerned. On its part, Germany has deployed its best efforts with a view to making good what could be made good within the limits of its capabilities. The 1990 Treaty on the Final Settlement with respect to Germany[145] settled the issue of reparations once and for all. The situation of peace and good neighbourhood which prevails in Europe since that time should not be unhinged by judicial decisions that fail to even perceive the wider context of the issues they are called upon to adjudicate.

[145] Of 12 September 1990, 5 (1990) ILM 1187.

114. The doctrine embraced by the Corte di Cassazione is also fraught with dangers in respect of future developments. Comprehensive peace treaties are a structural necessity in international relations. Many situations are highly complex. Not even experts are invariably able to say with authoritative firmness what really happened, who fired the first shot and who, for instance, is to be blamed for a massacre that in fact occurred. Rarely are historical situations as simple and straightforward as they were in the days of the Nazi regime. To take just one example: In a future peace treaty between Israel and Palestine a comprehensive waiver clause will also be required of necessity. After the conclusion of such a treaty no one should be able to destabilize the delicate balance reached by instituting reparation claims before his/her own courts. Under the doctrine of the Corte di Cassazione, even resolutions of the Security Council would not be immune from challenges that fundamental human rights, such as access to a judge, have been encroached upon and that therefore individual claims against the States subject to such determinations are not precluded. Indeed, the recent judgments of the Court of First Instance of the European Union in *Yusuf* and *Kadi*[146] held that the discretion of the Security Council was bound by the rules of *jus cogens*. Accordingly, all legal avenues permitting to re-establish peace after war could be blocked in instances where a peace settlement requires sacrifices of the populations concerned, or would at least be in danger of becoming subverted by subsequent individual claims that would cleverly make use of the *jus cogens* argument.

11) Judicial Practice

115. Ample judicial practice may be cited which has rejected the doctrine elaborated by the Corte di Cassazione. The thesis that States which commit grave violations of human rights forfeit their sovereign immunity has found no acceptance. In particular, whenever cases involving the activities of military forces were to be adjudicated, the highest courts both at European and national levels have refused to assume jurisdiction. The Corte di Cassazione has in fact taken note of that case law. But it based the *Ferrini*

[146] Judgments T-306/01 and T-315/01, 21 September 2005.

judgment and the subsequent decisions consistently on the minority opinions which were voiced in some of the judgments, disregarding the majority views. As it openly acknowledges, it wishes to make a contribution to developing the existing law. As was shown in the preceding pages, that attempt is short-sighted since it ignores the complexity of settlements in respect of war damages. It should also be reiterated that in the international community it does not fall to domestic courts to develop the law. Judicial bodies may follow the views held and practices observed as they change over time. But they need broad political support for their moves. They cannot push ahead with reformist ideas. In that regard, the Corte di Cassazione stands on shaky ground. Its case law lacks solid support – any support outside the Italian borders.

116. In November 2001, the European Court of Human Rights had to pronounce twice on applications which complained that their right of access to a judge, guaranteed by Article 6 of the European Convention on Human Rights (ECHR) had been violated. In both cases, their remedies had been dismissed on procedural grounds by the domestic courts concerned. In the *McElhinney* case against Ireland[147] as well as in the *Al-Adsani* case against the United Kingdom[148] the Respondent was a foreign State. It was already explained in an earlier section of this submission (para. 73) that *McElhinney* concerned an incident at a border crossing between Northern Ireland and the Republic of Ireland, where a British soldier, acting as security agent at that check point, was dragged away against his will on a trailer towed by an Irish car driver into Irish territory and might have acted somewhat emotionally after the threat to his life had ceased. The applicant, the driver of the car involved, tried unsuccessfully to obtain a judgment on the incident from the Irish courts. The Irish Supreme Court did not feel entitled to entertain the action against the United Kingdom since the soldier had acted *jure imperii* in the discharge of his functions. The *Al-Adsani* case concerned a British and Kuwaiti national who had allegedly been tortured while in Kuwait. After his return to the United Kingdom, he wished to bring an action against

[147] Application No. 31253/96, 21 November 2001.
[148] Application No. 35763/97, 21 November 2001.

the State of Kuwait. That was denied to him. His action was rejected as being inadmissible.

117. Since the two judgments were pronounced on the same day, they contain a number of identical passages precisely on the issues that are relevant in the present context. First of all, the ECtHR stated:

"that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[149]

Thus, the ECtHR acknowledged sovereign jurisdictional immunity as a general rule of international law currently in force. After having stated that the guarantee of access to a judge as enshrined in Article 6 ECHR does not operate in a vacuum, but must be interpreted in harmony with general international law, it continued:

"Measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."[150]

118. After those common passages, which confirmed the binding nature of the principle of sovereign immunity, the two judgments had to follow different pathways. In *Al-Adsani,* the emphasis was on the alleged acts of mistreatment as constituting torture, with all the attendant consequences, whereas in *McElhinney* the scope and meaning of the territorial exception clause had to be explored.

---

[149] *Al-Adsani* v. UK, 21 November 2001, Application 35763/97, § 54; *McElhinney v. Ireland*, 21 November 2001, Application 31253/96, § 35.
[150] *Al-Adsani*, *ibid*., § 56; *McElhinney*, *ibid*., § 37.

119. In fact, in *Al-Adsani*, the applicant attempted to draw benefit from the characterization of torture as breach of a *jus cogens* rule. He argued that in such instances the defence of sovereign immunity must yield. This view was not shared by the ECtHR. It held:

"Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[151]

In *McElhinney*, on the other hand, the ECtHR stressed that military activities are in any event covered by sovereign immunity so that any claim alleging misconduct on the part of the armed forces of a State must be rejected without any consideration as to their merits:

"The Court observes that, on the material before it … there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears from the materials referred to above (see paragraph 19) that the trend may primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards. The Court agrees with the Supreme Court in the present case (see paragraph 15 above) that it is not possible, given the present state of the development of international law, to conclude that Irish law conflicts with its general principles."[152]

Since the time when the two judgments were rendered, the jurisprudence of the ECtHR has not changed. The ECtHR keeps on holding that with the exception of commercial activities or acts *jure gestionis*, a State is immune before the courts of another State and cannot sued there. In *Kalogeropoulou*

[151] *Al-Adsani*, § 61.
[152] *McElhinney*, § 38.

v. Greece and Germany the complaint directed against Greece on account of the Minister of Justice's implicit refusal to authorize enforcement of the judgment of the Regional Court of Livadia against Germany was rejected as "manifestly ill-founded". The ECtHR relied on exactly the same grounds that it had given in *Al-Adsani* and *McElhinney*.

120. It is true that the decision in *Al-Adsani* was taken by a slim majority. Nine judges supported the judgment, whereas eight judges tendered dissenting opinions. However, the leading dissenting opinion of judges Rozakis and Caflisch, which was joined by four other judges, has little persuasive force. No disagreement was present between the majority and the minority regarding the *jus cogens* nature of the ban on torture. They differed in respect of the legal consequences to be drawn from an actual breach of that ban. The six judges argued (§ 3):

> "The acceptance … of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions … Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect".

Seemingly logical, this reasoning is fundamentally flawed. The *jus cogens* rule is the substantive proposition that torture amounts to a grave crime under international law. Any national act that would promote, assist or condone torture would indeed be irreconcilable with that prohibition. However, to apply the customary principle of jurisdictional immunity, i.e. to refuse to a victim to bring a claim against the author State before its own courts, lacks any colour of complicity. A State denying access to its courts in such instances simply applies a rule of international law. It wishes to maintain good order in international relations, being convinced that such disputes should better be resolved through other methods than individual claims. By no means can such a denial be equated with conduct that infringes the prohibition of torture. The minority in the *Al-Adsani* case simply overlooked the distinction that must be drawn between the substantive primary rule and the secondary rules that come into play once a

violation has occurred. Already in an earlier section of this submission, the necessity of this distinction was highlighted.

121. Germany's position is buttressed by authoritative voices in the legal literature. Suffice it to refer to a recent publication, which is the result of four years of work by the Committee on International Human Rights Law and Practice of the International Law Association (ILA), where the author examines with a lot of sympathy for new methods of reasoning in international law the *Ferrini* doctrine of the Corte di Cassazione.[153] Yet he comes to the conclusion that it is untenable. Commenting on the minority opinion in the *Al-Adsani* case, he writes:

"Despite its seemingly logical rigour, the argument is seriously flawed because neither the alleged normative conflict nor the presumed hierarchy between human rights and state immunity can be demonstrated to exist … A normative collision could … only be assumed if the prohibition of torture (or any other *jus cogens* rule) implied the duty to establish jurisdiction over foreign states and their officials in order to provide compensation to the victims … As international law stands today, such a general duty to establish criminal or civil jurisdiction with a view to providing judicial remedies for the violation fundamental human rights endowed with the status of *jus cogens* (mandatory universal jurisdiction) only exists in exceptional circumstances .. Under customary international law there is no rule of mandatory universal jurisdiction with regard to criminal or tort proceedings."[154]

122. The conclusion therefore seems to be warranted that the Corte di Cassazione has departed from a common European standard. It should be noted, in this connection, that the decision in *Kalogeropoulou* was unanimously adopted by the ECtHR. None of the judges opined that the refusal of the Greek Minister of Justice to authorize the application of measures of constraint against Germany amounted to a violation of Article 6 ECHR, the guarantee of access to a judge. The ECtHR thus made it clear that the rule of sovereign immunity could not be dislodged by a human rights guarantee.

---

[153] Thilo Rensmann, 'Impact on the Immunity of States and their Officials', in: *The Impact of Human Rights Law on General International Law* (Oxford 2009), pp. 151-170, ANNEX 36.

[154] *Ibid.*, 166-7.

123. The judgment handed down by the Court of Appeal of Ontario in *Bouzari v. Iran* on 30 June 2004[155] is also remarkable for its sober examination of the procedural consequences deriving from the commission of acts of torture. In that case, an Iranian, having been accepted by Canada as a "landed immigrant", wished to sue Iran on account of acts of torture to which he had been subjected while still residing in his original home country. One of his main arguments was that any State was under an obligation to provide victims of torture with a civil remedy, irrespective of the venue of the crime, hence even if the crime had been perpetrated outside the forum State. The Court of Appeal of Ontario did not share that view. With extreme care, it scrutinized the arguments advanced by the applicant which could not convince it. In summing up its view, it cited approvingly a statement by the lower court, the Ontario Superior Court of Justice:

> **"**An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to jus cogens. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state."[156]

On this basis, the claim was rejected. The Supreme Court of Canada denied the application for leave to appeal.

124. In the United Kingdom, the House of Lords had also to pronounce on the issue. In a case very closely resembling the Canadian case of *Bouzari*, the *Jones* case, [157] it was called upon to determine whether a person who had allegedly been subjected to "severe, systematic and injurious" torture in Saudi Arabia, could bring a suit against the Kingdom before the courts of the United Kingdom. After a careful examination of all

[155] 128 ILR 586.
[156] *Ibid*., para. 88.
[157] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Sandiya (the Kingdom of Saudi-Arabia*), 14 June 2006, 129 ILR 713.

the arguments put forward by the claimant, all of the judges came unanimously to the conclusion that the British courts lacked jurisdiction, both under the UK Act of 1976 and under general international law. In particular, the judges had an opportunity to appraise the reasons given by the Corte di Cassazione in *Ferrini*. We can report that their appraisal was less than favourable. According to the words of Lord Bingham of Cornhill (para. 22),

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

Lord Hoffmann's comments were already referred to in an earlier section of this submission. The gist of his observations is that judges should refrain from playing an activist role as promoters of "progress"[158] - and he is certainly right in emphasizing the need for a judge to keep a reserved attitude with regard to the cases before him. Judges are not called upon to act with the explicit intention to create new law. In hindsight, one will often find that indeed the law was moved forward step by step through judicial pronouncements. Common law has evolved in that fashion. But judges have to act *lege artis*. They must at least base their reasoning on the *bona fide* belief that the rule applied by them was developed in a constructive effort to synthesize elements actually in force as component parts of the legal order. To push the law in force aside, deriving instead the legal reasoning from values underlying that law but not yet having crystallized as truly legal rules, reveals a tragic misunderstanding of the function entrusted to them. What may be acceptable in a domestic framework cannot be justified at the universal level where 192 nations have the same right to contribute to the formation of the law. The courts of one nation cannot impose their views on all the other nations. International law is based on consensus. Hegemonic methods are incompatible with its egalitarian nature. In the case of *Military and Paramilitary Activities* the Court said quite unequivocally that States may indeed attempt to bring into being novel rules and that such attempts "might … tend towards a modification of customary international law", but

[158] *Ibid*., para. 64.

the precondition is that for such reliance on novel concepts support is obtained from other States: "if shared in principle by other States".[159] Even under such circumstances, the Court remains extremely cautions. Attention is drawn to the words "might" and tend" which deliberately refrain from providing clear answers.

125. The French jurisprudence is also of unequivocal clarity in respect of the immunity of foreign States who have performed acts, challenged by a petitioner as violating human rights or international humanitarian law, in the exercise of their sovereign power (*actes de puissance publique*). In a case against Germany (*Bucheron*), where French jurisdiction with regard to a claim derived from the plaintiff's deportation to Germany for purposes of forced labour was in issue, the Cour de Cassation held that the facts

"consistant à contraindre des personnes requises au titre du service du travail obligatoire, à travailler en pays ennemi, avaient été accomplis à titre de puissance publique occupante par le Troisième Reich, dont la RFA est successeur … n'étaient pas de nature à faire échec au principe de l'immunité juridictionnelle de la RFA selon la pratique judiciaire française … »[160]

The Cour de Cassation does not even deem it necessary to provide reasons for its decision. As the citation shows, the judges confine themselves to referring to the French judicial practice. The Ministère public had deemed it sufficient to devote half a sentence to the argument of the claimant that a violation of international humanitarian law leads to forfeiture of jurisdictional immunity:

" … tant par les moyens mis en oeuvre que par la finalité poursuivie, les opérations critiquées ont été entreprises par l'Etat allemand dans le cadre de ses prérogatives de puissance publique et dans l'intérêt de son service public (quel que puisse être par ailleurs le jugement à porter au plan moral sur la légitimité d'une telle action). »[161]

---

[159] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, at 110 para. 209. See also the plea for caution by Olivier Corten, 'Breach and Evolution of Customary Law', in: Enzo Cannizzaro and Paolo Palchetti (eds.), *Customary International Law on the Use of Force. A Methodological Approach* (Leiden/Boston 2005), pp. 119 *et seq*.

[160] 108 (2004) RGDIP 259, at 260.

[161] Submission of 26 April 2002/25 June 2002, ANNEX 37.

Only in the note written by François Poirat[162] are some more general considerations put forward. Beforehand, the Cour d'Appel de Paris[163] had also expressed itself in a more substantial manner:

"Les États étrangers bénéficient de l'immunité de juridiction lorsque l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public … tant par les moyens mis en œuvre que par la finalité poursuivie, les faits dont le requérant a été la victime s'intègrent dans un ensemble d'opérations entreprises par l'État allemand dans le cadre de ses prérogatives de puissance publique. En l'état du droit international, ces faits, quelle qu'en soit la gravité, ne sont pas, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, de nature à faire échec au principe de l'immunité de juridiction des États étrangers. »

126. The Constitutional Court of Slovenia, in a judgment of 8 March 2001,[164] also rejected complaints based on the argument that a State committing grave violations of human rights should be denied immunity in proceedings where compensation is sought as reparation for injury suffered. The Constitutional Court felt that there was a "trend" towards the limitation of State immunity, but it held that the cases referred to, in particular the Greek judgment in the *Distomo* case, could not

"serve as a proof of general state practice recognized as a law and thus as the creation of a rule of international customary law, which would in the case of violations of the cogent norms of international law in the area of human rights protection as a consequence of state activities in the framework of *iure imperii* … allow Slovenian courts to try foreign states in such cases."

There is no need to comment on this finding.

127. Some lower courts in those countries that during World War II suffered German occupation have also rejected applications requesting to find Germany's responsibility for damage and losses during that time as a consequence of military operations. Reference is made to

[162] 108 (2004) RGDIP 260.
[163] Judgment of 9 September 2002, ANNEX 38.
[164] ANNEX 39.

- the judgment of the Rechtbank (Regional Court) of Gent (Belgium) of 18 February 2000 [165] which sees the rules laid down in the European Convention on State Immunity, although not directly applicable to the case at hand, as a reflection of the applicable rules of customary international law, arguing that the actions of armed forces shall in any event remain covered by jurisdictional immunity (Article 31 of that Convention);
- the judgment of the tribunal of first instance Leskovac (Serbia) of 1 November 2001 (no specific reasoning given; general reference to international treaties and custom);[166]
- the judgment of the Court of Appeal of Gdansk of 13 May 2008 which denies the jurisdiction of the Polish courts for claims requesting reparation for serious physical harm (burns) suffered during World War II (2 February 1944) in a village close to Lublin.[167]

Mostly, such judgments do not come to the knowledge of the public at large – or, in many cases, not even to the German Government - inasmuch as courts generally reject claims based on actions by the German armed forces in foreign territory without any hesitation, not bothering to provide lengthy explanations.

128. In order to round off its pleadings, Germany draws the attention of the Court to the restrictive interpretation to which the Court of Justice of the European Communities has subjected the concept of "civil and commercial matters" in Article 1 of the [European] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).[168] Originally, the Italian courts based their decisions on the enforceability of the Greek decisions in the *Distomo* case on that Convention. However, in *Lechouritou and Others* the Court of Justice of the European Communities held that the Convention does not cover legal actions brought by natural persons in one Contracting State against another Contracting State for compensation of loss or damage

[165] ANNEX 40.
[166] ANNEX 41. The same view was expressed in a legal opinion of the Yugoslav Federal Ministry of Justice of 24 April 2002, ANNEX 42.
[167] ANNEX 43.
[168] Official Journal 1978 L 304, p. 36.

suffered as a consequence of acts of warfare.[169] The cooperation among European nations within the framework of the Brussels Convention does not extend to such actions, which have a special nature and cannot be dealt with like any other dispute between civil litigants, even when the plaintiffs claim compensation for tortious acts committed by the armed forces of the respondent party.

129. No comfort can be drawn for the position of the Corte di Cassazione from the judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia of 10 December 1998 in *Furundzija*.[170] In that judgment, the Trial Chamber went on a long journey in attempting to explain the legal effects deriving from a violation of a *jus cogens* rule. Rightly holding that the prohibition of torture constitutes indeed such a rule, it held that

> "[p]roceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act."[171]

In the first place, it should be noted that the Trial Chamber gave an academic exposition which was in no way related to the case it had to adjudicate. Its observations are no more than *obiter dicta*. Second, the Trial Chamber did not address the legal defence of sovereign immunity which a State can hold against a reparation claim instituted before the courts of another country. Its sole concern is to underline that no State is in a position to invoke, as a defence to shield it from responsibility, a national act that would authorize torture. Lastly, the Trial Chamber explicitly stresses that its observations are confined to proceedings where a victim has unobjectionable *locus standi*, either before an international or a national judicial body. Hence, only a superficial perusal of *Furundzija* would permit to draw any justification for the *Ferrini* jurisprudence from that judgment.

---

[169] Case C-292/05, 15 February 2007, para. 46.
[170] IT-95-17/1-T, 38 (1998) ILM 317.
[171] *Ibid*., para. 155.

130. Lastly, Germany wishes to recall once again that Italian authorities that occupy the highest ranks in the Italian judicial system, the Avvocatura Generale dello Stato as well as the Procura Generale della Repubblica presso la Corte di Cassazione, have attempted to persuade the Corte di Cassazione that it should abandon its erroneous course (see Annexes 10, 12, 22). In their submissions, they cogently demonstrated that the alleged new opening in the defence of jurisdictional immunity simply does not exist since it lacks any solid foundation in general rules of international law. The Court should follow those voices coming directly from Italy. They confirm the well-foundedness of the present Application.

V. Relief Sought

131. Germany requests reparation as indicated in the subsequent requests. In particular, Italy must ensure that the recurrent violations of its sovereign immunity be brought to a halt. The Court should also specify that the unlawful judicial practice must not continue. Guarantees of non-repetition are all the more necessary since Germany has been battling the surge of civil actions seeking reparation for World War II injustices for more than five years, with new claims being brought month after month.

VI. Requests

132. On the basis of the preceding submissions, Germany prays the Court to adjudge and declare that the Italian Republic:

1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

2) by taking measures of constraint against "Villa Vigoni", German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

4) the Italian Republic's international responsibility is engaged;

5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above;

133. Germany reserves the right to request the Court to indicate *provisional measures* in accordance with Article 41 of the Statute should measures of constraint be taken by Italian authorities against German State assets, in particular diplomatic and other premises that enjoy protection against such measures pursuant to general rules of international law.

Berlin, 12 June 2009

Christian Tomuschat

Agent of the Government of the Federal Republic of Germany

Georg Witschel

Director General for Legal Affairs and Agent of the Government of the Federal Republic of Germany

List of Annexes

Annex 16 Corte di Cassazione, case of *Max Josef Milde*, judgment of 21 October 2008

Annex 17 Regional Court of Livadia, judgment 137/1997, 25 September/30 October 1997.

Annex 18 Court of Appeal of Florence, decision ("decreto") of 2 May 2005.

Annex 19 Court of Appeal of Florence, decision ("decreto") of 6 February 2007.

Annex 20 Corte di Cassazione, judgment No. 14199, 29 May 2008.

Annex 21 Court of Appeal of Florence, decision ("decreto") of 13 June 2006.

Annex 22 Avvocatura Distrettuale dello Stato di Firenze, submission of 11 September 2008.

Annex 23 Court of Appeal of Florence, decision of 21 October 2008.

Annex 24 Exchange of notes constituting an arrangement concerning the establishment of the "Villa Vigoni" Association as a German-Italian Centre, 21 April 1986, 1501 UNTS 57, No. 25828, 25829.

Annex 25 Inscription of a judicial mortgage in the land register covering "Villa Vigoni".

Annex 26 Avvocatura Distrettuale dello Stato di Milano, submission of 6 June 2008.

Annex 27 Corte di Cassazione, judgment No. 1653/1974, 6 June 1974; English translation: 65 ILR 308.

Annex 28 Corte di Cassazione, decision 8157/2002, *Markovic*, 5 June 2002; English translation: 128 ILR 652.

Annex 29 Francesca De Vittor, Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli, 2 (2008) Diritti umani e diritto internazionale, issue 3.

Annex 30 William H. Taft, IV, Legal Adviser, Department of State, submission as Amicus Curiae to the US Court of Appeals for the District of Columbia Circuit in the case of *Hwang Geum Joo v. Japan,* November 2004.

Annex 31 United States Court of Appeals for the District of the Columbia Circuit, *Hwang Geum Joo v. Japan, Minister Yohei Kono, Minister of Finance,* 28 June 2005.

Annex 32 Foreign State Immunity Law, 2008, Israel.

Annex 33 Corte di Cassazione, decision No. 530/2000, *FILT-CGIL Trento and Others v. United States of America*, 3 August 2000; English translation: 128 ILR 644.

Annex 34 Rechtbank s'-Gravenhage (Regional Court The Hague), judgment of 10 July 2008.

Annex 35 U.S. Department of State, Amicus Curiae brief in *Sampson v. Federal Republic of Germany*.

Annex 36 Thilo Rensmann, 'Impact on the Immunity of States and their Officials', in: The Impact of Human Rights Law on General International Law (Oxford 2009), pp. 151-170.

Annex 37 [French] Ministère public, submissions in *Bucheron* before Cour de cassation, of 26 April 2002/25 June 2002.

Annex 38 Cour d'appel de Paris, judgment of 9 September 2002, *Bucheron*.

Annex 39 Constitutional Court of Slovenia, judgment of 8 March 2001, English translation.

Annex 40 Rechtbank (Regional Court) of Gent (Belgium), judgment of 18 February 2000**.**

Annex 41 Tribunal of first instance Leskovac (Serbia), judgment of 1 November 2001.

Annex 42 Legal opinion of the Yugoslav Federal Ministry of Justice of 24 April 2002.

Annex 43 Court of Appeal of Gdansk (Poland), judgment of 13 May 2008.